

PHENOMENON OF UNDERAGE MARRIAGE: A STUDY IN THE PERSPECTIVE OF LAW AND ISLAM

FENOMENA PERNIKAHAN DI BAWAH UMUR: KAJIAN DALAM PRESPEKTIF HUKUM DAN ISLAM

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ABSTRAK

Perkawinan merupakan suatu ikatan yang melahirkan keluarga sebagai salah satu unsur dalam kehidupan bermasyarakat dan bernegara, yang diatur oleh aturan hukum, baik hukum Islam maupun hukum positif (negara). Dalam Undang- Undang perkawinan telah di tetapkan mengenai batas usia untuk dapat melakukan perkawinan (syarat materiil) salah satunya Ketentuan mengenai batas umur minimal tersebut terdapat di dalam Pasal 7 ayat (1) Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan. Pada kenyataannya banyak terjadi perkawinan yang dilakukan di bawah ketentuan undang-undang perkawinan, ini sudah lama terjadi dengan begitu banyak pelak, tidak hanya di kota besar tetapi tidak didaerah-daerah terpencil. Sebabnya-pun bervariasi, karena masalah ekonomi, rendahnya pendidikan, pemahaman budaya dan nilai-nilai agama tertentu, dan lain-lain. Kebanyakan ulama Muslim sepakat bahwa pernikahan di bawah umur halal dengan beberapa syarat. Dengan demikian, didukung dengan fakta bahwa sistem hukum kita tidak mengkriminalisasi pernikahan seperti itu dan bahwa isu ini masih menjadi perdebatan di masyarakat, pernikahan dini tidak boleh dikriminalisasi dalam hukum yang akan datang

Kata kunci: *Dibawah umur, perkawinan, pertanggungjawaban pernikahan dini*

ABSTRACT

Marriage is a bond that gives rise to a family as one of the elements in social and state life, regulated by legal rules, both Islamic law and positive law (state law). In marriage laws, the age limit for marriage has been stipulated (material requirements), one of which is the provision regarding the minimum age limit set forth in Article 7 paragraph (1) of Law Number 1 of 1974 concerning Marriage. In reality, many marriages are conducted below the provisions of marriage laws, which have long been happening not only in urban areas but also in remote areas. The reasons vary, due to economic issues, low education, understanding of cultural and certain religious values, and others. Most Muslim scholars agree that underage marriage is permissible with certain conditions. Thus, supported by the fact that our legal system does not criminalize such marriages and that this issue remains a subject of debate in society, underage marriages should not be criminalized in future law.

Keywords: *Underage, Marriage, Responsibility of Early Marriage*

INTRODUCTION

Cases of early marriage are not new in Indonesia. Early marriage is a social issue that occurs among teenagers, with the majority of victims being teenage girls. Generally, cases of early marriage occur more frequently in rural areas than in urban areas, and often affect families that are economically disadvantaged, have low levels of education, and have children who drop out of school. (Fadlyana & Larasaty, 2016) Since the 1990s, according to the United Nations Children's Fund (UNICEF), the incidence of early marriage has shifted to urban areas. This is evidenced by the increase in cases of early marriage in urban areas from 2% in 2015 to 37% in 2016. This means that

cases of early marriage can occur anywhere and at any time, therefore parents and communities must help children marry at the right age.(Manurung et al., 2021)

Cases of early marriage occur widely across the globe with various backgrounds. It has become the focus of the international community due to the risks associated with forced marriages, early sexual relations, young pregnancies, and sexually transmitted infections. Poverty is not the sole significant factor contributing to early marriage. Other factors to consider include the risk of complications during pregnancy and childbirth at a young age, leading to increased maternal and infant mortality rates. Additionally, early marriage can lead to disruptions in personality development and place children born from such marriages at risk of violence and neglect. The issue of early marriage represents a failure in protecting children's rights. Therefore, it is hoped that all parties, including pediatricians, will increase their awareness to stop the practice of early marriage. Such conditions are influenced by the presence of a still backward era, where the conceptualization of thinking does not necessarily lean towards a better future life. Traditionally, marriages in ancestral times were more inclined towards the cultural prospect of early marriage, with women marrying at around 15 years old and men at around 20 years old or younger.(Claudia, 2022)

According to the World Health Organization (WHO), the age range for youth is defined as 11-20 years, with a conceptual definition provided in 1994. In Sub-Saharan Africa and Latin America, women without primary education are three times more likely to marry before the age of 18. This difference is also evident in developed countries such as the USA, where 30% of women with less than 10 years of education will marry before the age of 18. In contrast, for women with more than 10 years of education, early marriage occurs in less than 10% of cases. The World Health Organization (WHO) in 2012 reported that 16 million births occurred to mothers aged 15-19 years, accounting for 11% of all births worldwide, with the majority (95%) occurring in developing countries.(Al Amin & Juniati, 2017)

In Latin America and the Caribbean, 29% of young women marry by the age of 18. The highest prevalence of early marriage is recorded in Nigeria (79%), the Congo (74%), Afghanistan (54%), and Bangladesh (51%). Based on the Indonesian Demographic and Health Survey (SDKI) in 2007, in several regions, it was found that one-third of the recorded marriages were conducted by couples under the age of 16. The number of early marriage cases in Indonesia reached 50 million people, with an average marriage age of 19.1 years. In East Java, South Kalimantan, Jambi, and West Java, the incidence of early marriage is 39.4%, 35.5%, 30.6%, and 36% respectively. Even in some rural areas, marriages are often performed immediately after a girl's first menstruation.(Fadlyana & Larasaty, 2016) The figures correspond to data from BKKBN indicating the high prevalence of marriages below the age of 16 in Indonesia, reaching 25% of the total number of marriages. Moreover, in some regions, the percentage is even higher, such as East Java (39.43%) and Central Java (27.84%). Similarly, findings from the Indonesian Child Protection Commission (KPAI) in the coastal areas show that child marriages reach 35.20%, with some marriages occurring at ages 9-11..(BKKBN, 2015)

Parents' knowledge about marriage age plays a crucial role in breaking the chain of early marriage cases; therefore, parents must understand the appropriate age for marriage. According to the Marriage Law of 1974, Articles 6 and 7, which are still in effect today, set the minimum marriage age at 19 for men and 16 for women. However, in 2014, the National Population and Family Planning Board (BKKBN) established the minimum marriage age at 21 for women and 25 for men.(Novriansyah, 2021)

Problem Formulation

Building upon the aforementioned background, there are 2 fundamental problems that need to be studied concerning the phenomenon of underage marriage in Indonesia:

1. How do Islamic legal experts (fuqaha) view underage marriage?
2. How is the phenomenon of underage marriage seen from a criminal law perspective?
3. What are the impacts of underage marriage?

Research Objectives

This research aims to achieve several objectives, which are established based on the existing problem formulation. Specifically, the research objectives are as follows:

- 1) To understand, analyze, and evaluate the views of Islamic legal experts (fuqaha) on underage marriage.
- 2) To understand, analyze, and evaluate the phenomenon of underage marriage from a criminal law perspective.
- 3) To understand, analyze, and evaluate the impacts of underage marriage.

RESEARCH METHOD

The method employed in this paper is the normative juridical approach.(Arifin & Satria, 2020) Data collection focuses on legal research through the examination of various legal materials, such as official documents, books, journals, magazines, and newspaper articles related to the issue of underage marriage.

Descriptive method is used to elaborate in detail existing legal regulations, legal concepts related to underage marriage, and comparisons with similar cases in other countries. By using this approach, the author aims to provide a comprehensive understanding of the background, implications, and challenges in addressing underage marriage from a legal perspective.

The normative juridical approach allows the author to analyze the existing legal framework and provide interpretations thereof, thereby offering an in-depth understanding of the legal aspects relevant to the issue.

RESULTS AND DISCUSSION

The Views of Islamic Jurisprudence Experts (Fuqaha) on Underage Marriage

In the Decision of the Ijtima 'Ulama Commission of Fatwa Indonesia III in 2009, there is no explicit provision regarding the age limit for marriage, whether minimum or maximum age limits. However, the wisdom of Islamic law in marriage is to create a harmonious family and to ensure offspring (hifz al-nasl), which can be achieved at an age where the prospective spouses have matured intellectually and are ready for the reproductive process.(Supriyadi & Harahab, 2012)

Based on this, the Fatwa Commission established several legal provisions. Firstly, Islam fundamentally does not set a minimum age limit for marriage, but rather emphasizes the capacity to perform and accept rights (ahliyatul ada' wa al-wajib), as stipulated in *sinn al-rusyd*. Secondly, underage marriage is considered valid as long as the requirements and pillars of marriage are fulfilled, but it is forbidden if it leads to harm. Maturity in age is one of the indicators for achieving the goals of marriage, namely the welfare of married life and society, as well as ensuring safety during pregnancy. Thirdly, to realize the welfare, marriage provisions are returned to the age standardization as stipulated in Law Number 1 of 1974 as a guideline. (Afrianti et al., 2023)

The decision of the MUI Fatwa Commission above is in line with the opinion expressed by Dr. HM Asrorun Ni'am Sholeh, MA, who stated that there is no explicit provision regarding the age limit for marriage. Therefore, marriages conducted by elderly individuals are considered valid as long as they meet the requirements and pillars, just as it is valid for young children. Early marriage is defined as a marriage conducted according to its requirements and pillars, but the spouses are still young. The definition of "young" here qualitatively refers to children who have not reached puberty and are not psychologically ready to undertake marital responsibilities.

In the perspective of positive law, "young" refers to individuals under the age of 19 (for males) and under the age of 16 (for females). Generally, in addressing the issue of early marriage from a legal perspective, the opinions of jurists can be categorized into three groups. First, the majority view permits early marriage, but it does not automatically allow sexual relations. If sexual relations would lead to harm, whether in early or mature marriages, it is prohibited. Second, the second view presented by Ibn Syubrumah and Abu Bakr al-Asham states that early marriage is strictly prohibited. Third, the third view presented by Ibn Hazm distinguishes between the marriage of young boys and young girls. The marriage of young girls by their fathers is permissible, while the marriage of young boys is prohibited.

The arguments underlying these views are based on the apparent Hadith of Aisha's marriage to the Prophet Muhammad. The Hanbali scholars assert that even though early marriage is valid, sexual relations are only allowed when the woman is psychologically prepared. Ibn Qudamah stated that if the woman is still young and not ready to undertake marital responsibilities, her guardian should delay consummation until she is ready. Furthermore, Imam al-Bahuty emphasized that if the woman is concerned for her well-being, she may refuse her husband's invitation to intercourse.

Although early marriage is permitted, certain conditions must be met to safeguard the welfare and achieve the objectives of Sharia law. Therefore, if early marriage occurs, it must adhere to the following conditions:

- a) The guardian must perform the marriage, and it must be conducted by the father or grandfather (on the father's side); self-marriage or marriage by a judge is not permitted.
- b) The marriage must be for the welfare of the spouses and believed not to cause harm to them.
- c) Sexual relations are not allowed until the spouses are ready to undertake marital responsibilities.
- d) To prevent sexual relations at a young age, the guardian may separate the spouses.

Juridically, males and females are only allowed to marry at the age of 19, unless granted dispensation by a judicial institution for valid reasons. In Indonesia, underage marriage has become a national phenomenon, influenced

significantly by cultural factors within society. Indonesia ranks 37th globally in terms of underage marriages and second in Southeast Asia. This is concerning as it affects population density.

Given the concerning prevalence of underage marriages, the author attempts to conduct a normative juridical study on the legal regulations related to the permissible age for marriage, particularly focusing on Law No. 1 of 1974 concerning Marriage, as amended by the Republic of Indonesia Law (2019) concerning Amendments to Law No. 1 of 1974 concerning Marriage and its implementing regulations, as well as Islamic Law Compilation.

Underage Marriage from the Perspective of Criminal Law

The existence of criminal law can fundamentally be viewed from three aspects. Firstly, the current criminal law in force or the criminal law that must be applied by the courts, known as *ius constitutum* or *ius operandum*. Secondly, criminal law that is actually applied to a concrete act, known as *ius operatum*. Thirdly, criminal law that is aspired or envisioned, known as *ius constituendum*.

Criminal law, seen in the context of *ius constituendum*, essentially relates to legal-political issues, namely the effort to realize good regulations according to the circumstances and situations at a given time. Legal-political issues in criminal law raise questions such as: is there a need for criminal law reform? If so, which areas need to be reformed or revised? This issue pertains, among other things, to criminalization, which is the process of designating an act that was not previously a crime as a criminal offense.

Based on the above explanation, underage marriage from the perspective of criminal law can also be seen through *ius constitutum*/*ius operandum*, *ius operatum*, and *ius constituendum*, with the following discussions: (Supriyadi & Harahab, 2012)

a. Perspective of *Ius Constitutum*

Underage marriage, seen from the perspective of *ius constitutum*, essentially relates to two questions. First, can underage marriage be considered a criminal offense under the current criminal law in Indonesia? Second, can underage marriage be prosecuted under the existing criminal regulations in Indonesia?

In relation to the positive criminal law perspective in Indonesia regarding underage marriage, no explicit criminal regulation has been found in Indonesia that explicitly prohibits underage marriage. The Indonesian Criminal Code (KUHP) and other criminal legislation only hint at unlawful acts that arise within marital relationships, including underage marriage, such as Article 279 and Article 288 of the KUHP, Law Number 23 of 2002 concerning Child Protection, or Law Number 23 of 2004 concerning the Elimination of Domestic Violence. In conclusion, the Indonesian Criminal Code or regulations outside the Criminal Code cannot be used as a reference that underage marriage is prohibited according to criminal law regulations. Therefore, there are no criminal sanctions that can be imposed on perpetrators of underage marriage.

b. Perspective of *Ius Operandum*

Underage marriage, seen from the perspective of *ius operandum*, essentially relates to the application of criminal law and its sanctions against such acts in practice. Research conducted in the Yogyakarta District Court, Sleman District Court, and Bantul District Court shows that there have been no criminal cases related to underage marriage. In other words, there has never been a court trial process because someone has engaged in underage marriage.

There are several factors that may underlie this situation. First, communities may be reluctant to report issues arising from underage marriage or criminal offenses associated with it. This may be because some communities still do not consider underage marriage to be a condemnable act, or perhaps they are not fully aware of its legal regulations. Second, the legal substance concerning underage marriage remains unclear. As mentioned earlier, Indonesian positive criminal law does not regulate the prohibition and criminal penalties for underage marriage. The Sheikh Puji case is a recent example, although there are many similar cases that could be subject to legal action.

c. Perspective of *Ius Constituendum*

Underage marriage, viewed from the perspective of criminal law as *ius constituendum*, is related to the issue of criminalization. According to Sudarto, criminalization is the process of designating an act by an individual as punishable by law. This process ends with the creation of laws where the act is sanctioned with a criminal penalty. Similarly, Barda Nawawi Arief states that the policy of criminalization is a policy in designating an act that was not previously a crime to become a crime.

There are three meanings to criminalization. Firstly, the original meaning of criminalization as the process of making an act that was not a crime into a crime. Secondly, criminalization can also be interpreted as actualizing criminal law regulations to be more effective. For example, using criminal law functions in environmental offenses that were once considered the last resort but are now considered the first resort. Thirdly, criminalization can also be interpreted as an effort to expand the scope of criminal law. This is evident in the general regulation of "corporate crime liability" in the Draft Criminal Code.

In the process of criminalization, there are measures that lawmakers must consider in designating an act as a crime. Sudarto emphasizes four things to consider in criminalization. First, the purpose of criminal law. Second, the

designation of undesirable acts. Third, the comparison between means and results. Fourth, the capacity of law enforcement agencies.

In determining whether an act needs to be criminalized, many factors must be considered. First, the community's consensus that underage marriage is an act worthy of criminalization can be channeled through various legal seminars, national discussion forums, and others. Second, marriage is a civil bond, especially if it is legally or religiously valid. Therefore, it is necessary to clarify which aspects of marriage can be covered by criminal law.

Impact of Underage Marriage

In marriage, age and maturity are crucial factors for both men and women who intend to enter wedlock. Observing the existing phenomena, adults entering marriage are deemed more capable of controlling emotions that may arise within the family. This capability stems from the quality of their intellect and stability of their mental state, enabling them to self-regulate and interact effectively with their partners and surroundings. Conversely, underage marriage has significant repercussions on both individuals and their families. (Harlina, 2020) The consequences of underage marriage include the following::

- a. Reduced opportunities for education and personal development for children.
- b. Limitation of women's potential and aspirations.
- c. High risk of pregnancy at a relatively young age.
- d. Increased maternal mortality rates during childbirth.
- e. Underdeveloped mental faculties and inability to cope with the responsibilities of marriage.
- f. Immaturity in managing family affairs, leading to the weakening of the Muslim family structure and contributing to divorce rates.

Underage marriage often results in an inability to comprehend or fulfill the rights and responsibilities of spouses. This is due to the physical and mental immaturity of the individuals involved, both of whom may exhibit high levels of selfishness, leading to frequent conflicts and disputes. These problems stem from marriages entered into without maturity in all aspects. In Indonesia, it is stipulated that prospective spouses must be of legal age, as outlined in Article 7 of Marriage Law No. 1 of 1974, which is further reinforced in the Compilation of Islamic Law, Article 15. The restriction on marriage age is based on considerations of welfare. Thus, in line with the purpose of marriage as a strong and stable foundation for familial tranquility based on love and affection, achieving this goal becomes challenging if each spouse has not matured mentally and emotionally.

The psychological impact of early marriage can result in stress, anxiety, depression, and divorce. Typically, teenage couples lack a thorough understanding of the significance of marital bonds, often marrying solely out of love or parental pressure to avoid being labeled as "old maids." Cultural influences may also cause adolescents to overlook the long-term implications of marriage. Concerns about entering married life may be disregarded to maintain social image and avoid being labeled as "old maids". (SYALIS & Nurwati, 2020)

The success or failure of a family in fulfilling its functions can be understood from the social realities that occur. The welfare of a society and nation is determined by the condition of families within that society and nation. A prosperous individual is one whose basic needs—sustenance, shelter, and clothing—are met, who is accepted in civilized society, and whose fundamental rights are protected by religious, legal, and moral norms. In a prosperous family, there are several indicators: pre-prosperous families, prosperous families I, prosperous families II, prosperous families III, and prosperous families III plus.

However, in reality, the impact of underage marriage significantly affects the well-being of households, both between spouses and between parents. It affects the well-being of the family itself (between spouses) due to economic dependence on their parents. Consequently, it indirectly impacts their parents, who are burdened with providing for their needs daily. Underage marriage, which affects household welfare, falls under the category of indicators of Prosperous Family I, which is a family that can meet its basic needs minimally but cannot yet fulfill its psychological and social needs.

Unstable personal maturity and integrity greatly affect the resolution of problems arising within marital life. Thus, after a family is formed, its members have specific roles or functions, including:

- 1) Biological function
- 2) Child socialization function
- 3) Educational function
- 4) Protective function
- 5) Economic function
- 6) Recreational function
- 7) Religious function
- 8) Affective function
- 9) Status determination function

CLOSING

Conclusion

In conclusion, according to Islamic scholars, underage marriage is permissible, but it does not automatically permit sexual relations between the couple. However, the existence of both Islamic and positive law should not justify this practice. In practice, there is currently no criminal law in Indonesia prohibiting underage marriage, but there is still debate in society regarding this matter. Nevertheless, early marriage has significant impacts, especially on family welfare, where many teenagers drop out of school and have low education levels, potentially harming future economic and family quality. Economic motives and environmental influences are the main factors driving early marriage. While there are positive effects such as avoiding premarital relationships and providing economic support after having children, the negative impacts outweigh them, including health risks for women and marital issues such as violence and divorce. Therefore, more serious efforts are needed to prevent underage marriage through intensive education, strengthening educational programs, and implementing stricter policies to protect adolescents from this practice, thereby improving family welfare and their future quality of life.

Recommendations

Based on the conclusions outlined above, several recommendations can be proposed to address the issues related to underage marriage:

1. Intensive Education: The government and relevant institutions should intensify efforts to educate the public, especially teenagers, about the risks and consequences of underage marriage. This educational program should include information about the physical, mental, and economic readiness required before marriage.
2. Strengthening Educational Programs: It is important to improve access to quality education for children and teenagers. By enhancing their education, it is hoped that more will understand the importance of completing their education and delaying marriage until a more mature age.
3. Formulating Stronger Policies: Stronger policies are needed to address underage marriage, including efforts to criminalize the practice under applicable law. This can help provide legal protection for individuals vulnerable to early marriage practices.
4. Access to Reproductive Health Services: It is important to ensure that adolescents have easy and affordable access to reproductive health services. This includes providing information, counseling, and contraceptive services to prevent unwanted pregnancies.
5. Empowering Women: Efforts to empower women in terms of economic and educational opportunities can help reduce pressure to marry at a very young age. Programs supporting gender equality and empowering women to choose their own paths can help change social norms that support underage marriage.
6. Strengthening Oversight: The government needs to strengthen oversight of underage marriage practices, including law enforcement against violations. Stricter oversight can help reduce incidents of early marriage and put pressure on those involved in such practices.

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