



# Islamic Family Law Reform: Early Marriage and Criminalization (A Comparative Study of Legal Law in Indonesia and Pakistan)

**Fatum Abubakar**

UIN Sunan Kalijaga Yogyakarta

bsa.fatum@gmail.com

## Abstract

*This paper compares the renewal of family law and law of early marriage in Indonesia and Pakistan. It seeks to answer firstly, why does the legislation of Indonesia provides dispensation of marriage in the Court for prospective couples under the age of marriage? Secondly, why does Pakistan's legislation give prison sanctions and penalties for married couples under the age of marriage? Thirdly, why does the legislation of Indonesia and Pakistan implement different determination of law for early marriage? The study reveals that both countries differs in implementing determination of law because Indonesia is influenced by the Dutch and adheres to civil law system that separates between civil and criminal law. Whereas Pakistan adopted common law system that combines the legal determination between the civil law and the criminal. This difference leads to different treatment for any aggressor of Family Law and law of early marriage in both countries. In addition to that also, it is arguably true that even though the renewal of Islamic law in the Indonesia have been done, Indonesia is somewhat late in doing Islamic law reform than Pakistan.*

**Keywords:** *Islamic Family Law Reform; Early Marriage; Criminalization.*

## Introduction

In some Islamic countries, not only Indonesia but also other modern Islamic countries, it is clear that social change greatly affects the policies and regulations of its legislation because it is no longer appropriate with the *madzhab* they embrace that is in accordance with the teachings of *sharia*, although Indonesia is quite slow compared to Bangladesh, Iran, Pakistan and Yemen (South) in terms of child marriage.

Family law reform, especially about the age of marriage, is far removed from the true Islamic law. This is because *fiqh* as a legal product of the thinking of classical thoughts is unable to answer the challenges of the times and current problems. In Indonesia, marriage

law No. 1/ 1974 explained that the limit of age of marriage is 16 years for women and 19 years for men. Although this regulation has provided a very clear boundary for married couples, the facts in the field show that many marriages are done below the prescribed standard limits, even tending to increase from year to year. These data provide evidence that in the practice, people who want to get married tend to ignore the regulation.

While the classical *fiqh* does not set the early marriage for sure, it only gives a *baligh* limit for a man as he experiences special dream and for women as she gets menstruation. The limits are not a pillar of marriage but only the terms of marriage. Abu Hanifah argues in *Kitab Bada'ith* that the marriage of a young child can be performed with an *ijbar* from the father based on several propositions, that is, it becomes common to marry a woman either teenager or adult as Abu Bakar set a marriage between little Aisha and the Prophet. Another case is that Sayyidina Ali set a marriage of his daughter named Umm Kalsum with Umar ibn Khattab.

The reform of law in Indonesia is considered slower than in the Islamic countries, as it was just done in the 1970s with the presence of Law No. 1 year 1974 about marriage, especially in family field. However, it has made significant progress. One of them is about the limitation of marriage age which will affect the determination of the prohibition of early marriage.

In addition to Law No. 1 of 1974, in Indonesia, the Islamic Law Compilation is clearly repeating Article 15 Paragraph (2), i.e. for candidates who have not reached the age of 21 years, they must obtain permission as provided in Article 6 Paragraph (2), (3), (4), and (5) of Law No. 1 year 1974. Of course the classical *fiqh* does not discuss this issue. This has been considered uniqueness in Indonesia, that is, for couples who have not reached the age of 21 years are likely to marry on terms of dispensation from the court or other officials (Nasution 2009a) as mentioned in Article 7, Paragraph (2) of the Marriage Law No. 1 year 1974. It says: "in the case of a deviation against paragraph (1) of this article, (the couples) may request a dispensation to the Court or other officials appointed by both the male and the female parents (Republik Indonesia 1991a)," because the age limit of marriage is not at all limited in Islam (Mahmood 1995a).

Pakistan, in the other hand, regulates things related to the minimum age limit in Act No. 29 Section 2, 4, 5, and 6 of Child Marriage Restraint Act year 1929 as it was made amended by MFLO year 1961. In this Act, unless there is anything repugnant in the subject or context - (a) *child* means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age; (b) *child marriage* means a marriage to which either of the parties is a child; (c) *contracting party* to a marriage means either of the parties whose marriage is about to be thereby solemnized; (d) *minor* means a person of either sex who is under eighteen years of age; 4. Whoever, being a male above eighteen years of

age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both. 5. Whoever performs, conducts, or directs any child marriage, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage. 6. (1). Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; provided that no woman shall be punishable with imprisonment. (2) For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized (Mahmood 1995a).

As a comparison to Indonesian law, the law in Pakistan is more extreme than the renewal of family law in the Middle East countries (Coulson 1971). One of them is the enactment of law against the marriage of marriage candidates who will be married whose age is under the provisions of the MFLO 1961 legislation. The married couple will get a maximum of one month's imprisonment or a fine of one thousand Rupees or both. Even more extreme parents who marry minors are also threatened with imprisonment for a maximum of three months or a fine of 1000 Rupees or both (Mahmood 1995b).

What is happening in Pakistan is still a long debate between conservatives and modernists and is still constrained by deeply rooted social and indigenous factors and factions in society (Mudzhar 2014). That is why the renewal of Islamic law in terms of early marriage criminalization penalties in Pakistan should be an example to be used as legal basis in Indonesia. So the writer feel it is important to contribute because considering that there is still a bit of emphasis on aspects of early marriage criminalization, the study of legislation of Indonesia and Pakistan fill the existing void.

Therefore, this study focuses on the form of legal reform of criminalization of early marriage in Indonesia and Pakistan. The study wanted to answer three questions; first, why does the legislation of Indonesia to provide dispensation of marriage in the Court for prospective couples under the age of marriage? Second, why does Pakistan's legislation give prison sanctions and penalties for married couples? Thirdly, why does the legislation of Indonesia and Pakistan implement different determination of law for early marriage or child marriage?

Basically the study of Islamic law reform and comparative legislation in Indonesia and in various countries has received attention from researchers, both from the outsider and insider from various point of view and different subjects. Some have discussed family law legislation in Islamic countries or comparisons of family law legislation in different countries in Indonesia and Pakistan as done by Tahir Mahmood, *Family Law Reform in the Muslim World* (1972) (Mahmood 1972) dan *Personal Law in Islamic Counties* (1987) (Mahmood 1987). Mahmood's writings the most comprehensive one and accompanied by comparative analysis of legislation in Islamic countries. His first work is presenting socio-political conditions, history and methods of legal reform of Islamic families. Meanwhile, his second work presents further developments on the updated rules and the elected laws in Indonesia and Pakistan and other countries in the Arab and African regions. Its revised edition not only looks at the methodology but also looks up to the development of Islamic law in the majority Muslim country, renewal of family law in Indonesia and Pakistan, followed by Malaysia, Afghanistan, Bangladesh, Brunei Darussalam, Turkey, Iran and Somalia. Norman Anderson's work through *Law Reform in The Muslim World* (1976), which discusses matters concerning the Islamic family law from the background, methods of reform, results, problems, and prospects in various Arab countries, Asia and Africa.

As for the discussion of women's status in traditional *fiqh* concepts and Egyptian and Pakistani legislation is done by John L. Esposito (Esposito 1982) and Khoiruddin Nasution (Nasution 2002). However, Khoiruddin only limited his work to the status of women in Indonesia and Malaysia and this work only briefly examined other modern Islamic countries.

The work on child marriage and the minimum limit for marriage both in Indonesia and in Pakistan is conducted by the Asia Research Institute; Working Paper Series 105 discusses the trend of early marriage in several provinces in Indonesia. The next two years on a regular basis ARI conducted research on the trend of marriage patterns more widely in Asia. Jones is confined to two parts of Asia, namely East and Southeast Asia, in one hand and South Asia (Pakistan) in other hand.

Angela Hawke's work focuses on early marriage - marriage of children and youth under the age of 18 from a human rights perspective. Research on early marriage tends to concentrate only on specific aspects of impact, such as reproductive health and school drop outs. There is little practice examination as a violation of the rights of the child to himself. The researcher examined the level of early marriage, its context, its causes and its impact on every aspect of the lives of affected people - especially young girls - and the wider community. It outlines strategies to help those who have been married early, and for the prevention of early marriage through education, advocacy and joint development. This

work concludes with a call to conduct rights-based research on an issue that has far better consequences. However, it does not discuss legal aspects, legal framework and does not compare with the laws of the Islamic State.

The work that discusses the renewal of family law in terms of early age in Muslim countries is the work of Khoidruddin. In addition to discussing the legislation, it also discussed the method of renewal and only briefly discussed the marriage of children in some Muslim countries and did not discuss the legislation of the State of Indonesia and Pakistan in full and detail (Nasution 2009b).

M. Atho Mudzhar's work (Mudzhar 2014) is an in-depth work on the laws of Pakistani families discussing the minimal issues of marriage age, marriage recording, and restrictions on the value of the *dowry*, divorce proceedings, polygamy, wife's livelihood, and inheritance. Furthermore, the comparison is done vertically with the books of fiqh and horizontally with other countries, especially Indonesia. This work discusses the conflict between Islamization and tradition pressure in Pakistan and briefly explains the articles in MFLO 1961. There is a previous work of Rubya Mehdi (Mehdi, 1994) on the renewal of criminal law, marriage and inheritance in Pakistan, complemented by a brief exposition of traditional concepts surrounding the issue and the debates between traditionalist and modernist groups.

There is a recent study by Sahreen Malik Bhanji and Neelam Saleem Punjani (Bhanji and Punjani 2014) in 2014. In this study, they proposed to amend the law to not engage in young marriage and include more stringent penalties. It is based on violations of human rights that affect children and adolescent girls rather than boys. Although the number of cases has decreased worldwide, there are still occurring in South Asia, especially Pakistan. This study focuses only on the threats of life and health of children and steps to reduce their impact. However, it does not discuss the laws of that country.

## **The Renewal of Early Marriage in Indonesia and Pakistan**

### **Indonesia**

#### **1. The Renewal of Family Law**

It has been generally known that Islamic law has existed since the time of the kingdoms until the Dutch colonial period. The enforcement of Islamic law also often becomes an issue between the colonizers and the colonized. This is evidenced by the theory of enforcement of Islamic law in Indonesia. Later in the twenty century the Islamic thinkers realized the need for family law reform in Indonesia because of the need for modernity and an urgency to escape from the colonial heritage that has been very strong rooted in our legal culture. The entire development of the legal system should be uniquely identified and codified with the administration of justice based on the principles of impartiality as well as be pursued professionally (Wignjosubroto 1994).

Being aware of the importance of unification and codification of law and still considering the pluralism of the Indonesian population, it is important to apply the law that is impartial only in one of the religions. However, it is unavoidable that Islam in Indonesia is still strongly attached with *fiqh* although, on the one hand, it needs the actual law that is rooted with the culture and on the other hand it can not be ignored that Islam entered in Indonesia with a strong *Shafi'i* madzhab (Syarifuddin 1990).

The renewal of family law in Indonesia, apart from the many controversies since long before the independence until the reformation period and since the implementation of marriage law, has been adopting some *fiqh* of Syafi'i madzhab in its chapters and some outside the *fiqh* of Syafi'i madzhab and the renewal is basically made up of two kinds. The method of renewal used by all imams of madzhab is basically partial, although from some cases it is reflected to another strong *nash* and that is not even in line with the idea supported. According to Anderson, there are four methods used in reforming Islamic family law, namely: (1) through an administrative arrangement commonly referred to as *takhyis al-qada* and *siyasah asy syar'iyah*, but the substance does not change; (2) *takhayyur* and *talfiq*; *takhayyur* is to choose one of the schools of several existing schools of jurisprudence without exception, whereas *talfiq* is to combine the views of some schools in a particular problem; (3) *ijtihad* is taken by way of reinterpreting the texts of *sharia*; (4) alternative method, namely using administrative rules in the form of sanctions that are not based on *sharia*.

## 2. Early Marriage

In Indonesia, the doctrine of marriage is inseparable from the teachings of *syafi'iyah* which has long been known since the entry of Islam to Indonesia according to the 7<sup>th</sup> century historical records. In a different form with the provisions contained in the *fiqh* books, the age limit of marriage of 19 years for men and 16 years for women gets special attention because it is against the provisions of *fiqh* that allow child marriage as this child marriage is contained in *fiqh*. This opinion is contrary to the opinion of Asy-Syauki's, which says that A'isha's marriage case is an exception.

The acceptance of restrictions on the age of marriage seems to be by reinterpreting God's remarks about the marriage ages stated in the verse of al-Nisa verse 6, or by taking the personal *fatwa* of the a mujtahid of Islam outside the main *madzhab*, such as Ibnu Shubrumah and Abu Ba-kar al-Asham that requires the age limit for marriage. The marriage law allows women who have reached the age of 21 to marry without a guardian; but in the *fiqh* Syafi'i books it is said that women in any circumstances, either child or adult, and girls are considered illegitimate to marry except when their guardian is brought in. Reactualization in this case may be in the form of acceptance of Syafi'i *fiqh* teachings that are valid in Indonesia. Meanwhile, the justification of adult women who marry without a guardian is by taking Hanafi's *fiqh* understanding.

So far, the applicable rules of early marriage are not in the marital terms pursuant to Chapter II of the UUP 1974 on the requirements of the minimum age of marriage for both prospective brides. The minimum age is set forth in article 7 paragraph (1) stating that: marriage is only permitted if the man has reached the age of 19 years and the woman has reached the age of 16 years.

Other requirements in this marriage law are for parents whose children are not yet 21 years of age to require them to obtain parental consent. This is stated in article 6 paragraph (2), namely: to marry a person who has not reached 21 years must get permission from both parents. The marriage law further regulates licensing under special circumstances in article 6, paragraphs (3), (4), (5), and (6).

A person who is not yet 18 years of age or has not been married is included in the immature category, so that they cannot do their own law but must be represented by their guardian or their parents covering all their legal acts whether they are personal or property, inside or outside the court. The purpose of this restriction of minimum age for marriage is mentioned in the explanation of article 7 verse (1) namely: to maintain the health of husband and wife and offspring, it is necessary to set age limits for marriage”.

On the other hand, the marriage law also provides an outlet as a solution if the minimum age requirement is not met. If both prospective brides are still below the minimum age for marriage, the parents of the two brides-to-be may submit a marriage dispensation in a religious court. In this article, there is no underlying reason either in the chapter or in the explanation. Dispensation of this marriage is regulated in Minister of Religious Affairs Regulation No. 3 year 1975, specifically for people who are Moslems.

In the regulation of the minister of religion, the marriage dispensation is filed by both parents from both sides to the Religious Courts that will consider the granting of a dispensation eligible for marriage in accordance with article 13, act (1),(2),(3), and (4) of Regulation of the Minister of Religious Affairs No.3 of 1975, namely:

1. If a prospective husband has not reached the age of 19 years and the prospective wife has not reached 16 years of marriage, they shall have a dispensation from the Religious Courts;
2. The application of marriage dispensation to them referred to in paragraph (1) of this article shall be filed by both male and female parents to the Religious Courts that occupy their place of residence;
3. After the Religious Courts examine in the hearing and believe that there are matters which may permit the dispensation, the Religious Courts shall grant marriage dispensation with a determination;
4. A copy of the stipulation is made and provided to the applicant to meet the requirements of marriage.

The marriage dispensation set forth in the Religious Courts should take into account various approaches, such as human, psychological, sociological, and philosophical approach, in addition to juridical reasons. This dispensation of marriage has become one of the cases in the Religious Courts (Arto 1998).

In addition to the Marriage Law No. 1 of 1974, the Civil Law regulates the maturity in marriage in Book I (of persons) Chapter IV (on Marriage). This case is stated on Article 29 of KUHP or the Civil Code as follows:

“A bachelor that has not reached the age of 15 years is not allowed to bind himself in marriage. In the meantime, in the case of important reasons, the President shall abolish the prohibition by granting a dispensation.”

However, it seems that between the Marriage Law and the Civil Code in establishing the minimum age of marriage and the permission attainment from both parents and judges is somewhat different to the prohibition of giving dispensation. Obtaining permission from parents or judges as well as minimum limits for marriage as the conditions of marriage relating to its impact on marriage prevention much takes from similar provisions in the Civil Code with some changes. Adult age change must obtain his guardian's permission until he or she is 30 years old, while Marriage Law regulates 21 years of age. Other changes in terms of prevention of marriage are not too significant.

Furthermore, in the Islamic Law Compilation, the marriage age limit shall be included in the terms of marriage by the prospective bride stated in Article 15 paragraph (1) and (2) namely:

1. For the benefit of families and households, marriage shall only be made by the prospective bride who has reached the age specified in Article 7 of the Marriage Act No.1 of 1974, i.e. the prospective husband is at least 19 years of age and the future wife is at least age 16 years.
2. The prospective bride who has not reached the age of 21 must obtain the permit as provided for in Article 6 paragraph (2), (3), (4) and (5) of UUP or Marriage Law No. 1 year 1974

The provisions of this Islamic Law Compilation articles clearly state that, in the terms of marriage, the conditions of obtaining parental consent and the minimum age for marriage are fully in effect from the provisions of the UUP or marriage law. However, the compilation of Islamic law does not require obtaining a marriage dispensation from the Religious Courts, but affirming the prevention such a marriage in Islamic law.

The provision of anyone who is entitled to prevent marriage is set forth in article 62 of Islamic Law Compilation as follows:



1. Those who can prevent marriage is the family in the lineage straight up or down, brothers, guardian of marriage, guardian of one of the prospective bride and the parties concerned.
2. A biological father who never performs his function as head of the family does not lose his right of conscience to prevent marriage to be performed by another marriage guardian.

Thus, early marriage can be minimized with various binding rules in Indonesia. This is in accordance with General Elucidation of Law Number 1 Year 1974 about Marriage; number 4 letter (d) mentions that underage marriage must be prevented. This precaution is based solely on the part of the bride to fulfill the noble purpose of their marriage.

The prevention can be implemented in several steps, such as to socialize about the impact of the implementation of early marriage and explain to the community about the nature of marriage. These results can be achieved by maximizing government agencies and self-help communities (Bastomi 2016).

Although The Marriage Law not only fails to meet the 18-year threshold for marriage recommended by International Human Rights Treaty Bodies, it contradicts Indonesia's own law of 2002 on child protection, which prohibits marriage under age 18 in any circumstances. It also sets the minimum marriage age lower for girls than boys, even though girls are more vulnerable to the harmful consequences of child marriage. The Marriage Law does not require proof of age at marriage, making it all the more difficult to protect girls.

## **Pakistan**

### **1. The Renewal of Family Law**

Many researchers believe that law reform in the Islamic world is more on the guidance of long-standing legal reform that has not been done in the Islamic State. This is a mirror of social change, the time, and technology that never stop. Further, the renewal is still in the pattern of Islam, where *aqidah* and *sharia* are still in line, so it is considered not to change. Therefore, as Anderson assesses the tendency of Islamic law in Islamic countries, there is a State that did not do any law reform at all, there is a State that has completely abandoned the Islamic family law and replace it with the laws of the secular State, and also there a State that is moderate enough to do the renewal of law by the way of compiling classical rules in Islamic *fiqh* with the law that has been renewed (Anderson, n.d.).

According to Esposito, the renewal of the Muslim family law needs to be done with the aim of two things, first, to elevate women and secondly to strengthen the position of core family members of distant male members.

This is necessary to do because, in the view of Esposito, the Pakistani culture that accustoms the usage of *purdah* which is firmly inherent among Pakistani women is impressed by the isolation and close association with the symbol. This shows the Pakistani women seem marginalized even inferior from superior men, where the man feels he is stronger both physically, mentally and morally. There are many more unique facts that show the helplessness of Pakistani women.

Women's disempowerment in Pakistan has made the government seek to reform its family law. Efforts made by a president Ayyub Khan are quite successful in a way to meet social interests and guidance of fiqh thinking without having to get out of the values of the Qur'an and Hadith by taking several methods (Mahmood 1972).

Seeing the above phenomenon, it can be ascertained that what is done by Pakistan is equal to the renewal of Islamic law by several countries with the demands of modernity and the fulfillment of women's rights. Rear phenomenon is present in the 21<sup>st</sup> century, that is, the fulfillment of children's rights is also considered. Pakistan which is a member of SAARC is obliged to uphold the KHA, with article 3 (3) stating, "States Parties consider the United Nations Convention on the Rights of the Child as a comprehensive international instrument on the rights and welfare of children and shall therefore repeat their commitment to their application." It further states that "States Parties shall ensure that appropriate legal and administrative mechanisms and their social safety and defense nets are always in place to ensure that their national law protects the child from any form of discrimination, harassment, neglect, exploitation, torture or degrading treatment of human dignity, trade and violence (Naveed and Butt 2015).

## 2. Early Marriage

Early marriage is implicitly regulated in laws in various countries, and age restriction rules for marriage are already set including Pakistan State. The first countries to enforce this rule secularly are Turkey, followed by Iran and Bangladesh. The law contains restrictions on the age of marriage that are not contained in any fiqh book. The known age concept is based on a man's and women form of physical appearance, i.e. having *wet* dreams, the growth of feathers around the genitals, and menstruation. It is this concept adopted by law as presupposing that the size of a person's maturity allowed marrying.

Further, like other Islamic countries, Pakistan introduces and treats sanctions and penalties for married couples who marry at an early age, even for the marriage providers, parents and guardians who are in compliance with the MFLO. This provision is

contained in the article related to the minimum age of marriage regulated in Law no. 29 year 1929 on child marriage restrictions (Child Marriage Restraint Act 1929) as amended by Ordinance No. 8 years 1961 (MFLO). In the Act it is defined that the child is a person less than 18 years of age for men and fewer than 16 for women. The marriage of a child (a marriage of a minor) is a marriage that either of the bride or groom is a child of the child as defined. Then the “minor” is defined as a person, both male and female, who are under the age of 18. It appears that this Act distinguishes between *child* and *minor*.

Furthermore, the MFLO provides that a man over 18 years of age who performs a marriage contract with a woman under the age of 16, threatened with a maximum imprisonment of one month or a maximum fine of one thousand Rupees or both, unless he has convincing evidence that what he does is not a marriage (child marriage). Then if a person in the “minor” category (under the age of 18) engages in a marriage contract with a minor, then the child’s parent or guardian, which encourages the marriage, or because of their negligence, are punishable by a maximum of one month’s imprisonment, or a fine of at most one thousand Rupees, or both, with the exception that women are not sentenced to imprisonment. If the child’s marriage is held, whereas the Court has warned the guardians not to marry it, either on the court’s own initiative or on the complaints of certain parties, the parent or guardian is punishable by a maximum of three months’ imprisonment or a fine of 1000 Rupees or both (Mahmood 1995a).

To get an idea of how the arrangements and threats of underage marriage sanctions were made, the following sections were quoted from section 2, 4, 5 and 6 of the Child Marriage Restraint Act of 1929 as amended by the MFLO of 1961:(a) “child” means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age; (b) “child marriage” means a marriage to which either of the parties is a child; (c) “contracting party” to marriage means either of the parties whose marriage is about to be thereby solemnized; (d) “minor” means a person of either sex who is under eighteen years of age;4. Whoever, being a male above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both. 5. Whoever performs, conducts, or directs any child marriage, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

1. Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment

- which may extend to one month, or with fine which may extend to one thousand rupees, or with both; provided that no woman shall be punishable with imprisonment.
2. For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized (Mahmood 1995a).

Although the ban on marriage has been implemented since 1929, the problem is still ongoing. This issue is linked to a number of societal and indigenous issues deeply rooted in society, such as customary barter marriages, forced marriage customs or marriage customs that are fully regulated by parents, customary handover of women and children as a result of inter-ethnic conflicts, other. Although the Child Marriages Restraint Act of 1929 poses a threat of punishment to both perpetrators and parents or anyone who encourages the marriage of children, but the marriage itself is not annulled and still considered valid. As a result child marriage is still a lot happening and the execution of punishment tends to be so low that it does not cause deterrent effect to society (Mahmood 1995a).

In addition to the arrangements in the articles of the Child Marriages Restraint Act of 1929, there are a number of articles in the Pakistani Criminal Code that have little to do with the issue of child marriage, namely Article 310-A which threatens anyone who gives a woman to marry in exchange for peace with a maximum sentence of ten years in prison or at least three years in prison, Article 375 which defines rape as intercourse with an underage woman, whether with or without his consent, Article 376 on the threat of capital punishment for perpetrators of rape, and Article 493-A concerning fraud which resulted in the intimate relationship between a woman and a man. The complete sound of the Articles is as follows:

*310-A. Whoever gives a female in marriage or otherwise in Badal-i-Shulh shall be punished with rigorous imprisonment which may extend to ten years but shall not be less than three years. 375. A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: 1. Against her will; 2. Without her consent; 3. With her consent, when the consent has been obtained by putting her in fear of death or of hurt; 4. With her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is.*

According to Article 310 of the Criminal Law of Pakistan, *Badal-i-Sulh* is a compensation whose form and value are mutually agreed upon in accordance with Islamic Shari'ah to be paid or given by the perpetrator of intentional murder to the

guardian of murder victim, whether in cash or in the form of immovable or immovable object (Explanation: In this section Badl-i-Sulh means the mutually agreed compensation according to Shariah to be paid or given by the offender to a wali in cash or in kind or in the form of movable or immovable property). Article 310 itself regulates the compensation (Diyât) substitute *qisas* in the event of intentional killing, believes herself to be married, or (5) with or without her consent when she is under sixteen years of age. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

376. 1. Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years, or more than twenty five years and shall also be liable to fine; 2. When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.

493-A. Everyman who deceitfully causes any woman who is not lawfully married to him believes that she is lawfully married to him and to cohabit with him in that belief shall be punished with rigorous imprisonment for a term which may extend to twenty five years and shall also be liable to fine. Therest of the average woman has more victims than men (Mahmood 1995a). As a result, the marriage of many girls still occurs and the execution of punishment tends to be so low that it does not cause deterrent effect to the community.

In addition to the strong customs in Pakistan, the Hanafi School is also strongly influential in society. Although four schools of thought agree that in order to carry out marriage, the male and female candidates must be sensible, able to use their wits but have not yet baliq and also agree on her legal marriage for small women even though not yet baliq. But the Hanafiyya fuqaha group argues that the al-ijbar's walah is the nature of as-sagir and as-shagirah, the madness of al-kabirah, meaning that the wali can perform ijbar to as-sagir and as-sagirah regardless of his virgin or widow also to crazy al-kabirah. According to Abu Hanifa, as-sagir and as-sagirah have Islamic Law Compilationyar right to their marriage after baliq if the guardian marries them other than father or grandfather. But in terms of marrying as-sagirah is Abu Hanifah he has no Islamic Law Compilationyar right. Therefore, the majority of Pakistani Muslims still adopt the Hanafi School in its religious social context regardless of the rules of their country. Thus, the conflict between traditionalist and modernist is a factor affecting law reform in the field of early marriage in Pakistan (Haider, n.d.).

## Comparative Analysis

### Indonesia

Indonesia is a country with diverse culture, ethnicity and race even religion. The majority of the Muslim community has a Syafi'i school of two hundred million people. Indonesia has been colonized by the Dutch for 350 years, besides Portuguese, English and Japanese, whose period is not too long compared to the Netherlands.

Seeing the above fact, this shows the plurality and heterogeneity of legal system in Indonesia. Even the values of adat and religion are believed to be their life system in regulating fellow relations and have been rooted since the primitive era is regarded as law (Lukito 1997).

However, law experts generally say that a good law is a living law in society. They base this on the opinion that in order to realize the social values that are expected of a society, it is necessary the rule as the value of Indonesian social culture needs to be reviewed in thought (Soekanto 2002), style and nature of Indonesian society as a whole is a mentality that underlies customary law (Soekanto 2002). Therefore, law experts generally say that good law is a living law in society.

In the next decade, the long reign of colonialization in Indonesia (Lukito 1998) has brought Western law in the mid 19<sup>th</sup> century with the intention of replacing the customary law and Islamic law to apply to all groups of the population. But this does not last long because the Islamic community is worried about continuing resistance so that it is restricted to the indigenous population.

Although the Islamic Shari'ah has been perfectly conveyed through the Prophet Muhammad, but the demands and historical facts continue to grow after leaving him until now. This development has implications on law, which are caused by the acculturation of local culture. Of course this requires *ijtihad* law to formulate the basis of Islamic law epistemology to anticipate differences in social and political changes that occur so that the Islamic law can be relevant to space and time. This is in line with *qaidah fihiyyah "taqarrul ahkam bi taqyur al-amkinah wal azminah"*.

Thus, in the framework of cultural social changes in society in general, can be divided into two forms; First, (Intended change) that the desired change can arise as a reaction (planned) to the social cultural changes that occurred before, whether which is a desired or unintended change if before an undesirable change occurs, then the desired change can be interpreted as a recognition of previous changes, so that they can be accepted by the wider community.

It can be mentioned about the law of indigenous marriage in Indonesia that at certain times we recognize taboo culture in Indonesian society to avoid adultery and slander.

Therefore, girls should be married even though they have not graduated (Candraningrum, Dhewy, and Pratiwi 2016). The indigenous peoples can also be found the existence of customary law of marriage which is very varied, at least there are big category based on kinship: patrilineal, matrilineal and bilateral. In indigenous communities there is preferential marriage (meaning someone already has her soul mate). In the Batak society, it is called *pariban*, and it is also in Minang society (Candraningrum, Dhewy, and Pratiwi 2016).

It seems that marriage in Indonesia, especially early marriage in girls, is affected by customary law and religious fundamentalism. In Indonesia restrictions on married age are set out in Article 7 paragraph (1) of marriage law no 1 year 1974, age 19 years for men and 16 years for women with parental consent. From the existing research and FGD conducted in West Java for example in Cikidang Village explained that the fear of this adultery outweighs the fear of the community over the death of girls due to early marriage or the loss of the future of their children due to early marriage.

Here are the results of exposure from Suherman community figures, FGD Cikidang Sukabumi Village November 13, 2015) (Candraningrum, Dhewy, and Pratiwi 2016).

“In Cikidang, early marriage usually happens in remote villages, not in the city area. Why did that happen? Usually it is because his parents hold on to religion. For example, 15-year girls already balig and can be married. While the government rules are not allowing. It happens like that. They have a fear of marriage over 17 years. Afraid of anything happening, she took a decision. For example, if a 15-year girl already has a boyfriend, she is suggested to be married. It should be added that article 7 of this marriage law is not forcing (unimperative).”

This research is a legal research, so reviewing a legal system arrangement, especially in matters of marriage law in Indonesia. According to Laurance Friedman, the legal system consists of several components namely substance, structure and culture (Friedman 1975). Substance is in the form of rules in the legal system, while the structure is a law enforcement institution. The structure includes judges, courts, while the substance is composed of rules and regulations on how the institution should behave. He quotes H.L.A. Hart who states that the hallmark of the legal system is a double collection of rules.

In this study, the legal system consists of substance, structure and legal culture, especially in matters of underage marriages in Indonesia and Pakistan. The legal substance studied is in the form of legislation on marriage under the provisions of age, while the structure studied here is the Religious Court Judges in deciding matters of marriage under age by providing marriage dispensation, and also studied culture in society, whether the marriage has become a reality in society that can be accepted in general.

It is clearly seen the leniency and non-coercive nature of our law, that is, there is another solution that can be taken if the minimum age requirement of marriage is not fulfilled. If both prospective brides are still below the minimum age for marriage, then their

parents may submit a marriage dispensation through a religious court. This is stipulated in Article 13 paragraph (1), (2), (3), and (4) Government Regulation of the Minister of Religious Affairs no 3 of 1975. However this has become a habit that is inherent in society because based on the time of the Prophet ever married by his father Abubakar with Aisha at the age of 9 years. It can be added that this Government Regulation is alternative.

## **Pakistan**

Pakistan is the second largest Muslim country. In terms of socio-religious country, it is based on Islam although in the 20<sup>th</sup> century it carried out a movement of independence in the Indian subcontinent with a strong Hindu influence. For it is not surprising that Pakistan in the early days of the establishment formulated an ideal Islamic concept for the life of the state and society. Pakistan was finally able to formulate its own ideology without being overshadowed by the British grip on August 14, 1947. It is two years later than Indonesia.

On one hand, the long debates between the country's founding fathers, i.e. Ali Jinnah (Traditionalist-Islamist) and the Muslim League have used Islamic symbols and slogans to mobilize the masses to demand separate state, i.e. a Muslim homeland. On the other hand, the subsequent ruler, i.e. Ayyub Khan (modernist) undertakes many policies and legal reforms. The repositioning of the constitution in 1962 eliminated the name "Islam" from the name of the State - despite the controversy - another policy was the establishment of the center of Islamic research and instituted the official ordinance for the Islamic family law known as MFLO 1961.

Ultimately, political turmoil occurred with the appearance of President Zia ul-Haqq by bringing the program of Islamization, including Islamization of law in Pakistan. It is undeniable that Pakistani scholars with traditional education are what produce the opposing ulama against the renewal of Islamic law. Meanwhile, the ruler has a modern Western education background and ideas of his thinking. This is a long-term problem that requires synchronization with the need for the emergence of young intellectuals, such as Fazlur Rahman who have future insight (Mas'adi 1998).

This is evidenced by moving forward from the form of anglo Muhammadan and law towards fundamentalist Islam. In the tradition of anglo Muhammadan law, the judge may be able to interpret the law according to his point of view. It is different from Islamic jurisprudence which does not authorize the judges fully. A clear example of interpretation results occurs in early childhood marriage.

Pakistan that previously treated the law of marriage and sanctions in child marriage enacted customary law with marriage barter, which is based on Hindu law. This does not stop there, historically; the marriage of children is in conflict between those who feel established and those who want change by reforming their family law. So, MFLO 1961 came out of the



outcome of the change of the Child Marriage Restraint Act 1929 to sanction marriage with fines and imprisonment for married couples who are married under the minimum age set for marriage. Even sanctions are given for parents, guardian, and marriage organizers as well as even more than the sanctions given to his son (Muslim Family Law Ordinance, 1961 Act 2,3,4, and 5). Based on the theory of social change, the law is more the result of the factors causing the changes of social. Thus the minimum age constraint in marriage is a legal product caused by socio-cultural change and socio-political developments that are important to do in order to provide security for children and women from the negative impacts caused by child marriage.

The presence of MFLO 1961 is inseparable from the interesting attraction around the formulation of the legal ordinance of the family between the conservative-textual scholars and the modernist-contextual (Mehdi 1994). This pressure is also attributed to the demands of women and children.

### **From Dispensation to Marriage Criminalization**

Indonesia and Pakistan are two countries that have similarities in some respects, e.g. from social community, customary culture, and religious pluralism. However, there is a legal juridical difference in the application of the law of marriage.

After coming out of colonialism and the end of the Second World War, many Islamic countries gained their independence. A number of new constitutions and laws were enacted. The interaction of the new Islamic State with the western legal system and the impetus from within and the social changes to renew the Islamic law has been affecting the legal reform of the family have gradually taken place (Alami and Hincliffe 1996).

The background of the establishment of marriage legislation in Indonesia and MFLO 1961 in Pakistan is inseparable from social change. In the field of civil law in Indonesia the Dutch East Indies government implements the national law that is by implementing the classification of population and the classification of law. This legal politics consequently leads to pluralism and legal dualism. But in its development, many of the people who do not belong to indigenous Indonesians become Indonesian citizens. Such a legal system, obviously untenable because it is left behind by other fields related to the needs of society will unification and codification of law in accordance with the personality of his nation. Similarly in Pakistan, the political laws of marriage are felt and strong desire to get out of the influence of British colonizers, so that the renewal effort was developed by the reformer with the enactment of a number of laws and regulations of the Islamic family law that can answer the social changes and legal thinking unity.

The formation of law and renewal of marriage law that have been pioneered by women both in the organization and in the legislative council showed a social change. The

higher level of education that women have gone through in recent decades has opened the mind to accept new things. They are able to assess the sense of justice for women and children of course. This is evidenced by the thought of marriage principles they propose in marriage law reform, such as monogamy marriage, agreement on both sides, restrictions on marriage, and sanctions for marriage under minimum age of marriage in this case child marriage, Pakistan is different.

Differences in the determination of the minimum age of marriage in Indonesia through Act No. 1 year 1974 on marriage set the age of 19 years for men and 16 years for women and for those who do not meet this requirement, it is only given Dispensation of marriage through religious courts without treating sanctions in the form of fines and imprisonment for both prospective men and women who will conduct marriage.

In Pakistan through the Child Marriage Restraint Act 1929 and amendment MFLO year 1961, the determination of the age of 18 years for men and 16 years for women and through articles 2 and 4 defined that the child is a person under the age of 18 for men and under 16 years for women. This law differentiates with age (minor). Furthermore, article 4 explains that men over 18 years of marriage to women under 16 years old are threatened with imprisonment of a maximum of one month and a fine of 1000 rupees or both. If the marriage continues to be exercised, both on the court's endorsement and on other people's complaints, then the parent or guardian will be punished with a longer term imprisonment of both the bride that is a maximum of three months and a fine of 1000 Rupees or both. Even the bridegroom special, which is reluctant to obey the decision issued by the court, while he knew the decision prohibits his actions, can be sentenced to a maximum of 3 months imprisonment.

Unlike Indonesia, it only provides leeway for underage weddings and even gives legitimacy to law through the court table. This shows that Indonesia is not yet aware of the protection of the right of women and children to exercise the right to be more advanced and independent.

Although in Indonesia there is already a regulation on child protection legislation contained in Law No. 23 of 2002 to guarantee its rights, but in the law does not treat sanctions on breaches of marriage under the minimum age of marriage. The efforts already made by a number of women activists in CLD Islamic Law Compilation 1991 were carried out in 2004 the concept of Islamic law reformation got the opposition from the board of the International Muslim Brotherhood Council (MAAI) arguing that this concept has caused a stir in society, because its content is in conflict with the mainstream in Islamic law and is assured that The draft of the Gender Mainstreaming Team of the Department of Religion on the Reform of Islamic Law is practiced by the Islamic community in Indonesia (Hasyim 2005). In his speech, the minister of religion affirmed that the Draft of the Gender Mainstreaming

Team of the Department of Religion concerning Islamic Law Reform has been canceled.

Other efforts through the Constitutional Court through the petition for judicial review of Law No. 1 of 1974 on Marriage, particularly Article 7 paragraphs 1 and 2 regarding the age limit of marriage for women were rejected by the Constitutional Court in August 2015 then found disappointment though children have the same rights to develop and the right to get protection. In fact, the material examination of the Act is rejected by the National Commission of Non-Violence against women and is deeply sorry and disappointed by saying the court has usurped children's right to develop.

Efforts to renew the family law in the case of rights of marriage under minimum age according to the prevailing rules have been done, but have not reaped encouraging results. The Indonesian government should go through more affirming marriage laws to enforce legal sanctions for perpetrators of underage marriages, because of the negative impacts that occur on the marriage of children who are increasing and endangering children and women in Indonesia. Therefore, Indonesia should reflect on the Pakistan State which treats criminal sanctions for married offenders under age to provide a deterrent effect on the community.

## Conclusion

The renewal of Islamic law in the Islamic State has been done. Indonesia is somewhat late in doing Islamic law reform than Pakistan. In the case of marriage law reform, Indonesia applies the rules for the married couples who marry under marriage by providing marriage dispensation through religious courts and only regulate the prevention of marriage. Meanwhile, Pakistan treats the law of married couples under the age of marriage in sanctions in the form of paying fines and prison for married couples and also to parents or guardians and wedding organizers.

This is different because Indonesia and Pakistan have different legal systems. Indonesia is capitalized with law that is influenced by the Dutch and adheres to civil law system that separates between civil and criminal law. Meanwhile, Pakistan is capitalized with law passed on by British colonialism and adopted common law system that combines the legal determination between the civil law and the criminal through the comprehensive step MFLO 1961. Therefore, the two countries are different in legal determination for underage marriage. It should also be noted that the implementation of family law in Indonesia and in Pakistan is still plagued by the influence of various social and cultural factors that have taken root in society.

When compared in horizontal terms to other modern Islamic countries, Indonesia and Pakistan are classified into a position that cannot be considered conservative, but they can be modern with reference to the fulfillment of the rights of children and women.

They also cannot be said of secular countries, such as Turkey. However, Pakistan is more progressive than Indonesia.

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