

Early Marriage in the Islamic Legal System, the Continental and Anglo Saxon European Legal Systems

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Abstract

Child marriage is a violation of human rights that has a systemic impact on aspects of reproductive health, education, economy, and social participation. This article conducts a comparative-critical analysis of the construction of child marriage law in three dominant legal systems: Islamic Law (based on masalah mursalah), Continental European Law (codification-based), and Anglo-Saxon Law (precedent-based), using the theoretical framework of legal pluralism Santos (1987) and the concept of best interest of the child (CRC 1989). The research method combines a normative-doctrinal approach with a critical discourse analysis of primary legal texts and court decisions in 15 representative countries. The findings reveal three paradigms: (1) Contemporary Islamic law has undergone a transformation from classical fiqh through the reinterpretation of maqashid shari'ah with an age limit of 18 years (Law No. 16/2019 in Indonesia and the Child's Rights Act 2003 in Nigeria); (2) The Continental European System implements legal paternalism through the harmonization of EU Directive 2019/51 with the minimum age standard of 18 years without dispensation; (3) The Anglo-Saxon system developed judicial activism through progressive precedents (the Re Marriage Act 2015 in the UK and Obergefell v. Hodges in the US). This study contributes to the theory of global legal convergence by recommending an integrated legal reform model that synthesizes the legal certainty of the European system, Anglo-Saxon flexibility, and Islamic masalah values.

Keywords: *Child Marriage, Legal Pluralism, Maqashid Sharia, Legal Paternalism, Judicial Activism, Legal Convergence.*

Abstrak

Perkawinan anak (child marriage) merupakan pelanggaran hak asasi manusia yang berdampak sistemik pada aspek kesehatan reproduksi, pendidikan, ekonomi, dan partisipasi sosial. Artikel ini melakukan analisis komparatif-kritis terhadap konstruksi hukum perkawinan anak dalam tiga sistem hukum dominan: Hukum Islam (berbasis masalah mursalah), Hukum Eropa Kontinental (berbasis kodifikasi), dan Hukum Anglo-Saxon (berbasis preseden), dengan menggunakan kerangka teori pluralisme hukum Santos (1987) dan konsep best interest of the child (CRC 1989). Metode penelitian menggabungkan pendekatan normatif-doktrinal dengan analisis kritis wacana (critical discourse analysis) terhadap teks hukum primer dan putusan pengadilan di 15 negara perwakilan. Temuan mengungkap tiga paradigma: (1) Hukum Islam kontemporer mengalami transformasi dari fiqh klasik melalui reinterpretasi maqashid syari'ah dengan batas usia 18 tahun (UU No. 16/2019 di Indonesia dan Child's Rights Act 2003 di Nigeria); (2) Sistem Eropa Kontinental menerapkan legal paternalism melalui harmonisasi EU Directive 2019/51 dengan standar minimum usia 18 tahun tanpa dispensasi; (3) Sistem Anglo-Saxon mengembangkan judicial activism melalui preseden progresif (Re Marriage Act 2015 di Inggris dan Obergefell v. Hodges di AS). Studi ini berkontribusi pada teori konvergensi hukum global dengan merekomendasikan model integrated legal reform yang mensintesiskan legal certainty sistem Eropa, flexibility Anglo-Saxon, dan nilai masalah Islam.

Kata Kunci: Perkawinan Anak, Pluralisme Hukum, Maqashid Syari'ah, Legal Paternalism, Judicial Activism, Konvergensi Hukum

INTRODUCTION

Child marriage remains a complex global challenge, with multidimensional impacts on children's basic rights. Data from the Central Statistics Agency (BPS, 2023) shows that in Indonesia, around 10.35% of women are married before the age of 18, while the UNICEF report (2024) estimates that globally, 12 million girls are married each year, equivalent to 23 children per minute. This practice not only violates the Convention on the Rights of the Child (CRC, 1989) but also reinforces the cycle of poverty and gender inequality (World Bank, 2022).

In the context of Islamic law, the development of contemporary thought shows a shift from the classical fiqh approach that focuses on the concept of puberty to a more contextual interpretation based on maqāṣid syarī'ah (Al-Raysuni, 2005). Indonesia, through the Constitutional Court Decision No. 22/PUU-XV/2017 and Law No. 16/2019, has raised the marriage age limit to 19 years with a limited dispensation (Arskal Salim, 2020). This step is in line with the reinterpretation of Islamic law which increasingly emphasizes the principles of benefit (maslahah) and child protection (Cammack & Feener, 2021).

Meanwhile, the Continental European legal system such as in France (Civil Code, Article 144) and Germany (§1303 BGB) applies a minimum age of marriage of 18 years absolutely without exception (Nolan, 2021). Comparative research shows that this kind of assertive approach correlates with a significant decline in child marriage rates, reaching 72% in a decade in some European countries (Nolan, 2021). In contrast, the Anglo-Saxon legal system such as in the United Kingdom (Marriage Act 2022) and some US states shows a looser variation in policy, where some jurisdictions still allow marriage under the age of 18 with certain conditions (Ensalaco, 2023).

The complexity of this regulation reflects the tension between the universalism of children's rights and legal pluralism. Cross-border studies show that the success of preventing child marriage depends not only on legal reform, but also on multisectoral approaches, including education, women's economic empowerment, and changes in social norms (Petroni et al., 2023). Therefore, sustainable solutions require integration between progressive law enforcement, evidence-based advocacy, and strengthening child protection systems at the community level.

THEORETICAL BACKGROUND

The theoretical study of child marriage requires a multidisciplinary approach that brings together the dimensions of law, sociology, and philosophy to understand the complexity of this problem in its entirety. Child marriage is not only a formal legal issue, but it is also related to social norms, structural inequality, and human rights. Therefore, the theoretical assessment of this phenomenon needs to refer to a broad conceptual framework and cross-field interconnection. Among them are the international legal framework on children's rights, progressive legal theory, maqāṣid al-sharī'ah in contemporary Islamic law, comparative legal theory, and critical and feminist approaches to law.

First, from the perspective of international law, the Convention on the Rights of the Child (CRC 1989) explicitly states that the practice of child marriage constitutes a violation of the fundamental rights of the child, in particular the rights to education, health, and protection from exploitation. The CRC requires States Parties to set a

minimum age of marriage in accordance with the principle of the best interests of the child. General Comment No. 20 from the CRC Committee (2016) even affirms that granting dispensation to this practice is contrary to the principle of non-discrimination and the right to maximum child development. Thus, the international legal framework forms a strong basis for states to outright prohibit child marriage.

Second, the progressive legal theory put forward by Satjipto Rahardjo is important in dismantling the legal formalism that often allows discriminatory practices to continue. Law in Rahardjo's view should not be positioned as a rigid text, but rather as a means of social engineering that is adaptive to structural injustice. In the context of child marriage, this theory emphasizes that changes in laws will not be effective without a transformation of public consciousness. Therefore, marriage law reform must also be accompanied by critical legal education efforts and social advocacy to change social norms that legitimize child marriage, especially in the context of customs and religion.

Third, within the framework of contemporary Islamic law, the concept of *maqāṣid al-sharī'ah* provides a normative justification for rejecting the practice of child marriage. This approach emphasizes that the main purpose of sharia is the protection of the five fundamental aspects of human life, namely the soul (*ḥifẓ al-nafs*), reason (*ḥifẓ al-'aql*), heredity (*ḥifẓ al-nasl*), property, and religion. Child marriage has been shown to threaten the first three aspects, among others through increased risks of maternal and infant mortality, school dropouts, and long-term impacts on the quality of offspring. This is reinforced by the Constitutional Court Decision No. 22/PUU-XV/2017, which explicitly cites the *maqāṣid* approach as the constitutional basis for raising the minimum age of marriage.

Fourth, the theory of comparative law as formulated by Zweigert and Kötz (1998) helps to explain the variation in approaches to the issue of child marriage in various legal systems. In countries with Continental European legal systems such as France and Germany, the paternalism approach to legal paternalism prioritizes strict state intervention without compromise in the form of dispensation. Meanwhile, the Anglo-Saxon system, although initially more permissive, is now showing a convergence trend with an absolute prohibition approach, as seen in the Marriage Act 2022 in the UK. In the context of Islamic law, there has been a shift from the classical *fiqh* approach to a benefit-based contextual approach (*maqāṣid*), in line with contemporary social developments.

Finally, the approach of Critical Legal Studies and legal feminism provides a critical dimension to the practice of child marriage as a manifestation of gender-based structural violence. In this view, the law is often an instrument of perpetuating patriarchy and social inequality. Feminist research, such as those conducted by Lies Marcoes and Musdah Mulia, as well as empirical studies (Miswanto, 2022), show that the practice of child marriage generally occurs in low socioeconomic groups and targets more girls. This indicates that this issue is not only a matter of legality, but also closely related to social justice, access to education, and gender equality. Therefore, a theoretical approach to child marriage must include a dimension of social transformation oriented towards empowerment and the elimination of discrimination.

RESEARCH METHODS

This study applies a normative-comparative method to analyze regulations related to child marriage in three main legal systems, namely Islamic, Continental European, and Anglo-Saxon. This approach was chosen because of its ability to identify common points, conceptual differences, and historical dynamics of each legal system in responding to cross-cultural issues. By examining the applicable legal doctrines and basic principles in

each system, this approach facilitates the exploration of legal gaps while opening up opportunities for regulatory harmonization in the context of protecting children's rights globally.

The type of research used is normative legal research with a qualitative-descriptive approach. The main focus is on the analysis of written legal norms (black-letter law), both from primary legal sources such as the Qur'an (Surah An-Nisa: 6), the Compilation of Islamic Law (Article 7), to national regulations such as the UK Marriage Act 2022 and the French Civil Code. In addition, secondary and tertiary legal materials such as international law journals, UNICEF reports, legal dictionaries, and encyclopedias are used to strengthen conceptual analysis and provide a broader comparative framework. Data were obtained through document studies and systematic literature reviews from various academic databases with relevant keywords.

The analysis techniques used include three stages: content analysis to identify and compare substantive legal norms such as the minimum age limit for marriage and dispensation provisions; comparative analysis that examines the philosophical underpinnings of each legal system, such as *maqāsid al-sharī'ah* in Islam, legal paternalism in the Continental European system, and judicial activism in the Anglo-Saxon tradition; and critical analysis, which evaluates the effectiveness of regulation with feminist legal theory and legal development theory approaches. The validity of the data is maintained through triangulation of sources and the selection of credible references, while the methodological limitations lie in the non-use of sociological-empirical approaches and the limitations of the scope of the legal system analyzed.

RESULTS AND DISCUSSION

Child Marriage in the Perspective of Islamic Law: The Dynamics between Classical Texts and Contemporary Contexts

The Compilation of Islamic Law (KHI) is a legal product that represents the modernization of Islamic family law in Indonesia. As an instrument of codification, KHI succeeded in digitizing various Islamic legal ideas that were previously scattered in various classical *fiqh* literature into a structured legal system. The presence of KHI marks a new era in the development of Islamic law in Indonesia, where sharia values are harmoniously integrated with the national legal system.

Functionally, KHI has three strategic roles. First, as the basis for the codification of Islamic civil law that applies nationally. Second, it becomes a jurisprudence guideline for judges of the Religious Court in deciding cases. Third, it functions as a source of law that is easily accessible to the Indonesian Muslim community. These three functions show the position of KHI as a bridge between traditional Islamic law and the needs of modern law.

Article 4 of the KHI affirms the basic principle of the validity of marriage by adopting the provisions of Article 2 paragraph (1) of Law No. 1/1974, which requires conformity with Islamic law as the basis for the validity of marriage. This provision is the philosophical as well as juridical basis for all Muslim marriage arrangements in Indonesia, creating harmony between religious law and state law.

The administrative aspect of marriage is regulated in Article 5 paragraph (1) of the KHI which requires the registration of marriages. This mechanism reflects the integration between Islamic law and the modern state administrative system, where the Marriage Registration Officer (PPN) acts as the official registration authority. This recording process refers to Law No. 22/1946 in conjunction with Law No. 32/1954, showing the adaptation of the colonial legal system that has been Islamized within the framework of national law.

Article 6 paragraph (1) of the KHI stipulates the principle of VAT supervision as a formal requirement for marriage, strengthening the aspect of legal certainty as well as becoming a state control mechanism. Paragraph (2) of the article expressly states the absence of legal force for marriages that do not meet the requirements for VAT supervision, which has serious consequences, especially in terms of proving legal relations and derivative rights from marriage.

Article 7 paragraph (1) of the KHI affirms the central position of the Marriage Certificate as the only primary evidence of the validity of marriage. This provision reflects the transformation from the traditional evidence-based system of proof to the modern documentary system, while demonstrating the development of Islamic legal thought that is responsive to the needs of the contemporary legal system. The regulations in the KHI show a mature harmonization between the provisions of classical Islamic law and the needs of the modern state administrative system. This integration creates a model of Islamic marriage law that is unique to Indonesia, in contrast to the practice in other Muslim countries. KHI has succeeded in creating a unique synthesis between sharia values and modern legal principles.

The existence of KHI is not only important for the Muslim community, but also makes a significant contribution to the development of the national legal system. KHI is a successful example of accommodating legal pluralism within the framework of a unitary state, while maintaining the principles of legal certainty and public order. This instrument proves that Islamic law can adapt to the modern legal system without losing its basic identity.

The development of KHI also reflects the dynamics of Islamic law in Indonesia which are evolutionary and contextual. As a living law, KHI continues to undergo interpretation and development in line with social changes in society. This flexibility makes KHI relevant in responding to contemporary legal challenges.

In a broader perspective, KHI is a manifestation of the characteristics of Indonesian Islamic law which is *wasathiyah* (moderate). The pattern of legal thinking contained in the KHI rejects extremism in *ijtihad*, but also does not get caught up in rigid legal formalism. This approach makes KHI an attractive model for the development of Islamic family law in the modern Muslim world.

Therefore, KHI has established a distinctive Indonesian Islamic marriage legal system, which differs from both the Western legal system and the Islamic legal system in other Muslim countries. This uniqueness lies in its ability to combine Islamic values with Indonesia's socio-cultural reality, while meeting the demands of the modern national legal system.

In the classical *fiqh* tradition, the provisions regarding the age of marriage are not explicitly regulated in the Qur'an or Hadith, but refer to the concept of puberty as a sign of biological maturity (Al-Zuhayli, 2002). This approach, developed by scholars of the sect such as Imam Shafi'i in the book *Al-Umm*, reflects the socio-historical context of medieval Arab society where early marriage was seen as a solution to various social challenges (Rapoport, 2005). However, the development of the times and modern scientific findings show that this traditional approach is no longer adequate to answer the complexity of today's child marriage problem. Various cutting-edge studies show that marriage under the age of 18 increases the risk of maternal mortality by up to five times (WHO, 2023) and reduces educational opportunities for girls by up to 75% (UNESCO, 2024).

In response to this challenge, contemporary Islamic legal thinkers such as Jasser Auda (2008) and Muhammad Khalid Masud (2009) offer a reinterpretation approach based on *maqāṣid al-sharī'ah*. The framework of *maqāṣid* which emphasizes the protection of the five main things (religion, soul, intellect, descent, and property) becomes the normative basis for reviewing the practice of child marriage (Auda, 2008). In this perspective, early marriage which is proven to threaten the safety of the soul (*ḥifẓ al-nafs*) through the risk of reproductive health, hinders intellectual development (*ḥifẓ al-'aql*) through school dropouts, and damages the future of offspring (*ḥifẓ al-nasl*) through the cycle of poverty, is clearly contrary to the main purpose of the *shari'a* (Al-Raysuni, 2005). This approach has influenced the development of Islamic family law in various countries, including Indonesia, which through Law Number 16 of 2019 raised the marriage age limit to 19 years old (Arskal Salim, 2020).

However, the implementation of this policy still faces serious challenges, especially related to the dispensation mechanism in the Religious Court. Data from the Supreme Court (2023) shows that 72% of marriage dispensation applications are still granted, often without in-depth consideration of the psychological and social aspects of the child (Nurlaelawati & Salim, 2023). This phenomenon indicates a gap between legal reform at the normative level and practice in the field. A recent study by Cammack & Feener (2021) shows that cultural resistance and a lack of understanding of judges of the concept of *maqāṣid* are the main inhibiting factors. Therefore, holistic efforts are needed that not only focus on regulatory changes, but also include scholarly education (Ali, 2022), community empowerment (Petroni et al., 2023), and strengthening the child protection system based on scientific evidence (UNICEF, 2024). Thus, Islamic law can remain relevant as an instrument to protect children's rights while maintaining the spirit of justice and humanity which is the essence of *sharia*.

The Anglo-Saxon (common law) legal system features unique characteristics in child marriage arrangements that differ significantly between jurisdictions. In the UK, the Marriage and Civil Partnership (Minimum Age) Act 2022 sets an absolute minimum age of marriage at 18 years without exception, reflecting a strong commitment to child protection (UK Parliament, 2022). However, in the United States, there are still 44 states that allow marriage under the age of 18 with certain conditions such as parental consent or court consent (Tahirih Justice Center, 2023).

These regulatory variations create several crucial problems:

- a) A shopping forum where perpetrators take advantage of regulatory differences between jurisdictions (Le Strat et al., 2022)
- b) Legal uncertainty in child protection (Ensalaco, 2023)
- c) Weak enforcement of the best interest of the child principle (CRC Committee, 2021)

The adversarial common law justice system also poses special challenges. Mather's research (2021) shows that 83% of girls in marriage dispensation cases are not accompanied by a lawyer, so their bargaining position is very weak. The judicial review mechanism that is supposed to protect often ignores the psychological and social aspects of children (Nolan, 2021).

However, there have been positive developments in recent years. The World Bank (2023) estimates that the elimination of child marriage can increase GDP per capita by up to 14% in low-middle-income countries. Several US states such as California and New York have made progressive reforms by raising the marriage age limit (Ensengo, 2023).

Comparative Analysis of Legal Approaches to Child Marriage

The three major legal systems – Islamic, Continental European, and Anglo-Saxon – show interesting developments in responding to the issue of child marriage. In Islamic law, there has been a significant transformation from the classical approach based on the sign of puberty to a contemporary interpretation based on *maqāṣid al-sharī'ah* (Al-Raysuni, 2005; Auda, 2008). This reinterpretation allows the determination of a numerical age limit (19 years old in Indonesia through Law No. 16/2019) by considering the health, education, and psychological aspects of children (Arskal Salim, 2020). However, its implementation still faces challenges in the form of a high number of marriage dispensations in religious courts (Supreme Court of the Republic of Indonesia, 2023).

The Continental European legal system, such as in France and Germany, shows consistency through the paternalism legal approach by setting an age limit of 18 years absolutely without dispensation (Nolan, 2021). This model has been shown to be effective in reducing the child marriage rate by 72% in the last decade (Nolan, 2021). This success cannot be separated from the integration of a comprehensive child protection system and strict law enforcement.

Meanwhile, the Anglo-Saxon system faces complexity due to variations between jurisdictions. If the UK through the Marriage Act 2022 has set an age limit of 18 years without exception, some US states still allow child marriage under certain conditions (Ensalaco, 2023). The flexibility of the common law, which should be a strength, actually creates a gap for the practice of child marriage, especially in areas with strong cultural influences (Mather, 2021).

These three systems show convergence in:

- 1) Recognition of the principle of the best interest of the child (CRC, 1989)
- 2) Shift from parental authority to state responsibility (Archard, 2018)
- 3) Adaptation to international human rights standards

However, the main challenge lies in:

- a) Cultural resistance in traditional societies (Okyerefo & Fiaveh, 2021)
- b) The gap between legal norms and practice in the field
- c) Weak coordination between law enforcement agencies

A comparative study by Petroni et al. (2023) of 45 countries shows that successful prevention of child marriage requires:

- a) Clear legal harmonization
- b) Strengthening the community-based child protection system
- c) Multisectoral legal awareness education
- d) Strict monitoring and evaluation mechanism

The age limit for marriage is a legal provision that sets the minimum age for couples to get married. As stated by Ahmad Masfulul Fuad (2016), this regulation aims to protect the basic rights of individuals while ensuring the psychological and biological readiness of the prospective bride. In the Indonesian context, the provisions regarding marriage are regulated in Law Number 1 of 1974 concerning Marriage which has been amended through Law Number 16 of 2019, as well as the Compilation of Islamic Law (KHI). Article 1 of the Marriage Law defines marriage as an innate bond between a man and a woman to form an eternal and happy family based on the One Godhead. This definition emphasizes the heterosexual aspect of marriage while emphasizing its religious purpose, as Santoso (2016) explained that marriage is the implementation of religious commandments.

Historically-normatively, Atho Mudzhar (in Fatma, 2019) identifies three approaches in comparing family law in Islamic countries: vertical, horizontal, and diagonal. The vertical approach reveals the influence of the dominant Shafi'i school in Indonesia and Malaysia, as seen from the references to the Shafi'iyyah fiqh book used by scholars in both countries (Pilova, 2022). Although Shafi'i fiqh does not set a rigid age limit for marriage, it advocates the criteria of puberty as an indicator of maturity. According to Musyarrafa and Khalik (2020), this school sets the age of 15 years as the benchmark for puberty, for both men and women, based on biological signs such as menstruation or wet dreams.

At the horizontal level, Indonesia sets a higher marriage age limit than Malaysia. Article 7 paragraph (1) of Law No. 16/2019 sets a minimum age of 19 years for both candidates, regardless of gender. Meanwhile, Malaysia, through Act 303 of 1984 Section 8, distinguishes the age limit based on gender: 18 years for males and 16 years for females. Both countries accommodate exceptions through a dispensation mechanism—in Indonesia it is submitted to the Religious Court, while in Malaysia it requires written permission from a Sharia Judge. This difference in policy shows a variation in interpretation of the principle of *maslahah*, considering the absence of explicit provisions in the Qur'an or hadith about the age limit for marriage (M. Rasyid Ridha, 2016).

The diagonal approach emphasizes that the marriage age limit policy in both countries is more influenced by considerations of benefits (common good) and prevention of *mafsadat* (damage) than secular factors. Pilova (2022) noted that the minimum age is aimed at protecting children from the negative impacts of early marriage, such as reproductive health disorders, school dropouts, and structural poverty. Marwa (2021) added that this regulation not only has an impact on individual families, but also on national socio-economic stability.

From a socio-juridical perspective, Indonesia's policy of standardizing the age limit for both genders reflects the principle of equality in modern family law. Meanwhile, Malaysia's policy of differentiating ages is still influenced by traditional gender constructions in classical fiqh. However, both systems agree that marriage dispensations must go through a rigorous legal oversight process, demonstrating a commitment to child protection.

Conceptually, this difference in regulation illustrates the dialectic between dynamic Islamic law and the needs of contemporary society. Indonesia through Law No. 16/2019 has carried out legal progressivism by raising the age limit from the previous 16 years (female) and 19 years old (male) to 19 years for all genders. This step is in line with international conventions such as CEDAW and CRC that emphasize the prevention of child marriage.

The implications of this policy are multidimensional. At the micro level, it increases the mental and economic readiness of the bride-to-be. At the macro level, it contributes to the development of human resources through the postponement of the age of marriage which is directly proportional to the improvement of the quality of education and health. Thus, the marriage age limit is not just a legal norm, but a strategic instrument in achieving the Sustainable Development Goals (SDGs).

CONCLUSION

This study shows that the approach to child marriage is strongly influenced by the legal system adopted, the basic values that underlie the formation of the law, and the social and cultural dynamics in each region. Islamic law, although in the classical tradition does not explicitly set a minimum age limit, has great potential to protect children through

a maqāṣid al-sharī'ah approach that emphasizes the benefit and protection of the soul, intellect, and offspring. Reinterpretation of classical texts is key in answering contemporary challenges. The Continental European legal system shows consistency in establishing a strict minimum age of marriage through legal codification, without leaving room for dispensation. This approach reflects a commitment to the principles of legal certainty and the protection of children as independent legal subjects. Meanwhile, the Anglo Saxon legal system displays high flexibility, but it also presents challenges in terms of policy harmonization between jurisdictions, especially in countries such as the United States.

Despite fundamental differences in legal structures and sources, all three systems show a similar tendency to strengthen protection for children and lead to the prohibition of the practice of early marriage. This shows that child protection has become a universal value that transcends the boundaries of the legal and cultural system. Therefore, efforts are needed to harmonize legal policies that are not only based on formal norms, but also take into account social realities and the principles of substantive justice.

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