

3-31-2019

## CHILD MARRIAGE AND ZINA IN INDONESIAN LEGISLATION IN ISLAMIC LAW

Neng Djubaedah

Faculty of Law Universitas Indonesia, nengdj@yahoo.com

Follow this and additional works at: <https://scholarhub.ui.ac.id/jhp>



Part of the [Family Law Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Djubaedah, Neng (2019) "CHILD MARRIAGE AND ZINA IN INDONESIAN LEGISLATION IN ISLAMIC LAW," *Jurnal Hukum & Pembangunan*: Vol. 49: No. 1, Article 10.

DOI: 10.21143/jhp.vol49.no1.1917

Available at: <https://scholarhub.ui.ac.id/jhp/vol49/iss1/10>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in *Jurnal Hukum & Pembangunan* by an authorized editor of UI Scholars Hub.

## CHILD MARRIAGE AND ZINA IN INDONESIAN LEGISLATION IN ISLAMIC LAW

Neng Djubaedah \*

\* Lecturer Faculty of Law, Universitas Indonesia  
Korespondensi: nengdj@yahoo.com  
Naskah dikirim: 4 Januari 2018  
Naskah diterima untuk diterbitkan: 12 Maret 2019

---

### Abstract

*Article 7 paragraph (1) of Law No. 1 Year 1974 on Marriage determines marriage permitted if the man is 19 years old and female 16 years old. The age limit of marriage for 16-year-old women is considered an early age and is a problem. Child marriage in this paper is a marriage performed by men and women under the age of 18 years. It is able to cause divorce and obstruction of education. In addition to article 7 paragraph (1), child marriage is also due to pregnancy due to free sex (zina) of teenagers. According to Islamic Law, zina is an out-of-wedlock marriage committed deliberately and consciously by man and woman with their individual willingness, likes, without coercion. How is the protection of Article 7 paragraph (1) on child marriage and women under 18 years old who commit zina in terms of Islamic Law? The method of research is normative-juridical and descriptive-qualitative, apply the theory of maqashid al-shari'a and neo receptio a contrario theory.*

*Keywords: child marriage, zina, religious education.*

### Abstrak

Pasal 7 ayat (1) UU No. 1 Tahun 1974 tentang Perkawinan menentukan pernikahan diizinkan jika pria berusia 19 tahun dan wanita 16 tahun. Batas usia pernikahan untuk wanita berusia 16 tahun dianggap sebagai usia dini dan merupakan masalah. Pernikahan anak dalam tulisan ini adalah pernikahan yang dilakukan oleh pria dan wanita di bawah usia 18 tahun. Hal ini dapat menyebabkan perceraian dan halangan pendidikan. Selain pasal 7 ayat (1), pernikahan anak juga karena kehamilan karena seks bebas (zina) remaja. Menurut Hukum Islam, zina adalah pernikahan di luar nikah yang dilakukan dengan sengaja dan secara sadar oleh pria dan wanita dengan kesediaan individu, suka, tanpa paksaan. Bagaimana perlindungan Pasal 7 ayat (1) tentang pernikahan anak dan wanita di bawah 18 tahun yang melakukan zina dalam hal Hukum Islam? Metode penelitiannya adalah normatif-yuridis dan deskriptif-kualitatif, menerapkan teori *maqashid al-shari'a* dan *neo receptio a contrario theory*.

Kata kunci: perkawinan anak, zina, pendidikan agama.

## A. INTRODUCTION

### 1. Background

Article 7 paragraph (1) Law No. 1 of 1974 concerning Marriage (Marriage Law) determines “Marriage is only permitted if the man has reached the age of 19 years and the woman has reached 16 years”. In 2014, a request for judicial review of Article 7 paragraph (1) of the Marriage Law on the Constitutional Court was submitted. Constitutional Court Verdict No.30 and 74/PUULXII/2014, Tuesday, June 18, 2015 “Declare rejecting the request entirely”. In 2017, Article 7 paragraph (1) was re-requested a judicial review to the Constitutional Court with Case No.22/PUU-XV/2017.

The Petitioners argued that Article 7 paragraph (1) determines the age limit of marriage for women 16 years is an early age caused a problem and child marriage. They proposed an age limit of marriage for the woman is 19 years old.

In this paper, child marriage is a marriage between a man and a woman aged before 18 years.<sup>1</sup> The age 18 refers to Law No. 23 of 2002 concerning Child Protection amended Law No. 35 of 2014, Article 1 number 1, “A child is someone who is not yet 18 years old, including a child who still in the womb”.

#### a. Factors Affecting Child Marriage in Indonesia

According to the Indonesian Central Statistics Agency, *Badan Pusat Statistik Indonesia* (BPS, 2016) child marriage are divided by geographical, cultural and religious factors. Child marriages are influenced by customs, local beliefs, and religion. They are (i) many customs cause girls to marry older men; (ii) the marriage is based on parents’ wishes; (iii) there is anxiety about pregnant out of wedlock; (iv) sexual intercourse nasaof marriage; (v) poverty;<sup>2</sup> and (vi) provision in Article 7 paragraph (1) of Marriage Law which determines the age limit for a woman is 16-year-old. However, the biggest cause of child marriage is pregnancy out of wedlock because of free sex (*zina*).<sup>3</sup>

#### b. Consequences of Child Marriage

BPS stated that the consequences of child marriage were female children’s rights stolen, namely (i) the right to education, after marriage, 85% girls in Indonesia stopped their education, (ii) health right, (iii) protection rights from exploitation, (iv) rights not to separated from their parents<sup>4</sup>, etc. The focus of this study is on the effects of child marriage on the right to education and divorce.

## 2. Research Problem

How does Article 7 paragraph (1) of the Marriage Law protect women before the age of 18 who committed sexual intercourse outside of marriage and child marriage?

---

<sup>1</sup>Badan Pusat Statistik cooperates with UNICEF, *Kemajuan yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia*, Catalog BPS 4103014, 2016, p. 6.

<sup>2</sup>*Ibid.*, p. 19.

<sup>3</sup>Tribun-Timur.com, makassar.tribunews.com; www.jawapos.com.

<sup>4</sup>*Ibid.*, pp.9, 10, 12.

### 3. Study Objective

The results of the study aim to give contribution to the public, academics, government and the legislative institutions that Article 7 paragraph (1) of the Marriage Law which sets the age limit for marriage to 16-year-old woman does not violate the rights of girls, because they are not required to marry, but they are allowed to marry. Therefore Article 7 paragraph (1) does not have to be changed.

### 4. Research Methods

The research data was obtained by using a juridical-normative method, in the form of qualitative-descriptive-analytical. Secondary data were obtained from primary legal materials, namely, the Qur'an, the Hadith, the Marriage Law, the Penal Code in Indonesia, and other laws and regulations. Secondary legal materials are obtained from Islamic laws book regarding marriage law and *zina*. The tertiary legal materials are the Encyclopedia of Islamic Law. Data were analyzed by using *maqashid al-shari'a* theory and *neo receptio a contrario* theory.

The theory of *neo receptio a contrario* is the theory of the relationship of Islamic law to customary law and/or Western law. For Muslims, Islamic law is applied to them. Customary law and/or Western law can be used for Muslims as long as it is not contrary to Islamic law (the Qur'an and the Sunnah) according to an-Nisaverse 59. *Maqashid al-Syar'ah* theory to preserve religion, life, mind, descent, wealth, and dignity is the main theory for analyzing data.

## B. CHILD MARRIAGE IN INDONESIA

### 1. Child Marriage and Sexual Intercourse Out of Wedlock

Factors that cause child marriage in Indonesia, among others, are due to the customary and religious law. It means that Islam whose adherents are 87 percent of Indonesia's population is considered to be one of the causes of the child marriage. Other causes are extramarital pregnancy due to extramarital sex or free sex (*zina*).<sup>5</sup> Pregnancy of teenagers who have been sexually active, according to BPS, because they lack sexual and reproductive health education,<sup>6</sup> and access to contraception is still difficult.<sup>7</sup> The next cause is Article 7 paragraph (1) of the Marriage Law which determines a 16-year-old woman as the age limit for marriage. However, the biggest cause of child marriage and abortion is pregnancy caused by free sex (*zina*, adultery).<sup>8</sup> Devie Rachmawati

<sup>5</sup>Badan Pusat Statistik, *Op.Cit.*, p.19.

<sup>6</sup>Sudibyo Alimoesa, Deputy KSPK, BKKBN, in Mercy Wahyuningsih, Putro Agus Harnowo "Remaja Puteri, Pelaku Aborsi Paling Banyak di Indonesia?", *detikHealth* www.m.detik.com, Wednesday, 30 May 2012.

<sup>7</sup>Mercy Wahyuningsih dan Putro Agus Harnowo, *Ibid.*, www.m.detik.com, Wednesday, 30 May 2012. See Nanda Wahyudi, *Policy Brief*, Determinan Kehamilan Remaja di Indonesia (Analisis SDKI 2012), p.2. Accessed on 30 Juli 2018.

<sup>8</sup>www.Tribun-Timur.com; www.makassar.tribunews.com; www.jawapos.com.

said 97 percent of teenagers have been exposed to pornography, 93 percent have had sex.<sup>9</sup>

The number of child marriages in Indonesia, according to BPS and UNICEF Indonesia, presents data on Demographic Health Survey (2012), 17 percent of women aged 20 – 24 who were married, married before the age of 18.<sup>10</sup> Based on the 2012 National Socio-Economic Survey (susesnas 2012), 25 percent of women aged 20 – 24 who were married, married before the age of 18, and 2 percent were married before 15 years old with the highest prevalence in the village. Child marriage before the age of 15 has a one-third decreased of 3 percent, which is 2 percent. According to BPS (2016), this means that 340,000 marriages on Indonesia occur in girls before the age of 18.<sup>11</sup> According to Yohana Yambise, Minister of Women's Empowerment and Child Protection (PPA), 23 percent of child marriages are carried out by children under the age of 18, and 13 million children are born to mothers with teenage pregnancies.<sup>12</sup>

Indonesia's population is almost 262 million. The female population, in 2018, is 131,000,009 people.<sup>13</sup>

Marriage of girls under the age 15 is 3 percent of 34,000 girls' marriages before age of 18, totaling 10,200 people, or 0,0077 percent of 131,000,009 women in Indonesia (2018), or 0.0039 percent of Indonesia's 262 million population (2018). The marriage of girls under the age 15 has decreased to 2 percent from 340,000 girls' marriage, totaling 6,800 people,<sup>14</sup> or 0.0054 percent of the female population in Indonesia, or 0.0026 percent of Indonesia's 262 million population.

Comparison of marriage for girls under 15 years is 2 percent of 340,000 child marriage is compared to intercourse outside of marriage, which, according to the Child Protection Commission and the Ministry of Health, that 63 percent of teenagers commit intercourse outside of marriage, even according to Devie Rachmawati 93 percent of teenagers have committed relationship sexuality. So, adolescents who commit intercourse outside of marriage (zina) are far more than child marriage.<sup>15</sup>

Extramarital sex and free sex (*zina*), according to the Indonesian Child Protection Commission and the Ministry Health (October 2013), were carried out by 63 percent of teenagers in Indonesia, 20 percent of 94,270 pregnant were outside of marriage are adolescents, 21 percent of them have abortions. The

<sup>9</sup>Metro TV, April 30 2015. Ade Armando, "Apa benar 93% Remaja Indonesia sudah melakukan Hubungan Seks" [www.madinaonline.id](http://www.madinaonline.id). The statement of Devie Rahmawati was responded by Ade Armando, "*Pernyataan Devie itu penting diperhatikan mengingat perilaku seks adalah persoalan sosial dan moral yang mendasar. Hanya saja, pernyataan itu sebenarnya mengandung sejumlah masalah. Pertama, dengan menggunakan akal sehat, hampir pasti data Devie salah. ... Kedua, implikasi pernyataan Devie serius ..*".

<sup>10</sup>*Ibid.*, p. 25. Lihat [www.Tribun-Timur.com](http://www.Tribun-Timur.com), Tuesday, 12 April 2018; [www.makassar.tribunnews.com](http://www.makassar.tribunnews.com) [www.jawapos.com](http://www.jawapos.com), 25 May 2018. Lihat [www.voaindonesia.com](http://www.voaindonesia.com) 29 April 2016, accessed on 30 Juli 2018. "*Di Amerika selama 20 tahun terakhir, kehamilan remaja 15 -19 tahun menurun 40 persen. Tahun 2014, hampir 250 ribu bayi dilahirkan dari remaja berusia 15 – 19 tahun*".

<sup>11</sup>Badan Pusat Statistik cooperation with UNICEF, *Op.Cit.*, pp. 17, 25-26.

<sup>12</sup>Badan Pusat Statistik, *Op.Cit.*, p.19.

<sup>13</sup>[www.databos.katadata.co.id](http://www.databos.katadata.co.id), accessed on 27 July 2018.

<sup>14</sup>[www.databos.katadata.co.id](http://www.databos.katadata.co.id), accessed on 27 July 2018.

<sup>15</sup> Kompasiana, "63 Persen Remaja di Indonesia Melakukan Seks Pra Nikah", [www.kompasiana.com](http://www.kompasiana.com) 28 December 2014, accessed on 28 July 2018.

cause of their pregnancy outside of marriage is pornography which is very easily accessible to them.<sup>16</sup> Sudibyo Alimoesa said that 2,5 million abortions, 1,5 million were carried out by teenagers. Mercy Wahyuningsih and Putro Agus Harnowo suspected that the cause of abortion was difficult for teenagers to obtain contraception, resulting in pregnancy being unwanted by them.<sup>17</sup> Nanda Wahyudi argued that teenage pregnancy is due to socio-economic level, traditional culture (child marriage), sticks of sexual activity, availability of sexual education, and affordability of contraceptive access.<sup>18</sup> Sri Purwaingsih, Researcher at the Center for Population and Policy Studies, UGM, said that 58 percent of teenagers who are pregnant, they try to abort.<sup>19</sup>

In Indonesia, currently, extramarital sex carried out by men and women who are not married to each other is not prohibited. The Criminal Act in Indonesia, Article 284 only determines the sentence for every male a man bound to marriage to have intercourse with, not his wife, and every woman bound to married has intercourse with a man, not her husband. Law No, 23 of 2004 concerning Elimination of Domestic Violence and Law No, 21 of 2007 concerning Eradication of Criminal Trafficking Persons do not determine the punishment of men and women who are not married to each other to commit adultery and prostitution with willingness. The Criminal Law Bill (2018) Article 446<sup>20</sup> as *ius constituendum*, stipulates a two-year long prison sentence for men and women who have sexual intercourse outside of marriage, whether they are married or not. This type of offense is an offense complaint by husband, wife, parents, or children, not involving other family members (brothers, sisters (siblings), grandfathers, grandmothers, uncles, aunts) and members of local society. Therefore, adultery and free sex will continue to develop in Indonesia. Except for the people in Aceh using Qanun No. 6 of 2014 concerning *Jinayah Hudud*.

For Muslims, based on the theory of *neo-receptio a contrario*, compliance with Article 284 of the Criminal Act and Article 446 the Criminal Law Bill is not obligatory to be followed. These articles do not forbid all kinds of adultery, except adultery committed by husbands, wives, parents, and children. Besides them, everyone can commit adultery (*zina*). Limitations of people who can complain of *zina*, it appears that the Criminal Law Bill not provided protection to everyone from committing *zina*.

Based on the above description, extramarital sex and free sex in Indonesia can only be prevented by building awareness of the need for religious knowledge and its implementation in everyday life, for all Indonesians. For Muslims in Indonesia, except Muslims in Aceh Province, prevention of extramarital sex (*zina*) is handed over to their respective individuals, families, and communities, through adequate Islamic religious education.

*Zina*, according to the author, is intercourse outside of marriage, which is done intentionally and consciously, by men and women with their respective willingness, like like, without coercion from anyone.

---

<sup>16</sup>*Ibid.*

<sup>17</sup>Mercy Wahyuningsih dan Putro Agus Harnowo [www.m.detik.com](http://www.m.detik.com).

<sup>18</sup>Wahyudi, *Op.Cit.*, p.2.

<sup>19</sup>Basuki Eka Purnama, [www.m.mediaindonesia.com](http://www.m.mediaindonesia.com), 12 October 2016, accessed on 30 July 2018.

<sup>20</sup>Criminal Law Bill 9 April 2018 version.

## 2. Child Marriage and Article 7 paragraph (1) of the Marriage Law

### a. Position and Role of Islamic Law (Maqashid Shari'a Theory and Neo Receptio A Contrario Theory) in Child Marriage and Marriage Law

Article 7 paragraph (1) of the Marriage Law is analyzed based on Islamic law by applying the maqashid shari'a theory and the neo receptio a contrario theory which applies to Article 29 paragraph (1) of the 1945 Constitution as a legal basis for the establishment of the law on Marriage.

Position Article 29 paragraph (1) of the 1945 Constitution in the Marriage Law is as mandated by TAP MPRS No. II of 1960. The description is contained in the Decree of the National Planning Agency for Legal Counseling, Ministry of Justice, May 28, 1962, concerning Family Law, Section 12 contains principles of family law. The detailed in the Resolution of the National Law Seminar (Jakarta 12 – 16 March 1963), number III: "Principles of national law in the field of marriage law, number 2 sub number (11) is formulated that "Marriage rules may not violate the principles subject to something religion".<sup>21</sup>

Article 29 paragraph (1) of the 1945 Constitution determines that "*State based on the God Almighty*". Paragraph (2) determines "*The State guarantees the independence of every citizen to embrace their respective religion and to have faith according to their religion and belief*". Prof. Dr. Hazairin interpreted article 29 paragraph (1) of the 1945 Constitution as follow:

1. In the State of the Republic of Indonesia, something that is not against or contrary to Islamic principles for Muslims, or something that is contrary to the rules of Christian religion for Christians, or contrary to the rules of Hinduism for Hindus, or contrary to the morality of Buddhism for Buddhists, or contrary to Confucian religion for followers of Confucianism (Neng Djubaedah).
2. The Republic of Indonesia is obliged to carry out Islamic Shari'ah for Muslims, Christian Shari'ah for Christians, and Hindu Shari'ah for Hindus, simply carrying out the Shari'ah requires the mediation of state power.
3. Shari'ah which does not require the power of the State to do so, and because it can itself be carried out by each adherent of the religion concerned, it becomes a personal obligation to Allah for each person, who runs his own according to his own religion.<sup>22</sup>

Based on Hazairin's interpretation, for Muslim people, the rules of Islamic law apply, including the law of marriage, whose implementation requires the assistance of the Republic of Indonesia to form it.

The application of *maqashid shari'a* theory and *neo receptio a contrario*<sup>23</sup> the theory is also based on provisions of religious rights are human rights that cannot be reduced under any circumstances (Article 28I paragraph (1) of the 1945 Constitution). Religious rights for Muslims, including the right

<sup>21</sup>Hazairin, *Hukum Kekeluargaan Nasional*, (Jakarta: Tintamas, 1968), pp. 9, 93.

<sup>22</sup>Hazairin, *Demokrasi Pancasila*, (Jakarta: Bina Aksara, 1985), pp. 34-35.

<sup>23</sup>In Indonesia: theory of *receptio in complexu* (LWC van den Berg), the theory of *receptie* (Snouck Hurgronje), the theory of *Iblis* (Hazairin), the theory of *receptio a contrario* (Sajuti Thalib).

to apply Islamic law (Islamic Marriage Law), which is, Islamic shari'a as a part of Islam, in addition to faith and morals (akhlak). Islam is embraced by 87 percent of Indonesia's 265 million population,<sup>24</sup> or 230,5 million inhabitants.

Another reason is Islamic law as a source of legal formation in Indonesia, in addition to customary law and Western law, including legal source to determine the age limit for men and women to marry.

## **b. Various Types of Age Limits for Marriage Before Marriage Law**

Prior to the Marriage Law, there are several marriage laws in Indonesia which set the age limits for men and women to marry.

### **1) Age Limit for Marriage according to Customary Law**

Customary Law does not determine the limit age for people who do marry in the form of age number. According to Soepomo, in West Java are child marriage, called hanging marriage (*kawin gantung*), namely marriage between children who are immature and still living in parents' home. They postpone living together in marriage until adults girls get married (*akil-baligh*).<sup>25</sup> But in Bali, marriages that are with women who are not yet mature are biologically subject to criminal charges.<sup>26</sup> In West of Java, there are also marriages between adult men and women who are not yet adult, called taking a son-in-law (*mulung mantu*), namely marriage aimed at making a man work for the benefit of the female family (married to work, *kawin ngarah gawe*). After marriage, the man resides in his in laws' house. The husband may not have intercourse with his wife because he has to wait for his wife to mature.<sup>27</sup>

### **2) Age Limit for Marriage according to Islamic Law**

The age limit for marriage between man and women in Islamic law is adult (*akil-baligh*), except marriage by guardian *mujbir* (*wali mujbir*).<sup>28</sup> According to Islamic law, a person who perform legal actions, including stating an agreement to marry, as if he has been acquitted, namely someone who has arrived at a certain age to be charged with shari'a law (taklif), and is able to know or understand the law.<sup>29</sup> Jumhur ulama agreed to limit the age of baligh for people who do not get signs of baligh (menstruation for women, dreaming for men) is if someone is 15 years old. Imam Syafi'i and Imam Hambali argued that the age limit for baligh is 15 years; Imam Malik believes that the adult age limit (baligh) is 17 years, Imam Hanafi believes that men are 18 years old and women are 17 years old. However, according

---

<sup>24</sup> Kementerian Badan Perencana Pembangunan Nasional, released by Kementerian Badan Perencana Pembangunan Nasional, 2018; See <https://databoks.katadata.co.id>, accessed on 30 July 2018.

<sup>25</sup> R. Soepomo, *Hukum Perdata Adat Jawa Barat*, printed 2, (Jakarta: Penerbit Djambatan, 1982), p. 43. See, Iman Sudiyat, *Hukum Adat Sketsa Asas*, (Yogyakarta: Liberty, 1981), p. 127.

<sup>26</sup> Sudiyat, *ibid.*, p. 127.

<sup>27</sup> Soepomo, *op.cit.*, p. 43. See, Sudiyat, *ibid.*, p. 127.

<sup>28</sup> Muhammad Jawad Mughniyah, *Fikih Lima Mazhab*, (Jakarta: Penerbit Lentera, 1996), p. 315.

<sup>29</sup> Abdul Azis Dahlan, et.al, *Ensiklopedi Hukum Islam*, vol. 1, (Jakarta: Ichtar Baru van Hoeve, 1996), p. 82.



to Imam Hanafi, the age limit is the maximum limit, the minimum age for baligh is 12 years for men and 9 years for women.<sup>30</sup>

**3) Age Limit for Marriage according to Civil Law (KUH Perdata)**

The Civil Law (KUH Perdata) Article 29 determines the age limit for marriage for 18-year-old men and a 15-year-old woman.

**4) Age Limit for Marriage according to the Indonesian Marriage Act.**

Indonesian Christian Javanese Marriage Law, Minahasa, and Ambon (Ordinance date 15 December 1933 Stbl 1933 No. 74 *juncto* Stbl 1936 No. 247 and No. 605 amended and added to Stbl 1938 No. 264 and No.370, Stbl 1938 No. 268 ad Stbl 1946 No. 136) Article 4 paragraph (1) determines “Man who is not yet 18 years old and women who are not yet 15 years old cannot marry”.<sup>31</sup>

**5) Age Limit for Marriage according to the Code of Canon Law**

Code of Canon Law, Chapter III: Obstacles That Prevent in Particular, Kan. 1083 paragraph 1 determines “Men are not 16 years old and women who have not been 14 years of age cannot marry”.<sup>32</sup>

Provisions on the age limit for marriage in customary law are not specified in the age number, but men and women are adults, *akil baligh*, competent to do legal acts. Although the customary law recognizes hanging marriage (*kawin gantung*) and *mulung mantu*, intercourse between husband and wife can be done if an adult husband and wife (*akil baligh*).

Among the Syfi'i schools, argued that the marriage of daughters can be carried out by the guardian of *mujbir* (*wali mujbir*), with the conditions that (i) between father and daughter there is no hostility, for example, because of the divorce of her father and her mother; (ii) his daughter is married to a man of equal equality; (iii) a dowry given by a husband to his wife in sufficient quantities; (iv) prospective husbands are not difficult to give dowries; (v) his daughter is not married to a man which can make a women suffer, like a blind man, old man.<sup>33</sup> If the wife does not approve the marriage by the *mujbir* guardian, the marriage can be canceled based on the hadith Messenger of Allah SAW (Rasulullah SAW) narrated by Ahmad, Abu Daud, Ibnu Mas'ud, Ibnu Majjah, and Daruquthni, from Ibnu 'Abbas "that in fact there was a woman coming to Messenger of Allah SAW, the Prophet SAW told her to choose".<sup>34</sup>

Marriage agreement by men and women is a human rights, as the World Islamic Human Rights Declaration, Paris, September 1981, that "No one can be married if it contradicts his/her will, or is lost (reduced) by his/her legal personal rights (obeying Islamic law) in marital matters".<sup>35</sup> Therefore, if the

<sup>30</sup>Mughniyah, *op.cit.*, p. 315.

<sup>31</sup>KH Ahsbullah Bakry, *Kumpulan Lengkap Undang-Undang Perkawinan di Indonesia*, (Jakarta: Penerbit Djambatan, 1978), p. 67.

<sup>32</sup>Kitab Hukum Kanonik (Codexiuris Canonic), Official Editionon Bahasa Indonesia, promulgated by Paus Yohanes Paulus II, printed 1, Konferensi Waligereha Indonesia, Jakarta, 2016, p. 310.

<sup>33</sup>M. Yusuf Qardhawi, *Fatwa-Fatwa Kontemporer*, vol. 2, (Jakarta: Gema Insani Press, 1995), pp. 468-469.

<sup>34</sup>*Ibid.*, pp. 469-470. See Asy-Syaukani, *Nailul Authar*, vol. 5, translated by A. Qadir Hasan, et.al, (Surabaya: PT. Bina Ilmu, 1984), p. 2164.

<sup>35</sup>Syeikh Syaukat Husain, *Hak Asasi Manusia dalam Islam*, translated by Abdur Rochim, (Jakarta: Gema Insani Press, 1996), pp. 150-151.

marriage contract has been carried out by the mujbir guardian, then the women who are married without her consent can choose whether the married will be continued or canceled.

In Indonesia, the principle of marriage approval is stipulated in Article 6 paragraph (1) of the Marriage Law, for Muslims also applies Article 16 Compilation of Islamic Law (CIL, KHI), paragraph (1) determines "*Marriage is based on the consent of the bride*".

The principle of marriage approval can only be stated by an adult (akil baligh). Jumhur Ulama agreed that the age limit for baligh is 15 years based on Hadith narrated by Bukhari, from Ibnu'Umar who said: "*I came to the Messenger of Allah to follow the battle of Uhud when I was 14 years old. Then the Messenger of Allah SAW did not give permission to follow the war. One year later I came to the Messenger of Allah to take part in the battle of Khandak, the Messenger of Allah SAW allowed me to fight. I was 15 years old at the time*".<sup>36</sup> Imam Syafi'i and Imam Hambali argued that the age limit for baligh is 15 years; Imam Malik believes that the adult age limit (baligh) is 17 years, Imam Hanafi believes that men are 18 years old and women are 17 years old. However, according to Imam Hanafi, the age limit is the maximum limit, the minimum age for baligh is 12 years for men and 9 years for women.<sup>37</sup>

The age limit of stipulates marriage in Article 29 of the Civil Code (KUH Perdata) and Article 4 paragraph (1) of the Indonesian Christian Marriage Law that for men 18 years and for women 15 years, also in the Code of Canon Law, Kan. 1083 that for men 16 years and for women 14 years is adult (baligh).

### **c. Age Limit for Marriage in Article 7 paragraph (1) Of Law No. 1 of 1974 concerning Marriage**

Article 7 paragraph (1) of the Marriage Law is considered as the cause of child marriage. To find out the usefulness of the Article for girls in Indonesia today, the Article will be analyzed by comparing them to Article 7 paragraph (1) of the 1973 of Marriage Bill.

The Government of The Republic of Indonesia dated 21 Juli 1973 submitted the Marriage Bill to the Parliament (Gotong Royong), Article 7 paragraph (1) of the Marriage Bill stipulated "*Marriage is only permitted if the man has reached the age of 21 years and women has reached 18 years*".<sup>38</sup>

Position Article 9 paragraph (1) is a condition for man and women who will marry, therefore, both Article 7 paragraph (1) of the Marriage Law and Article 7 paragraph (1) of the Marriage Bill are released by linking it with the terms of marriage, legal marriage, and an child out of wedlock.

### **1) The Meaning of Marriage and Legal Marriage according to the 1973 Draft Marriage Law and Marriage Law**

<sup>36</sup>Dahlan, et.al, *Ensiklopedi ...*, vol. 1, *op.cit.*, pp. 82-83.

<sup>37</sup>Mughniyah, *op.cit.*, p. 315. M. Yusuf Qardhawi, *Fatwa-Fatwa Kontemporer*, vol. 4, translated by Moh. Suri Sudahri, et.al., (Jakarta: Pustaka Al-Kautsar, 2009), p. 531.

<sup>38</sup> Direktorat Jenderal Hukum dan Perundang-undangan, Departemen Kehakiman, *Op.Cit.*, p. 12.

According to Article 1 of the 1973 Draft Marriage Law “*Marriage is a physical and spiritual engagement between a man and a woman to form a permanent and happy household (family) based on the One Almighty God*”.

Legitimate marriage provisions in Article 2 of the Draft Marriage Law were not agreed upon by DPRRI in 1973, therefore the formula was amended in Article 2 of the Marriage Law.

### Comparison of Article 2 of the 1973 of Marriage Bill and Article 2 of the Marriage Law

1973 of Marriage Bill	Marriage Law 1974	Theories of <i>Maqashid Shari'a</i> dan Neo Receptio A Contrario
<p>Article 2</p> <p>(1) Marriage is valid if done before the Marriage Registrar, registered in the employee's registrar of marriage, and carried out according to the provisions of the law.</p> <p>(2) The marriage registration referred to paragraph (1) of this article is carried out by a state official who is further regulated by separate laws and regulations.</p>	<p>Article 2</p> <p>(1) Marriage is legal if it is done according to the law of each religion and belief.</p> <p>(2) Each marriage is registered according to the laws and regulations.</p>	<p>Article 2 draft of Marriage Law is not in accordance with the maqashid shari'a theory and neo receptio a contrario theory, also Article 1 of the Bill of Marriage Law.</p> <p>Article 2 of the Marriage Law is in accordance with the maqashid shari'a theory and neo receptio a contrario theory, also Article 1 of the Marriage Law.</p>

Article 2 paragraph (1) of The 1973 of Marriage Bill stipulates that marriage is valid if done before a marriage registrar and registered. The provisions set aside the religious the law as a determinant of legal or illegal marriage.

Article 2 is reviewed from Article 29 paragraph (1) of the 1945 Constitution which determines "the State based on the Almighty God", so Article 2 is not in accordance with the Article 29 paragraph (1) of the 1945 Constitution. The reason is the Article 29 paragraph (1) of the 1945 Constitution – as legal basis for the establishment of the Marriage Bill – is as the elaboration of the opening of the fourth paragraph of the 1945 Constitution of Republic Indonesia which contains Pancasila, especially the first and foremost principle, the One God Almighty principle.

Hazairin has interpreted Article 29 paragraph (1) of the 1945 Constitution, among others things, Islamic Shari'ah rules apply to Muslims. In addition, the position of Islamic law is one of the sources of law formulation in Indonesia, in addition to customary law and Western law – as long as it in accordance with Pancasila, especially the One God almighty principle – then the Islamic (religious) law must animate Article 2 paragraph (1) of the Marriage Bill.

The degree of the importance of the provisions of marriage that is legitimate according to religion can be seen from the struggle of the people's representatives who brought the voice of people in the Parliament (DPRRI/DPRGR) on 17- 18 September 1973, including Teuu H.M. Saleh.<sup>39</sup> The result is the Article 2 paragraph (1) of the Marriage Law determines Marriage is legal if it is done according to the law of each religion and belief.

As a result of legal marriage is a legitimate child can be born. Legitimate child provisions in Article 48 of the Marriage Bill, then become Article 42 of the Marriage Law and Article 99 of the CIL (KHI) – especially for Muslims –determines” *A Legitimate child is a child born in or due to legal marriage*”.

A legitimate child is a child born due to her/his mother's intercourse with her/his father in a legal marriage, whether he/she is born in legal marriage or out of wedlock due to a divorce or death of the husband. However, in life often a conception a child in the womb of woman out of wedlock, called an out of wedlock child.

## 2) Out of Wedlock Children according to the 1973 of Marriage Bill and the Marriage Law

Out-of wedlock children born to women who are pregnant outside of marriage are due to sexual intercourse outside of marriage, free sex (zona), or rape determined on Article 49 of the Marriage Bill, then become Article 43 of the Marriage Law.

### Comparison of Out of Wedlock Children in Article 49 of the 1973 of Marriage Bill and article 43 of the Marriage Law

1973 of Marriage Bill	Marriage Law 1974	Theories of Maqashid Shari'a and Neo Receptio A Contrario
<p>Article 49</p> <p>(1) Children born out of wedlock only have a civil relationship with their mother or family.</p> <p>(2) The child referred to in paragraph (1) of this article can be recognized by his father.</p> <p>(3) The child referred to in paragraph (1) of this article can be legalized by marriage.</p>	<p><b>Article 43 jo. Constitutional Court Verdict No. 46/PUU-VIII/2010</b></p> <p>(1) Children born out of wedlock only have a civil relationship with their mother or family and a man as their father which can be proven based on science and technology and/or other evidence according to the law have a blood relationship, including with their father's family.</p> <p>(2) The provision of the child referred to in paragraph (1)</p>	<p>Article 49 paragraph (1) of the Marriage Bill is in accordance with maqashid shari'a theory and neo receptio a contrario theory.</p> <p>Article 49 paragraph (2) and paragraph (3) of the Marriage Bill are not in accordance with maqashid shari'a theory and neo receptio a contrario theory.</p> <p>Article 43 of the marriage law <i>juncto</i></p>

<sup>39</sup> Direktorat Jenderal Hukum dan Perundang-undangan, Departemen Kehakiman, *Op.Cit.*, pp. 101-102.

	above is further regulated in a Government Regulation...	Decision of the Constitutional Court No. 46/PUU-VIII/2010, the authors interpret, that children out of wedlock only have a civil relationship with their biological fathers, but do not have a <i>nasabb</i> relationship.
--	--	--

Children who are impregnated outside of marriage but born in legal marriage or children born out of wedlock are children of *zina*, as the opinion of Imam Shafi'i.<sup>40</sup> The legal position of children from *zina* (adultery) in terms of maqashid shari'a theory and neo receptio a contrario theory is not a legitimate child, because *zinai*s an unlawful act. The provisions of *zina*, *hadd zina*, in an-Nur verse 2 and Hadith of Rasulullah SAW are the laws of *qath'i*, *asthe right of Allah*, which cannot be changed, reduced, added, or eliminated by humans.<sup>41</sup> Therefore, recognition and ratification of children out of wedlock is prohibited, because *zina* (adultery) is prohibited.<sup>42</sup>

The position of the child out of wedlock, according to the hadith of Rasulullah SAW narrated by Abu Daud, that he/she only had a *nasabb* relationship with his/her mother and his/her mother's family.<sup>43</sup> This hadith is written on Article 43 paragraph (1) *juncto* The Constitutional Court Verdict No. 46/PUU-VIII/2010 *juncto* Article 100 and Article 186 Compilation of Islamic Law, and Fatwa MUI No. 11 of 2012 concerning Position of Child Out of Wedlock and Treatment of Them.

Protection of out-of-wedlock children, as the result of the author's research in 1995-1996, continued with research in 2001-2005, and 2006-2011, the Indonesian Ulema Council issued Fatwa No. 11 of 20012 concerning the Position of Children Resulting from *Zina* (Adultery) and Treatment of them which contents protect children resulting from *zina*. He/she only has a civil relationship with a man that causes him/her to born, if proven, but does not have a *nasabb* relationship. Therefore they cannot inherit each other. Against this man, based on *ta'zir*, he is obliged to give the cost of daily living for his child, cost of education, treatment, care until the child is mature.

With obligation imposed on men which causes the child of *zina* was born, then the settlement or *hadd zina* in Qanun No. 6 of 2014 which applies in Aceh, does not fail. The sentence based on *ta'zir* in Article of the Criminal Act also does not fail.<sup>44</sup>

<sup>40</sup>Fatchur Rahman, *Ilmu Waris*, (Bandung: AlMa'arif, 1971), p. 221.

<sup>41</sup>Imran Ahsan Khan Nyazee, *Theorie of Islamic Law, The Methodology of Ijtihad*, (Kuala Lumpur: The Other Press, 2002), pp. 118-119.

<sup>42</sup> Neng Djubaedah, *Op.Cit.*, pp. 334, 321-339.

<sup>43</sup>Rahman, *Op.cit.*, p. 223.

<sup>44</sup> Neng Djubaedah, *Kedudukan Anak dalam Peraturan Perundang-undangan di Indonesia...*, p. ... Lihat Neng Djubaedah, ..., makalah ...

Thus, the recognition and ratification of an extramarital child in Article 49 of the Marriage Bill have a legal effect on a child being a legitimate child is prohibited in Islamic law.

### 3) Age Limit for Marriage according to 1973 of Marriage Bill and the Marriage Law

The Principle of marriage law (1962), that, "Both brides must have reached the minimum age specified in the legislation", has been determined in Article 7 paragraph (1) of the 1973 of Marriage Bill, which must be based on the principle of religion as mandated in Decree of the Provisional People's Consultative Assembly No.II of 1960, "Marriage Regulations must not violate basic principles rather than religion", then each Article must not conflict with any religion.<sup>45</sup>

#### Comparison of Article 7 of the 1973 Marriage Bill and Article 7 of the Marriage Law

The 1973 of Marriage Bill	Marriage Law 1974	Theories Maqashid Shari'a and Neo Receptio A Contrario
<p>Article 7:</p> <p>(1) Marriage is permitted if the man has reached the age of 21 and the woman has reached 18 years.</p> <p>(2) In the event that deviations from paragraph (1) this article can be requested to be dispensed to the Court by both the parents of both men and women,</p> <p>(3) The Provisions regarding the condition of one or both of the parents i Article 6 paragraph (3) and paragraph (4) of this law, also apply in the case of the request for dispensation in paragraph (2) of this article.</p>	<p>Article 7</p> <p>(1) Marriage is permitted if the man has reached the age of 19 and the woman has reached 16 years.</p> <p>(2) In the event that deviations from paragraph (1) this article can be requested to be dispensed to the Court or other officials appointed by both the parents of both men and women,</p> <p>(3) The Provisions regarding the condition of one or both of the parents i Article 6 paragraph (3) and paragraph (4) of this law, also apply in the case of the request for dispensation in paragraph (2) of this article by not reducing the intended Article 6 paragraph (6).</p>	<p>Article 7 paragraph (1) of the 1973 Marriage Bill provides an opportunity for pregnancy out of wedlock and the birth of an extramarital child is more than 2 years more than Article 7 paragraph (1) of the Marriage Law.</p> <p>On another hand, sexual intercourse by men and women who are not married to each other is not punished by Article 284 of the Criminal Code.</p>

Every person who marries must fulfill the absolute marriage requirements– that is to fulfill the prohibition of marriage according to the law

<sup>45</sup>Hazairin, *Hukum Kekeluargaan Nasional*, (Jakarta: Tintamas, 1968), pp. 9, 93.

of each religion or belief, including the prohibition of marriage due to blood relations, marital relations – and the requirements are not absolute – that is the conditions specified in the legislation (the result of *ijtihad*) – such as Article 7 paragraph (1) of the Marriage Law.

The legal consequences of violating absolute marital requirements is that marriage is null and void, and the legal consequences of violating marital requirements are not absolute is the marriage can be canceled.

Provisions on the age limit for marriage for women 18 years in Article 7 paragraph (1) of the Bill Marriage, as proposed by the Petitioners to the Constitutional Court and others parties, are provisions that do not violate Islamic shari'a, because it is part of *ijtihadiah*. However, the age limit for marriage for women 18 years not directly proportional to Article 284 of the Criminal Code and the other regulations that do not punish men and woman who are not married each other to commit sexual intercourse outside of marriage.

Article 7 paragraph (1) of the Marriage Bill, including the proposal of the Petitioners to the Constitutional Court, in conjunction with the article 284 of the Criminal Code invites women who have been baligh but have not reached 18 years so that they do not obey Allah and Rasulullah SAW which determines the prohibition of adultery (fornication) and punishment. According to Islamic law, legal origin involves sexual intercourse outside of marriage is *haram*, unless the intercourse is carried out by a man and a woman concerned in a legal marriage, then the law is lawful to become halal.<sup>46</sup>

The age limit for woman 18 years to be allowed to marry is to provide a two-year longer opportunity for planning to get pregnant out of wedlock and giving birth to children out of wedlock compared to Article 7 paragraph (1) of the Marriage Law.

Marriage dispensation for women is not yet 16 years based on the determination of the court, usually due to pregnancy outside of marriage (Article 7 paragraph (2) of the Marriage Law). Therefore, the age limit for doing 18 years of marriage for women is more harm than the benefits, so it is not in accordance with the maqashidshari'a theory and the neo receptio a contrario theory.

Provisions for the age limit for doing 18 years of marriage for women constitute a violation of individual rights, because marriage is a lawful act, and doing it is worship,<sup>47</sup> which aims to obey the commands of Allah and the Messenger of Allah, to realize a happy and eternal household, family,

---

<sup>46</sup>Abdul Azis Dahlan, et.al, *Ensiklopedi Hukum Islam*, vol. 6, (Jakarta: Ihtiar Baru van Hoeve, 1996), p. 2026. See, Dr. Haji O.K. Tahmat, *Hubungan antara Manusia dengan Manusia dan Alam Sekelilingnya*, (Singapura: Pustaka Nasional PTE LTD, 1991), p.81. See, Abdul Qadir Audah, *At-Tasyri' al-Jinai Muqaranan bil Qanunil Wad'iy*, translated by Tim-Tsalisah – Bogor, *Ensiklopedi Hukum Pidana Islam*, vol. IV, Indonesia edition, (Bogor: PT Kharisma Ilmu, 2007), p. 154.

<sup>47</sup>Marriage is worship. It aims(a) so as not to violate the prohibition of adultery in (i) al-Qur'an surah an-Nur verse 2; (ii) surah an-Nur verse 4 determines the prohibition and the punishment of *qazf*; (iii) surah an-Nur verse 6 - verse 9 determines the oath of *li'an* for a husband or wife who sees with his own eyes (*in flagranti delicto*) the act of adultery of his wife or husband; (iv) the hadith of the Messenger of Allāh about Ma'iz bin Malik, also the hadith of the Gamidiyah, who claimed to commit adultery before the Messenger of Allāh; and (b) avoiding the act of approaching adultery in the surah al-Isra verse 32.

mawaddah, and rahmah, and to avoid adultery, because adultery is an unlawful act.

Sexual intercourse outside of marriage in Indonesia is not prohibited, except adultery is carried out by men and women who are married. This means that the rights of the people and individual rights are also not protected from adultery by the regulations in Indonesia today. Thus, women have been baligh but still under 18 years old are not protected from adultery (zina), except in Aceh based on Qanun No. 6 of 2014.

#### **c. Age Limit for Marriage in Article 7 paragraph (1) Conjunction with Article 2 paragraph (1) of the 1973 of Marriage Bill**

Article 2 paragraph (1) of the 1973 of Marriage Bill stipulates that marriage is valid if done before the marriage registrar, registered, and recorded in accordance with the law. The article ignores the legal provisions of marriage according to religion. The article was sourced from Article 26 of the Civil Code, the product of Dutch law. Judging from the maqashid shari'a theory and the neo receptio a contrario theory, Article 2 paragraph (1) of the Marriage Bill is not in accordance with the Islamic law and article 29 paragraph (1) of the 1945 Constitution because it disregards religious provisions for the legality of marriage.

Marriage, according to Islamic law, is not solely for worldly affairs but is worship. Article 2 CIL determines "Marriage according to Islam is *nikah*, that is very strong contract or that the mitsaqan ghalidzan to obey Allah/s commands and it is worship". Marriage law includes human rights (adami rights), but in Islamic law, marriage cannot be separated from the rights of the family as the basic foundation of society, and the rights of the community.

#### **d. Age Limit for Marriage in Article 7 paragraph (1) Conjunction with Article 49 of the 1973 of Marriage Bill**

Out of wedlock child is a child resulting from intercourse and born out of wedlock. Child out of wedlock can be admitted by the biological father based on Article 49 paragraph (2) of the Marriage Bill, and ratification of an extramarital child based on Article 49 paragraph (3) of the Marriage Bill. The Article based on Western law, namely Article 280 of the Civil Code which determines the recognition of an extramarital child. and Article 272 of the Civil Code which determines the ratification of an extramarital child.

Women who are not yet 18 years old who give birth to children out of wedlock, according to Article 7 paragraph (2) of the Marriage Bill can be requested to be sent to the court. The legal consequences of marriage on the basis of court disputes against adultery children are legitimate children (Article 48 of the Marriage Bill). According to Islamic law, the child is "not a legitimate child".

Out of wedlock children born to women are not yet 18 years old can be recognized by their biological father based on Article 49 paragraph (2) of the Marriage Bill, or can be ratified through the marriage of his/her mother and biological father based on Article 49 paragraph (3) of the Marriage Bill.

Provisions on recognition and ratification of extramarital children in Article 49 paragraph (2) and paragraph (3) of the Marriage Bill in terms of



maqashid shari'a theory and the neo receptio a contrario theory, the verses in the Article do not apply to Muslims. Islamic law forbids Muslims recognition and ratification of extramarital children because adultery (zina) is a cruel act that damages the society's order and punishment is determined directly in the Islamic Shari'ah (al-Qur'an surah an-Nur verse 2), and is *the right of Allah*. Hadith of the Prophet Muhammad SAW from Ibn Umar ra "The man accused his wife of adultery, and he did not recognize the child (the result of adultery of his wife), then the Messenger of Allah SAW divorced between them and connected the child to his mother."<sup>48</sup> The hadith is the legal basis for the purpose of Islamic law that maintaining offspring is mandatory *nasabb* through a legal marriage.

The development of Islamic law in Indonesia currently has a law protecting children of the result of zina that they can have a civil relationship with their biological fathers, but cannot have a *nasabb* relationship. The legal basis is the Constitutional Court Verdict No. 46/PUU-VIII/2010 conjunction with Fatwa MUI No. 11 of 2012 concerning the Position of Children Out of Wedlock and Treatment of Them.<sup>49</sup>

Based on the description above, the birth of adulterous children born to women has not had 18 years, as Article 7 paragraph (1) of the Marriage Bill and the Petitioners' proposal to the Constitutional Court means they have not allowed 18 years for women to spend more than two years. compared to Article 7 paragraph (1) of the Marriage Law.

#### **e. Article 7 Paragraph (1), Article 2 Paragraph (1), and Article 43 of The Marriage Law**

Article 2 paragraph (1) of the Marriage Law determines "Marriage is legal if it is done according to the law of each religion and belief." Requirements for people who are going marry must fulfill the absolute requirements (requirements specified by religion) and the non-absolute requirement, such as Article 7 paragraph (1) of the Marriage Law determines that the age limit for marriage for men have reached 19 years and women have reached 16 years. This position was the result of the struggle (ijtihad) of the people's representatives at DPRRI in 1973, especially on 17 – 18 September 1973, including Asmah Syahrono and Teuku H.M. Saleh.<sup>50</sup>

According to article 7 paragraph (1) of the Marriage Law, if there is extramarital pregnancy for woman aged 16 years until they are not 18 years old, she can do marriage with a man who impregnates the woman without having to submit a dispensation request to the court. They do marriage according to the law of each religion or belief (Article 2 paragraph (1) of the Marriage Law)

The legal position of an extramarital child born to a woman not yet 18 years old according to Article 43 of the Marriage Law conjunction with the Constitutional Court Decision No. 46/PUU-VIII/2010, that, "Child born out of

<sup>48</sup>A. Hassan, *Al-Fara'id, Ilmu Pembagian Waris*, (Surabaya: Balai, Pustaka, 1986), p.10.

<sup>49</sup>Neng Djubaedah, *Op.Cit.* p.... See Neng Djubaedah, "...", the paper was presented in academic meetings. See Neng Djubaedah, "...", dissertation examined and passed on 27 November 2013, Fakultas Undang Undang, Universiti Kebangsaan Malaysia.

<sup>50</sup> Direktorat Jenderal Hukum dan Perundang-undangan, Departemen Kehakiman, *Op.Cit.*, p. 12.

wedlock only have a civil relationship with their mother or family and a man as their father which can be proven based on science and technology and/or other evidence according to the law have a blood relationship, including with their father's family.”

Article 43 of the Marriage Law in conjunction with the Constitutional Court Decision No. 46/PUU-VIII/2010 do not determine the recognition of an extramarital child and the ratification of the extramarital child. However, according to the author, the position of an extramarital child must be protected by law, for Muslims without breaking Islamic law. The State must make legislation based on *ta'zir* to protect and fulfill the interests out-of-wedlock children (the children resulting of zina) that they have the right to get a fee from their biological father for daily life, education, health, care, and treatment until an adult child is able to face his own life. In addition, the father was also given the obligation to provide protection to children out of wedlock in a socio-economic-psychological and religious spiritual way. At present, the rights of extramarital children can be obtained through a Judge's decision in the Court. The opinion of the author is an accordance with MUI No. 11 of 2012 concerning the Position of Child Out of Wedlock and The Treatment of Them.

The author's proposal regarding the protection of children resulting zina (adultery) must be accordance with the principles of Islamic law, that the shelter between child resulting from adultery (zina) with her/his biological father and her/his father's family is only a civil relationship, not a *nasabb* relationship.

Men under the age of 18 and women under the age 16, if they cannot control their sexual appetite because they are stopped, for example after they watch pornography, then Article 7 paragraph (1) of the Marriage Law serves as an emergency door to avoid greater harm (disaster), namely intercourse and pregnancy out of wedlock. Several groups and government institution argue that Article 7 paragraph (1) of the Marriage Law destroys women under the age of 18. In Islamic law, there is a rule of law that “the lighter danger between two hazards, the lighter danger can be done in order to protect from greater danger (*yartakibu akhaffu-dhdhararani li-itqaa-i asyaddihimaa*)”.<sup>51</sup>

The rules of Islamic law are used in an effort to maintain the age limit for marriage for women if they have reached the age of 16 years. The danger level of marriage by a 16-year-old woman is lighter than the danger level of adultery. Prohibition and punishment of adultery are determined *qath'i* in Islamic Shari'ah and is the right of God cannot be changed by humans. Compliance with the provisions of adultery (zina) forbidden in the Qur'an and Sunnah is intended to preserve religion, maintain faith, and piety as well as morality that begins with Allah SWT, as well as maintain the self-esteem of individual, families, and communities.

Proof of the existence of a blood relationship between a child of extramarital marriage with a man as his father results in a civil relationship, not a *nasabb* relationship, both man and women are involved in marriage, including, child marriage, or not. The legal consequences of both relationships are different.

---

<sup>51</sup> Abdul Wahab Khallaf, *Ilmu Ushul Fiqh*, translated by Masdar Helmy, (Bandung: Gema Risalah Press, 1996), p.371.

- 1) Legal consequences of *nasabb* relations: (i) *nasabb* relations occur since the child in the mother's womb; (ii) the father is obliged to maintain, finance, educate, and protect his child, both for the lives of children in the world and in the hereafter; (iii) in inheritance law: they have the right to inherit each other; (iv) marriage law field: father has the right to be marriage guardian for his daughter, and can apply for the annulment of his daughter's marriage if his rights as a marriage guardian is violated.
- 2) As a result of civil relations: (i) an extramarital child only has a *nasabb* relationship with his mother and his mother's family; (ii) civil relations between children out of wedlock and their biological fathers based on *ta'zir* (Judge's decision); (iii) the rights of unmarried children are limited to the field of civil law which is not strictly prohibited in Islamic sharia, namely the right to get the cost of life, education, care, medicine and other health until adult and independent children are based on *ta'zir* (Fatwa MUI No. 11 of 2012); (iv) his father cannot be a marriage guardian for an outsourced daughter; the daughter must be married by the judge's guardian; (v) inheritance law: between adultery children and their fathers cannot inherit each other, they can only give each other a will, a grant, a mandatory wasiat, and a gift based on *ta'zir* (MUI Fatwa No. 11 of 2012).

#### **g. Consequences of Child Marriage: Divorce and Disconnected Education**

##### **1) Religious Education, Sexual Education, and Reproductive Health Education**

According to some peoples, some group, and government institutions that prevention of child marriage is carried out because there has been a pregnancy out of wedlock due to free sex carried out by teenagers is to give sex education and reproductive health education to them, as well as access to obtain contraceptives easily accessible to them. According to the author, this opinion is not appropriate.

The author does not refuse sexual education and reproductive health education is given to adolescents as a provision for their knowledge with the educational conditions given to adolescents who have been physically and psychologically mature based on religion accompanied by primary and compulsory education to adolescents namely religious education. Religious education, according to Islam, is the right of the child and must be carried out by the child's parents since the child is still in the womb of his mother.

Religious education is the most important method of education to deal with child marriage equipped with sexual education and reproductive health education. Through religious education, the purpose of using contraception as an effort to realize family planning programs can be accomplished by not misusing contraceptives to violate the provisions of religious law. Contraception is only intended for a married man and woman to organize their family programs. Contraception is not to avoid pregnancy out of wedlock for teenagers.

Religious education must be given to every child based on Law No. 22 of 2003 concerning National Education System, Article 3 determines "National

education to function to develop the ability and form a dignified national character and civilization in order to educate the life of the nation, aiming to develop personal of student to be faithful and fearful people of God Almighty, noble, healthy, knowledgeable, capable, creative, independent, and become a democratic and responsible citizen."

Article 38 paragraph (3) of the National Education System law determines "The curriculum is prepared with educational levels within the framework of the Unitary State of the Republic of Indonesia by taking into account: a. Increasing faith and piety; b. Improving noble character; ... h. Religion".

The National Education System Law clearly determines the function and objectives of national education is that students become human beings who believe and fear God Almighty, noble, healthy, knowledgeable, capable creative, independent, and become responsible citizen, without distinguishing whether students are married or not.

Religious education is given to students to avoid free sex and the danger of free sex which can cause teenage girls to experience pregnancy out of wedlock. Religious education is also intended so that the students avoid moral and social sanction, as well as foster awareness of a sense of responsibility as human beings before God Almighty, Allah SWT. Parents, family, community, and state are a responsible for religious education for children in Indonesia, and as a form of their accountability to Allah SWT in order to implement Pancasila, especially the One- God Almighty, and Article 29 paragraph (1) of the 1945 Constitution.

## **2) Child Marriage: Right to Education After Marriage**

Article 28C paragraph (1) the 1945 Constitution determines "Everyone has the right to develop themselves through the fulfill of the basic needs, the right of education and benefit from science and technology, art and culture, in order to improve the quality of their lives and for the welfare of humanity".

Article 28C paragraph (2) the 1945 Constitution determines "Everyone has right to advance himself in fighting for his rights collectively to build society, nation, and state".

Article 28C of the 1945 Constitution guarantees that every citizen has the right to receive education at all levels (elementary, junior high, high school, University), and in every condition, whether he/she is married or not, or has ever married.

The legislation, government, and individual school policies, as well as community care for everyone to obtain educational opportunities, is one way to every to overcome the problems faced by women and men who commit child marriages. The government program provides Package A School (elementary level), Package B School (junior high school level), Package C (high school level) must be socialized to all level of society and developed to educate all Indonesian people and carry out the mandate of Article 28C of the 1945 Republic Indonesia Constitution. For example, Susi Pudjiastuti, Minister of Fisheries and Maritime Affairs of the Republic of Indonesia, took the Package C exam in the Department of Social Sciences (IPS) at SMAN I Pangandaran on 11 – 13 May 2018.

So, child marriage is not a barrier for someone to get an education. Families, communities, governments, and the state must jointly work together to seek the right to education for each person, including those who engage in child marriages.

One of the efforts to prevent divorce in child marriages, the education of household skills are given to students as a provision to carry out marital life and their domesticity. The education must be based on religious education, manners, a noble character based on One God Almighty.

#### **h. Child Marriage and Divorce**

The National Population and Family Planning Board (NPFPPB, BKKBN), Surya Chandra Urapaty, stated that one of the factors contributing to the high rate of divorce in Indonesia was a large number of child marriages. They are mentally not ready to marry. BKKBN (NPFPPB) through the Youth Generation program encourages teenagers to continue to mature the age marriage.<sup>52</sup> However, BKKBN did not state the exact number of divorce because of child marriage.

In Indonesia, in 2012 there were 40 divorces in every hour. The Majority of divorces occur in people under 35 years old, 70 percent of divorce is proposed by the wife.<sup>53</sup> According to the Directorate General of the Religious Courts Agency, the Supreme Court, in 2016 there were 365,633 divorces in the Religious Courts.<sup>54</sup> In the data obtained by the author, there has been no statement of the number of certain numbers regarding divorces caused by child marriage. The biggest cause of divorce is dominated by infidelity, economics, and domestic violence.

Even so, efforts to overcome divorce must continue. One way to overcome divorce caused by child marriage is the education about marriage that not separated from religious education is to be given continuously to all people. The community itself has organized pre-marital education. Therefore, to overcome divorce it is necessary to provide education to teenagers and the community about the following matters:

1. Pre-marital education must be organized by the government through the Office of Religious Affairs (Kantor Urusan Agama, KUA) or other equivalent institutions together with local community institutions.
2. Pre-marital education materials are about marriage, family, and the household which covers various aspects of life given based on religion and related laws and regulations.
3. Sexual education and reproductive health education programmed by the government together with non-government organizations are obliged to be given in connection with or based on religious education along with marriage law education in accordance with the laws of each religion.

---

<sup>52</sup> Herman, "BKKBN: Nikah Muda Tingkatkan Risiko Perceraian, <https://www.beritasatu.com/gaya-hidup/286930-bkkbn-nikah-muda-tingkatkan-risiko-perceraian.html>, accessed on 30 July 2018.

<sup>53</sup> Endah Wijayanti, "Angka Perceraian di Indonesia terus meningkat, Apa Penyebabnya?" <https://m.vemale.com/topik/pernikahan/97913-angka-perceraian-di-indonesia-terus-meningkat-apa-penyebabnya.html> accessed on 30 July 2018.

<sup>54</sup> [lokadata.berotagar.id/chart/preview/jumlah-perceraian-di-indonesia-2014-2016-1510649052.html](https://lokadata.berotagar.id/chart/preview/jumlah-perceraian-di-indonesia-2014-2016-1510649052.html) accessed on 30 July 2018.

The reason is that marriage is a lawful act (*halal*) that must be maintained. While

4. Adultery (*zina*) is an illegitimate act (*haram*) which is prohibited by religion, and according to Islamic law, the provision of adultery (*hadd zina*) is the right of Allah. Therefore, adultery should be prohibited in Indonesia. Because of that, too
5. Marriage by women aged 16 years with the aim of avoiding illicit act (*haram*), as such as adultery (*zina*), is not *haram*.
6. Marriage by women under the age of 18 based on Article 7 paragraph (1) of the Marriage Law because it is pregnant outside of marriage due to free sex is a respectable solution, and the Article is no problem. It is based on the rules of Islamic law that “the lighter danger between two hazards, the lighter danger can be done in order to protect from greater danger (*yartakibu akhaffu-dhdhararani li-itqaa-i asyaddihimaa,*)”.

### C. CONCLUSION

1. The limit age for marriage in Article 7 paragraph(1) of the Marriage Law is a solution, not a problem. The age limit for marriage for a 16-year-old woman is not to oblige a daughter to marry at the age, but she may marry. Marriage by a 16-years-old woman is *halal* and has a merit (*maslahat*) rather than adultery (*zina*) that makes human being harm (*mudharat*).
2. Article 7 paragraph (1) of the Marriage Law protects 19-year-old man and woman 16 years old if they want to marry. The purpose of marriage is to safeguard religion, soul, **reason**, descent, property, and honor of ourselves, family, society, and country.
3. The position and function of Article 7 paragraph (1) of the Marriage Law is as an emergency door, to avoid greater harm, namely *zina* (adultery) whose punishment is created directly by Allah SWT in the surah an-Nisa verse 2 and in the Hadith of Rasulullah SAW, and it is the right of Allah. In the rules of Islamic law that “the lighter danger between two hazards, the lighter danger can be done in order to protect from greater danger (*yartakibu akhaffu-dhdhararani li-itqaa-i asyaddihimaa,*)”. Wallahu’alam.

### REFERENCES

- Bakry, KH Ahsbullah. *Kumpulan Lengkap Undang-Undang Perkawinan di Indonesia*. Jakarta: Penerbit Djambatan, 1978.
- Dahlan, Abdul Azis, et.al. *Ensiklopedi Hukum Islam*. Jilid 1. Jakarta: Ichtiar Baru van Hoeve, 1996.
- Dahlan, Abdul Azis, et.al, *Ensiklopedi Hukum Islam*. Jilid 6. Jakarta: Ichtiar Baru van Hoeve, 1996.
- DetikHealth m.detik.com, Rabu, 30 Mei 2012, pukul 12.50 WIB.
- Direktorat Jenderal Hukum dan Perundang-undangan, Departemen Kehakiman, *Sekitar Pembentukan Undang-Undang Perkawinan Beserta Peraturan*

- Pelaksanaannya*, (Jakarta: Direktorat Jenderal Hukum dan Perundang-undangan, 1974), hal. 94-95.
- Djubaedah, Neng. *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat Menurut Hukum Positif dan Hukum Islam*. Jakarta: Sinar Grafika, 2010.
- Hazairin. *Hukum Kekeluargaan Nasional*. Jakarta: Tintamas, 1968.
- Instruksi Presiden No. 1 Tahun 1991 *juncto* Surat Keputusan Menteri Agama RI No. 154 Tahun 1991.
- Kitab Hukum Kanonik (Codexiuris Canonica)*, Edisi Resmi Bahasa Indonesia, Dipromulgasikan oleh Paus Yohanes Paulus II, Cet.1, Konferensi Waligereha Indonesia, Jakarta, 2016.
- Mughniyah, Muhammad Jawad. *Fikih Lima Mazhab*. Jakarta: Penerbit Lentera, 1996.
- Soepomo, R. *Hukum Perdata Adat Jawa Barat*. Cet. 2. Jakarta: Penerbit Djambatan, 1982.
- Sudiyat, Iman. *Hukum Adat Sketsa Asas*. Yogyakarta: Liberty, 1981.
- Asy-Syaukani. *Nailul Authar*. Jilid 5. Diterjemahkan oleh A. Qadir Hasan, et.al. Surabaya: PT. Bina Ilmu, 1984.
- [www.jawapos.com](http://www.jawapos.com), 25 Mei 2018.
- [www.Tribun-Timur.com](http://www.Tribun-Timur.com), Kamis 12 April 2018;
- [www.Makassar.tribunews.com](http://www.Makassar.tribunews.com);