

## **Equality of Rights and Courts: Constitutional-Based Arguments on the Fixed- Standard of Minimum Age for Marriage in Lights of *Maqāshid al-Syarīah***

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### **Abstract**

*This study presents the dynamics of constitutional-based arguments in the discourse of fixed-standard of minimum age for marriage through the judicial review mechanism at the Constitutional Court. Two decisions contain this provision. In the first decision (No. 30-74/PUU/XII/2014), the Court rejected reviewing the law. Meanwhile, the Court partially granted the request in the second decision (No. 27/PUU/XV/2017). This study aims to analyze the dynamics of changes in these provisions: constitutional-based arguments and their logic of legal reasoning. This article is written by applying a case and conceptual approach. Legal cases are derived from several documents analyzed using ideas and theories of teleological dimensions in Islamic law. The study results revealed that the change in the provisions was caused by differences in the Judge's legal considerations in the two Court decisions resulting from different philosophical perspectives originating from the articles of legal texts. Those considerations and changes are in accordance with maqāshid al-syarī'ah: the efforts to fulfill the protection of the soul (hifz al-nafs), property (hifz al-māl), and honor (hifz al-irdh).*

### **Keywords**

*Equality of Rights, Legal Reasoning, Constitutional Court, Minimum Age For Marriage, Maqāshid al-Syarī'ah.*

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## Introduction

The minimum age of marriage is one of the provisions of the Marriage Law, which is anticipatory and responsive and adapts to the conditions and needs of the Indonesian people.<sup>2</sup> The provision states that “marriage is only permitted if the man reaches the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years.”<sup>3</sup>

The emergence of these provisions is motivated by several factors. One factor is explicitly mentioned in the general explanation of the Marriage Law, namely the health factor.<sup>4</sup>

Other factors that also influence are psychological, sociological, and educational.<sup>5</sup> The legislators, in this case, have realized that marriage at a young age is very vulnerable to negative things.<sup>6</sup> Therefore, it is deemed necessary to regulate the minimum age for marriage.

In its development, these provisions received various receptive and resistant responses. It has been noted that there have been several attempts to reform the minimum age limit for marriage as regulated in the Marriage law. The Gender Mainstreaming Group (PUG) carried some of these efforts out.<sup>7</sup> The National Population and Family

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<sup>2</sup> Achmad Asrori, “Batas Usia Perkawinan Menurut Fukaha Dan Penerapannya Dalam Undang-Undang Perkawinan Di Dunia Islam,” *AL- 'ADALAH* 7, no. 4 (2015): 807–826.

<sup>3</sup> “Law (UU) No. 1 of 1974 concerning Marriage,” <https://peraturan.bpk.go.id/Home/Details/47406/uu-no-1-tahun-1974>.

<sup>4</sup> Lihat di bagian penjelasan umum Undang-undang No. 1 tahun 1974 tentang Perkawinan.

<sup>5</sup> Faridatul Jannah and Umi Sumbulah, “Pernikahan Dini Dan Implikasinya Terhadap Kehidupan Keluarga Pada Masyarakat Madura (Perspektif Hukum Dan Gender),” *Egalita*, 2012, 83–101, <https://doi.org/10.18860/egalita.v0i0.2113>.

<sup>6</sup> Melinda Rahmawati and Heni Ani Nuraeni, “Peran Dispensasi Kawin Dalam Peningkatan Angka Pernikahan Dini Di Wilayah Kotamadya Jakarta Barat,” *Al- Istinbath: Jurnal Hukum Islam* 6, no. 1 (2021): 1–14.

<sup>7</sup> Nur Mohammad Kasim, “Optimalisasi Pembaruan Hukum Islam Dalam Bingkai Metodologis Counter Legal Draft,” 6 *Al-Manahij*:

Planning Agency (BKKBN) through the Maturation Age of Marriage Program (PUP)<sup>8</sup>, the Ministry of Religion of the Republic of Indonesia in the Draft Law on Material Law for Religious Courts.<sup>9</sup>

Changes to these provisions were also attempted through the Judicial Review mechanism twice. First, in 2014 several parties at two different times (2013-2014) submitted a judicial review of articles 7 paragraphs (1) and (2) of Law no. 1 of 1974 against article 28A; Article 28B paragraphs (1) and (2); Article 28C paragraph (1) Article 28D paragraph (1); Article 28G paragraph (1); Article 28H paragraphs (1) and (2); Article 28I paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia.<sup>10</sup> In this first attempt, the Court rejected the petition of the Petitioners.

*Second*, a similar effort was made by citizens who felt disadvantaged in 2017 by examining Article 7 of Law no. 1 of 1974. However, the article in the Constitution used as the constitutional basis is different, namely Article 27 of the 1945 Constitution of the Republic of Indonesia.<sup>11</sup> In the second attempt, the Court granted the petition of the Petitioners to increase the minimum age of marriage for women.

There have been several scientific studies in the form of theses, dissertations, and journal articles related to these provisions that have been carried out both after the

Jurnal Kajian Hukum Islam (2012), <https://doi.org/10.24090/mnh.v6i2.602>.

<sup>8</sup> Badan Koordinasi Keluarga Berencana Nasional Direktorat Remaja dan Perlindungan Hak-hak Reproduksi, *Pendewasaan Usia Perkawinan Dan Hak-Hak Reproduksi Bagi Remaja Indonesia*, Jakarta (Jakarta: BKKBN, 2008), p. 19.

<sup>9</sup> Kementerian Agama R.I., “Rancangan Undang-Undang Hukum Materiil Peradilan Agama Bidang Perkawinan,” Eli Hakim Silaban and Partner Personal Library Law and Regulation Collection Series, 2008, <https://www.scribd.com/doc/52178445/Draft-RUU-HMPA-Bid-Perkawinan>.

<sup>10</sup> Mahkamah Konstitusi, “Putusan No. 30-74/PUU-XII/2014” (Jakarta, 2015).

<sup>11</sup> Mahkamah Konstitusi, “Putusan No. 22/PUU-XV/2017” (Jakarta, 2018).

changes and before. Several studies have examined the age provisions from the legal aspect using various perspectives as done by Mustopa (2015), who examines these provisions with a comparative analysis of developmental psychology theory and *maqāshid al-syarī'ah*.<sup>12</sup> Likewise with Sebyar (2018) which uses the theoretical perspective of *al-tsabāt and al-tathawwur* Yusūf al-Qardhāwī<sup>13</sup> and Hilmy (2018) which uses the perspective of the theory of limit (*dhawābit al-mashlahah*) Sa'īd Ramadhān al-Būthī<sup>14</sup> in reviewing the age requirements.

In addition to legislation, several studies examine the decisions of the Constitutional Court, both the first decision (No. 30-74/PUU-XII/2014) such as that conducted by Haikal (2015), which uses a positive legal perspective and Islamic law comparatively.<sup>15</sup> As well as the second decision (No. 27/PUU-XV/2017) as done by Hadi (2018) with the perspective of *mashlahah* theory<sup>16</sup>,

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<sup>12</sup> Lutfi Ma'sum Mustopa, "Batas Usia Perkawinan Dalam Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Menurut Psikologi Perkembangan Dan Maqasid Al- Shariah" (Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2015).

<sup>13</sup> Muhammad Hasan Sebyar, "Batas Minimal Usia Perkawinan Dalam Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan Perspektif Integrasi Antara Thabat Dan Taṭawwūr Yusuf Al-Qardāwī," *UIN MAULANA MALIK IBRAHIM MALANG* (Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2018).

<sup>14</sup> Ahmad Arif Masdar Hilmy, "Disparitas Usia Minimal Perkawinan Dalam Kompilasi Hukum Islam Perspektif Teori Batas Maṣlahah Sa'īd Ramadhān Al-Būṭī," *Islam Nusantara* 03, no. 01 (2019): 123–157.

<sup>15</sup> Hasanain Haikal, "Analisis Yuridis Normatif Dan Hukum Islam Terhadap Putusan Mahkamah Konstitusi Nomor 30-74/PUU-XII/2014 Tentang Batas Usia Perkawinan Anak (Perempuan)," *Pembaruan Hukum* 2, no. 1 (2015): 111–118.

<sup>16</sup> Samsul Hadi, "Putusan MK NO.22 /PUU-XV /2017 Tentang Permohonan Judicial Review Pasal 7 Ayat (1) Uu No. 1 Tahun 1974 Tentang Usia Perkawinan Dalam Perspektif Masalahah," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 11, no. 2 (2018): 72–81, <https://doi.org/10.14421/ahwal.2018.11206>.

Hamzah (2019) with a *maqāshid al-syarī'ah* perspective<sup>17</sup>, Wahid (2019) with a historical perspective<sup>18</sup>, and Nugraha, et al. (2019) which was carried out collectively with a normative juridical perspective.<sup>19</sup> Likewise, Hamidin and Alfitri (2021) also reviewed the Constitutional Court's decision from a normative juridical perspective.<sup>20</sup>

As the sole judicial interpreter of the Constitution, the Constitutional Court has the authority to review the material provisions of the Act against the Constitution (UUD 1945), which is final and binding.<sup>21</sup> This authority makes the Constitutional Court's decision absolute.<sup>22</sup> Even if there is a fallacy in the future, then only the Constitutional Court itself has the right to decide otherwise. Thus, concerning the two decisions that

<sup>17</sup> Hamzah, "Telaah Maqasid Syariah Terhadap Putusan Mk No. 22/PUU-XV/2017 Tentang Batas Usia Nikah," *Al-Syakhshiyah Jurnal Hukum Keluarga Islam Dan Kemanusiaan* 1, no. 1 (2019): 61–84, <https://doi.org/10.35673/asyakhshiyah.v1i1.210>.

<sup>18</sup> Nur Wahid, "Historisitas Dan Tujuan Aturan Umur Minimal Perkawinan Dalam Perundang-Undangan Keluarga Islam Di Indonesia," *Volkgeist* 2, no. 2 (2019): 163–177, <https://doi.org/10.24090/volkgeist.v1i2.2822>.

<sup>19</sup> Xavier Nugraha, Risdiana Izzaty, and Annida Aqilla Putri, "Rekonstruksi Batas Usia Minimal Perkawinan Sebagai Bentuk Perlindungan Hukum," *Lex Scientia Law Review* 3, no. 1 (2019): 40–54, <https://journal.unnes.ac.id/sju/index.php/lslr/article/view/30727/13413>.

<sup>20</sup> Hamidin and Alfitri, "Safeguarding Women's Constitutional Rights in the Judicial Reviews of Marriage Law on the Minimum Married Age Limit," *Mazahib Jurnal Pemikiran Hukum Islam* 20, no. 1 (2021), <https://doi.org/10.21093/mj.v20i1.3307>.

<sup>21</sup> Tim Penyusun Hukum Acara Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi*, ed. Fajlurrahman Jurdi, 2nd ed. (Jakarta: Kepaniteraan dan Sekretariat Jendral Mahkamah Konstitusi, 2019), p. 144.

<sup>22</sup> Bambang Sutiyoso, "Pembentukan Mahkamah Konstitusi Sebagai Pelaku Kekuasaan Kehakiman Di Indonesia," *Jurnal Konstitusi* 7, no. 6 (2010): 25–50. See also, Ahmad Fadlil Sumadi, Achmad Edi Subiyanto, and Anna Triningsih, *Hukum Acara Mahkamah Konstitusi Perkembangan Dalam Praktik*, 1st ed. (Depok: Raja Grafindo Persada, 2019), p. 4-5.

contain a judicial review of the minimum age of marriage, it is clear that they reflect the dynamics of the Court's interpretation of Article 7 paragraph (1) of Law no. 1 1974.

This study aims to analyze changes in the minimum age for marriage which are embodied in two questions regarding how the dynamics of the Court's ratio decidendi are the reference for legal considerations in two decisions (No. 30-74/PUU/XII/2014 and No. 27/PUU/XV/2017). Moreover, examine these changes with the principle of *maqāshid al-syarī'ah*. This goal has at least two differences from some of the studies above—*first*, the aspect of the legal material under study. *The second* is the analysis aspect.

The primary legal material in this study was in the form of two copies of the Constitutional Court's decision text obtained by the document study method.<sup>23</sup> The data that has been collected is then processed and analyzed using descriptive-analytical methods. A case approach is used to understand the decisions under study in this study. A statutory approach is used to understand the relevant legislation. At the same time, the conceptual approach is used to reveal the ratio decidendi of the Court and the relevance of changes to the articles 7 paragraphs (1) of Law no. 1 of 1974 with the principle of *maqāshid al-syarī'ah*.

### **The Discourse of Minimum Age Requirements for Marriage**

Marriage is a sacred bond<sup>24</sup> between men and women and becomes a means of outpouring love between the two by trying to complement each other in fostering households to get happiness in the world and the hereafter. Getting married means taking an oath to accept all the shortcomings and be grateful for your partner's

<sup>23</sup> Soejono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI-Press, 2010), p. 21.

<sup>24</sup>In Islam, the sacredness of the marriage bound is called by *mītsāqan ghalīzan*. See, Q.S. Al-Nisa' [4]: 21.

strengths by committing to protect each other. Therefore, marriage requires each bride and groom's physical and spiritual readiness, both male and female.

Physical and spiritual readiness in marriage is represented by the maturity of the bride and groom. Physical maturity can be seen through several physical changes in both men and women regarding the physical aspect. In Islam, this is manifested in two conditions that the bride and groom must own: having a healthy mind and having reached puberty.<sup>25</sup>

The maturity of the mind as a manifestation of spiritual readiness cannot be measured with certainty considering its metaphysical and abstract form. Therefore, the formulation of marriage law in classical literature, especially fiqh, tends to override this aspect. In other words, if it has reached an indication of physical maturity, then the marriage can be carried out.<sup>26</sup>

The decision to determine the marriage age for girls in the 1974 Marriage Law - despite the awareness of various considerations of harmful excesses - is set at a minimum age of 16 years. The age relatively close to the maximum age limit is a sign of a person's maturity which was initiated by the scholars of *madzāhib al-arba'ah*, especially the Shafi'iyyah and Hanabilah groups.<sup>27</sup>

KH. Ali Yafie confirmed this when he was one of the drafters of the Marriage Law. According to him, as quoted by al Maliki (2021), the determination of 16 years as the

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<sup>25</sup> 'Abd al- Rahman al- Jaziry, *Al- Fiqh 'alā Al- Madhāhib Al- Arba'ah Juz IV* (Beirut: Dār al- kutūb al- 'Ilmiyah, 2003), p. 19.

<sup>26</sup> That explanation can be found at the primary source of classical fiqh. See, 'Abd al- Rahman al- Jaziry, *Al- Fiqh 'alā Al- Madhāhib Al- Arba'ah Juz II* (Beirut: Dār al- kutūb al- 'Ilmiyah, 2003), p. 313-315. Abd al- Qādir 'Audah, *Al- Tashrī' Al- Jinai Al- Islamiy Juz I* (Beirut: Dār al- Kātib al- 'Araby, n.d.), p. 602-603. Shams al- Dīn Muhammad ibn Qāsim al- Ghazziy, *Fath Al- Qarīb Al- Mujīb Fī Sharh Alfāz Al- Taqrīb* (Beirut: Dār Ibnu Hazm, 2005), p. 42.

<sup>27</sup> The Syāfi'iyyah School determine 15 years old for men and women who have not experienced the *baligh* signs as the maximum limit. See, 'Abd al- Rahman al- Jaziry, *Al- Fiqh 'alā Al- Madhāhib Al- Arba'ah, Juz II...*, p. 315.

minimum age for marriage for women is a policy taken to avoid the large gap between the provisions of balig in fiqh and favorable legal policies in Indonesia.<sup>28</sup> This seems to show that in the context of marriage law in Indonesia, the legacy of the classical fiqh understanding is still firmly rooted in policy makers' perspectives.

This fact shows a dominant attachment and influence of classical fiqh reasoning.<sup>29</sup> This indicates that the variety of policies that emerged at that time -though not as a whole - tended to be patriarchal because the Ulama, whose opinions became the reference for policymakers, were not gender-sensitive, as mentioned by several contemporary Muslim scholars.<sup>30</sup>

The considerations that appear in the general explanation of the Marriage Law, when referring to the above facts, seem to indicate that the awareness of policymakers about the harmful excesses that will be experienced by women when they marry young is limited to the extent to which classical fiqh provides an opportunity to implement them. In other words, if fiqh does not provide room for development, then policymakers tend to ignore the potential for legal reform in this area.<sup>31</sup>

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<sup>28</sup> Muhammad Alwi al Maliki, *Fikih Sosial Dan Kesetaraan Hak Dalam Keluarga*, 1st ed. (Serang: A-Empat, 2021), p. 153.

<sup>29</sup> This can be seen from the stagnation of statutory norms, especially in the field of family law in the midst of the demands of a dynamic era. One of the concrete evidences is the failure of family law reform in both the HMPA draft laws and CLD-KHI. Both contain the renewal of legal norms that are different from the legal norms in classical fiqh. See, Kementerian Agama R.I., "Rancangan Undang-Undang Hukum Materil Peradilan Agama Bidang Perkawinan,"

<sup>30</sup> Husein Muhammad, *Fiqh Perempuan Refleksi Kiai Atas Tafsir Wacana Agama Dan Gender*, 2nd ed. (Yogyakarta: IRCiSoD, 2019), p. 161-166. See also, Nur Rofi'ah, "Perspektif Perempuan Korban Kekerasan," in *Nalar Kritis Muslimah Refleksi Atas Keperempuanan, Kemanusiaan, Dan Keislaman*, 1st ed. (Bandung: Afkaruna, 2020), p. 92.

<sup>31</sup> This is as determined in fiqh terms as a legal case that is included in the qath'iyyah category or not included in the majāl al-ijtihad



This argument also explains the disparity in the minimum age of marriage between men and women where the position of men is more advantageous with higher minimum age; he can obtain human rights that have been guaranteed by the Constitution more optimally than those obtained by girls. This is due to the dominance of patriarchal reasoning, which policymakers use as a reference.<sup>32</sup>

## **The Epistemology of Constitutional Court**

### **1. Sources of Law and Methods of Interpretation**

There are two kinds of legal sources, material and formal. Material legal sources are factors that originate from the values of Pancasila and legal principles related to the administration of justice within the Constitutional Court.<sup>33</sup> In contrast, traditional legal sources form the basis for provisions in the rules to obtain legitimacy in the form of binding and coercive legal forces. In the context of the Constitutional Court's Procedural Law, the formal source of law is the favorable legal provisions governing the Constitutional Court's procedural law or related matters.<sup>34</sup>

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category such as the provisions on the prohibition of marriage in article 8 of the Marriage Law. See, "Undang-Undang (UU) No. 1 tahun 1974 Tentang Perkawinan," <https://peraturan.bpk.go.id/Home/Details/47406/uu-no-1-tahun-1974>.

<sup>32</sup> Husein Muhammad, *Fiqh Perempuan...*, p. 52-54.

<sup>33</sup> Tim Penyusun, *Hukum Acara Mahkamah Konstitusi*, 1st ed. (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), p. 25-26. The legal principles referred to include: 1) the *ius curia novit* principle; 2) The trial is open to the public; 3) Independent and Impartial; 4) the principle of fast, simple, and free of charge; 5) the principle of *audi et alteram partem*; 6) the principle of an active judge in the trial; 7) the principle of *presumptio iustae causa*; 8) final and binding principle; the principle of *erga omnes*; 10) the principle of self-implementing/executing. See, Tim Penyusun, *Hukum Acara Mahkamah Konstitusi...*, p. 32-48.

<sup>34</sup> In this case, articles 28 to 85 of Law no. 24 of 2003, jo. UU no. 8 of 2011 concerning the Constitutional Court. In addition, there are

Furthermore, Article 86 of the Constitutional Court Law states that the Constitutional Court can independently further regulate several matters needed to implement its duties and authorities smoothly. Therefore, based on the article, several decisions of the Constitutional Court emerged, which became a formal legal source for the Constitutional Court's Procedural Law. In addition, the Constitutional Court also emphasized that the Constitutional Court's Procedural Law could develop along with the development of cases and the Constitutional Court's decision.<sup>35</sup>

The Constitutional Court has the main task of interpreting the Constitution.<sup>36</sup> In this regard, several methods have been used. According to Sudikno Mertokusumo and A. Pitlo, there are several interpretation methods commonly used by judges to decide court cases.<sup>37</sup> Some of these methods do not necessarily limit absolutely; in general, these methods are commonly used by judges. These methods include grammatical interpretation, teleological or sociological interpretation, systematic interpretation, historical

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several related laws such as Law no. 48 of 2009 concerning Judicial Power, Law no. 12 of 2011 concerning the Establishment of Legislation, Law no. 23 of 2014 concerning Regional Government, Law no. 7 of 2017 concerning Elections, Law no. 2 of 2008, jo. UU no. 2 of 2011 concerning Political Parties and several other related laws.

<sup>35</sup> Tim Penyusun Hukum Acara Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi...*, p. 51-54.

<sup>36</sup> Some legal experts mention that there is a difference between the interpretation of the constitution and the interpretation of the laws under it. However, in practice the interpretation of the constitution cannot be clearly distinguished from the interpretation of the law. The interpretation of the constitution in this context is seen as part of the interpretation of the law. The Court is not only required to understand the written provisions in the constitution, but also to understand what is called the "spirit" behind the birth of the written provisions. Therefore, the interpretation of the constitution and the interpretation of the law cannot be clearly distinguished. See, Muhammad Alwi, *Fikih Sosial...*, p. 66.

<sup>37</sup> Sudikno Mertokusumo, *Penemuan Hukum* (Bandung: Citra Aditya Bakti, 1993), p. 14.

interpretation, comparative interpretation, and futuristic interpretation.

Arief Hidayat added that although there are many methods in interpreting the Constitution, there are 5 (five) sources that serve as the basis for interpreting the Constitution. First, the text and structure of the Constitution. Second, the intentions of those who drafted voted to propose or ratify the provision in question. Third, prior precedents. Fourth, the social, political, and economic consequences of alternative interpretations. Fifth, natural law.<sup>38</sup>

The interpretation or interpretation of law by judges is an explanation that must lead to applying the rule of law to concrete legal events that the community can accept. This stems from the view that a judge has a logical function in his capacity.<sup>39</sup> As a method oriented towards the utilization of reasoning to understand something by interpreting it, legal interpretation has a strong connection with the hermeneutic tradition. According to Gadamer, one of the hermeneutic figures, understanding something means interpreting something and vice versa. When applied in law, understanding the law is interpreting it, and vice versa.<sup>40</sup>

## **2. Legal Considerations: Minimum Age for Marriage**

The change in the Court's belief in the first decision (2014), which gave birth to the second decision (2017), indicates the occurrence of a shifting paradigm in the Court's legal reasoning process. The differences in the context of space and time and the social

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<sup>38</sup> Arif Hidayat, "Penemuan Hukum Melalui Penafsiran Hakim Dalam Putusan Pengadilan," *Pandecta (Jurusan Hukum Dan Kewarganegaraan, Fakultas Ilmu Sosial Universitas Negeri Semarang)* 8, no. 2 (2013), <https://doi.org/10.15294/pandecta.v8i2.2682>.

<sup>39</sup> Sudikno Mertokusumo, *Penemuan Hukum...*, p. 13.

<sup>40</sup> Tim Penyusun Hukum Acara Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi...*, p. 108.

dynamics of society require the Court to reinterpret the previous decision. In a decision, the dynamics of the interpretation are manifested in the ratio decidendi or legal considerations of the Court.<sup>41</sup> Peter Mahmud Marzuki said that to find out the ratio decidendi of a decision, it can be seen in the “weighing” considerations on the “main case.”<sup>42</sup>

### 2.1. Ratio Decidendi PMK No. 30-74/PUU/XII/2014<sup>43</sup>

As for the Court’s legal considerations in the first decision, several points of consideration are as follows.

*First*, marriage is the right of everyone that must be guaranteed and protected by the state because marriage is a human and instinctive to humanity that is inherent in everyone and something natural. Marriage is closely related to sacred beliefs based on sacred religious rules and values that cannot be ignored. Therefore, the legitimacy of marriage must be seen from two aspects, namely the aspect of legitimacy according to religion and legitimacy according to the state. This is as stated in article 1 and article 2 paragraph (1) of the Marriage Law.

In Islam, marriage is one of the suggestions for anyone who is an adult and can have a family to get married to calm the heart, soul, and body and continue offspring in forming a happy family. This is based on the word of Allah SWT in QS. Al-Rūm (30): 21. In addition, there are suggestions in the

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<sup>41</sup> The ratio decidendi or legal reasoning is an important part of a court decision that contains considerations that form the legal basis of the Court in deciding a case. See, Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 2002), p. 203.

<sup>42</sup> Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Kencana, 2009), p. 94.

<sup>43</sup> Mahkamah Konstitusi, “Putusan No. 30-74/PUU-XII/2014” (Jakarta, 2015), p. 218-233.

form of encouragement to get married soon for young people. This is as stated by the Prophet Muhammad SAW:

حَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ، وَأَبُو كُرَيْبٍ، قَالَا: حَدَّثَنَا أَبُو مُعَاوِيَةَ، عَنِ الْأَعْمَشِ، عَنْ عُمَارَةَ بْنِ عُمَيْرٍ، عَنْ عَبْدِ الرَّحْمَنِ بْنِ يَزِيدٍ، عَنْ عَبْدِ اللَّهِ، قَالَ: قَالَ لَنَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: يَا مَعْشَرَ الشَّبَابِ، مَنْ اسْتَطَاعَ مِنْكُمْ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصْرِ، وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وَجَاءٌ.<sup>44</sup>

Based on the above considerations, the provisions on the age of marriage in each religion are different, and each of these provisions is binding on all adherents. The state in this context is tasked with providing services in the implementation of marriage according to state law, including administrative records to ensure legal certainty for husband and wife couples and their descendants.

*Second*, marriage is not only a material matter. Marriage also has close ties to the spiritual dimension. Even so, the age of marriage is relatively changing according to the dynamics of the times. As stated by Prof. Muhammad Quraish Shihab who stated that,

*“In the provisions of the holy book al-Qur’an as well as the sunnah of the Prophet, does not set a certain age. This is in line with divine wisdom that does not include details of something in the holy book regarding things that have changed... Because there is no definite provision from the holy book, Islamic scholars have different opinions about the age, even among the Muslim community, which revises and changes the legal provisions regarding*

<sup>44</sup> Muslim ibn al- Ḥajjāj al- Naysaburiy, *Ṣaḥīḥ Muslim*, Juz II (Beirut: Dār Iḥyā al- Turāth al- ‘Araby), p. 1019.

*that age. This is to adapt to the development of society and its needs.”*

*Third*, hastening marriage is intended to prevent more significant harm, especially in today's developments where the potential for harm is tremendous because access has been made available through technological advances, thus accelerating the desire for lust. According to religious teachings, this lust should be channeled through a legal marriage so as not to give birth to children outside of marriage or illegitimate children or bed children.

*Fourth*, based on the legal considerations above, it is clear that the need to determine the age limit for marriage, especially for girls, is relatively adapted to the development of various aspects, from health to socio-economic aspects. No guarantee can ensure that increasing the marriage age limit for women from 16 (sixteen) years to 18 (eighteen) years will further reduce the divorce rate, overcome health problems, and minimize other social problems. However, that does not mean that preventive measures are not necessary to prevent child marriage, which is feared to cause various problems, as argued by the petitioners.

*Fifth*, it is possible that as technology, health, social, cultural, economic developments, and other aspects develop, the age of 18 is no longer the ideal minimum age for marriage for women.

*Sixth*, Considering based on several legal considerations above, the Court thinks that the provisions of the articles 7 paragraphs (1) of Law no. 1 of 1974 along with the phrase “16 (enam belas) tahun” do not conflict with the 1945 Constitution of the Republic of Indonesia. Therefore, the arguments of the petitioners have no legal basis.

## 2.2. Ratio Decidendi PMK No. 27/PUU/XV/2017<sup>45</sup>

As for the Court's legal considerations in the second decision, several points of consideration are as follows.

*First*, concerning the open legal policy case, the Court believes that it is not within its jurisdiction as long as it violates morality, rationality, and intolerable injustice, does not conflict with political rights, people's sovereignty, and the policy does not exceed the authority of the legislators and not an abuse of authority and does not conflict with the 1945 Constitution of the Republic of Indonesia as stated in decision no. 51-52-59/PUU/2008.

The Court is aware of the different natures of men and women so that in such a context, the distinction between the two is not a form of discrimination. However, if the distinction impacts or hinders the fulfillment of the constitutional rights of citizens, then such a distinction is discrimination, as stated in article 1 paragraph (3) of Law no. 39 of 1999 concerning Human Rights. Related to this, the Court made the compulsory education program launched by the government as a reference for consideration, considering the age of marriage of 16 years hinders the achievement of the program's objectives.

*Second*, the enactment of the articles 7 paragraphs (1) of Law no. 1 of 1974 causes a dissonance of legal norms in efforts to protect children as written in the general explanation number 4 letter d of the Marriage Law with article 26 paragraph (1) of the Child Protection Act. Article 7 paragraphs (1) of Law no. 1 of 1974 can make it challenging to realize the new universal development agenda (SDGs): to achieve gender

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<sup>45</sup> Mahkamah Konstitusi, "Putusan No. 22/PUU-XV/2017" (Jakarta, 2018), p. 43-58.

equality and empower all women and girls. One of the concrete steps towards this goal is to suppress and abolish child marriage (eliminate all harmful practices, such as child, early, and forced marriage).

*Third*, several social engineering efforts have been carried out to minimize the practice of child marriage by both the Governor and the Mayor/Regent through a Regional Regulation. Even so, Indonesia, as a party to The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has been ratified through Law no. 7 of 1984, has provided recommendations in article 16 paragraph (1) which reads:<sup>46</sup>

- (1) States Parties shall take extraordinary measures to eliminate discrimination against women in all matters relating to marriage and family relations, and based on equality between men and women in particular to ensure:
- a. Equal rights to marriage

*Fourth*, although the arguments put forward by the petitioners are legally grounded, the Court does not necessarily declare the articles 7 paragraphs (1) of Law no. 1 of 1974 as long as the phrase “16 tahun” is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force as long as it is not read “19 tahun” because the policy may change at any time according to the demands of the development needs of various aspects of society. The Court gives no later than 3 (three) years to legislators to immediately change legal policies related to the minimum age for marriage.

*Fifth*, considering that based on all of the above considerations, the argument for the applicant’s application as long as the provisions of

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<sup>46</sup> “Convention on The Elimination of All Forms of Discrimination Against Women” (1981), <https://doi.org/10.1080/02587203.1995.11827574>. Convention on The Elimination of All Forms of Discrimination Against Women.



Article 7 paragraph (1) of Law no. 1 of 1974 has caused discrimination based on sex or gender, which has an impact on the non-fulfillment of the rights of girls as part of human rights guaranteed in the 1945 Constitution of the Republic of Indonesia which is grounded according to law.

### **3. *Maqāshid al- Syarī'ah***

*Maqāshid al-Syarī'ah* etymologically is composed of two words, namely *maqāshid* and *al- Syarī'ah*. *Maqāshid* is the plural form of the word *maqshad*, which has various meanings such as fair, moderate, and not crossing boundaries.<sup>47</sup> While *al- Syarī'ah* is the road to the spring, al-Raysuni explained that what is meant by *sharī'ah* is several applied laws (*'amāliyah*) related to the concept of *aqidah* and Islamic law legislation.<sup>48</sup> Meanwhile, in terms of terminology, *Maqāshid al-Syarī'ah* is wisdom, meaning, and purpose desired by Allah SWT as the maker of *Shari'ah*.<sup>49</sup>

Ibn Asyūr defines *maqāshid al-syarī'ah* as the meaning and wisdom that Allah as *al- Syāri'* considers in every legal stipulation or most of it. This does not apply specifically to certain types of *Shari'a* law so that it includes the characteristics, general objectives, and meanings that are considered in determining the law, also includes meanings and wisdom that are not considered as a whole but are preserved in many forms of law.<sup>50</sup> Furthermore, Jasser Auda states that every legal provision must rely on the purpose of applying Islamic law itself: *maqāshid al-syarī'ah*, whether

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<sup>47</sup> Ahmad Bu'ud, *Maqāshid Al- Sharī'ah; Min Al- Nazari Ilā Al- Sulūk* (Mesir: Dār al- Salām, 2011), p. 13-14.

<sup>48</sup> Ahmad Al- Raysuni, *Al- Fikr Al- Maqāshidi Qawāiduhu Wa Fawāiduhu* (Ribath: Matbaah al- najah al- jadidah li Dar al- Baydha', n.d.), p. 10.

<sup>49</sup> Sāmi' 'Abd al- Wahhāb, *Ahammiyah Al- Maqāshid Fi Al- Sharī'ah Al- Islāmiyyah* (Damaskus: Resalah Publisher, 2008), p. 15.

<sup>50</sup> Muhammad al-Thahir Ibn 'Ashūr, *Maqāshid Al- Sharī'ah Al- Islāmiyyah, Juz II* (Qatar: Wuzārah al- Awqāf wa al- Shu'ūn al- Islāmiyyah, 2004), p. 53.

explicitly explained by al- Syāri' (*manshushah*) or seriously explored by mujtahids (*mustanbathah*). ), both must carry out the mission of bringing *mashlahah* and rejecting *mafsadah*.<sup>51</sup>

Based on some of the definitions above, it appears that *maqāshid al-syarī'ah* is an essential element in any legal formulation effort. al-Syāthibī firmly stated that a mujtahid who does not understand the intent or purpose of a matter being prescribed results in a void of benefits in the legal formulation. Even a mujtahid who does not understand *maqāshid al-syarī'ah* ideally deserves to be questioned about the results of his *ijtihad*.<sup>52</sup>

Discussing *maqāshid al-syarī'ah* cannot be separated from the dynamics of *mashlahah* as the primary entity in Islamic law as stated by al-Ghazali that the Islamic law that Allah SWT sent down for the people of the prophet Muhammad SAW. aims to realize the benefit and avoid harm.<sup>53</sup> To achieve this, a deep understanding is needed so that the essence of Allah's revelation (*maqāshid al-syarī'ah*) can be picked up and felt by the people in the form of solutions to their actual problems.<sup>54</sup>

There are differences among the Ulama from time to time in defining the *maqāshid al-syarī'ah* classification. Al-Juwayni divided *maqāshid* into 5 (five) categories: *First*, aspects of Shari'a can be understood by reason and are included in primary needs (*al-*

<sup>51</sup> Jasser Auda, *Al- Ijtihād Al- Maqāshidi* (al- Shabkah al- 'Arabiyyah li al- Abḥaṣ, 2011), p. 17.

<sup>52</sup> Ibrāhīm ibn Mūsā al-Shāṭibī, *Al- Muwāfaqāt Fi Uṣūl Al- Shari'ah* (Beirut: Dār al- kutūb al- 'Ilmiyah, 2004). This is a logical consequence of the agreement of the scholars that Islamic law was revealed by Allah in order to realize the benefit of mankind. See, Ahmad al- Raysuni, *Naẓāriyyat Al- Maqāsid 'Ind Al- Imām Al- Shāṭibī* (Virginia: IIIT, 1995), p. 145.

<sup>53</sup> Abu Hamid Muhammad ibn Muhammad Al-Ghazali, *Al- Mustaşfā Min 'Ilm Al- Uṣūl Juz I* (Riyadh: Dar al- Wathan, 1997), p. 417.

<sup>54</sup> Hammady Al-'Ubaidy, *Al-Shāṭibī Wa Maqāsid Al-Shari'ah* (Beirut: Dar Qutaybah, 1996), p. 125.

*dhārūriyyāt*). *Second*, aspects of shari'a relating to secondary needs (*al- hājiyyāt*) do not reach the *al-dharūrah* category. *Third*, aspects of shari'a which are not related to *al-dharūriyyāt* and *al-hājiyyāt* but relate to only tertiary matters (*makramah*). *Fourth*, aspects of Shari'a which are not related to *al-dharūriyyāt* and *al-hājiyyāt* but are included in the category of matters that are *sunnah* only. *Fifth*, aspects of Shari'a universally have goals that can partially be reached by reason.<sup>55</sup>

Al-Ghazali developed Imam al-Juwaini's *dhārūriyyāt* concept. He further developed the concept of *dhārūriyyāt*, which was previously included in one of the *ushūl al-syarī'ah* in the view of Imam al-Juwaini by providing a more profound explanation that the purpose of Islamic law was to protect five main objectives, namely the protection of religion, soul, mind, lineage, and property. Later on, they are known as *al-dharūriyyāt al-khams*.<sup>56</sup>

Al-Syāthibi updated *maqāshid al-syarī'ah*. He divided it into 3 (three), namely *al-dharūriyyāt*, *al-hājiyyāt*, and *al-tahsīniyyāt*. He added that the three divisions constitute a building with hierarchical dimensions. Therefore, the *dhārūriyyāt* is the highest that must be maintained because the two lower dimensions (*tahsīniyyāt* and *hājiyyāt*) are complementary.

In addition, according to Al-Syāthibi, there are other divisions based on the objectives scope of the Shari'a to be achieved, namely *maqāshid al-syarī'ah al-'āmmah* and *maqāshid al-syarī'ah al-khāshshah*. The first refers to the fundamental principles of public welfare. Whereas the second to the protection and goals of individual rights.

In the contemporary discourse, Jasser Auda divides *maqāshid al-syarī'ah* into three: *al-'āmmah*, *al-*

<sup>55</sup> Imām al- Haramayn Abd al- Mālik al- Juwaynī, *Al- Burhān Fī Uṣūl Al- Fiqh Juz II* (Beirut: Dār al- kutūb al- 'Ilmiyah, n.d.), p. 923-926.

<sup>56</sup> Al-Ghazali, *Al- Mustafā Min 'Ilm Al- Uṣūl, Juz I...*, p. 417-418.

*khāshshah*, and *juz'iyah*. Auda rejects the hierarchical concept proposed by al-Syāthibi and offers and emphasizes a new concept, namely complementary (multidimensional) *maqāshid*, which requires continuity and interrelationships between one *maqāshid* and one another.<sup>57</sup>

The dynamics of thinking in the concepts of *mashlahah* and *maqāshid al-syarī'ah* continue to develop over time. Hengki Ferdiansyah mentions that two groups of *maqāshidiyyūn* appear in the dynamics of the development of *maqāshid al-syarī'ah* studies from time to time. The two groups were born because of their different perspectives on the benchmarks used to determine the objectives of the Shari'a (*maqāshid al-syarī'ah*) whether these goals can only be known through *nash*-textual reasoning or can also be known through the rational use of reason.<sup>58</sup>

First, textualists. This group states *nash* as the main foothold in uncovering and determining *maqāshid al-syarī'ah*. This group uses a textual approach as an analytical method, such as applying linguistic rules, thematic interpretation, and inductive methods (*istiqrā'*). The second is the contextualist group. Unlike the previous one, this group gives more portion to the mind (*ratio*) to reveal and determine the *maqāshid* of the validity of the law. This group provides space for a variety of contextual approaches to understand the objectives of the Shari'a. Such an approach is through social, historical, and political contexts.<sup>59</sup>

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<sup>57</sup> Jasser 'Audah, *Membumikan Hukum Islam Melalui Maqasid Syariah* (Bandung: Mizan Media Utama, 2008), p. 36-40.

<sup>58</sup> Hengki Ferdiansyah, *Pemikiran Hukum Islam Jasser Auda*, 2nd ed. (Tangerang Selatan: Yayasan Pengkajian Hadits el- Bukhor, 2018), p. 64.

<sup>59</sup> Hengki Ferdiansyah, *Pemikiran Hukum Islam Jasser Auda...*, p. 66.

## **The Study of the Dynamics of Constitutional Reasonlar**

Every court decision in the jurisdiction of the Supreme Court from the first instance to the cassation and in the jurisdiction of the Constitutional Court must go through a legal reasoning phase. The main activity of judges is examining and deciding cases in thinking activities. In the legal domain, thinking juridically means thinking normatively.<sup>60</sup> Juridical reasoning has various models of thinking influenced by the different views of legal philosophy. Syarif said that six schools of legal philosophy form the basis of legal reasoning models. First is a natural law. The second is legal positivism. Third the utilitarianism. Fourth is the school of history. Fifth the sociological jurisprudence. Sixth the legal realism.<sup>61</sup>

In the legal considerations of PMK No. 30-74/PUU-XII/2014, the Court stated a strong correlation between state law and religious provisions in terms of marriage. In order to confirm this, the Court quoted verses from the Qur'an and the Hadith of the Prophet Muhammad, which is understood as the basis for the recommendation to hasten marriage when it has reached puberty. The Court also mentions various harmful excesses that almost certainly arise due to delaying marriage, such as free sex behavior. This becomes logical considering that modernization in communication and information seems to provide facilities.

The Judge's legal opinion on PMK No. 30-74/PUU-XII/2014, when examined from the aspect of reasoning in general, as mentioned above, appears to use the natural law school of thought, which requires integration between law and morals.<sup>62</sup> According to Aquinas, the natural law places God's will (*lex aeterna*) at the center and the

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<sup>60</sup> Philipus M. Hadjon, *Argumentasi Hukum*, 4th ed. (Yogyakarta: Gajah Mada University Press, 2009), p. 13.

<sup>61</sup> Syarif Mappiasse, *Logika Hukum Pertimbangan Putusan Hakim*, 2nd ed. (Jakarta: Kencana, 2017), p. 48-49.

<sup>62</sup> Abdul Manan, *Pembaruan Hukum Islam Di Indonesia*, 1st ed. (Jakarta: Kencana, 2017), p. 14-15.

highest peak of the legal order. If the provisions of man-made law (*lex humane*) contradict the moral law and God's will, then the law is not valid.<sup>63</sup> In the context of Indonesia, God's will is manifested in the rules of various religions recognized by the State.

Based on the aspect of legal reasoning, it can be understood that the Court uses more grammatical, systematic and ethical interpretations than teleological because the aspect of legal certainty is based on moral integrity, which is the reference in the legal reasoning process. Even so, the Court's legal opinion appears to be based on natural law sources that consider various religious provisions and moral values adopted by the community. Nevertheless, in the context of the state, it is worth asking why in the *ratio decidendi*, the provisions of the Islamic religion were chosen.

Choosing the natural law school of thought is legally valid because the Court legally has the freedom to determine which truth will be applied in its legal opinion. However, this freedom is not value-free. This freedom must be understood integrally with the norm, which states that constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society.<sup>64</sup> Even so, with its position as the sole judicial interpreter of the Constitution, it is, of course, obligatory for the Court to view the entire petition for a review of the constitutionality of laws with a comprehensive perspective of law enforcement and justice based on Pancasila.<sup>65</sup>

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<sup>63</sup> Legal reasoning according to this school has the potential to not guarantee the satisfaction of justice seekers, but on the other hand it ensures the existence of morality in the provisions of articles that are reviewed for constitutional aspects. See, Sharif Mappiasse, *Logika Hukum...*, p. 55-57.

<sup>64</sup> Lihat pasal 5 ayat (1) "Undang-Undang No. 48 Tahun 2009 Tentang Kekuasaan Kehakiman," Pub. L. No. 48 (2009), <https://peraturan.bpk.go.id/Home/Details/38793/uu-no-48-tahun-2009>.

<sup>65</sup> Bernard Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum, Sebuah Penelitian Tentang Fundasi Kefilsafatan Dan Sifat*

As for the legal considerations of PMK No. 27/PUU-XV/2017, the Court does not seem to prioritize the morality aspect as before. In the second decision, the Court emphasized the aspects of the legal facts presented by the Petitioners at the trial. In addition, the Court also pays careful attention to several legal provisions relating to the provisions of the articles 7 paragraphs (1) of Law no. 1 of 1974, both vertically and horizontally.<sup>66</sup> In this scope, articles 7 paragraphs (1) of Law no. 1 of 1974 become more objective to study because the factual approach and synchronization of legal provisions require dialectical interaction rather than an ethical approach in the context of natural law philosophy.<sup>67</sup>

Based on this, the Court appears to be using the sociological jurisprudence school of thought, which in its reasoning process carries out two analytical movements, namely bottom-up with inductive non-doctrinal methods and top-down with deductive doctrinal methods.<sup>68</sup> The bottom-up movement referred to can be seen in several opinions of the Court that seek to draw a correlation between the articles 7 paragraphs (1) of Law no. 1 of 1974 and various facts that indicate a contradiction with the constitutional mandate regarding the phrase “bersamaan kedudukannya di dalam hukum” in Article 27 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. This contradiction, in turn, gives rise to discriminatory actions against the rights of girls who should have the same income as boys.

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*Keilmuan Ilmu Hukum Sebagai Landasan Pengembangan Ilmu Hukum Nasional* (Bandung: Mandar Maju, 2000), 185.

<sup>66</sup> The vertical relation means that the articles 7 paragraphs (1) of Law no. 1 of 1974 is related to the statutory provisions at the higher level in the building of the national legal system. While the horizontal relation means that the articles 7 paragraphs (1) of Law no. 1 of 1974 is related to the same level of statutory provisions.

<sup>67</sup> Mahrus Ali, “Pemetaan Tesis Dalam Aliran-Aliran Filsafat Hukum Dan Konsekuensi Metodologisnya,” *Jurnal Hukum IUS QUIA IUSTUM* 24, no. 2 (2017): 213–31, <https://doi.org/10.20885/iustum.vol24.iss2.art3>.

<sup>68</sup> Syarif Mappiasse, *Logika Hukum...*, p. 62-63.

Meanwhile, the top-down movement can be seen in the Court's opinion, which seeks to position the provisions of the articles 7 paragraphs (1) of Law no. 1 of 1974 on the historical dimension, which is tied to the dynamics of the period of its emergence and synchronizes it with the dynamics of the development of statutory provisions related to the provisions of the article. The Court emphasizes this synchronization regarding the concept of discrimination which must be understood based on constitutional amendments, the Human Rights Law, and the Child Protection Act. Even so, Indonesia's position as a state party to CEDAW further emphasizes that the direction of development desired by the government for the Indonesian people in the future requires the acquisition of constitutional rights between men and women, including in marriage law.

### **Reviewing the Decision with the Concept of *Maqāshid al-Syarī'ah***

It has been mentioned earlier that every Shari'a, a rule in human life, is intended to realize the benefit. Even so, the legal provisions in the legislation in Indonesia are intended to realize the benefit of the community. Therefore, the applicable provisions must follow the purpose of forming the law. Limiting the minimum age of marriage is one of the efforts to make it happen.

Regarding PMK No. 30-74/PUU-XII/2014, as mentioned above, the Court provides legal considerations based on religious values in Indonesia, especially from the perspective of Islam. This reasoning is a style of thinking in the natural law philosophy, which requires integrating law and morals. This pattern of thinking also exists in the dynamics of Islamic legal thought. As stated by al-Ghazali, benefit in the provisions of the Shari'a revealed by Allah SWT is intended to maintain and protect the purpose of Shari'a, which is nothing but the will of the



maker of the Shari'a (*al-Syāri*). There are two domains here, namely *maqāshid al-Syāri*' and *maqāshid al-khalq*.<sup>69</sup>

According to the classification proposed by Hengki, the pattern of thinking above is included in the legal reasoning of the textualist *maqāshid* group, which places authoritative texts as the primary source with a textual approach. This group places the text of the Qur'an and Hadith as the primary sources for knowing and determining *maqāshid al-syari'ah* with a variety of textual approaches such as thematic interpretation methods, induction methods (*istiqrā*), and the application of Arabic grammatical rules.<sup>70</sup>

In determining the benefit, this group determines the realization of *maqāshid* hierarchically starting from the *dharūriyyāt* aspect, which is the priority scale, then the aspect of *hājiyyāt* and followed by the *tahsīniyyāt* aspect.<sup>71</sup> In other words, if there is a conflict of fulfillment between several *maqāshid* in one case, then the priority is the aspect of the most priority (*al-tarjih al-maqāshidi*).<sup>72</sup> In the priority aspect (*dharūriyyāt*), there are five main principles referred to as *dharuriyyāt al-Khams*, namely *hiḏ al-Dīn*, *al-Nafs*, *al-Nasl*, *al-Māl*, and *al-'Aql*. According to the textualist group, the five principles are also hierarchical.

The Court's opinion that refuses to increase the minimum age of marriage for women appears to contain *hiḏ al-dīn* and *hiḏ al-nasl* at the primary level (*dharūriyyat*). This is represented by the opinion of the Court, which states that marriage is human nature and is a recommendation for every religious adherent. Marriage is a means of controlling lust and minimizing disobedience.

<sup>69</sup> Abu Hamid Al-Ghazali, *Al- Mustashfā Min 'Ilm Al- Uḏul Juz I...*, p. 416.

<sup>70</sup> Hengki Ferdiansyah, *Pemikiran Hukum Islam Jasser Auda...*, p. 83.

<sup>71</sup> Ibrāhim ibn Mūsā al-Shātibī, *Al- Muwāfaqāt Fi Uḏul Al- Shari'ah...*, p. 221-223.

<sup>72</sup> Holilur Rohman, *Metode Penetapan Hukum Islam Berbasis Maqasid Al- Syariah* (Yogyakarta: Magnum Pustaka Utama, 2020), p. 16-17.

As for the aspect of fulfilling girls' rights to get access to education, ensuring the health and economic stability, which are the subject of the Petitioners' petition, the Court tends to see it as a benefit at the secondary level (*hājiyyat*). The Court believes that although the minimum age of marriage for girls is essential to increase based on several considerations of the above aspects, this does not guarantee that social problems will occur. After all, it is closely related to the mindset of the community. In other words, no guarantee that increasing the age of marriage for girls can solve the social problems.

AS MENTIONED ABOVE, the PMK No. 27/PUU-XV/2017, the Court uses legal reasoning with the mindset of the sociological jurisprudence philosophy, which does not make normative provisions as a single benchmark of truth. The social reality is a manifestation of a sense of justice that grows and develops in society simultaneously as its position in the legal reasoning process.<sup>73</sup> In other words, various non-juridical dimensions also affect the consideration of several aspects in a legal event.

The pattern of thinking that is not limited to juridical-normative provisions is also contained in the dynamics of Islamic legal thought. Hassan Hanafi stated that the changing times and the social development of society affected the existing legal provisions. Al-Qur'an and Hadith must be read following the social conditions that occur.<sup>74</sup>

According to the classification put forward by Hengki, the pattern of thinking above is included in the contextualist *maqāshid* group legal reasoning, which provides more expansive space and opportunity for a reason to *ijtihad* in order to realize aspects of human benefit, significantly the public benefit. According to this

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<sup>73</sup> Khudzaifah Dimiyati, "Penalaran Hukum" (Surakarta, 2008), <https://dimiyati.wordpress.com/2008/09/11/penalaran-hukum/>.

<sup>74</sup> Masmuni Mahatma, "Membaca Semangat Hermeneutika Hanafi," *Melintas* 31, no. 1 (2015): 63, <https://doi.org/10.26593/mel.v31i1.1456.63-89>.

group, reason does not only function as a reinforcement of the truth of the text (al-Qur'an and Hadith). More than that, the reason is a means given by God to humans to understand the text. Therefore, this group uses a contextual approach in knowing and determining the objectives of the Shari'a so that legal reform as a response to changing times is a necessity.<sup>75</sup>

If the textualist group states that the *maqāshid* classification is formed in a structural hierarchy, then according to this group, *maqāshid* is multidimensional so that the legal structures that are formed can complement and relate to each other the level of application.<sup>76</sup> This group divides *maqāshid* based on the range of three—first, *maqāshid al-'āmmah*, namely *maqāshid*, which includes universal and eternal principles in Islam. Second, *maqāshid al-khāshshah*, namely *maqāshid*, whose scope is limited to one discussion in a particular chapter. Third, *maqāshid juz'īyyāt*, namely specific *maqāshid*, includes particular intentions behind a thing that is prescribed.<sup>77</sup>

The Court's opinion, which states that the minimum age of marriage for girls must be increased

<sup>75</sup> Hengki Ferdiansyah, *Pemikiran Hukum Islam Jasser Auda...*, p. 78. Regarding *maqāshid al-syarī'ah*, Al-Jabiri commented that the concept of *dharūriyyat al-khams* is a representative product of the spirit of the times of the previous Ulama. So it is not appropriate if these principles are used to meet current needs taken for granted. Therefore, reformulation of some of these principles is needed in responding to the dynamics of modernity. See, Muhammad Abid al-Jabiri, *Al-Dīn Wa Al-Dawlah Wa Taṭbīq Al-Sharī'ah*, 1st ed. (Beirut: Markaz Dirāsāt al-Waḥdah al-'Arabīyyah, 1996), <https://foulabook.com/ar/book/الدين-والدولة-وتطبيق-الشريعة>-pdf, p. 189-190.

<sup>76</sup> Jasser 'Audah, *Membumikan Hukum Islam Melalui Maqasid Syariah* (Bandung: Mizan Media Utama, 2008), p. 40.

<sup>77</sup> Al-Tāhir 'Ibn Ashūr, *Maqāsid Al-Sharī'ah Al-Islāmiyyah, Juz II...*, p. 123-130. Bandingkan dengan, Jasser 'Audah, *Membumikan Hukum Islam...*, p. 36-37. See also, Holilur Rohman, *Maqāsid Al-Syarī'ah Dinamika, Epistemologi Dan Aspek Pemikiran Ushuli Empat Mazhab* (Malang: Intrans Publishing, 2019), p. 128.

based on considerations resulting from the bottom-up and top-down mindset as previously discussed, appears to contain mental protection (*hifz al-nafs*), financial (*hifz al-māl*) and honor (*hifz al-'irdh*) at the secondary level (*Hājiyyat*). This is represented by the Court's view regarding the urgency of fulfilling girls' constitutional rights, which has not been realized optimally due to the enactment of the provisions of the articles 7 paragraphs (1) of Law no. 1 of 1974—starting from the aspect of health economy to education.

In contrast to the textualist group, the application of *maqāshid* according to the contextualist group is viewed from the reach of its benefit. Although the benefit lies in the second aspect, it must be realized if it turns out to have a broader impact and is following universal and eternal principles in Islam, namely convenience, justice, realizing benefit, and avoiding danger. In the context of increasing the minimum age for marriage, various facts that mention the negative impact of applying the provisions of the articles 7 paragraphs (1) of Law no. 1 of 1974 have been convincingly proven to pose a significant danger to girls.

This fact is undoubtedly contrary to the principle of *daf'u al-dharar* in Islam. Although the minimum age is not a primary thing in marriage, its existence is a means of realizing the purpose of marriage. Even so, changing times that can bring about legal changes must be placed in the context of the culture and perspective of the people.<sup>78</sup> In the context of contemporary Indonesia, the position of women is no longer seen as a subordinate subject like several decades ago when the Marriage Law was enacted. Therefore, it is not appropriate if the

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<sup>78</sup> As states in the legal maxim, *taghayyur al- aḥkām bi taghayyur al-thaqāfah al- mudrikah aw ru'yah al- 'ālam*. See, Jasser 'Audah, *Maqāshid Al- Shari'ah Ka Falsafah Al- Tashri' Al- Islāmī Ru'yah Mandzūmiyah*, 1st ed. (Virginia: al- Ma'had al- Ālamī li al- Fikra l- Islāmī, 2012), p. 324.

arguments that arise as a response to the past are used as the basis for current thinking.

Based on this perspective, the Court's legal considerations by placing the dynamics of the times and changing norms in the post-amendment Constitution as a reference for its opinion is a concrete form of an effort to realize the public benefit (*mashālih al-'āmmah*) based on the universal principles of Islam (*maqāshid al-'āmmah*).

### **Conclusion**

After examining the two decisions of the Constitutional Court above from the aspect of legal reasoning, it can be understood that the two decisions both contain the goal of realizing the benefit in the field of marriage. The difference between the two decisions lies in the construction of the Court's thinking caused by a different philosophical point of view. In the first decision, the Court departed from marriage's ideal closely related to religious norms. This is a characteristic of the philosophical mindset of the natural law school that integrates law and morals. Whereas in the second decision, the Court departed from the reality of the marriage that occurred. Consideration of data and facts and the dynamics of the development of legislation in Indonesia is the primary basis for legal considerations. This is a characteristic of the philosophical mindset of the sociological jurisprudence flow resulting from two analytical movements, bottom-up (inductive non-doctrinal) and top-down (deductive doctrine). As for the changes to the minimum age of marriage in the second decision, when examined with the principle of *maqāshid al-syarī'ah*, it is following efforts to fulfill the principle of life protection (*hifz al-nafs*), financial (*hifz al-māl*), and honor (*hifz al-'irdh*) at the secondary level (*hājiyyāt*) based on the perspective of the contextualist *maqāshidiyyūn* group.

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