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The Minimum of Marriageable Age in *Maqāsid al-Sharia* and Psychological Perspectives

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Keywords: marriageable age, maqasid al-shariah, children rights, psychology.

Abstract: The minimum of marriageable age becomes an interesting topic in Indonesia. As the most populous Muslim country, Indonesia should exert the Islamic teaching in the case. Aisha, the Prophet Muhammad's wife, got married to the Prophet when she was six and consummate to him when she was nine. The Indonesian government, as a member of the United Nations (UN), should follow and ratify the UN treaties that prohibited the child marriage. This study employs conceptual and statute approach to examine the problem of marriageable age based on maqasid al-shariah and psychological perspectives. The results of this study are: (1) Islamic law does not decide the minimum age to get married to the bride and the groom. The Quran conditions for the bride and the groom to have, at least, a rushd quality to get married. (2) Based on the maqasid al-shariah and psychological perspectives, the minimum of marriageable age, 16 years and 19 years for the bride and the groom respectively should be preserved but the bride who got married in 16 years was still the child who should be under the protection of her parents.

1 INTRODUCTION

The child marriage age of the first marriage contributed to the stability of marriage, especially for women. However, the research results found by Lehrer and Jeong Son indicated that the marriage union was influenced by the ethnicity of the marriage parties besides the age. The study done in America found that the females' age 30-32 decreased the probability of divorce for non-Hispanic white women and for the black women their instability decrease in 24-26 whereas for the Hispanic wives' ages 20-23, their household unsteadiness tended to decrease. (Lehrer and Son, 2017) Therefore, the age of the bride and the groom should be stipulated to decrease the level of divorce besides to fall the rate of the mortality of the mother. (Anjarwati, 2017); (Marphatia et al., 2017) Their age should be increased to promote economic empowerment, (Yount et al., 2018) and educational achievement, especially for women. (Mohammad Mainul Islam, Md. Kamrul Islam, Mohammad Sazzad Hasan, And Md. Aminul Haque, 2016)

The minimum of the nubile age is contentious

provisions that the Muslim countries vary in deciding the age for the bride and the groom. The countries stipulated the age for early marriage below 18 years for boys were Lebanon 13, Iran 15, and Kuwait 17 while for the girls: Lebanon 9, Iran 13, and Kuwait 15. (Arthur et al., 2018) The differences of these provisions might be influenced by their diverse understanding pertaining to Aisha's marriage in 6 and her consummation in 9. However, the child marriage under 18 was prohibited by the United Nations (UN) as was stipulated in article 16 (2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The minimum of marriageable age prescribed by the Indonesian law number 1/1974 is 16 years and 19 years for the bride and the groom respectively. The provision of the minimum age was stipulated in 1974 when their maturities had been reached in these years by the bride and the groom. The maturity is an important quality for the bride and the groom to enter the marriage life.

The contemporary cultural and social change, influenced by globalization and the development of information technology, alters the time of the

maturity. The maturity of reason tends to delay while the maturity of sex tends to predate.

The minimum of marriageable age, the orthodox Muslim jurists exerted the concept of *baligh* as for women and men are nine and fifteen respectively. The concept was used for sexual maturity than the intellectual one. The meaning of *baligh* is used as the sign for Muslim to be liable for his deeds before Allah.

The marriage is not only purposed for reproductive objection but also for preserving harmonious family and establishing the new generation ready to be Allah's vicegerents in the world that do not come but from the harmonious family fulfilled with caring, respecting, and loving among husband, wife and their children. Therefore, the minimum of marriageable age should regard the objectives of establishing family those are not merely for reproductive objectives.

2 METHODS

The method used in the research employs hermeneutic analysis to understand the Quranic verses and hadith concerning with marriageable age interpreted by Interpreters as well as the legal reasoning concluded by Muslim jurists. These two sources of Islam are regarded as one system strengthening each other. This analysis sees that their interpretation of the Quran and hadith and their conclusion as well are not independent but depends on their knowledge backgrounds, circumstances and the people they faced. The research utilizes *maqāṣid al-sharī'ah* and psychological perspective as tools analysis to solve the problems of the marital age. The first examines the minimum age of the bride and the groom based on multi-dimensions perspectives, not only from the Quranic and hadith teachings but also from the principle of justice and human rights and psychological views as well. The second analyzes the age of maturity as a pre-requisite for marriage. The maturity of mind, psyche, and physical body should be reached by the bride and groom to enter an ideal marriage. The age of maturity to get married is important according to *maqasid al-sharī'ah* and psychological perspectives to revise the age for the bride and the groom to get married.

3 RESULT AND DISCUSSION

3.1 The Objectives of Marriage based on Quran and Hadith

The Quran ordains the marriage in many verses, among them are mentioned in al-Rūm: 21 as follow

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً
وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يُتَفَكَّرُونَ

“And among His Signs is this, that He created wives for you from among yourselves, that you may find tranquillity in them, and He has put between you affection and mercy. Verily, in that are indeed signs for people who reflect.

Based on the verse, there are three objectives of marriage, namely tranquility, affection, and mercy in the marriage and family. The tranquility means that marriage should guarantee that husband and wife to give tranquility and peacefulness to each other as well as to their children. The affection should color their conjugal life that husband and wife have an interchangeable fondness for each other. The mercy of marriage and family means that husband, and wife should have a mutual feeling and compassionate to each other.

However, based on the text of the verse the majority of Quranic interpreters said that the obligation of establishing tranquility, affection as well as mercy is not mutual obligation between husband and wife rather they are the responsibility of men than the liability of women as was said by Aḥmad Mustafā al-Maraghī (d. 1945) in his *Tafsīr al-Marāghī*. However, Muḥammad Ṭāhir ibn ‘Ashūr (d. 1973) contended that these responsibilities are equally shouldered by husband and wife. He argued that the word “*lakum*” in this verse consists of both male and female as the word “*azwāj*” does not mean only as single-sex but to the husband as well as a wife. Additionally, he reasoned that the verse is the rule of procreation ordained by Allah for human beings to differentiate from that of animals. (Muḥammad Ṭāhir, 1984, p. 71)

The objective of marriage as procreation is emphasized by Hadith as follows.

النِّكَاحُ مِنْ سُنَّتِي، فَمَنْ لَمْ يَعْْمَلْ بِسُنَّتِي فَلَيْسَ مِنِّي، وَتَزَوَّجُوا، فَإِنَّهُ مُكَاتِرٌ
بِكُمْ الْأُمَمَ، وَمَنْ كَانَ ذَا طَوْلٍ فَلْيُنكِحْ، وَمَنْ لَمْ يَجِدْ فَعَلَيْهِ بِالصَّبَامِ، فَإِنَّ
الصَّوْمَ لَهُ وَجَاءٌ

The marriage is one of my recommendations. Whoever does not practice my recommendation is not my faction. Get marriage! Because I am

in the contest upon you among prophets to have considerable people. Whoever has an extension please to get married and whoever does not to take fast because the fasting is a shield for him. (Ibn Mājah, 1406, p. 321)

Based on the hadith, procreation of human beings is needed to make large people and to strengthen Muhammad's people among prophets' people. Therefore, Muhammad enjoined his people who have enough properties to marry and to procreate or to take fast if he does not.

3.2 The Minimum of Marriageable Age in Islamic Law

The minimum of age that the bride and groom can make a contract of marriage, there is no provisions exactly decide it. However, there is hadith chained from Aisha says that Aisha got married to the prophet Muhammad when she was only six and consummated to him when she was nine.

تَرَوُّحِي رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَيْسَتْ سِنِينَ، وَبَنِي بِي وَأَنَا بِنْتُ تِسْعِ سِنِينَ
 “The prophet Muhammad, peace be upon him (p.b.u.h.), got married me when I was six and consummated to me when I was nine” (Naishabūrī al-, 1987, p. 206).

The marriage of the Prophet p.b.u.h. to Aisha when she was child stirred heat debate among Muslim scholars from historians, Quranic interpreters to jurists. There were many opinions concerning the age of Aisha when the Prophet married her from six, sixteen, seventeen to eighteen. The opinions of her age other than six based on the age of Asma bint Abū Bakr, the elder sister of Aisha who was ten years older than Aisha. (Ghafīlī al-, 2011, pp. 391–402) They also based their opinion on that the hadith was transmitted by a weak memorization of the transmitter, Hishām ibn ‘Urwah ibn Zubair. Based on the hadith, Bowden concluded that the Aisha’ in the consummation of marriage had reached the age of maturity as the prerequisite for having a marital relation. (Bowden, 2013)

The differences of opinions concerning the nubile marriage are a common feature and a dynamics of Islamic law. However, we should comprehend that the hadith does not enjoin the people to do so. The order on marriage given by the prophet is to teenagers as concluded from his statement as follows:

يَا مَعْشَرَ الشَّبَابِ، مَنْ اسْتَطَاعَ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَعْيُنُ اللَّبْصَرِ وَأَخْصَنُ لِلزَّفْرِجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وَجَاءٌ

"O you the group of teenagers, whoever has the capability to marry, please marry because the

marriage can cast down the look and can fortify the sexuality and whoever has no capability to marry, they should take a fasting because the fasting becomes a shield for him" (Ghafīlī al-, 2011, p. 355)

The hadith indicates that the order for marriage is not to the age of someone but given to whoever attach and become teenagers.

The teenager in psychological terminology is called adolescence. The adolescence is a period ranging from puberty to maturity. (Bhatia, 2009, p. 11) It is hard to define as to what age the adolescents have. However, some psychologists decide that their ages are between 10 and 19 and others say they are between 11 to 22, but among them say that they are between 13 and 30. It can be said that adolescents are they who are no longer children but are not yet adults. There are many changes within the individual, whether physically, cognitively, or socially. The physical change is interrelated with puberty, the cognitive change associated with intellectual competence, and social change, related to exchange of focus to more on peer orientation. (Moshman, 2005, p. xx) The change of the adolescents differs from one to another, from villagers to others, and from country citizens to others. There are many factors influencing the changes in the individuals from food, hormone, civility to religiosity.

Therefore, the term teenager or adolescent we cannot decide exactly to the age of individuals but to the physical, cognitive, and social transformation of such individuals. The Quran contends that the precondition of marriage is when someone cognitively attains, at least, the full legal age as mentioned in al-Nisā': 6 as follows:

وَابْتَلُوا الْيَتَامَى حَتَّى إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ

“And examine the capabilities of the orphans until they attain a marriageable age, then if you see in them sound judgment, devote their properties to them”

The verse indicates that the key to enter the marriage is at least when someone has *rushd* potency. It is understandable from the verse that the property contract the Quran requires the parties to have *rushd* potency, how about the marriage contract consisting also property contract between the spouse.

The word *rushd* has many meanings like the integrity of one's action, sensible conduct; reason, good sense, senses; consciousness; and maturity of the mind while *sinn al-rushd* means full legal age. (Wehr and Cowan, 1976, p. 341) The *rushd* potency is obtained after

individuals attain the puberty. (Bowden, 2013) The *rushd* quality should be promoted as a requirement for everyone to enter the marriage. The age of *rushd* should replace the *bāligh* requirement of the marriage passed by Muslim jurists because the *baligh* tends on physical and sexual potency than the cognitive and social potency of the parties.

3.3 The Minimum of Marriageable Age in Indonesian Law

The Indonesian government, one of the states ratified UN treaties, should exert the CEDAW, especially article 19 (2) as follows:

“The betrothal and the marriage of a child shall have no legal effect, and all necessary actions, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory”.(The United Nations, 1979)

The child marriage was prohibited by the UN as the marriage abused the children’s rights. There are many rights disappear because of the marriage, for instances, education, playing, and living with their families.

The Indonesian government issued the law number 35/2014 in Liu to the law number 23/2002 concerning the protection of the children’s rights. The article 16 (1) point c said:

“The parents have obligation and responsibility to prevent the marriage in child age”.(The Law of Indonesia Number 35/2014, n.d.)

The individual is called a child if his or her age is under 18 years (The Law of Indonesia Number 35/2014, n.d., p. article 1) as was ordained by the United Nations. (The United Nations, 1989, p. Article 1). If the law of Indonesia ordained the minimum marriageable age 16 for the bride as was stipulated in the law of marriage (The law of Indonesia number 1/1974, n.d., p. Article 7 (1)) and the compilation of Islamic law, (Indonesian Presidential Instruction number 1/1991, n.d., p. Article 15 (1)) the provision is against the UN’s provision and the other Indonesian laws.

The prohibition of marriage for individuals under 18 years is assumed that the individuals under the age do not have the maturity, whether sexual, physical, and rational to enter the marriage lives since the qualities are the requirement for the men and women to face various problems across the family life. Such qualities, the Quran termed as *rushd* quality.

The *rushd* potency of the marriage parties differs from countries to countries and also differs between a bride and a groom. In 1974, Indonesian Government

passed the law concerning the marriage as the article 7 (1) stipulates that “the marriage is allowed if the groom has attained 19 years old while the bride has attained 16 years old.”[10] The age stipulated under the law of marriage was a compromise between the two extreme parties. The committee of NTR (Marriage, Divorce, and Remarriage) backed by Ulama, firstly, proposed the groom, and the bride should be 18 and 15 years old respectively while the member of parliament and KOWANI proposed the minimum of marriageable age is 21 years for the male and 18 years for the female.

The age of 19 years and 16 years as the requirements for the groom and the bride respectively to enter the marriage is in line with the circumstances and the condition of Indonesian people. The men of 19 years old had discovered the potencies needed to enter the marriage. They also had experienced physical, cognitive, and social changes in their body and life. The women of 16 years old had obtained the potencies and had experienced the changes as well as of those of the men.

The potencies needed for the marriage are fixed requirements that prevail throughout times and spaces. However, when the marriage parties attain and obtain such potencies differs from times to times and places to places. Because of the globalization and the social and cultural transformation, the minimum of marriageable age for the groom and the bride had been contested recently.

Many organizations that are active in protecting the mothers and the children such as SCN (*Semerlak Cerlang Nusantara*), MAGENTA (*Masyarakat untuk Keadilan Gender dan Antar Generasi*), KPI (*Koalisi Perempuan Indonesia*), and YPH (*Yayasan Pemantau Hak Anak*) perceived that the minimum age for marriage parties ordained in the law no.1/1974 is not compatible anymore with the social and psychological transformation of the youth. Therefore, they had filled the case to the ICC and proposed to increase the minimum of marriageable age from 19 and 16 to 19 and 18 for the groom and the bride respectively. However, their case was finally nullified by the ICC in the decree number 30-74/PUU-XII/2014.(The Indonesian Constitutional Court Number 30-74/PUU-XII/2014, n.d.)

The nullification of the case leaves behind the problems that may be experienced by the children who perform an early marriage performed by the parties under 18 years. There are many impacts may occur towards pregnant mothers under 18 years and their babies as follows: a) a premature childbirth, b) a physical defect of the babies, c) an underweight baby, d) an anemia mother, e) a bloody child-birthing, f) the

mothers experiencing eclampsia during pregnancy, g) an increasing of depressive mothers, h) an increasing of death rates of mothers, i) an increasing of cervical cancer of mothers, and j) a risk for the mothers to be infected by sexual disease. (The Indonesian Constitutional Court Number 30-74/PUU-XII/2014, n.d.)

3.4 The Ideal of Marriageable Age in *Maqāsid al-Shariah* and Psychological Perspectives

The *maqāsid al-sharia* is the objectives of sharia, the provisions stipulated by Allah and the Prophet Muhammad in the Quran and hadith. The *maqāsid* formulated by the orthodox Muslim scholars cannot dissolve contemporary problems without adding the element regarded necessities (*darūrī*). (Ibrahim, 2014). The *maqāsid*, as one of Islamic epistemologies, should not be locked on seventh century or era of the formulation of Islamic jurisprudence because it will restrain the dynamism and universality of the Quran. (Abou El Fadl, 2015) Jasser Auda, a modern Muslim jurist, developed the concept of *maqāsid al-sharia*. He divided it into three categories, general, specific, and partial *maqāsid*. The general is the highest level that is concluded from the whole Islamic teachings of the Quran and the hadith. It consists of three levels, necessities (*darūrī*), needs (*ḥājji*), and goodness (*tahsīnī*). In addition, he puts the principle of justice and facilitation in this category. The specific is the objectives observed from a certain chapter of Islamic law, for instance, marriage (*munākahaḥ*), law of inheritance (*mawārīth*), and politics (*siyāsah*). And the partial is observed from the intent of particular rulings like praying (*ṣalāh*) and fasting (*ṣawm*). (Auda, 2008, p. 5)

The principle of justice and facilitation, Auda included in the general *maqāsid* was inspired by Ibn Qayyim al-Jawziyah who said:

The cornerstone and basis of sharia are grounded on the wisdom and benefit of the people in this world and hereafter. Sharia is all about justice and people wellbeing. Every rule deviates from justice to injustice, from mercy to its opposite, from welfare to evil, and from soundness to uselessness are not sharia. (Ibn al-Qayyim al-Jawziyyah, 1423, p. 337)

Additionally, Auda proposed a system as an approach that is consisting of purposefulness, cognition, holism, multi-dimensionality, and openness to analyze a certain provision of Islamic law. (Auda, 2008, p. 192) He also proposed to take into account the opinions of Muslim jurists, the legal sources,

linguistic analysis of the sources, a method of judicial reasoning, culture, history, location, and time when examining contemporary cases.

There are three methods of legal reasoning for resolving the contemporary problems: (1) to differentiate the texts as the means (*wasā'il*) and the ends (*ahdāf*), (2) to exert a multi-dimensional approach to harmonize of opposing proofs, and (3) to take the principle of universality of sharia and observe the cultures and customs in its implementation. (Auda, 2011)

The marriage is a partial *maqāsid* as it is ordained by particular provisions of the Quran and hadith. However, the provisions cannot contradict against the general objectives of sharia namely justice, facilitation, and people's welfare. The objectives of marriage, among them, are to establish the family fulfilled with tranquility, affection, and mercy among the members.

The harmonious family cannot be reached by the marriage parties who do not have *rushd* quality. This quality should be reached for an individual to make a contract of property as was contended in al-Rūm: 21. The marriage as a contract not only on the property but also human and familial contracts should have prerequisite more than this quality. Therefore, the *rushd* is a minimal requirement for the bride and the groom to enter the marriage. The maturity of reason also becomes a requirement to complement each other in the familial life since husband and wife are united in one as was mentioned in al-Baqarah: 187 (the wives are the garments for you, and you are the garment for them). The function of each party as the garment to cover and compliment the defections of each other cannot be achieved if the marriage parties do not have the maturity of reason, psyche, and physical anatomy as well. The conjugal partners need commitment sharing to endure their marital relationship. (Rozario, 2012)

The objective of the marriage, among others, is to establish marital satisfaction and wellbeing in the family. (Margelisch et al., 2017) The husband and wife should give a satisfied-relation to each other. It cannot be done by the child spouse who does not have mature reason and vulnerable for high risk by their intimate mates. (McFarlane et al., 2016) Marital harmony, according to marriage counselors and therapists, depends on the maturity of the spouses. (Chettiar, 2015) Therefore, the maturity of the marital parties' minds is the required element for the bride and the groom to accomplish the goals.

In the psychological perspectives, the human's maturity of the reason is reached completely when they are in the adolescent age. In this age, they have

maturity in intellect, physic, hormone, and social. However, there are many factors influence the individual's maturity, among others, are age, sex, and nutrition. (Sharma et al., 2013) The maturity of the human brain should regard brain functional activity, functional connectivity and interrelation between brain structure, function, and network organization of the brain. (Somerville, 2016) The adolescent age of human spans from 10 years to 24 years but the complete maturity is gained at the age of 25 years old. The adolescence is an epoch between the childhood and adulthood. This epoch is signed with the changes, the individual experienced in his or her life.

The ideal age of the marriage is when the marriage parties attain the complete maturity, namely 25 years old. However, this age hard to be accomplished in the Indonesian context since the law number 1974 stipulated minimum age of marriage is 16 years and 19 years for the bride and the groom respectively. Even, the low-legal age to enter the marriage can be decreased by means a legal exception or marriage dispense filled in the civil or religious court, and this legal procedure becomes an emergency exit for the brides who have a pregnancy before the legitimate marriage.

4 CONCLUSION

The minimum of the marriageable age is a complicated problem that is should be solved by the Indonesian government. Based on the discussion, it can be concluded that Islam does not decide the minimum of the marriageable age. However, Islam provisioned two qualities to be met, namely the *shabāb* (the adult/adolescence) and the *rushd*. The first tends to physical maturity while the second tends to psychological and social maturities. Pre-requisites for the marriage parties to solemnize their marital contract. These two potencies must be concluded by the Indonesian government as the characteristics for issuing the minimum age to marry.

The minimum of nubile age as was issued in the law number 1/1974 is 19 and 16 for the groom and the bride respectively. Although the allowed age for a female is 16 years, there were thousands of legal exceptions (*dispensasi kawin*) filled before the religious and civil courts of Indonesia for many reasons, mostly because of the illegitimate pregnancy. There are contentious problems concerning with the stipulation of the minimum age of marriage, namely (1) if a minimum of marriageable age for the bride is increased to 18 to meet the child protection law No. 35/2004, it can trigger the increasing number of

adultery and illegal conjugal relation, and (2) if a minimum age to marry is decreased below 19 and 16, it can prompt to increasing number of divorce because of the immaturity of marital parties physically, psychologically, and socially. Therefore, the stipulation of a minimum of marriageable age should be based on *maqāṣid al-sharia* and psychological perspectives. The objectives of marriage are to maintain harmony, tranquility, love, and care family. The marital parties to attain these goals should have two qualities; the *shabāb* and the *rushd*. These two potencies, according to psychological perspectives, are concerning with the maturity of the parties physically, mindfully, socially, and psychologically as well. Therefore, if the men and women contracted their marriage before 18 years, they were should be still under their parents' protection because they are still children and should be under the auspices of their mother and father.

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