

## **Determination of the Minimum Age Limit for Marriage: Balancing Legal Supremacy and the Objectives of *Sharia* in Indonesian Marriage Law**

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### **Abstract**

Based on the new Indonesian marriage law provision, marriage is only permitted if the man and woman have reached the age of 19 years. Since then, a relatively high violation of marriage law has occurred, marked by the practice of early marriages for children. Thus, the function of law as a tool of social engineering and a means of order does not work well. The research is a normative legal study that utilized the State of Law Theory, the Law Protection Theory, and the *Maqāṣid Sharia* to analyze the loophole in Indonesian marriage law provisions on minimum age of marriage, application for an early age marriage, officialization of unregistered early age marriage, and their practice in the Religious Court. This study reveals that the law supremacy of lowering the minimum age of marriage has the noble purpose of safeguarding religion (*hiḏz al-din*) through marriage at the appropriate age, the soul (*hiḏz al-naḏs*) from the threat of death through children marriage, the mind (*hiḏz al-aql*) through the provision of opportunities for higher education, the offspring (*hiḏz al-nasl*) from the threat of stunting and miscarriages, and property (*hiḏz al-māl*) from the threat of poverty as a result of children being denied their right to an education. Therefore, upholding the primacy of benefit (*maṣlahat*) and rejecting damage is the desired outcome of the legislation limiting the age of marriage. By increasing the minimum marriage age, Indonesian law has created a breakthrough in unifying the state and Islamic legal norms, with one of its sources being *'urf* (customs or practices of a society).

**Keywords:** The supremacy of the law, Age of marriage, Maqāṣid sharia

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## Introduction

Indonesia declares itself a state of law (*rechstaat*).<sup>1</sup> The principle of the rule of law is explicitly stated in the constitution: "*Indonesia is a state of law.*"<sup>2</sup> The concept of the rule of law is based on the belief that state power should be exercised following fair and equitable laws.<sup>3</sup> All citizens are guaranteed the protection of their rights by upholding the dignity of humanity. Therefore, the state is required to ensure that all citizens have legal protection. According to Article 1, Paragraph (3) of the 1945 Constitution, the Fourth Amendment provides that all Indonesian citizens are entitled to legal protection without exception.

A theory of legal protection focuses on individuals in a vulnerable position, both economically and socially, both physically and economically. It is essential to provide legal protection for vulnerable groups, such as women and children, by providing certainty and guarantees regarding the minimum marriage age. The goal is for Indonesian children to complete their compulsory education for 12 years and support government programs to realize an outstanding Indonesian human being.

Historically, the minimum marriage age in Indonesia has changed over time. With the enactment of Law Number 1 of 1974 concerning Marriage, a marriage is only permitted if the male party is at least 19 years old and the female party is at least 16 years old. However, in its development, there have been rapid changes in society that need to be accompanied by changes in law. This was

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<sup>1</sup> The explanation of the concept of the legal state is in line with the characteristics of the ideal state according to Plato because all aspects of state life are under legal control. Read more in... Soetiksno, *Filsafat Hukum* (Jakarta: Pradnya Paramita, 1991), 13.

<sup>2</sup> Article 1, paragraph (3) of the 1945 NRI Constitution which constitutionally states that "The State of Indonesia is a state of law"... "UUD 1945 Dan Amandemen", accessed October 22, 2022.

<sup>3</sup> Sirajuddin, *Komisi Yudisial Dan Eksaminasi Publik: Menuju Peradilan Yang Bersih Dan Berwibawa* (Bandung: Citra Aditya Bakti, 2006), 1.

done by reviewing the contextuality of the minimum age of marriage in Law Number 1 of 1974 concerning marriage. Thus, the Constitutional Court Decision Number 22/PUU-XV/2017 was born, which, in its ruling, ordered the legislators to change the Marriage Law, especially regarding the minimum age of marriage for women.<sup>4</sup>

According to the decision, the minimum age limit for marriage in Law Number 1 of 1974 requires revision. The age distinction between men and women in Article 7 paragraph (1) of Law 1/1974 manifests not achieving equality in law protected by Article 27 paragraph (1) of the 1945 Constitution. The difference in age provisions between men and women solely based on gender reasons is a form of discrimination. Even if these provisions are justified by health concerns, developments in the medical world indicate that women who marry at the age of 16 are particularly vulnerable to health problems, especially reproductive health.<sup>5</sup> Women who marry before the age of 19 have a higher risk of becoming victims of domestic violence, complications during pregnancy and childbirth, and other reproductive health issues.

Additionally, women may disrupt their education and careers as they may have to drop out of school and become housewives to meet the needs of their husbands and children.<sup>6</sup> According to Article 28C paragraph (1) of the 1945 Constitution, education is a constitutional right that every citizen should be entitled to enjoy equally as men. A woman failing to fulfill her primary education may be

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<sup>4</sup> “Constitutional Court Decision Number 22/PUU-XV/2017” (2018), [https://mkri.id/public/content/persidangan/putusan/22\\_PUU-XV\\_2017.pdf](https://mkri.id/public/content/persidangan/putusan/22_PUU-XV_2017.pdf).

<sup>5</sup> Made Oka Negara, “Mengurai Persoalan Kehidupan Seksual Dan Reproduksi Perempuan,” *Jurnal Perempuan* 41 (2005): 7–21.

<sup>6</sup> Dina Yonada, “Perubahan UU 16/2019 Tentang Usia Menikah Bagi Wanita: Mengapa Hal Ini Penting Dan Tepat?,” *BelajarHijrah.Com* (blog), May 20, 2024, <https://www.belajarhijrah.com/perubahan-uu-16-2019-tentang-usia-menikah-bagi-wanita-mengapa-hal-ini-penting-dan-tepat/>.

considered violating her constitutional obligations because, according to Article 31 paragraph (2) of the 1945 Constitution, every citizen must attend primary education. Thus, if the minimum marriage age for women remains at 16, it contradicts the government's agenda of 12 years of compulsory education because if a woman marries at the age of 16, then she will lose the opportunity to complete the entire 12 years of education.<sup>7</sup> Therefore, in one of its decisions, the Constitutional Court ordered the legislators to make changes to Law Number 1 of 1974 concerning Marriage, especially concerning the minimum age of marriage for women within a maximum period of 3 (three) years.<sup>8</sup> The House of Representatives finally changed the minimum marriage age in 2019. This change is contained in Law Number 16 of 2019, which pertains to amendments to Law Number 1 of 1974 regarding Marriage.

As stated in Article 7 paragraph (1) of Law 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, marriage is only permitted when both parties have reached the age of 19 (nineteen) years, and the woman has reached the age of 19 (nineteen) years. The regulation of the minimum age of marriage is a spectacular law solution that should be supported and strengthened so that it has certainty, a binding force for the community, and there is no more practice of children marriage so that it is hoped that law protection for women and children can be better guaranteed.<sup>9</sup>

Islamic law has no definite standard regarding the minimum age at which a marriage should be performed. Accordingly, Imam Syafi'i and Imam Hambali define puberty (*baligh*) at the age of 15 for both men and women. It is agreed that puberty (*baligh*) begins with menstruation for women and semen/wet dreams for men.

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<sup>7</sup> Constitutional Court Decisions Number 22/PUU-XV/2017, 10. to Law Number 1 of 1974 concerning Marriage.

<sup>8</sup> Constitutional Court Decisions Number 22/PUU-XV/2017, 11-12.

<sup>9</sup> Law Number 16 of 2009 concerning Amendemens of Law Number 1 of 1974 concerning Marriage.

Due to the individual variability in the timing of menstruation or wet dreams, it has been collectively determined that puberty is set at 15.<sup>10</sup> Imam Maliki set puberty age for boys and girls at 17 years old.

Meanwhile, Imam Hanafi set the age of puberty for boys at 18 years old while girls are 17 years old. Hanafi's opinion is that the age of puberty is the maximum limit, while the minimum age is 12 years for boys and 9 years for girls. At this age, a boy dreams of emitting sperm, getting pregnant, and emitting semen, while girls can get pregnant and menstruate.<sup>11</sup> Thus, among the four imams, there are still differences of opinion in determining the qualification of puberty (*baligh*) as one of the conditions for marriage.

A dialectic of Islamic and Indonesian law has created new treasures and traditions that should be developed in the field of marriage law. When viewed from the dynamics of its history, the reason is that Islamic family law has long been a positive law that applies in Indonesia and is a customary practice among most Indonesians (*'urf*).<sup>12</sup> Before independence, marriage law for native communities was an unwritten law adopted from religious and customary law that was adapted based on the reception theory. After independence, the differences in schools of thought in determining the minimum age for marriage became problematic because it led to legal uncertainty, prompting political movements of Muslim communities and Islamic parties to unify the law in the form of the Marriage Law. For example, in its political struggle in the House of Representatives (DPR), the Development Unity Faction adhered to the results of the ulama consultation in Jombang. This consultation was

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<sup>10</sup> Muhammad Jawad Mughniyah, *Fiqih Lima Mazhab: Ja'fari, Hanafi, Maliki, Syafi'i, Hambali* (Jakarta: Lentera, 2003), 317.

<sup>11</sup> Mughniyah, *Fiqih Lima Mazhab*, 317.

<sup>12</sup> Ahmad Zaenal Fanani, *Pembaharuan Hukum Sengketa Hak Asuh Anak Di Indonesia (Perspektif Keadilan Gender)* (Yogyakarta: UII Press, 2015), 1.

held after it was known that the Draft of Marriage Law (RUUP) that entered the DPR was adopted from BW and HOCl, which was not in line with Islamic teachings. The PPP Faction consulted with PBNU in Jakarta, and the result was used as a guideline during the session in the DPR. The revision of the RUUP draft brought by the PPP Faction received support from Islamic organizations such as IPNU, PII, GMII, and scholars. Demonstrations occurred, and Minister of Religion Mukti Ali engaged in political lobbying with the PPP Faction and scholars. Then, General Soemitro was appointed as the person responsible for this issue, which Ali Moertopo previously held. Soemitro moved quickly by holding meetings with the PPP Faction and other Islamic groups. With these meetings, all clauses deemed to contradict Islamic law were changed so that they no longer contradicted.<sup>13</sup>

Based on the narrative and historical facts provided, the birth of the Marriage Law, which also includes the minimum age for marriage, was significantly influenced by the strong role of Islamic law in its formulation and shaping. The dialectic of customary law (*'urf*) within society also shaped the law. Furthermore, the political movement of the Islamic community successfully gave birth to the Islamic Law Compilation (Kompilasi Hukum Islam or KHI), which is more characterized by Indonesian jurisprudence, one of which regulates the age of marriage. The KHI is a significant work of Indonesian scholars from various schools of thought, whose opinions were united in a codification as a Presidential Instruction.

Therefore, in 2019, when the marriageable age for women was raised from 16 to 19 years, it did not cause a major upheaval among the Muslim community because it was understood that the change in norms had been thoroughly studied from various aspects, including health, education, social, economic, cultural, and human

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<sup>13</sup> Maulida Zahra Kamila, "Politik Hukum Undang-Undang Perkawinan Di Indonesia," *Al-Ahwal Al-Syakhsyiyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 3, no. 2 (2022): 207–20.

development. When Islam does not specify a definite minimum age for marriage, then tradition/ *'urf* is a mechanism for determining Islamic law. In this context, it is known as *al-'adah al-muhakkamah* (tradition can become law). Therefore, the characteristic of Indonesian Islamic jurisprudence that was fought for at the beginning of its formation and adhered to Law Number 1 of 1974 on Marriage was not too worried about deviating from its Islamic spirit. Significantly, the change in norms has a significant impact on rejecting the *mafsadat* (prohibited) in the form of high maternal and infant mortality rates and other impacts as a consequence of child marriage. This change in norms has been in line with the principles of Islam that prioritize rejecting harm over seeking benefits. The update of marriage law is interpreted as thoughts, ideas, movements, and efforts to change existing views or thoughts in the field of marriage to align with new customs (*'urf*) that have emerged due to advancements in science and technology following the values of Islamic teachings.<sup>14</sup>

The problem is that although Law (UU) Number 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, has raised the minimum age of marriage to 19 years, the prevalence trend of child marriage in Indonesia remains relatively high. Based on data from the National Socio-Economic Survey (Susenas) Co 2020, 26.55% of girls were married between 16 and 18. One of the child marriage practices can be seen through the data on the submission of marriage dispensation cases to the Religious Courts. According to data compiled by the Directorate General of Religious Courts, in 2020, 65,301 marriage dispensation cases were handled by religious courts throughout Indonesia. In 2021, there were 62,919 cases, and in 2022, there were 50,000 cases. The four provinces with high marriage

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<sup>14</sup> Mukhlis Mukhlis, "Pembaharuan Hukum Perkawinan di Indonesia," *Adliya: Jurnal Hukum dan Kemanusiaan* 11, no. 1 (2017): 59–78, <https://doi.org/10.15575/adliya.v11i1.4852>.

dispensation rates are East Java, Central Java, West Java, and South Sulawesi. Before 2019, marriage dispensation cases only amounted to 23,700. This is a very significant increase over the last fourteen years.<sup>15</sup> This condition makes Indonesia, as a pilot project for the fight against child marriage, slumped in second place in Southeast Asia and 7<sup>th</sup> in the world. The increase in cases of marriage dispensation is also an indicator in measuring the level of failure of the objectives of marriage law in eradicating the problems of women and children, which are academic concerns.

The practice of unregistered marriage with the excuse of avoiding adultery has also worsened the situation. Those who are reluctant to apply for marriage dispensation choose to marry in secret, and only after reaching the age of 19 years do they apply for marriage recognition to the Religious Court. Although the authority to assess the validity of marriage lies with the judge, this phenomenon is considered a form of legal evasion by avoiding the marriage dispensation case and using the instrument of marriage recognition to obtain its validity. The situation is exacerbated by the varying attitudes of judges in dealing with confirmation of marriage (*isbat nikah*), where the marriage was conducted while the applicant was still underage. Some judges tend to accept, while others reject such applications. At the Tanah Grogot Religious Court, there are two conflicting rulings on the confirmation of marriage, namely Ruling Number 248/Pdt.P/2021/PA.Tgt rejects the applicant's request and Ruling Number 366/Pdt.P/2021/PA.Tgt accepts the applicant's request. Despite both legal rulings being issued by the same court, the disparity in the judges' decisions has confused the public and uncertainty.

Previous research studies have indeed explored the changes in norms regarding the minimum age for

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<sup>15</sup> Leisha Lister, "Analisa Putusan: Dispensasi Kawin" (Peluncuran dan Webinar Buku Saku Pedoman Mengadili Permohonan Dispensasi Kawin di Mahkamah Agung, Jakarta, 2020).



marriage. The latest study can be read in research titled "Implementation of Marriage Age Changes According to Law No. 16 of 2019 on Amendments to Law No. 1 of 1974 on Marriage". This research examines and compares the marriage age of children before and after the revision of the Marriage Law. The type of research is juridical normative, with an approach to regulatory law and using the theory of legal effectiveness. The research results show that setting a minimum marriage age of 19 years for both males and females was done to protect children's rights (especially women). The new rules have been applied in the Office of Religious Affairs and the Department of Population and Civil Registration. However, several factors, such as legal factors, law enforcement, facilities and resources, and social and cultural factors, cause the implementation of the new rules to be ineffective and do not show a decrease in early marriage rates.<sup>16</sup>

The research discussed differs from this study regarding the theoretical aspects used and its findings. Although the previous research discussed the role of legal enforcement factors as one of the obstacles to the effective implementation of new norms regarding the minimum age for marriage, the criticism of the previous research was only related to the role of the Religious Affairs Office and the Civil Registration and Population Office. However, the role of judges in enforcing the law in marriage dispensation cases is crucial to be considered because if judges make a mistake in determining the law, it will become one of the entry points for children's marriage practices. Another gap not addressed in the previous research is related to the phenomenon of legal evasion by society through the practice of early marriages at ages

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<sup>16</sup> Syarifah Lisa Andriati, Mutiara Sari, and Windha Wulandari, "Implementasi Perubahan Batas Usia Perkawinan Menurut UU No. 16 Tahun 2019 Tentang Perubahan Atas UU No. 1 Tahun 1974 Tentang Perkawinan," *Binamulia Hukum* 11, no. 1 (2022): 59–68, <https://doi.org/10.37893/jbh.v11i1.306>.

below 19. When their age meets the criteria for marriage, they submit a request for marriage recognition to the Religious Court. The panel of judges dismissed some marriage recognition cases because, at this time, the couple had reached the age of 19, and there was no obstacle to marrying.

This study is motivated by the gap in the aspects of structure, substance, and law of culture, where at the level of the rule of law and observance of the law the prevalence of violations in Indonesia remains relatively high, thus causing enormous harm to the sustainability and safety of the lives of women and children. The minimum age for marriage has a close relationship with the objectives/purposes because objectives/purposes are a theory that tries to reveal the purpose and goals underlying the establishment of a law. Therefore, a comprehensive understanding of the welfare that a law will achieve can be obtained. Moreover, marriage law is inseparable from the influence of 'urf as a method of *istinbath* (procedures or methods in exploring the arguments of revelation) of Islamic law.

This study analyzes the dimensions of the essence and benefits behind the minimum age restriction of marriage using the *maqāṣid sharia* theory with the aim that the dissemination process of limiting the age of marriage through a religious approach can be more accepted by the public, considering that the majority of Indonesian people are Muslim. Religion is one of the factors that influence changes in society and law.

This research also provides significant contributions to the aspect of judicial supremacy concerning the minimum age for marriage, allowing judges to be more careful in adjudicating dispensation marriage and marriage recognition cases involving underage marriages. The issue of changing the minimum age norm for marriage is an academic problem that needs to be solved through the applied theory of *Maqāṣid Sharia* by Imam Ash-Syathibi because the state's limitation on the

minimum age for marriage aims to prevent harm/damage to the life of citizens. Allah revealed the Islamic law to seek benefit and avoid harm (*jalbu al-mashalih wa dar'u al-mafasid*). Therefore, the limitation on the minimum age for marriage is a compulsory duty (*maqāṣid*) or a benefit of necessity (*dharuriyyat*) that must be fulfilled to achieve the benefit of religion and the world. If this aspect is not fulfilled, it will cause harm, even leading to the loss of life and livelihood. The benefits or objectives of *dharuriyyat* by Ash-Syathibi are divided into five stratifications, namely: preserving religion (*al-din*), the soul (*al-nafs*), offspring (*al-nasl*), wealth (*al-mal*), and intellect (*al-aql*).<sup>17</sup> The formula for the stratification of '*maslahah*' (public interest) guides judges in systematically drafting legal and decree considerations.

### **Child's Marriage and the Minimum Marriage Age Provision Violation**

Despite the state's efforts to prevent child marriage through the establishment of a minimum marriage age, the number of violations of the Marriage Law remains high. Based on data from the Central Statistics Agency over a decade, the marriage rate for children has been around 10.5 percent. The provinces with the highest marriage rate for children in 2023 are Nusa Tenggara Barat at 17.32 percent, Sumatera Selatan at 11.41 percent, and Kalimantan Barat at 11.29 percent. According to the 2023 UNICEF data, Indonesia ranks fourth globally, with an estimated 25.53 million female children married.<sup>18</sup> Article 7 of Law (UU) Number 16 of 2019 concerning Amendments to Law No.1 of 1974 concerning Marriage states that marriage is only possible

<sup>17</sup> Yusup Hidayat, *Penyelesaian Sengketa Ekonomi Syariah di Indonesia* (Jakarta: Prenada Media, 2020), 193–94.

<sup>18</sup> Yoesep Budianto, "Tingginya Angka Perkawinan Usia Anak di Indonesia," *kompas.id*, March 8, 2024, <https://www.kompas.id/baca/riset/2024/03/08/tingginya-angka-perkawinan-usia-anak-di-indonesia>.

if both parties have reached the age of 19 (nineteen) years. Furthermore, Article 7 paragraph (2) states that in the event of a deviation from Paragraph (1), a person may request a dispensation from the court or other officials appointed by both parents of the male and female sides. According to these provisions, two potential entry points for violating the minimum marriage age may lead to the practice of child marriage, namely unofficial/unregistered marriages, and applications for marriage dispensations to religious courts. Violations of the minimum age of marriage through unofficial/unregistered marriage (*sirri*) in Indonesia are very high. More than 330,000 children and adolescent marriages annually cannot be registered by the Office of Religious Affairs (KUA) or Civil Registry because they do not go through the courts.<sup>19</sup> This data shows that the number of violations of the minimum age of marriage is still concerning.

Children marriage through unofficial marriage is a violation of the Marriage Law committed by citizens involving parents, local leaders, and children. Meanwhile, children marriage that has obtained court permission but the judge does not consider aspects that are oriented towards the best interests of the children is qualified as a form of formalized crime. Therefore, judges must explore the philosophical nature of limiting the age of marriage. The philosophical aspect of the age limitation for marriage is a consideration or a meaning that depicts that the rules established by the government aim to consider the best interests of the children, the right to life and development of the children, recognition of the children's opinion, and the fundamental human rights. The philosophical framework for the minimum age for marriage can be seen in the explanation of the Law of the Republic of Indonesia No. 16 of 2019 Regarding the Amendment of Law No. 1 of

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<sup>19</sup> Yoanes Litha, "Angka Perkawinan Anak di Indonesia Turun Jadi 9,23 Persen pada 2021," VOA Indonesia, August 5, 2022. <https://www.voaindonesia.com/a/angka-perkawinan-anak-di-indonesia-turun-jadi-9-23-persen-pada-2021-/6688135.html>.

1974 on Marriage, which essentially states that the age limit in question is considered to have reached the maturity of its soul to be able to continue with marriage in order to achieve the good purpose of marriage without ending in divorce and to have healthy and quality offspring. The increase in the minimum age for marriage for women is aimed at reducing the risk of maternal and child mortality. In addition, parental support and access to better education are necessary to fulfill children's rights so that children can grow and develop. Furthermore, Article 1 paragraph (6) of PERMA No.5 Year 2019 states that children's best interest is all actions that must be considered to ensure the children's protection, upbringing, welfare, continuation of life, and development.

The meaning of formalized crime is when a judge, with his significant authority, allows children's marriage to occur through a decision without comprehensively considering the children's best interests for the future. The forms of formalized crime resulting from the judge's recklessness can be observed when the judge adjudicates marriage dispensation applications, whether following the Supreme Court Regulation No. 5 of 2019 guidelines on the Guidelines for Adjudicating Marriage Dispensation Applications. In this regulation, the judge is bound by obligations, among others: fulfilling administrative requirements for the applicant and the children; obtaining recommendations from psychologists or doctors, ensuring that the authorized party applies; the obligation to have the children, the prospective spouse, and the parents/guardians of the prospective spouse present to provide their statements; the obligation to provide counseling, and other matters that fundamentally focus on the best interests of the children. The judge must also be able to precisely dig and formulate the urgent reasons why the children must be married immediately. Although the law does not specify urgent reasons, reasons such as pregnancy outside of marriage, for

example, have not been stated as urgent reasons to be accepted when all obligations stated in the Supreme Court Regulation No. 5 of 2019 provisions have not been fulfilled.

One of the main problems with the practice of child marriage is poverty. Families from poor strata "force" their children to marry so that the family's dependents are reduced and the burden shifts to the husband as the head of the family. Instead of improving the economic level achieved, Women are trapped in complicated problems, such as problems of domestic violence, psychological suffering, reproductive disorders, threats of divorce, poverty, and abandonment,<sup>20</sup> which are qualified as omissions offenses.<sup>21</sup> If this problem is left unchecked, it will become a time bomb that threatens the rights of women and children.

The negative impact of unregistered marriages is undoubtedly detrimental to women. Husbands are more likely to neglect their wives, do not provide a living, and are unwilling to divide the joint property acquired during the marriage.<sup>22</sup> This is very demeaning to the dignity of women as human beings who have human rights, as stated in the 1993 Vienna Declaration and Program of Action.<sup>23</sup>

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<sup>20</sup> Deonisia Arlinta, "Rentetan Panjang Dampak Perkawinan Anak," *kompas.id*, April 19, 2021, <https://www.kompas.id/baca/ilmu-pengetahuan-teknologi/2021/04/20/rentetan-panjang-dampak-perkawinan-anak/>.

<sup>21</sup> Omission offense is an offense in the form of violation of statutory obligations. Examples as in Articles 217, 218, 224 and 397 number 4 of the Penal Code.

<sup>22</sup> Syukri Fathudin Ahmad Widodo and Vita Fitria, "Problematika Nikah Siri Dan Akibat Hukumnya Bagi Perempuan," *Jurnal Penelitian Humaniora* 15, no. 1 (2010). <https://doi.org/10.21831/hum.v15i1.5030>.

<sup>23</sup> The Vienna Declaration and Programme of Action is a declaration of human rights that affirms that human rights are universal, indivisible, interdependent, and interrelated. More details can be read... "Deklarasi dan Program Aksi Wina," in *Wikipedia bahasa*

Another cause of child marriage practices is due to the factor of pregnancy before marriage. Girls between the ages of 12 and 18 who should spend time in school should stop before they grow. This low level of education triggers children to become manual laborers, vulnerable to poverty, and can even become objects for the spread of radicalism. Because of promiscuity and lax parental control, a child becomes pregnant without being married. Parents have no other choice. In order to cover the family's disgrace, the children are married off prematurely. The research entitled "Disclosure of Pregnancy Outside of Marriage by Adolescent Girls to Other Parties" argues that Eastern norms still assume that pregnancy outside of marriage is a disgrace to the family or community, whatever the initial cause of the pregnancy. Teenagers who become pregnant outside of marriage are labeled as bad things that should happen but must be hidden.<sup>24</sup>

Not only the mental anguish experienced as a result of children's marriage. However, there are also physical threats. Young pregnancies are rarely accompanied by adequate reproductive knowledge. Women whose reproductive organs are still premature are perilous when functioning because they cause the problem of maternal death due to bleeding. In 2018–2019, the maternal mortality rate in Indonesia remained high at 305 per 1000 live births. One of the reasons is that sexual information is still deficient.<sup>25</sup> Thus, dogmatically, the regulation of limiting the age of marriage does not fully solve the

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*Indonesia, ensiklopedia bebas*, February 1, 2023, [https://id.wikipedia.org/w/index.php?title=Deklarasi\\_dan\\_Program\\_Aksi\\_Wina&oldid=22826578](https://id.wikipedia.org/w/index.php?title=Deklarasi_dan_Program_Aksi_Wina&oldid=22826578).

<sup>24</sup> Reni Puspita Sari, "Pengungkapan Rahasia Kehamilan Di Luar Nikah Oleh Remaja Putri Kepada Orang Lain" (skripsi, Surabaya, Universitas Airlangga, 2014), <http://lib.unair.ac.id>.

<sup>25</sup> Aditya Widya Putri, "Angka Kematian Ibu Melahirkan di Indonesia pada 2019 Masih Tinggi," *tirto.id*, September 30, 2019, <https://tirto.id/angka-kematian-ibu-melahirkan-di-indonesia-pada-2019-masih-tinggi-eily>.

problem of the practice of child marriage with all its harmful excesses.

Violations of the Marriage Law do not only come from the community. Law enforcement officers who use their authority to commit legalized crimes can also commit potential violations. Religious Court judges, for example, with a very high volume of marriage dispensation cases, have the potential to violate and open up space for the practice of child marriage if, in deciding cases, they are not based on applicable law provisions. For example, a judge during a marriage dispensation case does not listen to the statements of the parents or both prospective grooms, does not consider the legal standing of the applicant, ignores the recommendations of a psychologist or doctor, does not conduct proof on all the grounds of the application, does not dig into the background of the prospective groom to check if he is a drug addict, a gambler, or has previously committed physical violence, does not dig into the prospective groom's income, and so on.

The Supreme Court has issued Supreme Court Regulation No. 5/2019 on Guidelines for Adjudicating Marriage Dispensation Cases. This provision regulates the obligation of judges to consider the following principles.<sup>26</sup> The judge is oriented towards protecting the rights and future of the children by hearing the testimony of the prospective bride and groom, the parents of the prospective bride and groom, and advising them with consideration of saving the children's right to 12 years of compulsory education, ensuring the continuation of the

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<sup>26</sup> Article 2 of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation states that judges adjudicate applications for marriage dispensation based on the principle of the best interests of children, the right to life and development of children, respect for children's opinions, respect for human dignity and dignity, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty... "Peraturan Mahkamah Agung RI Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kawin" (2019).



children's education to the highest level, the problem of the children's reproductive organs not being ready, the economic, social, and psychological impact on the children, and the potential for discord and domestic violence if the children are married at an early age.

In addition, the judge ensures that the will of the parties to the marriage is not coerced, not due to economic, psychological, or sexual pressure. However, because they love each other, there is no relationship of blood relations, related by marriage (*semenda*) relatives, and breastfeeding. The prospective bride and groom are not bound by marriage with other people and are not a woman still in the prescribed time with another man. Then, what is the urgency of limiting the minimum age of marriage? Urgency is intended as a law value associated with law objectives, which also involves questions about the legitimacy of the law.<sup>27</sup>

### **Limiting the Minimum Marriage Age and Law Supremacy in Indonesia**

The term state of law in the Indonesian treasury is a translation of *rechtsstaat* or *rule of law*. This term has the same objective: to prevent absolute government power to recognize and protect human rights.<sup>28</sup>

The rule of law has different terms in different countries. The United States mainly uses the term *Government under Law*, Germany calls it *der Rechtsstaat*, and France uses the term *le Principe de la Lawite or la Regie du Droit*. These differences occur because they are influenced by the historical background of a nation's worldview.<sup>29</sup> *Rechtsstaat* and *Rule of Law* can broadly represent the term state of law. Continental European

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<sup>27</sup> Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel* (Yogyakarta: Mirra Buana Media, 2020).

<sup>28</sup> Azhary, *Negara Hukum Indonesia: Analisis Yuridis Normatif Tentang Unsur-Unsurnya*, Cet. 1 (Jakarta: Penerbit Universitas Indonesia, 1995), 30.

<sup>29</sup> Azhary, 33–34.

jurists often use the term *Rechtsstaat* in the *civil law* system, while Anglo-Saxon jurists often use the term Rule of Law in the *Common law* system.<sup>30</sup>

One form of embodiment of the principle of the rule of law is to carry out the order, supremacy, and protection of the law to all citizens without exception. The theory of law protection is critical to study because this theoretical study focuses on legal protection provided to the community, especially women and children, as vulnerable groups. According to Philipus M. Hardjon, legal protection for the people against government actions stems from recognizing and protecting human rights.<sup>31</sup> He then categorizes two kinds of law protection, namely, preventive law protection and repressive law protection.<sup>32</sup> Preventive law protection prevents disputes from occurring, while repressive law protection aims to resolve disputes.

Limiting the age of marriage in the context of the theory of the rule of law and the theory of law protection means that the relationship between law, power, and society must be balanced by making power subject to the law. In other words, the law becomes the central pillar in moving the joints of the life of society, nation, and state. This also proves that the law is placed in an essential position to protect citizens as a manifestation of legal sovereignty. However, surrendering all affairs to the state will not succeed ideally. Parental and community involvement is needed to support the success of combating children's marriage practices. Families,

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<sup>30</sup> Padmo Wahyono, *Membudayakan Undang-Undang Dasar 1945* (Jakarta: Ind-Hill, 1991), 24.

<sup>31</sup> Philipus M. Hadjon, *Perlindungan hukum bagi rakyat di Indonesia: sebuah studi tentang prinsip-prinsipnya, penanganannya oleh pengadilan dalam lingkungan peradilan umum dan pembentukan peradilan administrasi negara* (Surabaya: Bina Ilmu, 1987), 38.

<sup>32</sup> Philipus M. Hadjon, "Pengkajian Ilmu Hukum Dogmatik (Normatif)," *Yuridika* 8, no. 1 (1994): 2, <https://doi.org/10.20473/ydk.v8i1.5762>.

educational institutions, and the community must disseminate the dangers of children's marriage early through formal and non-formal education channels, as rejecting the harm is prioritized over seeking benefits.

In his theory of law as a social engineering tool, Roscoe Pound argues that law is a tool for renewal and changes in society's social values. Law as social control is implemented by a special body that is authoritative and applied in the context of law and administrative processes. Social control is needed to strengthen society's civilization because it controls antisocial behavior contrary to the rules of social order.<sup>33</sup>

Roscoe Pound classified the interests that must be protected by law, namely the law, to protect the public, community, and private interests. Public interests include the state's interests as the guardian of society's interests. Public interests include the protection of social institutions, the prevention of moral degradation, violations of rights, and social welfare. Private interests include the protection of individual, family, and property rights.<sup>34</sup>

The state, as an authoritative institution that embodies the principle of the rule of law and law protection for its citizens, if associated with Roscoe Pound's *law as a tool of social engineering* theory, actually has a solid commitment to protecting the interests of the Indonesian people as a whole through the regulation of limiting the age of marriage so that Indonesian citizens can grow and develop properly, gain access to adequate education, and avoid health and economic problems.

The state has carried out social engineering and renewal of community civilization through formal institutions such as the Government, the Constitutional

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<sup>33</sup> Lili Rasjidi, *Dasar-dasar filsafat dan teori hukum* (Bandung: Citra Aditya Bakti, 2007), 74.

<sup>34</sup> Satjipto Rahardjo, *Ilmu hukum* (Bandung: Citra Aditya Bakti, 2006), 206.

Court, the Supreme Court, and the House of Representatives as "engineers" who bring people to be more obedient and accept the positive impact of limiting the age of marriage. Thus, the law plays a vital role in maintaining public order despite the threat of underage marriage and all its negative impacts. A small failure to achieve the goal of changing the norms about the minimum age for marriage cannot be attributed to the government. All elements of the nation have a shared responsibility in combating child marriage practices. This includes legal supremacy and society's compliance with the law. The fair and professional enforcement of the law becomes the key to preventing children marriage from entering through the door of dispensation for marriage. Similarly, compliance with the law is a form of feedback from society to the state that has tried to protect its citizens through marriage regulations.

### **Limiting the Minimum Marriage Age and the Objectives of *Sharia* in Marriage**

Despite the state's noble attempts to modify the legal age of marriage for men and women as a sort of social engineering, laws, and cultural norms still have a low degree of supremacy. The violations that occur, among other things, the practice of marrying children in secret, and then after the children's age reaches 19 years, the couple in question submits the marriage for recognition to the Religious Court, as well as the issue of legal supremacy concerning the disparity in opinions of judges regarding the validity of the marriage of children, which is recognized when the children are 19 years old, indicate that the objectives of the law politics of the legislators have not been fully achieved. So, this study analyzes the dimensions of the essence and benefits behind the minimum age restriction of marriage using the *maqāsid sharia* theory with the aim that the dissemination process of limiting the age of marriage through a religious approach can be more accepted by the public, considering

that the majority of Indonesian people are Muslim. Religion is one factor that influences changes in society and law. Differences in thinking about the applicable law in religion will result in different ways of thinking about the law. Hence, religion is also very influential in shaping the mindset of society..<sup>35</sup>

The Religious Court (judge) plays a crucial role in enforcing the supremacy of marriage law over matters of marriage dispensation or annulment, ensuring that the goal of establishing the minimum age for marriage can be realized and that the granting of marriage dispensations or the recognition of marriages can be legally accountable. The disparity in the judgments of the Religious Court in adjudicating marriage recognition cases needs to be regulated to prevent it from becoming a gateway to underage marriages. The judgments of the Religious Court Tanah Grogot Number 248/Pdt.P/2021/PA.Tgt and Number 366/Pdt.P/2021/PA.Tgt are two examples of *ijtihad* (independent legal reasoning) by judges that are opposed despite the cases being almost identical. Although the material issues of the case fall within the domain of *ijtihad*, this issue affects the law's supremacy concerning the minimum marriage age. Therefore, legal unification is required to produce legal certainty and justice.

The consideration of the judicial council regarding the rejection of the application under Decision No. 248/Pdt.P/2021/PA.Tgt is as follows:

*“Considering that the marriage of the applicants has fulfilled the basic requirements for marriage, but because the marriage does not meet the age requirement as stipulated in Article 97, Section 7, Paragraph (1) of Law Number 1 of 1974, which has been amended by Law Number 16 of 2019 on Marriage, where the first applicant was 18 years old*

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<sup>35</sup> Nur Amin, *Agama Perspektif Sosiologi*, (Jakarta: Rajawali Grafindo, 2002), 58.

*at the time of marriage with the second applicant who was 15 years old as revealed in the trial, following the understanding of the contrary to Article 7, Paragraph (3), letter (e) of the Islamic Law Compilation in Indonesia, that the marriage performed by a couple who does not meet the age requirement as stipulated by Law Number 16 of 2019 on Marriage cannot be annulled. This is also in line with the fatwa of the Supreme Court of Indonesia Number 231/PAN/HK.05/1/2019 regarding Marriage Registration that does not meet the requirements for Marriage Registration dated January 30, 2019, which states that the applicants who have not met the age requirement as determined in Article 7, Paragraph (1) of Law Number 16 of 2019 on Marriage, due to the amendment of Law Number 1 of 1974 on Marriage, must first obtain a dispensation from the court. If the age requirement is unmet, such a marriage has violated the law. If they wish to register their marriage after meeting the age requirement, they must remarry or renew their marriage (tajdid nikah), and only then is it recorded. The Council of Judges views the marriage between the first applicant, who was 18 years old at that time, and the second applicant, who was 15 years old, as a marriage that has violated the law, based on the provisions of Article 7, Paragraph (1) of Law Number 1 of 1974, which has been amended by Law Number 16 of 2019 on Marriage, Article 7, Paragraph (3), letter (e) of the Islamic Law Compilation in Indonesia, and Letter of the Supreme Court Judge of Indonesia Number 231/PAN/HK.05/1/2019.”<sup>36</sup>*

The judicial council will consider the approval of Application No. 366/Pdt.P/2021/PA.Tgt, which accepts the application of the applicant, is as follows:

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<sup>36</sup> Religious Court Decision Tanah Grogot Number 248/Pdt.P/2021/PA.Tgt.

*“Considering that in the case at hand, the reason for the provision of Article 7 paragraph (3) of the Islamic Law Compilation letter e. The judge interprets this provision intensively, that is, narrowing the meaning of the clause "obstacle" to 100, limited to the provisions of Articles 8 to 10 of Law No. 1 of 1974, and looking at the intention of the doctrine of law in the coordination meeting of the marriage law in 2019 in the field of material law number 5 which states "in the case of a marriage performed by a couple underage, it does not need to be cumulated with the case of dispensation throughout the marriage as long as it meets the provisions of the law, then it can be accepted" which in this case can be interpreted that the law provision referred to is limited to the basic requirements of marriage contained in Articles 8 to 10 of Law No. 1 of 1974, therefore it meets the requirements of marriage that can be annulled; "The judge then concludes that the marriage of the applicants is a marriage that has met the provisions of Article 2 paragraph (1) of Law No. 1 of 1974 on Marriage because it has met the conditions and basic requirements of marriage according to Islamic law and the judge considers that this marriage does not violate the prohibition / prohibition of marriage in Articles 8 to 10 of the Marriage Law as required by Article 7 paragraph (3) letter (e) of the Islamic Law Compilation in Indonesia. The marriage of the applicants is also not categorized as a marriage in connection, so based on that, the judge believes that as long as it meets the basic conditions of marriage according to Islamic law and protects the fundamental rights of every citizen, the judge, therefore, ignores the provision of Article 2 paragraph (2) of Law No. 1 of 1974 on Marriage.”<sup>37</sup>*

With its legal systems, Islam is mainly responsible for

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<sup>37</sup> “Religious Court Decision Tanah Grogot Number 366/Pdt.P/2021/PA.Tgt.

developing the value system. All types of religious symbols, miracles, and magic greatly aid in forming a value system in society. Once formed, a person can immediately use this value system to understand, evaluate, and interpret situations and experiences. In other words, his value system manifests as norms about behavior. In humans, there are already several potentials to provide direction in human life.<sup>38</sup>

These potentials are *hidayat al-ghariziyat* (instinctive), *hidayat al-hissiyat* (sensory), *hidayat al-aqliyat* (reason), and *hidāyat al-diniyat* (religion). Through this approach, religion has become a potential by birth. Religion motivates individuals to carry out an activity against the background of religious beliefs because it is considered to have elements of holiness and obedience. This connection will influence a person to do something, and in doing something, a person's actions will be bound to the provisions between what is allowed and what is not allowed according to the religious law he adheres to.<sup>39</sup>

Islamic law is a law that has perfect, contextual, and universal characteristics. The uniqueness of Islamic law is also seen in its dynamic, elastic, visionary, and broad scope. These characteristics are often known as *Islam rahmatan lil ālamīn*.<sup>40</sup> Fathurrahman Djamil said the perfection of Islamic law lies in its general and invariable form, which is always contextual because it transcends time and era. Elastic covers all areas of human life but does not contain rigid, harsh, and coercive dogma.

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<sup>38</sup> Mulyadi Mulyadi, "Agama Dan Pengaruhnya Dalam Kehidupan," *Tarbiyah Al-Awlad: Jurnal Kependidikan Islam Tingkat Dasar* 7, no. 2 (2017), <https://doi.org/10.15548/alawlad.v7i2.424>.

<sup>39</sup> Mulyadi.

<sup>40</sup> Term of *rahmatan lil 'alamin* it is found in Al Anbiya verse 107 which means: "And We did not send you (Muhammad) but to (be) a gift to all nature"



Instead, it provides space for creativity for its people to carry out *ijtihad*.<sup>41</sup>

The flexibility and universality of Islamic law have led to its adoption by various countries in forming legislation. One such country is Indonesia. The incorporation of Islamic law as one of the sources of legal authority by the Indonesian state is evident in the regulation of the minimum age of marriage. The argument is supported by historical experience in the formulation of the Marriage Law in 1974, where Islamic law successfully filtered out clauses deemed not to follow Islamic teachings. 'Urf, as part of customs consisting of words, actions, and good habits, underwent crystallization of values that are technically encapsulated into rules for the minimum age of marriage. Following the approval of Law Number 16 of 2019, the influence of Islamic law remains potent. In the environment of the Religious Court, the authorized judge enforces positive law and makes Islamic law one of the material laws. Therefore, in its judicial work, the judge cannot be freed from the process of positivizing Islamic law. The decisions of the Religious Court judges almost always use the *Sharia*, the principles of Fiqh, as the basis for consideration and the foundation of the law-making process. The relevant Fiqh principles concerning the minimum age of marriage are *al-ādah al-muhakkamah* (customs can become law). The decisions of these judges are valid as law and can even be more practical than laws that often lag behind societal development.

Based on the *maqāṣid sharia* theory of Ash-Syathibi,<sup>42</sup> Allah revealed the Islamic *Sharia* to benefit and avoid harm (*jalbu al-mashalih wa dar'u al-mafasid*). The laws that Allah has enacted are solely for the benefit of humanity. The benefit is divided into three essential

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<sup>41</sup> Fathurrahman Djamil, *Filsafat Hukum Islam* (Jakarta: Logos Wacana Ilmu, 1997), 11, [//opac.fidkom.uinjkt.ac.id/index.php?p=show\\_detail&id=731](http://opac.fidkom.uinjkt.ac.id/index.php?p=show_detail&id=731).

<sup>42</sup> Abu Ishaq Al-Syathibi, *Al-Muwafaqat Fi Ushul al-Ahkam* (Beirut: Dar al-Kutub Al-Ilmiyyah, n.d.), 7–8.

parts, namely *dharuriyyat* (primary), *hajiyyat*, (secondary), and *tahsinat* (tertiary). *Maqāṣid*, or *al-maslahat al-dharuriyyat*, is something that must be fulfilled in order to realize the benefits of religion and the world. If this element is missing, it can lead to damage and even loss of life and property. *Maslahat* or *maqāṣid al-dharuriyyat* by Ash-Syathibi is divided into five, namely: religion (*al-din*), soul (*al-nafs*), offspring (*al-nasl*), property (*al-māl*), and aqal (*al-aql*).

The stipulation of the minimum age of marriage in Indonesia, Ash-Syathibi's *maqāṣid sharia* shows that the state, with its authority, actively promotes the well-being of its citizens. By ensuring the right to life, development, and safety for every family entity, the state aims to strengthen the foundation of society—the family—as a crucial pillar in pursuing general welfare. One way to address this is by strengthening the ratio of legality, professionalism, and integrity among judges in enforcing the supremacy of the law on the minimum age for marriage so that the decisions made contain considerations that can be accepted by sound mind and are based on the preservation of religion (*al-din*), soul (*al-nafs*), offspring (*al-nasl*), property (*al-māl*), and intellect (*al-aql*). Any form of legal evasion, such as the recognition of marriages between underage individuals, cannot be tolerated as it serves as a gateway to children's marriages and sets a bad precedent in the enforcement of marriage laws. Society, which is unaware of the law and chooses to marry underage rather than applying for a marriage dispensation, must be stopped by refining the Marriage Law so that law enforcement can impose criminal penalties on those who perform unregistered marriages.

The family is the pillar of the country. If the family, as the smallest unit in society, is of good quality, then so is the society and the country. Therefore, the purpose of the law is to establish a minimum age limit for marriage. This ensures that married couples possess the maturity of both body and soul, enabling them to fulfill the purpose

of marriage properly—eternally and happily, based on the guidance of God Almighty—and to raise good offspring. Children who are not yet eligible for marriage or are underage should have the opportunity to pursue education to a higher level, find a stable job for economic security, prepare themselves, learn about reproductive health, and enhance their mental maturity. This way, when they become eligible for marriage, they will have adequate provisions to navigate the challenges of married life, reducing the potential for divorce, broken marriages, the threat of maternal and child mortality, domestic violence, illiteracy, and poverty.

Looking further into the theory of *Maqāṣid Sharia*, it is necessary first to define the meaning of *Maqāṣid Sharia*. *Maqāṣid Sharia* consists of two words: *Maqāṣid* and *Sharia*. “*Maqāṣid*” is a compound form of the word ‘*maqṣad*,’ which means ‘the destination.’ The word, when deciphered, comes from the root ‘*qaṣada – yaqṣudu – qaṣdan*,’ signifying a straight path, holding fast, fairness, purpose, or goal, as found in the *Lisanul Arabic* dictionary. Meanwhile, “*Sharia*” was initially used to indicate water flowing from its source. It later evolved to signify the essential need of living things for water.<sup>43</sup>

Etymologically, the word *Sharia* means religion. Terminologically, *Sharia* means the rules prescribed by Allah SWT relating to creeds and various laws of deeds. This definition is stated by Muhammad Sa'ad ibn Ahmad ibn Mas'ud al-Yubi in his work *Maqāṣid Sharia al-Islāmiyah wa Alāqotuhu bi Adillat al-Shar'iyah*. Meanwhile, according to Ahmad ar-Raysuni in his work *al-Fikr al-Maqāṣidi Qawāiduhu wa Fawāiduhu*, *Sharia* is defined as several laws of *amaliyah* (actions) contained in Islam, namely through the Qur'an and Sunnah, which teach about creed and law legislation. *Maqāṣid Sharia*,

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<sup>43</sup> Nur Hasan, “Mengenal Maqasid Syariah: Untuk Apa Dan Mengapa Syariat Islam Ditetapkan?,” Islami[dot]co, 2020, <https://islami.co/mengenal-maqasid-syariah-untuk-apa-dan-mengapa-syariat-islam-ditetapkan/>.

according to Ahmad ar-Raysuni, is defined as the ultimate goal in the form of the ultimate benefit, with the stipulation of the law on humans by *al-Syari'*. Muhammad Thahir Ibn Ashur defines *maqāṣid sharia* in his book, *Maqāṣid Sharia al-Islamiyah*, as the meanings and wisdom *Sharia* maintained in each of His decrees. These meanings and wisdom are not specific to certain laws but include various law characteristics, general objectives, meanings contained in a law provision, and even meanings not considered by a law provision. Meanwhile, according to Umar ibn Shalih ibn Umar, in his work, *Maqāṣid Sharia 'inda al-Imām Izzudin ibn Abdissalam*, *maqāṣid sharia* means the ultimate goal and secret, even the value or norm, and meaning of the establishment of a law.<sup>44</sup>

Observing some of the above definitions, *maqāṣid sharia* holds an essential position in the methodology of determining Islamic law. It is not only limited to what the law is set for but also related to the wisdom of setting it, why it is set, and its motive (*illat*). Imam Ash-Syatbibi is one of the great scholars who initiated the science of *maqāṣid sharia*. The book *al-muwāfaqāt* is his monumental work in the field of ushul fiqh. Ash-Syathibi emphasized that no matter how good the *Sharia* is, it will be meaningless if its adherents do not feel the benefits. According to Imam Ash-Shathibi, God revealed the rule of law to take benefit and avoid evil (*jalbu al maṣalih wa dar'u al-mafāsīd*).<sup>45</sup>

The rules of law that Allah sets are only for the benefit of humanity itself. Syathibi then divided this *maslahat* into three essential parts, namely *dharuriyyat* (primary), *hajiyyat* (secondary) and *tahsinat* (tertiary). *Maqāṣid* or *Maslahat Dharuriyyat* must exist to realize religious and worldly benefits. If this does not exist, it will cause damage and even loss of life and life. *Maslahat* or

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<sup>44</sup> Hasan.

<sup>45</sup> Hasan.

*maqāṣid dharuriyyat* by Ash-Syathibi is divided into five, namely: religion (*al-din*), soul (*al-nafs*), offspring (*al-nasl*), property (*al-mal*) and aqal (*al-aql*). Although in its development, new elements emerged in the safeguards in *maqāṣid sharia* such as maintaining honor (*Hifẓ al-'Ird*), protecting the environment (*Hifẓ al-Bi'ah*), maintaining the welfare of the people (*Hifẓ al-Ummah*), maintaining security (*Hifẓ al-Amn*), maintaining human glory (*Hifẓ al-Karomah al-Insaniyah*). According to Imam Ash-Syatibi's *maqāṣid sharia* theory, Islamic law aims to gain benefit and avoid harm (*jalb al-mashalih wa dar al-mafasid*). *Maslahat* is divided into three essential parts, namely *dharuriyyat* (primary), *hajiyyat* (secondary), and *tahsinat* (tertiary).

In the context of limiting the age of marriage in Indonesia, legal protection for women and children through establishing a minimum age limit for marriage is a significant step towards maintaining the public good. Qualitatively, the spirit behind the introduction of provisions on the age limit for marriage can be observed in the general explanation of Law (UU) Number 16 of 2019, which pertains to Amendments to Law No. 1 of 1974 concerning Marriage. It is explained that the age limit in marriage aims to ensure that couples entering into marriage possess physical and emotional maturity. This, in turn, is expected to enable them to effectively fulfill the purpose of marriage, preventing it from ending in divorce and promoting the creation of healthy and well-adjusted offspring. Therefore, the interpretation of the substance extends beyond a mere consideration of age numbers; it also encompasses an evaluation of mental maturity and other supporting factors.

Based on Imam Ash-Syathibi's *maqāṣid sharia* theory, there are five main stratifications to be achieved through the enactment of the marriage age restriction law. First, protecting religion (*Hifẓ al-Din*). The concept of maintaining religion in the context of marriage supremacy for children is carried out through two aspects:

The judge must ensure prospective spouses, specifically Islam, adhere to the same religion. Interfaith marriage is prohibited in Indonesian law; it is forbidden to temporarily convert to another religion and then revert to the original one. If there is a difference in religion between the children and the parents/guardians, a dispensation application is submitted to the court according to the children's religion (Article 7 of PERMA No.5 of 2019). Limiting the minimum age of marriage in the Marriage Law is an effort to maintain religious values. Marriage is an Islamic religious law, and the law is obligatory for those who are mature and ready physically and mentally. Therefore, adulthood is required so households can bring about the benefits of happiness rather than harm (*mafsadat*).

Second, Protecting the soul (*Hifz al-Nafs*) is crucial. The rising number of maternal deaths resulting from early marriage and the unpreparedness of reproductive organs pose a significant social and health problem that cannot be ignored. Therefore, the state plays a crucial role in establishing a minimum age for marriage, aiming to reduce maternal mortality or, in other words, safeguard the well-being of the soul. Literature studies have found the importance of community empowerment aimed at changing social and cultural norms that hinder access to comprehensive reproductive and sexual health knowledge for children, to be carried out simultaneously with other prevention programs.<sup>46</sup> The family also informs children about sexual education and reproductive health, allowing them to explore according to their interests and engage in productive activities. They also recommend strengthening organizations and communities to be involved in

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<sup>46</sup> Santi Kusumaningrum, "Risalah Kebijakan: Pencegahan Perkawinan Anak untuk Perlindungan Berkelanjutan bagi Anak" (Depok: UI Publishing), 13, accessed May 29, 2024, <https://puskapa.org/blog/publikasi/6043/>.

preventing teenage pregnancy.<sup>47</sup>

Third, Protecting the mind (*Hifz al-Aql*) is crucial. Early marriage deprives children of their right to higher education, forcing them to adapt to an environment that moves too quickly for them to engage in. Consequently, there is a surge in illiteracy. With noble intentions, the state aims to protect the mind, ensuring citizens possess above-average intelligence, avoid primitiveness, and are more civilized and broad-minded in educating their families. The cases in the Penajam Religious Court from 2020 to 2023 have proven that most children seeking marriage dispensation have only completed junior high school. Some of them have experienced pregnancy. These cases are very complex, and the judges are challenged to think clearly about saving the children in their wombs or allowing them to continue their education. Based on the investigation results, they prefer to marry to clearly define the children's status in their womb, while the desire to continue education can be pursued after marriage.<sup>48</sup>

Fourth, safeguarding offspring (*Hifz al-Nasl*) is imperative. Child mortality is a growing concern, exacerbated by the increase in maternal deaths resulting from the practice of child marriage. Young mothers often fail to realize they are pregnant and resort to high doses of pain medication, leading to miscarriages. Based on the results of the marriage dispensation decisions in the Religious Court, 54.22% of the dispensation applications were submitted by one of the applicants, a minor. Of the total marriage dispensation applications, 40.98% were submitted because the female applicant was pregnant. Meanwhile, based on 104 data from marriage dispensation decisions in 2020, 2021, and 2022 collected non-probabilistically from the Religious Court of Surabaya, 42.31% were submitted, with the reason being

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<sup>47</sup> Kusumaningrum, 16.

<sup>48</sup> Public Relations of the Penajam Religious Court, The Annual Reports of the Penajam Religious Court for 2022 and 2023, n.d.

pregnancy.<sup>49</sup> The judge must respond to the data with wisdom and fairness so that the supremacy of law runs fairly and is oriented towards the interests and future of the children.

Fifth, Protecting property (*Hifz al-Mal*) is crucial. Poverty remains a persistent problem in the country to this day. Underage marriage contributes to the issue, as it deprives children of their right to education, leaving them to enter the family arena with limited educational backgrounds. Consequently, in the long run, these children often end up as manual laborers or coolies, facing difficulties in advancement. The state has anticipated such problems by prohibiting underage marriage. The axiological dimension behind the regulation of limiting the age of marriage is to uphold the supremacy of benefits (*maslahat*) and reject misfortune.<sup>50</sup>

Efforts to realize public benefits and mitigate misfortunes, in realizing the minimum marriage age from the perspectives of the *maqāṣid sharia* and functional sociology theory, are pertinent to the fiqh rule: *avoiding harm takes precedence over seeking benefits*. Although child marriage may have some positive impacts, the negative consequences are far more significant. Therefore, according to religious beliefs, avoiding harm (*mafsadat*) takes precedence over seeking benefits. Likewise, the fiqh rule: *the harm must be eliminated*; in the sense of preventing young marriages, which have very complex impacts, they must be eliminated. Finally, the fiqh rule *must not cause harm to oneself or others*; child marriage has a significant impact on the physical and

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<sup>49</sup> “Laporan Pelaksanaan Kegiatan 2022” (Pengadilan Agama Penajam, 2022), <https://drive.google.com/file/d/1EadjfjrerRnCRh2t8Z3h05RDt0itb2Bha/view>; “Laporan Pelaksanaan Kegiatan 2023” (Pengadilan Agama Penajam, 2023), <https://drive.google.com/file/d/1sXQvKdvyfgIdaHjIAFESibjDGiivME0V/view?usp=sharing>.

<sup>50</sup> Hasan, “Mengenai Maqasid Syariah.”



mental safety of both men and women, which, in a broader context, undermines the social fabric.<sup>51</sup>

Therefore, the violation of the minimum age of marriage, characterized by the practice of children marriage, whether carried out by the community or officials through their authority, which is applied arbitrarily and unlawfully, is not only a form of non-compliance with the supremacy of marriage law but also implicitly a form of disobedience to religious orders. This is because, according to Imam Ash-Syatibi's *maqāṣid sharia* theory, the spirit behind the minimum age of marriage is equivalent to the values contained in Islamic teachings. Namely, it aims to realize a lasting and happy family based on Almighty God's principles.

## **Conclusion**

Determining the minimum marriage age aims to safeguard Indonesian children to ensure that their rights to live, grow, develop, and participate are realized following human dignity so that they may live, grow, develop, and participate optimally. Protection is provided to Indonesian children from abuse, torture, or inhumane punishment within their family environment. It is a preventive measure to minimize the adverse impact of child marriage on the various aspects of human life, such as religion, soul, mind, offspring, and property, which are the most fundamental components of human nature in Islam. Likewise, such negative impacts as maternal and child mortality, the threat of illiteracy, reproductive disorders, violence and neglect, poverty, and the threat of divorce can be combated through state control, the use of appropriate official authority, and public law awareness. This legal arrangement places rules as obligations that must be obeyed and religious orders that must be upheld

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<sup>51</sup> Al-Imam Jalaluddin Abdurrahman As-Suyuthi, *Al-Asybah Wa An-Nazhair* (Semarang: Maktubah wa Mathbu'ah Thoha Putera, n.d.), 59.

and obeyed. By increasing the minimum marriage age, Indonesian law has created a breakthrough in unifying the state and Islamic legal norms, with one of its sources being *'urf* (customs or practices of a society).

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