Juridical Study of the Constitutional Court's Decision No. 22/PUU-XV/2017 Regarding Restriction of Marriage Age from the Perspective of *Maslahah* Theory by Muhammad Sa'īd Ramadhân Al-Būthī's and Gender Equality in Islam

Machrus Ali Syifa¹, Ahmad Tholabi Kharlie², Mualimin Mochammad Sahid³

Abstract: *Juridical Study of the Constitutional Court's Decision No. 22/PUU-XV/2017 Regarding Restriction of Marriage Age in the Perspective of Maslahah Theory by Muhammad Sa'īd Ramadhân Al-Būthī's and Gender Equality in Islam.* This article is intended to answer questions on the legal considerations of the Constitutional Court Decision No. 22/PUU-XV/2017 regarding the minimum age of marriage for women and how the Judgment is seen from the Muhammad Sa'īd Ramadhân al-Būthī's *maslahah* theory and the theory of gender equality in Islam. From the conducted studies, several conclusions can be drawn. *First*, the Judge's legal considerations in canceling the minimum age of marriage in decision No. 22/PUU-XV/2017 are based on consideration of discrimination acts, health and educational aspects, child exploitation, the minimum age requirement for marriage in various countries, and policy demands related to marriage age. *Second*, in terms of the al-Būthī's *maslahah* theory, the Constitutional Court's ruling on the equalization of marital age between men and women is not categorized as a *maslahah*, since it does not meet the five criteria for something to be called as a *maslahah*. *Third*, according to the gender equality theory in Islam, it can be concluded that the Constitutional Court's decision is not suitable to the theory, since the meaning of equality in Islam is not to be equal but rather to the fulfillment of rights according to the level of needs.

Keywords: Constitutional Court's Decision, the minimum age of marriage, *maslahah*, gender.

Abstrak: *Kajian Yuridis Terhadap Putusan Mahkamah Konstitusi No. 22/PUU-XV/2017 Tentang Batasan Usia Perkawinan dalam Perspektif Teori Maslahah Muhammad Sa'īd Ramadhân Al-Būthī dan Kesenjangan Gender dalam Islam.* Artikel ini bertujuan untuk menjawab pertanyaan seputar pertimbangan hukum Hakim Mahkamah Konstitusi dalam putusan Nomor 22/PUU-XV/2017 tentang batas minimal usia menikah bagi perempuan dan bagaimanakah Putusan tersebut ditinjau dari teori *maslahah* Muhammad Sa'īd Ramadhân al-Būthī serta teori kesetaraan gender dalam Islam. Dari kajian yang dilakukan diperoleh sejumlah kesimpulan. *Pertama*, pertimbangan hukum Hakim dalam membatalkan batas minimal usia menikah pada putusan No 22/PUU-XV/2017 didasarkan pada pertimbangan tindak diskriminasi, aspek kesehatan, aspek pendidikan, eksploitasi anak, ketentuan minimal

¹Sekolah Tinggi Agama Islam (STAI) Imam Syafi'i, Sarongge, Ciputri, Pacet, Cianjur, Jawa Barat

²Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, Jln. Ir. H. Juanda 95, Ciputat, Tangerang Selatan

³Universiti Sains Islam Malaysia, Bandar Baru Nilai, Negeri Sembilan, Malaysia

E-mail: 'machrusali1992@gmail.com, 'abimania@uinjkt.ac.id, 'mualimin.sahid@usim

usia perkawinan di berbagai negara, dan tuntutan kebijakan terkait usia perkawinan. *Kedua*, ditinjau dari teori *maṣlahah* al-Būthī, maka putusan MK tentang penyamarataan usia perkawinan antara laki-laki dan perempuan bukan merupakan suatu kemaslahatan, karena tidak memenuhi lima kriteria sesuatu dapat disebut *maṣlahah*. *Ketiga*, ditinjau dari teori kesetaraan *gender* dalam Islam maka dapat disimpulkan bahwa putusan MK juga tidak sesuai dengan teori tersebut, karena arti kesetaraan dalam Islam tidak harus sama rata akan tetapi lebih kepada pemenuhan hak-hak sesuai kadar kebutuhannya.

Kata Kunci: Putusan MK, batas minimum usia perkawinan, *maṣlahah*, jender.

Introduction

One of the regulations implemented by the government on marriages is the marriage age limitation. concerning the issue of marital age restrictions, Indonesia is one of the countries that pay attention to marriages with the acceptance of Indonesian Law Number 1 of 1974 concerning Marriage (Law on Marriage), which is legally becoming a national constitution governing marriage in Indonesia.¹

Article 7 Paragraph (1) of Law Number 1 of 1974 concerning Marriage mentioned, that:

“Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years”.

The existence of these restrictions is aimed to realize the goals of marriage, to avoid divorce, to give birth to a good and healthy offspring, and to inhibit the high rate of birth and population growth.²

In connection with Article 7 Paragraph (1) of the Marriage Law, various kinds of responses, opinions, and proposals began to emerge and consequently made the provisions on marital age restrictions in the Marriage Act to be revised. In this regard, the Constitutional Court on December 13th, 2018 has decided the case for a petition for judicial review related to the Marriage Law article 7³ to increase the minimum

¹ Kaharuddin, *Nilai-Nilai Filosofi Perkawinan Menurut Hukum Perkawinan Islam Dan Undang-Undang RI Nomor 1 Tahun 1974 Tentang Perkawinan*, (Jakarta: Mitra Wacana Media, 2015), p. 4.

² Ahmad Rofiq, *Hukum Perdata Islam Di Indonesia* (Jakarta: Rajawali Press, 2013), p. 59.

³ R. Subekti dan R. Tjitrosudibi, *Kitab Undang-Undang Hukum Perdata*, 15 (Jakarta:

age for women to marry. The petitioners requested to make the minimum age for women in marriage as same as the minimum age for men or 19 years old, to achieve equality between men and women in the law as stated in Article 27 paragraph (1) of the 1945 Constitution of Republic of Indonesia (*UUD 1945*).

If the reasons presented by the petitioners are examined and become the consideration for the judge in deciding the case, it leads to two (2) things, namely; benefit and gender equality.

Regarding the *maslahah* principle, Muhammad Sa'īd Ramadhān al-Būthī through his doctoral dissertation entitled *Dhawābith al-Maslahah fī al-Syarī'ah al-Islamiyah*, trying to re-restrict the use of the *maslahah* theory in Islamic law. Many people are then considered applying *maslahah* to spin around Islamic law. Whereas the *maslahah* that violates these limitations is not considered a real *maslahah* which worth consideration in the determination of law. In the introduction to his book, he said, the truth is that *maslahah* in Islamic law from all sides have clear boundaries of reason and do not leave the slightest difficulty in understanding it. *Maslahah* in Islam does not allow contradictions between its parts and is built on a very strong basis and visible intent and source of origin. Thus, there is nobody can try to manipulate this problem.⁴

In addition to the *maslahah* theory above, the issue of gender equality also becomes an interesting subject to be carried by a group of people. They understand that the concept of gender equality is when men and women are placed on the same social level by getting the same amount in the same quantity. This understanding has been widely adopted from Western ideas about gender equality.⁵ Meanwhile, the Islamic perspective is contradicted the western idea, because it is conflicting with natural law. Men and women are both human beings who have their own

Pradnya Paramita, 1982), p. 551. Lihat juga Putusan Mahkamah Konstitusi No. 22/PUU-XV/2017.

⁴ Muhammad Sa'īd Ramadhān al-Būthī, *Dhawābith Al-Maslahah Fī al-Syarī'ah al-Islāmiyyah* (Damaskus: Mu'assasah al-Risālah, 1973), p. 76.

⁵ Muhammad Sa'īd Ramadhān al-Būthī, *Perempuan Antara Kedzaliman Sistem Barat Dan Keadilan Islam*, (Karangsem: Era Intermedia, 2002), p. 106.

characteristics.⁶ Therefore, if they are equated in all aspects, then it can result in the violation of God's will since they were born differently. From this explanation, the authors can conclude that gender justice (equality) in Islam does not always have to be equal but rather to fulfill the rights according to the degree of need.

From the description above, the author is interested in examining the Constitutional Court decision in the granting of judicial review of article 7 paragraph (1) No. 1 of the Marriage Law of 1974 concerning the minimum marriage age for women, which then analyzed through the perspective of the *Maslahah* Theory by Muhammad Sa'īd Ramadhān al-Būthī and gender equality in Islam.

Although the discussion related to the provisions on marital age restrictions has been widely studied and researched, however, this research will be different from the earlier studies because the author observes the provisions on marital age restrictions from the results of the latest decision of the Constitutional Court No. 22/PUU-XV/ 2017 by using the *maslahah* theory by Muhammad Sa'īd Ramadhān al-Būthī and gender equality in Islamic perspective. Consequently, it can be revealed whether the Constitutional Court's decision has been effective and relevant to be applied in this country or need further correction.

From the aforementioned explanation, the writer can formulate the research questions as follows; a) How was the Judicial Judgment obtained in the Constitutional Court Decision No. 22/ PUU-XV/2017 concerning the Minimum Marriage Age for Women?, b) How was the result of Constitutional Court's Decision No. 22/PUU-XV/2017 concerning the Minimum Marriage Age for Women in the Perspective of the *Maslahah* Theory of Muhammad Sa'īd Ramadhān Al-Būthī?, C) How was the Constitutional Court's Decision No. 22/PUU-XV/2017 concerning the Marriage Age for Women in the Perspective of Gender Equality Theory in Islam?

It is important to know that this research is a type of legislation

⁶ Paizah Ismail, 'Status Wan Ita Dalam Islam: Antara Prinsip Syariah Dan Ijtihad Fuqaha', *Jurnal Syariah*, 11.2 (2019), 61–72 (p. 62).

study, which was applying comparative method, and data collection techniques are fulfilled through library research, and finally, the data were analyzed using the content analysis method of judges' consideration in a decision.

The Theory of *Maslahah* by Muḥammad Sa'īd Ramadhān al-Būthī

Al-Būthī in one of his books argues that Allah SWT in creating people – male or female – is according to His will, by giving them their own characteristics. Allah SWT knows the pleasure of women is different from what men like most as well as the advantages and characteristics of both sexes. As a result, rules are distinguished according to differences in their character and preference.⁷

From the opinion of al-Būthī, the authors consider that al-Būthī disagrees with the equalization of the minimum age between men and women in marriage. Since both of this gender have their respective functions or are known by “Fate” or “Natural tendency”, therefore, it is required a differentiation. This divergence does not constitute discrimination against women but rather acts to treat women as their fate. Precisely by increasing the minimum age of women to be equal with men is an act of discrimination because it does not treat women as they should.

Al-Būthī defines *maslahah* as the benefits intended by Allah SWT for the benefit of His servants, whether in the form of care for their religion, soul, intellect, descent or wealth according to a certain order contained in that maintenance category⁸. According to him, *maslahah* is not an independent verse such as the arguments of other *syara'* verses, namely the Qur'an, Hadits, Ijmā, and Qiyās, which incidentally can be made the basis for the arguments against the *juz'iyāt*⁹ (*furū'iyah*) law as it is stated and formulated by several researchers. *Maslahah* is the general

⁷ Said Ramadhan al-Buthi, *Perempuan Dalam Pandangan Hukum Barat Dan Islam* (Yogyakarta: Suluh Press), p. 2005.

⁸ Muhammad Sa'īd Ramadhān al-Būthī, *Dhawābith Al-Maslahah Fī al-Syari'ah al-Islāmiyyah*, p. 27.

⁹ Or a law that must be firstly relied on to other shari'ah sources such as Al-Qur'an, Hadits, Ijma' and Qiyas. See Alaidin Koto, *Ilmu Fiqh Dan Ushul Fiqh* (Jakarta: Raja Grafindo Persada, 2004), p. 160.

meaning contained in a set of *juz'īyyāt* laws based on the arguments of *syar'ī*. Therefore, in determining the *maslahah*, it is required a criterion to limit the generality of the *maslahah* contained in the *juz'īyyāt* laws and then relates it to the *tafsīlī* verses of these laws, so that the generality combination of *maslahah* with its *juz'īyyāt* is perfect.¹⁰ The existence of changes in law is due to changes of *maslahah* in society.¹¹ However, not all forms of *maslahah* can be used as an argument to change a law, particularly in religious law.

According to *usūl fiqh* theory, specifically seen from religious recognition, the *maslahah* is divided into three types. First, *Maslahah al-Mu'tabarah*, or a *maslahah* which is explicitly recognized by religion and its existence has been determined based on the verses of the Al-Qur'an, hadīts, *ijmā'*, or *qiyās*. This type of issues is an essential *maslahah* that returns to the five principles of shari'ah, namely *hifzh al-dīn*, *hifzh al-nafs*, *hifzh al-aql*, *hifzh al-nasl*, and *hifzh al-māl*. This category is the true problem and can be the basis of analogy (*qiyās*).¹²

Secondly, *Maslahah al-Mulghah*, a *maslahah* which do not recognize by religion, is even rejected and considered vanity by religion. It is considered as a *maslahah* by the mind, nonetheless, it is rejected since it contradicts the *naṣ* (Qur'an's verse).¹³

Thirdly, *Maslahah al-Mursalah*, or a *maslahah* which religion does not prescribe the law to make it happen, also no evidence shows the recognition or cancellation.¹⁴

Furthermore, the *maslahah* in terms of strength and influence is categorized into three types. The *first* is *Maslahah Dharūriyyah*, or all things that become the joints of the existence of human life that must

¹⁰ Muhammad Sa'īd Ramadhān al-Būthī, *Dhawābiḥ Al-Maslahah Fī al-Syarī'ah al-Islāmiyyah*, pp. 115–16.

¹¹ Muḥammad Musthafā Syalabī, *Ta'līl Al-Ahkām*, (Beirut: Dār al-Nahdhah al-'Arabīyyah, 1981), p. 307.

¹² Abū Hāmid Muhammad al-Ghazālī, *Al-Mustasfā Min 'Ilm al-Usūl* (Baghdād: Musannā, 1970), p. 415.

¹³ Sa'd ibn Nāsir al-Syatsrī, *Syarh Qawā'id Al-Usūl Wa Ma'āqid al-Fusūl*, 1st edn (Riyad: Dār Kunūz Isybīliyyā, 2006), p. 351.

¹⁴ 'Abdul Wahhāb Khalāf, *Ilm Usūl Fiqh Wa Khulasah Al-Tasyrī' al-Islāmī*, (Kairo: Dār al-Fikr al-'Arabīy, 1996), p. 80.

exist for their benefit through the care and maintenance of the five principles of shari'ah (*maqāsid al-syarī'ah*)¹⁵.

The *second* is *Maslahah Hājiyyah*, everything that is needed by humans to eliminate difficulties and reject all obstacles. It means, that the absence of this aspect of *hājiyyah* does not threaten the existence of human life, but only causes difficulties¹⁶.

The last is *Maslahah Tahsiniyyah*. It means that if this aspect is not realized, then human life will not be threatened as chaotic and dangerous as if the *dharūriyyah* aspect is not realized, and also it will not bring distress as the aspects of *hājiyyah* are not fulfilled. However, the absence of this aspect will cause a condition that is less harmonious in the view of common sense and customs, violates propriety, manners, and causes significant difficulties in human life. This type of *maslahah* occupies the level of tertiary needs.¹⁷

Maslahah in terms of its content is divided into two kinds.¹⁸ First, *Maslahah al-Āmmah*, or *maslahah* related to the interests of many people. The public benefit does not mean for the benefit of all people, but can be in the form of the interests of the majority of the people or most people. Like keeping the country from enemies and people from division. Second, *Maslahah al-Khāssah*, *maslahah* related to the interests of certain people. Like the rules in socializing (*mu'amalah*) both in the household or in a contract (buying and selling, etc.).

According to Al-Būthī, the ultimate *maslahah* must be supported by other sharia propositions or at least do not contradict the *syari'ah* verse. Otherwise, it cannot be called as a *maslahah*, since the value of the *maslahah* will disappear by itself. Al-Būthī argues that the independent mind will not be able to find the benefit of humans in particular matters.¹⁹

¹⁵ Muhammad Sa'id Ramadhān al-Būthī, *Dhawābith Al-Maslahah Fi al-Syarī'ah al-Islāmiyyah*, p. 119.

¹⁶ Wahbah al-Zuhailī, *Usūl Al-Fiqh al-Islāmī*, (Damaskus: Dār al-Fikr, 1986), pp. 1022–23.

¹⁷ Wahbah al-Zuhailī, *Usūl Al-Fiqh al-Islāmī*, p. 1023.

¹⁸ Wahbah al-Zuhailī, *Usūl Al-Fiqh al-Islāmī*, p. 1028.

¹⁹ Muhammad Sa'id Ramadhān al-Būthī, *Dhawābith Al-Maslahah Fi al-Syarī'ah al-Islāmiyyah*, p. 117.

To be considered as an essential *maslahah*, al-Būthī limits it to five conditions, the first is related to the disclosure of the universal meaning of the *maslahah*, while the other four is limited only by connecting to detailed legal arguments.²⁰ The five conditions are as follows: (1) *Maslahah* must be within the scope of the objectives of the Shari'a; (2) *Maslahah* does not contradict Al-Qur'an; (3) *Maslahah* does not conflict with al-Sunnah; (4) *Maslahah* does not conflict with Qiyās; (5) *Maslahah* does not contradict the higher *maslahah*.

Theory of Gender Equality in Islamic Perspective

Generally speaking, gender is defined as a form of differentiating the roles and responsibilities of men and women as the result of socio-cultural construction that is not permanent, can be learned, and can be exchanged according to time, place, and certain cultures from one sex to another.²¹

Gender following the above definition is contrary to the teachings of Islam, because the division of tasks, roles, and responsibilities of women and men both in the family (domestic space) and in the community (public space) is based on Allah's revelation, and not all of them are cultural products. Some roles change, but the rest of the roles remain unchanged. What determines the role is not culture, but Allah's revelation, which has been exemplified by the implementation of the Prophet Muhammad. The reason is that Islam is indeed a religion of revelation, which teachings are determined based on Allah's revelation, not based on the social or cultural consensus of a particular society.

Gender equality is defined generally as the equality of conditions and positions for women and men to get the opportunity to access, participate, control, and obtain development benefits in all areas of life.

Additionally, this common concept of equality also contradicts the Islamic concept of equality, where men and women cannot be equalized

²⁰ Muhammad Sa'īd Ramadhān al-Būthī, *Dhawābiṭh Al-Maslahah Fī al-Syarī'ah al-Islāmiyyah*, p. 118.

²¹ Dina Martiany, 'Pro Dan Kontra RUU Kesenjahteraan Dan Keadilan Gender (KKG)', *Info Singkat Kesejahteraan Sosial*, 2012, p. 10 <https://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-IV-10-II-P3DI-Mei-2012-62.pdf>.

in all respects. Adian Husaini also considered that gender equality when understood in this way would be a form of oppression and tyranny against Muslims who obey the teachings of their religion.²²

The Islamic religion, which existed since 15 centuries ago, has substantially eradicated discrimination between men and women. Islam views women as having the same position as men, even if there are differences, then it is due to the main functions and tasks that religion imposes on each sex so that differences do not result in one feeling superior to the other, rather they complement and help each other.²³ This is confirmed in the word of Allah SWT in Surah Al-Nisa' verse 32 which reads:

وَلَا تَتَمَنَّوْا مَا فَضَّلَ اللَّهُ بِهِ بَعْضَكُمْ عَلَى بَعْضٍ ۚ لِلرِّجَالِ نَصِيبٌ مِّمَّا اكْتَسَبُوا وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا اكْتَسَبْنَ ۚ وَسَأَلُوا اللَّهَ مِنْ فَضْلِهِ ۗ إِنَّ اللَّهَ كَانَ
بِكُلِّ شَيْءٍ عَلِيمًا

And do not be jealous of what Allah has given to you more than any other part. (Because) for men, there is a part of what they are trying to do, and for women (even) there is a part of what they are trying to do, and ask Allah for some of His gifts. Indeed, Allah is All-Knowing everything.

Etymologically, the term gender equality consists of two syllables, the first is equality, derived from the word equal, and the second is the word of gender. In terms of etymology, the word “equal” or “same” comes from the Arabic word *kafā'ah*, usually interpreted as proportional or same, as the *fulan* is equal to the *fulan*, meaning comparable. While in terms of terminology, according to the majority of fuqahā', equality is comparable in terms of religion, freedom, and profession.²⁴ This explanation is in the chapter “Equality (*Kafā'ah*) in Marriage”. The scholars themselves have examined the equivalent words contained in the Qur'an, and there are

²² Dina Martiany, 'Pro Dan Kontra RUU Kesetaraan Dan Keadilan Gender (KKG)', p. 10.

²³ Huzaemah Tahido Yanggo, *Fikih Perempuan Kontemporer*, (Bogor: Ghalia Indonesia, 2010), p. 83.

²⁴ Wahbah Al-Zuhaili, *Al-Fiqh Al-Islāmī Wa Adillatuh*, 2nd edn (Suriah: Dar al-fikr, 1985), ix, pp. 213–14.

only principles of equality, not concepts, terms, and ideological values of gender equality.²⁵ The principle of equality found in the Qur'an includes: (a) In terms of service, Islam does not differentiate between men and women in service, the difference being the measure is only devotion; (b) In terms of the status of events, Al-Qur'an explains that women and men were created by Allah in the same degree; (c) In terms of being tempted, in Al-Qur'an it is stated that the temptations and seduction of the devil apply to men and women as does Adam and Eve'; (d) In terms of humanity, Al-Qur'an rejects the view that distinguishes men and women, especially in the field of humanity; (e) In terms of ownership and management of assets, Al-Qur'an abolishes all traditions imposed on women in the form of prohibitions or restrictions on the right to spend their possessions; (f) In terms of inheritance, Al-Qur'an gives inheritance rights to men and women; (g) Legal equality regarding divorce.

From the explanation earlier, it can be concluded that Islam has placed women in such a noble position far from the word of oppression as well as stated by the author regarding the rights granted by Islam to women who uphold their dignity and honor. Islam also does not differentiate between men and women but for several conditions and the presence of certain factors such as differences in abilities, circumstances, and innate traits that exist in the personalities of both men and women. However, this distinction is not a discriminatory factor but a noble and just nature that intends to put something in its place and accordance with its content/portion.

Judge's Legal Considerations in Determining the Minimum Age of Marriage in Constitutional Court Decision No. 22 / PUU-XV / 2017

As the stated argument above, this case is intended for a petition on judicial review article 7 (paragraph 1) of Law no. 1 of 1974 concerning Marriage. The author aimed to examine the basic considerations of the court in deciding cases in the decision of the Constitutional Court Number 22/PUU-XV/2017. The description of the case is mentioned as

²⁵ Huzaemah Tahido Yanggo, *Pandangan Islam Tentang Gender* (Surabaya: Risalah Gusti, 1996), p. 156.

follows: *First*, the existence of differences in the minimum age of marriage has led to discrimination and real losses for women. *Second*, there is the latest research that states that the age of 16 years is susceptible to health problems, especially in the reproductive organs, namely during the process of pregnancy. *Third*, the difference in the minimum age of marriage has led to discrimination against girls in obtaining the right to education. *Fourth*, the difference in the minimum age of marriage has also caused girls who marry at the age of children to be at risk of child exploitation. *Fifth*, there is an equal age of minimum marriage for men and women in various countries.

Analysis of Theory of Maslahah by Sa'īd Ramadhān al-Būthī Against the Minimum Age of Married for Women in the Constitutional Court Decision No. 22/PUU-XV/2017

When looking at the previous discussion, the equalization of the minimum age of marriage for men and women in the Constitutional Court's decision is classified as *maslahah al-mulghāh*, *maslahah tahsīniyyah*, and *maslahah al-khāssah*. It is called *maslahah al-mulghāh*, as it is not recognized by religion, although it is considered *maslahah* by the mind, it is rejected because it contradicts the *Nas*. It is called *maslahah tahsīniyyah* because the absence of this aspect does not cause human life to be threatened with chaos and danger and finally is called *maslahah al-khāssah* because it is only related to the interests of certain people.

From the explanation above, the researcher sees that the judges' legal considerations in the Constitutional Court's ruling are not included in the category of essential *maslahah*, because their status is still classified as the *maslahah al-mulghāh*, *maslahah tahsīniyyah*, and *maslahah al-khāssah*, where their existence is in contradiction with the *nas* and its absence do not result on the chaotic and dangerous, of human life, plus, the benefits are only related to certain people. This can be seen in rural communities or the children of community leaders and *kiai*, especially in Java, who has got into a marriage at a young age and can live happily far from the things that are feared by the applicants for judicial review in the reasons which are then used as legal considerations in the Constitutional Court's decision.

The detailed explanation related to the Constitutional Court's decision from the perspective of the five conditions of al-Būthī ijtihad results to be considered as an essential issue is as follows: *First, Maslahah* must be within the scope of *Maqāsid al-syarī'ah* which revolves around five cases namely *hifzh al-dīn* (preserving religion), *hifzh al-nafs* (preserving the soul), *hifzh al-'aql* (preserving reason), *hifzh al-nasl* (looking after descendants), and *hifzh al-māl* (looking after property).

1. When looking at the side of *hifzh al-din*, then there is a change in the minimum age of marriage for women to 19 in the Constitutional Court's decision No. 22/PUU-XV/2017, it can be understood that the government has made it difficult for its citizens who are physically and mentally prepared to get married although they are still below the specified limit. This is certainly different from Islamic law which calls on people to get married when they feel there is a capacity. This is as the words of the Prophet Muhammad.

عَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ قَالَ قَالَ لَنَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: (يَا مَعْشَرَ الشَّبَابِ مَنِ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ فَإِنَّهُ أَغْضُ لِلْبَصَرِ وَأَحْصَنُ لِلْفَرْجِ وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وَجَاءٌ).²⁶

From 'Abdullah bin Mas'ūd said, Rasulullah SAW said to us, "O young generation, those of you who have a family get him married because he can subdue his views and support the campaign. Anyone incapable seeks fasting because he can support you. (H.r. Muslim)

2. In terms of *hifzh al-nafs*, the existence of the Constitutional Court's decision related to increasing the minimum age of a woman to 19 years, has provided the protection and safety of the soul of his wife and offspring later. Because marriages carried out at a young age, especially teenagers give an impact on reproductive health.
3. In terms of *hifzh al-'aql*, the Constitutional Court's decision is considered to give a right for women to get the same opportunities

²⁶ Muslim bin Hajjāj, *Sāhih Muslim*, 4th edn (Jeddah: Dār al-Minhāj, 2003), p. 128.

as men in pursuing a high level of education, because marrying a child at school-age often cause the loss of their right to education as mandated in Article 28C paragraph (1) of the 1945 Constitution of Republic of Indonesia.

Preservation of mind is not merely by maintaining the ability of reason to not becoming crazy or drunk, but the fulfillment of intellectual rights for every individual in society is also included in the category of maintenance of mind from ignorance'.²⁷

4. In terms of *hifzh al-nasl*, the Constitutional Court's decision was considered to help reduce cases of infant death and maternal death, because pregnancy under the age of 19 years has a high risk, including difficulties during pregnancy, illness, disability, maternal / infant death. BKKBN also explained that the age below 18 years would indicate some health problems such as cervical cancer in the future.
5. In terms of *hifzh al-māl*, the existence of the decision was also considered to have supported in regulating economic or financial aspects in the family.

However, in the researcher's point of view, the above reasons are the only concern, while many women get married at a young age and their lives run normally without any disturbance from the risks of concern as explained above.

Secondly, Maslahah does not contradict the Qur'an. As explained earlier that al-Būthī (based on the analysis of the author in his statement) disagrees with the equalization of the minimum age limit between men and women in marriage, because men and women have their respective functions commonly referred to as fate or natural tendency, so it demands a difference. This notion is according to the word of Allah SWT in surah al-Nisā' verse 34 which means:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَنِيئٌ حَفِظَتْ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ

²⁷ Jamāluddīn 'Athiyyah, *Nahwa Tāfīl Maqāsid Al-Syari'ah* (Damaskus: Dār al-Fikr, 2001), p. 149.

Men are leaders for women, because Allah has exalted one of them (men) over another (women), and because they (men) have spent part of their property. Therefore, a godly woman, who is obedient to God, takes care of herself when her husband is not there...

According to the above verse, it can be understood that there are differences between men and women. Allah SWT exceeds men over women, meaning that he (men) will later become her leader and become a judge who can lead his wife back when she (wife) is not in the path of Allah SWT.²⁸ Researchers assess the existence of differences in the minimum age of marriage for men and women is a form of law that is appropriate for the fate of both. Considering the sacredness of marriage, a rule is required to prepare a husband and wife on their ability to undergo the relation, one of which is to provide different opportunities between men and women to realize the purpose of marriage.

Thirdly, Maslahah does not contradict al-Sunnah. After experiencing a trace, the author did not get the *hadīts* that contain and support the equalization of the age of marriage either explicitly or implicitly, on the contrary, it can be found for the adversaries who mentioned differences in the minimum age for marriages for men and women, as in the following *hadīts*:

عَنْ جَابِرِ بْنِ عَبْدِ اللَّهِ رَضِيَ اللَّهُ عَنْهُمَا قَالَ: هَلَكَ أَبِي وَتَرَكَ سَبْعَ بَنَاتٍ أَوْ تِسْعَ بَنَاتٍ فَتَزَوَّجْتُ امْرَأَةً ثَيِّبًا فَقَالَ لِي رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: تَزَوَّجْتَ يَا جَابِرُ؟ فَقُلْتُ نَعَمْ، فَقَالَ: بِكْرًا أَمْ ثَيِّبًا؟ قُلْتُ: بَلْ ثَيِّبًا، قَالَ: فَهَلَّا جَارِيَةً تُلَاعِبُهَا وَتُلَاعِبُكَ وَتُضَاحِكُهَا وَتُضَاحِكُكَ، قَالَ فَقُلْتُ لَهُ: إِنَّ عَبْدَ اللَّهِ هَلَكَ وَتَرَكَ بَنَاتٍ، وَإِنِّي كَرِهْتُ أَنْ أَجِيئَهُنَّ بِمِثْلِهِنَّ، فَتَزَوَّجْتُ امْرَأَةً تَقُومُ عَلَيْهِنَّ وَتُضِلُّهُنَّ. فَقَالَ: بَارَكَ اللَّهُ لَكَ.²⁹

²⁸ Al-Sayyid Mahmūd al-Ālūsī, *Rūḥ Al-Ma'ānī Fī Tafsīr Al-Qur'an al-Azhīm Wa al-Sab' al-Matsānī*, 2 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1994), p. 41.

²⁹ Muslim bin Hajjāj, *Sāhiḥ Muslim*, p. 176.

From Jābir bin 'Abdillāh said: My father died, and left 7 or 9 daughters, and I will marry a widow, then the Messenger of Allāh SA said to me: "Have you married O Jir? then I will answer: true, Rasulullāh SAW asked: girl or widow? I replied: widow, Rasulullāh SAW said: "Is not a girl, so that you can joke with her ?, Then I will answer: Indeed 'Abdullāh (father) has died and left many daughters, and in fact, I am reluctant to have a wife like them (virgins), then I will marry a widow so that she can care for her, then the Messenger of Allāh said: "May Allāh give blessings to you". (H.r. Muslim

From the above *hadīts*, it can be understood that there is an implicit suggestion to the husband to look for a young wife (girl) to maintain family harmony. That a young wife (girl) can add love³⁰ and intimacy.³¹

Fourthly, Maslahah does not contradict Qiyās. Al-Būthī argues that every qiyās will certainly consider the problem, but not every maintenance of *maslahah* is called *qiyās*. After searching for legal issues of marriages that were resolved by using qiyās, researchers did not find qiyās laws that conflicted with an increase in the minimum age of marriage for women.

Fifthly, the maslahah is not in conflict with the more urgent *maṣlahah*. When looking at the fifth requirement here, the researcher considers that the Constitutional Court's decision on increasing the minimum age of marriage for women is included in the category of *maṣlahah tahsīniyyah*, since the absence of this aspect does not cause human life to be threatened with chaos and danger. Because it is a *maṣlahah tahsīniyyah*, it should not conflict with a more urgent *maṣlahah*, namely the *maṣlahah dharūriyyah*.

The thing that is classified as the *maṣlahah dharūriyyah* is to keep from falling into adultery. The existence of the Constitutional Court's ruling on increasing the age limit of marriage gives the impression of delaying marriage to adolescents who already feel able to build a marriage relationship because the age is still below the minimum limit set. The

³⁰ 'Alī al-Qārī, *Syarh Musnad Abi Hanīfah*, 1 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1995), p. 254.

³¹ Abū Hāmid al-Ghazālī, *Ihya' 'Ulūm al-Dīn*, 1 (Beirut: Dār al-Ma'rifah, 2010), p. 394.

existence of this Constitutional Court ruling is very dangerous because it can lead women to adultery since sex is a human need.

Regarding the results of the above analysis, it can be concluded that the equalization of the minimum age of marriage for men and women in the Constitutional Court's decision is not a *maslahah*. Considering that the five conditions cannot be fulfilled for a *maslahah* to be considered as an essential *maslahah* in al-Būthī -ī's perspective.

Analysis of Gender Equality Theory in Islam Against the Minimum Age in Marriage for Women in Constitutional Court Decision No.22/PUU-XV/2017

Generally, gender is defined as a form of differentiating the roles and responsibilities of men and women was the result of socio-cultural construction that is not permanent and can be learned, and can be exchanged according to time, place, and certain cultures from one sex to another.³²

As the author explained at the beginning of the discussion, that gender in this sense is contradicted to the teachings of Islam, because the division of tasks, roles, and responsibilities of women and men both in the family and in society is based on the revelation of Allah, and not all of them are a cultural product. Some roles change, and others remained unchanged. What determines the role is not culture, but Allah's revelation, which has been exemplified by the implementation of the Prophet Muhammad. This is because Islam is indeed a religion of revelation, whose teachings are determined based on Allah's revelation, not based on the social or cultural consensus of a particular society.

Gender equality is defined generally as the equality of conditions and positions for women and men to get the opportunity to access, participate, control, and obtain development benefits in all areas of life.

This concept of equality also conflicted with the concept of equality in Islam, where men and women cannot be equalized in all respects. Adian Husaini also considered that gender equality when understood in

³² Dina Martiany, 'Pro Dan Kontra RUU Kesenjangan Dan Keadilan Gender (KKG)', p. 10.

this way would be a form of oppression and tyranny against Muslims who obey the teachings of their religion.³³

Following the words of Adian Husaini, in one of his books, Al-Būthī argues that Allah SWT created His servants, both men, and women according to His will, which gives them their characteristics. Allah SWT knows that women's pleasures are different from men's pleasures. Even so with the advantages and characteristics of men, which is different from the strengths and characteristics of women. Therefore, rules are distinguished according to differences in their character and love.³⁴

Prof. Huzaemah Tahido Yanggo in one of his books also explained that the Islam that was present in the 15th century ago, particularly in his teachings had substantially eliminated discrimination between men and women. Islam views women as having the same position as men, even if there are differences, then it is due to the main functions and tasks that religion imposes on each sex so that differences do not result in one feeling superior to the other, rather they complement and help each other.³⁵

Al-Qur'an in addressing differences between men and women also recognizes the distinction between men and women, but the difference is not discrimination that benefits one party and harms the other party. The distinction is intended to support the basic mission of the Qur'an, namely the creation of a harmonious relationship based on compassion (*mawaddah wa rahmah*) in the family environment, as a forerunner to the realization of an ideal community in a country that is peaceful and full of Allah's forgiveness (*baladun thayyibatun wa rabbun ghafūr*). This can all be realized when there is a pattern of balance and harmony between the two.³⁶

From the description above, it is noticeable that the concept of gender equality in Islam looks more at the aspect of fulfilling the rights of each individual based on the revelation of Allah SWT brought by the Prophet Muhammad.

³³ Dina Martiany, 'Pro Dan Kontra RUU Ksetaraan Dan Keadilan Gender (KKG)'

³⁴ Said Ramadhan al-Buthi, *Perempuan Dalam Pandangan Hukum Barat Dan Islam*, p. 15.

³⁵ Huzaemah Tahido Yanggo, *Fikih Perempuan Kontemporer*, p. 83.

³⁶ Nasaruddin Umar, *Argumen Kesetaraan Jender Perspektif Al-Qur'an* (Jakarta: Paramadina, 1999), p. 305.

Based on the description above, the author considers that the Constitutional Court's decision No. 22/PUU-XV/2017 mentioned that: *"The reason for raising the minimum age of marriage for women is to eliminate acts of discrimination in terms of fulfilling the constitutional rights of citizens. This is because the petitioners argue that the existence of article 7, paragraph 1 No. 1 The Marriage Law of 1974 which has distinguished the minimum age of marriage between men and women are considered to have discriminated against women and lead to gender inequality, so the need for equalization of age"* is contrary to the concept of gender equality in Islam. Since the religion of Islam recognizes the differences between men and women. The existence of this difference requires a difference in age limits in marriage (as the Marriage Law before it was revised) to maintain family harmony and foster love as expressed by Imam Ghazali in the book of *Ihyā' 'Ulūm al-Dīn*.

The difference could not be interpreted as an act of discrimination, because there are certain factors behind the distinction, as a consequence, equalization is frequently taken place to have an impact on discrimination. Like the equalization of the age limit of marriage, the writer considers that this discriminates against women because it violates the nature of being a woman whose process of maturation is faster than men. Therefore, differences in age at marriage are very compatible with gender equality in Islam.

Conclusion

Judge's legal considerations in canceling article 7 paragraph (1) of Law No. 1 of 1974 related to the minimum age of marriage based on several things, namely: Related to acts of discrimination: The previous ruling namely the ruling No. 028-029/PUU-IV/2006 and also article 1 number 3 of Law no. 39 of 1999 concerning Human Rights. Health aspects: Law no. 35 of 2014 concerning Child Protection. Educational aspects: Article 28 C of the 1945 Constitution of Republic of Indonesia (*UUD 1945*) and Article 31 paragraph 2 of the *UUD 1945*. Related to the exploitation of children: Number 4 letter d of the *UUD 1945*, article 26 paragraph (1) and Article 13 of the Child Protection Law. Minimum age requirement for marriages in various countries: Transforming our world document: the 2030 agenda for sustainable development goals

(SDGs), Policy demands related to marriage age: Article 16 paragraph 1 CEDAW.

In the perspective of the theory of *maslahah* by Sa'īd Ramadhān al-Būthī, it shows that the alignment of the minimum age of marriage between men and women in the Constitutional Court Decision No. 22/PUU-XV/2017 is not a benefit. Considering the failure to fulfill the five conditions, something can be considered as an essential problem, that is, the problem must be within the scope of the objectives of the *shari'ah* (*hifzh al-dīn*, *hifzh al-nafs*, *hifzh al-'aql*, *hifzh al-nasl*, *hifzh al-māl*), does not contradict with the Qur'an, al-Sunnah, Qiyās, and does not contradict a more urgent *maslahah*.

The term gender equality in Islam shows that the Constitutional Court Decision No. 22/PUU-XV/2017 concerning the equalization of the age limit of women and men is not in line with the theory, this is because it has violated the nature of women which incidentally is different from men. Therefore, what is required is a distinction in the age restriction instead of leveling which causes discrimination because it does not give rights to each of the women and men following their nature.

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