

LEGAL SYSTEM THEORY PERSPECTIVE ON CHILD MARRIAGE IN INDONESIA AFTER THE AMENDMENT TO THE MARRIAGE LAW

Agus Purnomo & Dawam Multazamy Rohmatulloh***

* Institut Agama Islam Negeri Ponorogo, Indonesia

** Utrecht University, Utrecht, Netherlands

Email: agus.purnomo@iainponorogo.ac.id

Abstract

This article critically examines the ideality and effectiveness of Indonesia's amended Marriage Law in curbing child marriage, a persistent socio-legal issue with deep-rooted cultural and religious dimensions. Despite legal reforms, child marriage continues to occur at alarming rates, raising questions about the law's capacity to address structural and normative barriers. Employing Lawrence M. Friedman's legal system theory, this study analyzes the problem through the interrelated dimensions of legal structure, legal culture, and legal substance. Methodologically, this research adopts a normative-empirical legal approach, integrating doctrinal legal analysis with socio-legal inquiry to assess the sources, functionality, and enforcement of relevant legal instruments. Findings reveal a critical tension between the amended law and prevailing cultural norms. In the dimension of legal culture, the entrenched influence of kitab kuning—traditional Islamic legal texts—continues to shape societal attitudes and justify early marriage, thereby weakening the law's preventive potential. From the perspective of legal substance, the absence of explicit sanctions for violators constitutes a significant legal loophole, undermining the deterrent effect of the amendment. Nonetheless, in the dimension of legal structure, the issuance of Supreme Court Regulation No. 5 of 2019—governing judicial review of marriage dispensation cases—reflects a proactive institutional response aimed at restricting the practice. This study underscores the urgency of harmonizing legal reform with cultural transformation and institutional enforcement. Its contribution lies in highlighting the multi-dimensional challenges of legal ideality

in child marriage prevention and offering a systemic framework for more effective policy implementation.

Keywords: *child marriage; legal system theory; marriage dispensation.*

Received: August 30, 2022; Revised: September 28, 2022; Accepted: October 20, 2022

Introduction

Child marriage in Indonesia is defined as a marriage or *akad* where one or both parties have not reached the legal age for marriage as stipulated by the current marriage law in Indonesia (Ahmed 2015, 8). From practical point of view, child marriage, which is referred to as a global issue (Lubis 2020, 86), may involve boys, but the highest prevalence tends to be among girls (Yüksel-Kaptanoğlu & Ergöçmen 2014, 1707; Naveed & Butt 2020, 161).

Child marriage is a serious problem in Indonesia. Indonesia was once included in the ten countries with the highest prevalence of child marriage. This is based on data released by UNICEF in 2018 before the amendment to the marriage law. According to the data, the number of girls aged twenty to twenty-four who married before the age of eighteen reached 1,220,900. (Hakiki 2020, 7).

In 2019, the issue of child marriage entered a new era with the enactment of the Law No. 16 of 2019 on the Amendment to Law No. 1 of 1974 on Marriage. The amendment stemmed from the decision of the constitutional court No. 22/PUU-XV/2017 on the judicial review applied by three housewives, each named Endang Wasrinah, Maryanti, and Rasminah against Article 7 paragraph (1) of the Law No. 1 of 1974 on Marriage.

The argument proposed by the petitioners in the judicial review was, *inter alia*, that the article has provided justification for the marriage of sixteen-year-old children, especially girls. It was considered by the petitioners to have violated constitutional rights because the legal age for marriage for men and women should not be differentiated. Another argument was the impact of child marriage, which, according to the petitioners, can hinder the fulfillment of constitutional rights such as the right to education and health and the right to grow and develop as guaranteed in the 1945 Constitution (The 1945 Constitution n.d.).

Through the amendment, the legal age for marriage, according to the marriage law paragraph (1) Article 7, becomes nineteen years for both men

and women. Previously, in the marriage law, the legal age for marriage was set at nineteen years old for men and sixteen years old for women. However, it should be noted that the law amendment on the legal age for marriage can still be violated through the application of marriage dispensation. It is regulated in the marriage law both before and after the amendment. One of the articles states that if the provision on the legal age for marriage, as referred to Paragraph (1), is violated, the groom and/or the bride's parents may file an application for a marriage dispensation to the Court on the grounds that the marriage is urgent based on valid and sufficient proof (The 1945 Constitution n.d.).

The ideality of marriageable age that is constructed in Law Number 16 of 2019 as an amendment to Law Number 1 of 1974 on Marriage has become a dilemma, as evidenced by the increase of applications for marriage dispensation after the law amendment. Two months after the amendment, the number of marriage dispensation applications filed to the religious courts was 23,126 nationally, while in 2018, it was around 13,815. Then, during 2020, the number reached 64,196 (Rosyadi 2022, 136).

The legal issue above initiated various studies, such as the study conducted by Musdah Mulia focusing on aspects of gender equality in the discrimination in marriageable age between men and women. The study was based on provision in the marriage law before it was amended. The provision that the minimum legal age for marriage is sixteen for a woman and nineteen for a man is considered to be a perpetuation of the subordination of a wife to a man as her husband (Mulia 2020, 303) and is considered contrary to the spirit of child protection (Musrrofa 2017, 141).

Another study concluded that there are several causes of the high rate of child marriage, namely, low educational attainment and low economic status. The lack of understanding about normative rules and belief in the myth that refusing a marriage proposal will cause one to have difficulty in getting a marriage partner in the future are also some of reasons for people doing under-age marriage. In addition, the increasing rate of promiscuity has caused the number of premarital pregnancies to increase. This condition directly leads to forced marriages in which women become the object to maintain family honor in society (Wantu, et al. 2021, 781).

The trend of young-age marriage promoted by public figures or influencers becomes one of the triggers for child marriage. However, its negative impact is often ignored. It is also associated with various intertwined factors behind the promotion of marriage at a young age, including economic

status, family, thriving traditions, and low educational background. All of these are factors that stimulate the surge of child marriages (Tsani 2021, 428).

A similar finding was revealed by Mim in her 2017 study focusing on the effects of child marriage. She divided the findings into two terms, namely education and empowerment. The study showed that child marriage tends to have the potential to cause low educational attainment or in other words, it has an impact on the continuation of proper education. Meanwhile, in terms of women's empowerment, the study found that child marriage has an impact on the powerlessness of a girl against a generally patriarchal culture (Mim 2017, 19).

Unlike the mentioned previous studies, the focus of this article is on examining child marriage after the marriage law amendment, which raised the minimum legal age for marriage, by focusing on the possibility of preventing child marriage based on the legal system theory proposed by Lawrence M. Friedman. This theory was used based on theoretical considerations about the complexity of the analysis in the theory, which can observe a law from different points of view. The theory asserts that the applicability and effectiveness of a law must be viewed in terms of legal structure, legal culture, and at the same time, its substance (Friedman, 2019, 16). This theory is classified to the study of sociology of law related to the effectiveness of the applicability of a law.

The first element, which is legal structure, is related to the study of the number of judges, the jurisdiction of the courts, the hierarchy in which the higher courts are above the lower courts, and the people associated with different types of courts. Meanwhile, the second element, the substance of the law, refers to the composition of the regulations and provisions regarding how the institution should perform.

Furthermore, Friedman defines legal culture as an element of social attitudes and values held by leaders and their subordinates because their behavior depends on their judgment, whether an option is considered correct and useful. Thus, according to Friedman, legal culture refers to the parts contained in the general legal culture, which includes customs, habits, opinions, and ways of acting and thinking that direct social forces toward or away from the law in certain ways. In another work, Friedman referred to the legal culture that is directly related to legal professions such as judge and lawyer with the term internal legal culture (Friedman 2002, 505).

Based on the theoretical framework above, this article begins by revealing the Islamic legal (*fiqhiyah*) argument, which is the starting point for

justification for the legitimacy of child marriage, in the concept of *kitab kuning* (lit: yellow book). It is a traditional set of the Islamic texts used in Islamic seminary milieu. Furthermore, child marriage was examined based on the marriage law applicable in Indonesia from the point of view of the legal system theory. Using this perspective, it is possible for this article to “dismantle” the legal structure surrounding child marriage in Indonesia and at the same time, analyze the factors behind child marriage in the context of legal system theory.

Research Method

This is legal research applying a normative-empirical legal study model (Muhammad 2004). This study collects data on child marriage from Fiqh, social, and legal perspective. The data analysis was carried out using Friedman’s theory of legal effectiveness, namely legal structure, legal substance, and legal culture. The study was concluded by interpreting the analyzed data on the effectiveness after the amendment to the marriage law and other influenced factors.

Result and Discussion

Islamic Legal and Constitutional Argumentations about Child Marriage

Referring to *kitab kuning* that contains *fiqhîyah* arguments about child marriage, according to Husein Muhammad’s analysis, child marriage may be based on several verses in the Quran, such as in Q.S. al-Talaq [65]: 4, “*As for your women past the age of menstruation, in case you do not know, their waiting period is three months, and those who have not menstruated as well...*”. Even though this verse refers to *iddah* period, it explicitly shows the permissibility of getting married at a young age because *iddah* is a waiting period that applies to a married woman whose marriage is broken legally (Muhammad 2019, 91). In another verse, Surah An-Nûr [24], Allah says, “*Marry off the free singles among you*”. This verse, according to Husein Muhammad, also has the potential to be identified as a loophole for the permissibility of child marriage because the word “*alayama*” in the verse refers to adult as well as young women (Muhammad 2019, 91).

The Islamic legal conclusion that is constructed through the logic of *mafhûm mukhâlafah* against the provision in Q.S. al-Talaq [65]: 4 is that women who are in *iddah* period must have been married. If there is a provision for *iddah* period for women who have not even menstruated, it

implies that women may marry even when they are not sexually mature. This logic can be refuted by another logic, which is that women who have no menstrual periods are not necessarily sexually immature. The absence of monthly menstrual period can be caused by health problems and therefore, the verse does not merely indicate permissibility for a woman who is not sexually mature, or has not menstruated, to marry (Nasution 2009, 389).

In addition, there is another verse that sometimes fails to be noticed by Islamic scholars to compare with the aforementioned verses, which is Q.S [4]: 6: "*Test the competence of the orphans until they reach a marriageable age. Then if you feel they are capable of sound judgment, return their wealth to them.*" This verse relates to the renouncement of responsibility for the maintenance of the orphans' property, which implicitly requires marriageable age as a minimum requirement for the delegation of their property. In this verse, the word "*rusyd*", which means "intelligent", is used. This is the basis for the scholars to reject marriage based solely on puberty, which is marked by nocturnal emission or menstruation. Marriage must also be based on adulthood age (Nasution 2009, 389).

In addition to the *fiqhiyah* arguments contained in the Quranic verses, there were many practices of the *sahabah* that are used as justifications for child marriage, for example, Ali Ibn Abi Talib who married off his underage daughter with Umar Ibn Khattab. Another example is Urwah Ibn Zubair who married off his niece to his nephew, both of whom had not yet reached adulthood or in other words, had not yet reached marriageable age (Husein 2001, 92).

Among the most authoritatively understood by *fiqh* scholars as justification for the validity of child marriage was the action of the Prophet himself when he married Aisha. The famed hadith records Aisha saying that the Prophet married her when she was six years old and began to live with her as married couple when she turned nine years old. This hadith is then affirmed by the practice of the *sahabah*, that is the uncle of the Prophet, Hamzah, who gave his daughter in marriage to the son of Abu Salamah, both of whom were still young. There was also Ali Ibn Abi Talib who married off his daughter, Umm Kulthum, who was still young at the time, to Umar Ibn Khattab (Husein 2001, 92).

The arguments above then induce the understanding that from the *fiqhiyyah* perspective, child marriage has a justification basis. In fact, sharia as God's "divine law" and *fiqh* narratives as the result of intellectual creations

of the Islamic scholars must, definitely, be distinguished (Azizy 2004, 65). On the other hand, the age when Aisha married Prophet Muhammad, as recounted by her in the hadith, is still disputed for its validity. It is partly because the information was conveyed by Aisha at the time she was old, plus the dating system was inaccurate at that time. If the age of Asma' bint Abi Bakr, who is none other than the older sister of Aisha, is used as a benchmark, then it is estimated that Aisha's age at the time of marriage to the Prophet was 17 years because Asma' was born 27 (twenty-seven) years before the hijra and Asma' was 10 years older than Aisha, indicating that Aisha was born 17 years before the hijra (Shihab 2018, 527).

Another analysis that casts doubt on the age when Aisha married is historical evidence which records that Abu Bakr was blessed with four children, all of whom were born during the *jahiliya* period or the period before the first revelation of the Prophet Muhammad in 610 AD. Thus, if Aisha was married before the hijra (before 622 AD), it means that she married at the age of over 12 years old and lived with the Prophet as husband and wife when she was over fifteen years old. Another analysis relates the age at which Aisha married with the birth of Fatima, the daughter of the Prophet Muhammad. According to that analysis, Fatima was born during the time of the rebuilding of the Kaaba or precisely, when the Prophet was 35 years old. Meanwhile, Fatima is five years older than Aisha. It indicates that Aisha was 13 years old at the time of the hijra and lived with the Prophet at the age of 14 (Shihab 2018, 48-49).

Regarding past practices, such as Aisha's marriage to the Prophet and the practice of the *sahabah* related to child marriage, the general public is expected to be wise enough in judging. Quraish Shihab stated that even if the historical record states that Aisha's age was nine years old at the time of living as the wife of the Prophet, it cannot necessarily be used as a justification for the permissibility of child marriage. The reason is that anyone who lives after the Prophet will certainly not be able to reach the level of nobleness of his morals and personality.

On the other hand, neither can such practices be condemned by using contemporary reality as a benchmark. Child marriage in the early days of Islam was motivated by many factors, including historical fact that did show that there were wars between tribes that knew no end. Therefore, the process of giving a girl in a marriage was the only way that could be taken in order for the girl to get protection from a husband and the tribe from which the husband who married her came from (Shihab 2018, 49).

There are a number of propositions constructed in *fiqh* texts that allow child marriage to occur. Such construction of Islamic legal propositions got a definitive interpretation in the law on marriage in Indonesia. Initially, girls were recognized as adults when they reached the age of sixteen, while boys were recognized as ones when they were nineteen. After the amendment to the marriage law, men and women who want to get married must be at least nineteen years old.

The existence of definitive limitation of marriageable age, according to the law, can be seen as a legal breakthrough on the entrenched habit in society known as *kawin gantung* (lit: suspended marriage), which accords a couple the status of husband and wife but does not require them to live together. With the age limitation, the ambiguity of the interpretation of the age limit for marriage both contained in customary law and Islamic law can be avoided. In addition, such limitation is also in line with the principle of marriage, which states that the future husband and wife must have matured mentally and physically (Nuruddin & Tarigan 2004, 71).

The minimum legal age to marry that is set at nineteen, as regulated in the law as a result of the amendment to law number 1 of 1974, is an answer to the concern of many reviewers of the marriage law. They consider that discrimination in the minimum legal age to marry between men and women and a number of contradictions between the provision of legal age of marriage in the previous marriage law and many provisions that also regulate the age limit for children in other laws have caused desynchronization between laws. The minimum legal age to marry that is set at nineteen is in line with the law in the field of education that requires 12 years of compulsory education for all children (Mudzhah 2017, 210).

Mulia still considers the age limit to be contrary to the substance of Article 98 of the Compilation of Islamic Law (KHI) regarding child rearing, which sets the age of 21 years as an indicator of one's independence and maturity. The age limit is also considered contrary to Article 1 of Paragraph 2 in the Child Welfare Law, which states that a child is a person who has not reached the age of 21 years old and has never been married (Mulia 2020, 58). As long as a person is still classified as a child who has not yet reached adulthood, their rights to enjoy their growth and development as a child must be guaranteed. In Islamic teachings, it is so important to guarantee the rights of children that they must still get the attention of their parents in any condition, including in the event of a divorce (Mulia 2020, 291).

Another aspect that can be proposed as “resistance” to the *fiqhîyah* logic of child marriage is a review from the side of legal accountability, which in principle terms is referred to as *mukallaf* or *mahkûm 'alaih*. In this context, the proposed definition revolves around the notion of an individual who is considered legally competent to act according to the commands or prohibitions of Allah. Therefore, the individual bears accountability for their actions. This accountability is inherent in every individual with the main considerations used to analyze it, one of which, being the aspect of actual power to commit or not to commit an act. This aspect is an essential element in legal obligation and therefore, any obligation that is beyond human capabilities in general can be viewed as illegitimate legal implication (Imron 2015, 135).

From this point of view, if marriage is declared a legal act so that the person who enters into it is called a *mukallaf*, then the defect of a person in accepting and doing their obligations becomes questionable. In other words, child marriage can be categorized as a legal action done by individuals who, in terms of *taklif* (legal implication), are classified as ineligible. Meanwhile, marriage can be equated with other contracts, in which the parties involved must at least perfectly qualified to take legal action (*kâmil al-ahlîyah*), which is indicated by the attainment of adulthood and reasoning ability (Nasution 2009, 390).

Ideality of Amendment to the Marriage Law vis-à-vis Legal System Theory

Any legal formulation, including regulations on marriage, in Indonesia cannot be separated from the various factors that surround it. In the context of legal system theory, the ideals established in the marriage law need to be examined from various aspects, namely legal structure, legal substance, and legal culture.

The enactment of Law Number 16 of 2019 as an amendment to Law Number 1 of 1974 on marriage is normatively aimed at addressing the injustice of marriage regulations toward the rights of a girl contained in the said law. In the first consideration, the reason for enacting the law is as a form of protection of the right of citizens to family life and to procreate through legal marriage. In addition, the law is also intended as a guarantee of children's rights to survival, growth, development, and protection from violence and discrimination as stated in the 1945 Constitution of the Republic of Indonesia.

In addition to protecting the rights of a child, the consideration for the enactment of Law Number 16 of 2019 is the negative impact of marriage at a young age. It affects negatively on children's growth and development and will cause the rights of children, such as the right to protection from violence and discrimination, civil rights, health rights, education rights, and social rights, to not be fulfilled (Latifiani 2019, 245).

From the perspective of legal culture, there are many things that can be identified as factors that are contrary to the ideals established in the marriage law. According to Friedman, legal culture is a system of conscious and unconscious knowledge, ideas, and constructs that a society has and its function is as a stepping point and legal guideline for the society. Therefore, the culture of a society, including the legal culture, becomes a driving force for each individual in taking every action (Rajafi 2015, 66).

Referring to the theoretical basis presented above, the ideality of amendment to the marriage law must confront the strong tradition of *kitab kuning*, which is already assumed to be the "voice of God". As is well known, in general, *fiqh* texts view marriage only from the legal point of view. This argument finds its justification when the formulation of the law was constructed at a time when the prevailing culture was patriarchal culture. Women have a very exceptional dependence on men as the guarantor of their lives. Such concepts change as the social system evolves. Marriage is no longer seen as a mere legal act that is fixated on aspects of its legality. Therefore, as Mas'udi said, *kitab kuning*, in addition to being an object of recitation, must be an object of study (Bruinessen n.d., 206).

According to Asghar, along with the development of the social system, marriage has a strong nuance of liberation for a woman in terms of entering into a marriage contract. Marriage in Islam is actually a contract between equal partners. In this case, women are equal to men who can set the conditions they want. Therefore, without the consent of a woman, including the conditions she requested, a marriage could not eventuate. In such a context, women also have an equal position with men in the event of divorce, although divorce is not so condoned in Islamic teachings (Engineer 2004, 138).

The concept of *wali mujbir* can also be expressed as a legal culture that is entrenched in social life and at the same time, as a competitor to the ideal construction of a marriage law to protect the rights of a child. The existence of such a concept can also be traced from the justification of tradition and religious understanding among the society. It is classified as the result of the

scholars' interpretation of religious texts. Therefore, it cannot actually be considered as the core of religious teaching itself because an interpretation of religious texts will never represent the truth that will be expressed by the religious text in question (al-Asyhar 2003, 162).

The concept of marriage, which is constructed by an interpretation and then affirmed by traditional factors, needs to be situated in a critical study of the background that has influenced Islamic jurists (*faqih*) in their respective works. An example is Umar who forbade women to go to the Mosque, while the Prophet allowed them to. It may be due to the patriarchal culture that surrounds the life of the second Rashidun caliph. Another example is that Abu Hurairah was very keen to popularize misogynistic hadiths and the tendency of his attitude is probably because Abu Hurairah never married nor ever fell in love with a woman (al-Asyhar 2003, 162).

Furthermore, in terms of legal culture, social mindsets or views on marriage need to be investigated. Another aspect that needs to be investigated, according to the theory proposed by Friedman, is the substance of the marriage law. From this point of view, the question of the effectiveness of amendments to the marriage law in order to prevent child marriage must also intersect with the reality of the "unproductiveness" of the substance aspect of the law. The substance refers to rules and norms, which are products produced by lawmakers who are in the legal system (Aripin 2012, 118).

Hence, the defect of the marriage law in terms of its substance, which at the same time poses a threat to the ideality behind the amendment to the law, is the absence of binding sanctions. This kind of defect can be found in almost all legislations that make Islamic law as their material source. Especially in the marriage law, the articles still have strong nuances of *fiqh* that only have implications for moral advice. Just as moral advice is not a positive norm, which is marked by the absence of sanctions for violations of the articles it contains, the current law does not have binding effect on the people to which it is subjected. This is certainly not in line with the aims and purposes of the formulation of the law, which must guarantee legal justice, certainty, and benefits (Najib 2011, 169).

In terms of legal force, the attribute of sanctions that can be imposed is one of the conditions that must be met. This aspect is not found in the formulation of the marriage law, including the post-amendment marriage law. Another aspect that can support the binding effect of a law is the attribute of authority, namely the making of laws by parties who have authority. In this case, the marriage law has fulfilled the requirements because

it was made by the legislative body, which is considered to have the authority. Based on another review of the attribute of universal application, the marriage law substantially does not have problems. Reviewed from the attribute of obligation, which is what is actually ordered and prohibited in the law, the marriage law also has no problems (Mudzhaz 2017, 202).

In terms of substance, the marriage law is still full of regulations that discriminate against gender and of course, this is not in line with the demands for equality proclaimed by feminists. The difference in the marriageable age between men and women in the marriage law before it was amended is clear evidence of the discrimination in question. Other forms of discrimination that exist include situating women in “second place” in the articles of the marriage law, such as those concerning guardian for marriage, witnesses, *nushûz*, polygamy, and the rights and obligations inherent in both parties. In fact, the parties who enter into marriage are not only men but also women, and the purpose of marriage is to establish a partnership that is not an unequal relationship between the superior and the inferior (Mulia 2020, 73).

Indeed, if it is examined carefully, the regulations in family law as outlined in the statutory instruments substantially reinforce the teachings of the Sunni schools (*madhhab*), especially the Shafi’i school (Rajafi, 2015, 46). The dominance of the Shafi’i school can be said to have contributed to the legalization of child marriage. The reason is because in the view of al-Imam al-Shafi’i, with reference to Aisha's marriage to the Prophet Muhammad, in which Aisha was married off by her father, Abu Bakr, she was still six or seven years old when she married. A father is more entitled to send his daughter who has not yet reached maturity in marriage than the daughter herself (Mahmudi 2009, 114).

Based on the explanation above, the power of a father as a guardian to marry off his daughter is very obvious. The power of a father over his daughter is not even limited to marital matters. All actions of a girl who has not yet reached maturity are absolutely represented by her father as a guardian (Mahmudi 2009, 114). The assumption behind this doctrine of jurisprudence (*fiqh*) is that women become passive subjects of law and men are positioned as responsible not only for the security, but also on the welfare of women (Norhasanah, 2018, 11). This analysis does not deny the prevalence of child marriage among boys, but girls have a higher prevalence due to the concept of *wali mujbir* (Naveed & Butt 2020, 161). The next review is in terms of the legal structure, which is an important element in the legal system theory proposed by Friedman. Legal structure refers to legal institutions, such as the

courts and the the institutions that support them (Aripin 2012, 117). In other words, the legal structure is closely related to the legal institutions that sustain the establishment of the legal system. This section concerns the legal order, legal institutions, law enforcement officers and their authorities, legal instruments, and their processes and performance in implementing and enforcing the law (Pahlevi 2022, 32).

In a review of the legal structure, the age limit for marriage that is aimed at least to minimize the number of child marriages can be related to the issuance of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. Through the regulation, the Supreme Court considers that the marriage dispensation is a form of violation of the marriage law. Although the application for dispensation for marriage is submitted by a parent or guardian, the most affected by the judgment of this matter was the girl or boy. In this case, the judiciary plays an important role as a guard that protects children and prevents child marriage and the court decision is the last guard to protect children (Tasya & Winanti 2021, 243).

The Article 10 of Supreme Court Regulation Number 5 of 2019 and so on has also regulated how dispensation cases are heard and various considerations that must be conveyed by the trial judge. Several considerations, which must also become advice that must be conveyed to the guardian who applies for a marriage dispensation, are; (a) the possibility of discontinuation of the children's education; (b) the children's biological immaturity; and (c) the economic, social and psychological impacts on the children that have the potential to trigger conjugal conflict and domestic violence. Some of these considerations make a judgment rendered by a trial judge handling a marriage dispensation application null and void when it does not include some of the considerations in question.

The Supreme Court Regulation also regulates the judges who have the right to handle marriage dispensation cases. The judge must have been certified as child-friendly judge, with the aim that in hearing and extracting information from children for whom a marriage dispensation is applied, the judge can understand the psychological aspects of the children. In this case, the judge is also required to use a way of speaking that is easily understood by the child in order to avoid psychological pressure for a child for whom a marriage dispensation is applied. The judge is not allowed to wear court attributes such as gown and tie and the deputy registrar is not allowed to wear

a suit. All of this is intended so that children can provide honest information without any psychological distress (Rosyadi 2022, 141).

Based on this elaboration, it can be said that in terms of legal structure, the amendment to the Marriage Law that equalizes the marriageable age for men and women to nineteen years even still leaves an issue about the legality of marriage dispensation. The marriage dispensation must go through a long process. In this case, the sensitivity and discretion of the judge becomes a determinant in their capacity as an enforcer of family law. Law enforcement in question is a process that must be done to achieve the purposes of a law (Rahardjo 2009, 24).

Citing an analysis by Saldi Isra, in terms of legal structure, the impartiality of judges in hearing cases that are solely based on the law and trial evidence and witness testimony is at stake (Isra 2010, 307). If it is related to the context of adjudication of child marriage case, then a judge is required to perform their functions regardless of the “interests” of one of the parties. The considerations taken must refer to the trial evidence and witness testimony and the law that should apply so that the ideality of amendment to the Marriage Law, which is expected to reduce the number of child marriages and provide legal protection for children, can be achieved (Jasmaniar & Muhdar 2021, 180).

Open Legal Policy: Towards the Child-Friendly Islamic Marriage Law

The term *open legal policy* (hereinafter abbreviated as OLP) appears in various decisions of the constitutional court. The examples are in the judicial reviews of the marriage law that were registered as matter number 74/PUU-XII/2014 and number 22/PUU-XV/2017. In the judgement on the matter Number 74/PUU-XII/2014, the constitutional court saw that the policy of the legislators, which stipulates the marriageable age for men is 19 (nineteen) years old and for women 16 (sixteen) years old, does not conflict with the constitution because it is an open legal policy. In this case, the state is free to determine or change the legal age limit for marriage based on considerations of advancement in society, economy, healthcare, culture, and information technology and so forth.

The term OLP also appears in the judgment of the constitutional court that is registered as the judgment in the matter Number 22/PUU-XV/2017. In this judgment, the constitutional court continued to argue that the Court is not authorized to determine a certain age as the legal age limit for marriage on the grounds that this policy is an OLP made by legislators. However, the

Court puts more emphasis on consideration of efforts to prevent child marriage and eliminate gender discriminatory actions in marriage, such as discrimination in the marriage age limit for men and women.

Terminologically, OLP is a policy regarding the purpose of a law that will be enforced by the state to achieve certain goals (Ajie 2016, 114). Meanwhile, the word "open" is defined as a *freedom* for legislators to take legal policies. The word "open" in binary opposition logic has the opposite word "closed", which means restriction on the authority of legislators in determining legal subjects, objects, actions, events, and/or consequences regulated in certain law and regulation. Such restriction is enforced by legal norms that are hierarchically higher than the legal norms being formulated (Wibowo 2016, 211).

The implication of the legal consideration of the constitutional court, stating that a provision is in an OLP, is that the norm in question does not conflict with the 1945 Constitution and therefore, the regulatory policy toward it is entrusted to the legislators (Fauzani and Rohman 2019, 130). By examining the judgements of the constitutional court that include their legal considerations in OLP, the conditions on which a law and/or legal material is considered to be classified as OLP are found. The first condition is that the 1945 Constitution gives a mandate to legislators to further regulate a material, but does not provide a boundary for the regulation of the material, while the second condition is that the 1945 Constitution does not give a mandate at all to regulate a material (Wibowo, 2016 212).

In the context of child marriage, which is the object of this study, OLP is not only viewed from its legal implication in the form of the constitutionality of a norm. OLP also provides opportunities for continuous norm renewal on the determination of the legal age limit for marriage by taking into account, for example, social changes and scientific developments. It shows that the legal formulation is not isolated from other scientific disciplines and cannot be separated from social needs under the mere pretext of the principle of legal certainty. If social needs are the determining factor of law, then in fact, every change that occurs in social life must be accompanied by a change in a norm (Rahardjo 2009, 92).

Declaring the legal age limit for marriage as OLP based on certain social and cultural contexts can be confirmed through the different minimum marriage age limits in Muslim countries as compiled in Table 1 (Mudzhar 2000, 219).

Table 1. Comparison of Minimum Marriage Age in Muslim Countries

No	Country	Minimum Marriage Age Limit	
		Men	Women
1	Algeria	21	18
2	Bangladesh	21	18
3	Egypt	18	16
4	Iraq	18	18
5	Jordan	16	15
6	Lebanon	18	17
7	Libya	18	16
8	Malaysia	18	16
9	Morocco	18	15
10	North Yemen	15	15
11	Pakistan	18	16
12	Somalia	18	18
13	South Yemen	18	16
14	Syria	18	17
15	Tunisia	19	17
16	Türkiye	17	15

Table 1 shows that among Muslim countries, including Indonesia, there is no final and uniform provision regarding marriageable age. Minimum marriageable age limit possibly depends on policies, situation and culture in each country. One thing that is certain, both in the Quran and the hadith of the Prophet, is that marriage is actually performed by those who have reached maturity. The criteria for one's eligibility for marriage are generally based on biological consideration, which consists of maturity as measured by age, and psychological indicators, which refer to the maturity of the psychological aspect. In addition, there are also financial considerations that refer to the ability of men and women to meet household needs (Rosyadi 2022, 131).

As an OLP, in the context of preventing child marriage, the elements of the legal structure mentioned by Friedman, which include legislators, can play their roles in determining policy. Various considerations that are presumably relevant are references to scientific reviews in the medical field and the field of family psychology. These two scientific disciplines certainly have their own contribution to legislators in designing child-friendly Islamic marriage law norms.

From medical perspective, as campaigned by the United Nations, child marriage is categorized as a risky traditional practice because such practice will pose high health risks to the subjects, such as maternal death due to

premature pregnancy, pelvic fracture, nutritional deficiencies, and so on (Hanafi 2013, 3). Psychologically, unstable emotional conditions, which are characterized, for example, by anxiety and stress, may affect family harmony (Noor et al. 2021, 17). Definitely, since the mental condition of the subjects is still unstable, they will not be able to solve the family problems they are facing (Yusdani 2015, 102).

The most important thing to highlight is the high risk of maternal and infant mortality in the case of child marriage. In one study, the negative impact of child marriage is the high number of infant deaths. According to the report of the public health center in the Special Capital Region of Jakarta, the infant mortality rate per 1,000 live births (that were reported) was 1.0. East Jakarta was recorded as the administrative city with the highest number of infant deaths in the Special Capital Region, with 52 infants (2009). In 2013, East Jakarta had the highest maternal mortality rate with 31 mothers dying, thus, making Jakarta to record 93 mothers died in the said year (Kartikawati 2014, 5).

Marriage is expected to realize a peaceful domestic life in order to protect all family members from all disturbances, which is referred to as a protective function. In addition, it functions as a place to practice social values in the family. Apart from the mentioned functions, there are still other functions, namely recreational and economic functions. The first function refers to a family structure as a place that can provide tranquility and comfort for all family members. Meanwhile, the second function is that marriage life is intended as a medium to cover basic needs (Directorate General of Islamic Community Guidance, Ministry of Religious Affairs of the Republic of Indonesia 2017, 15). The various functions and purposes of marriage as elaborated above show that marriage is not just a sexual affair that begins with mutual love, but more than that, it is intertwined with the mental readiness of each partner, which is an important factor in marriage (Muzzamil and Kunardi 2014 216).

The above elaboration implies that an interpretation of law does not mean final dogma so it is required to be dynamic simultaneously and to progress continuously. This is also a strong foundation which emphasizes that the law must undergo a process of adaptation according to their respective times in accordance with the social changes. Law is no longer an instrument to support the interests of the rulers. It requires fair law enforcement. In reality, law enforcement often ignores the sense of social justice considering that textually, the substance of the law requires more legal certainty. This is a

challenge for law enforcement officers in enforcing the law in Indonesia (Ansori 2018, 149).

Considering that the background of child marriage is also intertwined with the aspect mentioned by Friedman as the legal culture in society, in addition to the progressiveness of legislators in designing child-friendly family law structures, the aspect that is needed is efforts to provide legal awareness to the general public. The reason is that the law has an educational function which emphasizes that the law is not merely the one giving sanction, but must play educational and socializing role (Arif 2016, 115).

Based on legal system theory, in order to achieve the ideality of amendment to the marriage law, an intertwined relationship between elements of legal structure, legal substance, and legal culture is needed. In the study of legal system, the legal formulation is a unified whole consisting of parts or elements that are interrelated with each other. A legal system is a unit consisting of elements that have interaction with each other and work together to achieve the goal of that unit. It is an essential unit and is divided into parts. If there is a problem in it, then the legal system must find an answer or solution (Nuriyanto 2015, 21).

Therefore, the desired legal formulation, namely the marriage law, must be based on the principles of the formation of laws and regulations that include the composition of regulation (*Form der Regelung*), the method of formulating regulation (*Methode der Ausarbeitung der Regelung*), the form and the content of the regulation (*Inhalt der Regelung*), and the procedures and processes for the formulation of regulation (*Verfahren der Ausarbeitung der Regelung*). These legal principles aim that laws formulated by authorized institutions can have binding effects in accordance with social needs and the needs of the government for the welfare of its people (Neununy, 2021, 120) which is referred to by Satjipto Rahardjo as a state of law that enraptures its people (Rahardjo 2009, 90).

Conclusion

Amendment to the Marriage Law in the spirit of child protection is not necessarily in reality in line with the ideals on which the amendment to the law is based on. According to the legal system theory proposed by Friedman, the obstacle faced is the aspect of legal culture, where *kitab kuning* with the patriarchal culture surrounding it is one of the factors that can be identified. Meanwhile, from the aspect of legal substance, the absence of sanctions for

violation of the norm of the Marriage Law is another factor that also presents a legal impact that is contrary to the ideal it wants to achieve. However, in terms of the legal structure, the issuance of Supreme Court Regulation on Guidelines for Adjudicating Applications for Marriage Dispensation can be assumed to have helped prevent child marriages in Indonesia.

References

- Ahmed, T. 2015. Child Marriage: A Discussion Paper. *Bangladesh Journal of Bioethics*, 6(2): 8-14. DOI: <https://doi.org/10.3329/bioethics.v6i2.25740>.
- Ajie, R. 2016. Batasan pilihan kebijakan pembentuk undang-undang (Open legal policy) dalam pembentukan peraturan perundang-undangan berdasarkan tafsir Putusan Mahkamah Konstitusi. *Jurnal Legislasi Indonesia*, 13(2): 111-120.
- al-Asyhar, T. (Ed.). 2003. *Fiqh Progresif Menjawab Tantangan Zaman*. FKKU Press.
- Ansori, L. 2018. Reformasi Penegakan Hukum Perspektif Hukum Progresif. *Jurnal Yuridis*, 4(2): 148-163. DOI: <http://dx.doi.org/10.35586/v4i2.244>.
- Aripin, J. 2012. *Peradilan Agama dalam Bingkai Reformasi Hukum di Indonesia*. Jakarta: KPMG.
- Azizy, A. Q. 2004. *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum*. Jakarta: Teraju.
- Bruinessen, M. (n.d.). Kitab kuning; Books in Arabic script used in the Pesantren milieu; Comments on a new collection in the KITLV Library. *Bijdragen Tot de Taal, Land- En Volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia*, 146(2): 226-269.
- Engineer, A. A. 2004. *Hak-Hak Perempuan dalam Islam*. Yogyakarta: Bentang.
- Fauzani, M. A., & Rohman, F. N. 2019. Urgensi Rekonstruksi Mahkamah Konstitusi dalam Memberikan Pertimbangan Kebijakan Hukum Terbuka (Open Legal Policy). *Justitia et Pax*, 35(2): 127-152.
- Friedman, L. M. 2019. *Sistem Hukum: Perspektif Ilmu Sosial*. Malang: Nusamedia.
- Hakiki, G. (Ed.). 2020. *Prevention of Child Marriage Acceleration that cannot Wait*. Center on Child Protection & WellBeing.

- Hanafi, Y. 2013. *Rencana Kebijakan dan Rencana Aksi Untuk Pencegahan Perkawinan Anak di Bawah Umur*. Malang: Bintang Sejahtera.
- Husein, M. 2001. *Fiqh Perempuan: Refleksi Kiai Atas Wacana Agama dan Gender*. Yogyakarta: LKiS.
- Imron, A. 2015. *Legal Responsibility: Membumikan Asas Hukum Islam di Indonesia*. Yogyakarta: Pustaka Pelajar.
- Isra, S. 2010. *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer dalam Sistem Presidensial Indonesia*. Depok: Raja Grafindo Persada.
- Jasmaniar, J., & Muhdar, M. Z. 2021. Batas Usia Kawin Dalam Kaitannya Dengan Permohonan Dispensasi Kawin Di Pengadilan Agama. *Indonesian Journal of Criminal Law*, 3(1): 77-87.
- Latifiani, D. 2019. The Darkest Phase for Family: Child Marriage Prevention and Its Complexity in Indonesia. *Journal of Indonesian Legal Studies*, 4(2): 241-258. DOI: <https://doi.org/10.15294/jils.v4i2.34708>.
- Lubis, M. M. 2020. Pemenuhan Hak Restitusi Terhadap Anak Korban Tindak Pidana Kejahatan Seksual (Studi Penelitian Pengadilan Negeri Medan Kelas I-A Khusus). *Jurnal Hukum Al-Hikmah: Media Komunikasi Dan Informasi Hukum Dan Masyarakat*, 1(1): 185-193. DOI: <https://doi.org/10.30743/JHAH.V1I1.3072>.
- Mahmudi, Z. 2009. *Sosiologi Fikih Perempuan*. Malang: UIN Malang Press.
- Mim, S. A. 2017. Effects of Child Marriage on Girls' Education and Empowerment. *Journal of Education and Learning*, 11(1): 9-16.
- Mudzhar, M. A. 2000. *Hukum Keluarga Di Dunia Islam Modern*. Jakarta: C. Press
- Mudzhar, M. A. 2017. *Fikih Responsif: Dinamika Integrasi Ilmu Hukum, Hukum Ekonomi dan Hukum Keluarga Islam*. Yogyakarta: Pustaka Pelajar.
- Mulia, Musdah. 2020. *Ensiklopedia Muslimah Reformis: Pokok-Pokok Pemikiran Untuk Reinterpretasi dan Aksi*. Banten: Baca.
- Musarrofa, I. 2017. Analisis Wacana Kritis terhadap Fatwa Bahtsul Masa'il tentang Perempuan. *Ulul Albab: Jurnal Studi Islam*, 18(2): 135-160. DOI: <https://doi.org/10.18860/ua.v18i2.4523>.

- Muzzamil, H. M., & Kunardi, M. M. 2014. Implikasi Dispensasi Perkawinan Terhadap Eksistensi Rumah Tangga Di Pengadilan Agama Semarang. *Jurnal Pembaharuan Hukum*, 1(2): 209-218.
- Najib, A. Moh. 2011. *Pengembangan Metodologi Fikih Indonesia dan Kontribusinya bagi Pembentukan Hukum Nasional*. Kemenag R.I.
- Nasution, K. 2009. *Hukum Perdata Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim*. Malang: Tazzafa.
- Naveed, S., & Butt, D. K. M. 2015. Causes and Consequences of Child Marriages in South Asia: Pakistan's Perspective. *South Asian Studies*, 30(2): 161-175.
- Neununy, D. J. 2021. Urgensi Omnibus Law (Undang-Undang Cipta Kerja) Terhadap Hak Masyarakat Adat Di Wilayah Pesisir. *Balobe Law Journal*, 1(2): 119-131. DOI: <https://doi.org/10.47268/balobe.v1i2.653>.
- Noor, M. S. et al. 2021. The Impact of Physical and Psychological Health of Early Married Behaviors in Adolescents. *Jurnal Berkala Kesehatan*, 7(1):16-21. DOI: <https://doi.org/10.20527/jbk.v7i1.9618>.
- Norhasanah, N. 2018. Dispensasi Kawin Di Bawah Umur (analisis Putusan Mk No. 74? Puu-Xii/2014 Uji Materiil Pasal 7 Ayat 2 UU Perkawinan). *El-Mashlahah*, 8(1): 3-15. DOI: <https://doi.org/10.23971/el-mas.v8i1.1092>.
- Nuriyanto, N. 2015. Membangun Budaya Hukum Pelayanan Publik untuk Mewujudkan Kesejahteraan Rakyat. *Integritas*, 1(1): 15-36.
- Nuruddin, A., & Tarigan, A. A. 2004. *Hukum Perdata Islam di Indonesia*. Jakarta: KPMG.
- Pahlevi, F. 2022. Pemberantasan Korupsi di Indonesia Perspektif Legal System Lawrence M. Freidmen. *El-Dusturie*, 1(1): 23-42. DOI: <https://doi.org/10.21154/eldusturie.v1i1.4097>.
- Rahardjo, S. 2009. *Negara Hukum Yang Membahagiakan Rakyatnya*. Yogyakarta: Genta Publishing.
- Rajafi, A. 2015. *Nalar Hukum Keluarga Islam di Indonesia*. Yogyakarta: Istana P.
- Rosyadi, I. 2022. *Rekonstruksi Epistemologi Hukum Keluarga Islam*. Jakarta: KPMG.

- Shihab, M. Q. 2018. *Membaca Sirah Nabi Muhammad: Dalam Sorotan Al-Qur'an dan Hadits-Hadits Shahih*. Jakarta: Lentera Hati.
- Tasya, A. F., & Winanti, A. 2021. Dispensasi Perkawinan Anak Setelah Adanya Perma Nomor 5 Tahun 2019. *Wajah Hukum*, 5(1): 241-249.
DOI: <http://dx.doi.org/10.33087/wjh.v5i1.333>.
- Tsani, W. L. 2021. Trend Ajakan Nikah Muda Ditinjau dalam Aspek Positif dan Negatif. *ElUsrah: Jurnal Hukum Keluarga*, 4(2): 418-429.
DOI: <https://doi.org/10.22373/ujhk.v4i2.8271>.
- Undang Undang Dasar 1945 | Mahkamah Konstitusi Republik Indonesia. (n.d.). Retrieved August 30, 2022.
- Wantu, S. M. et al. 2021. Early Child Marriage: Customary Law, Support System, and Unwed Pregnancy in Gorontalo. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, 5(2): 780-803.
DOI: <https://doi.org/10.22373/sjkh.v5i2.9573>.
- Wibowo, M. 2016. Menakar Konstitusionalitas sebuah Kebijakan Hukum Terbuka dalam Pengujian Undang-Undang. *Jurnal Konstitusi*, 12(2): 196-216. DOI: <https://doi.org/10.31078/jk1221>.
- Yüksel-Kaptanoğlu, İ., & Ergöçmen, B. A. 2014. Early Marriage: Trends in Turkey, 1978-2008. *Journal of Family Issues*, 35(12): 1707-1724.
DOI: <https://doi.org/10.1177/0192513X14538025>.
- Yusdani. 2015. *Menuju Fiqh Keluarga Progresif*. Yogyakarta: Kaukaba Dipantara.