

MAQASHID AL-SYARIAH CONCEPT OF *Kafa'ah* IN MARRIAGE

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Abstract: Basically, *kafa'ah* in a marriage is equality, compatibility or proportionality between the prospective bridegroom and bride. *Kafa'ah* in terms of religion is a necessity for a Muslim who is going to get married. One of the important things that must be done before marriage is considering several things such as *nasab*, religion, belief, profession, freedom, and property. However, nowadays, many couples do not heed the *Kafa'ah* criteria, and even many marriages happen between men and women with significant age difference. For example, a marriage between an old woman and a very young man, or vice versa. Considering these phenomena in the society, then the concept of *maqasid al-shari'ah* or the purpose of Islamic law is an important discussion to look at the marriage practices in the society. This is very much related to the protection of religion, soul, mind, descendant and wealth. This study analyzed large age disparity marriage practices in Karang Endah village, by using the concept of *ushul fiqh*. The type of qualitative research used was ethnography. Research data were obtained through the use of some references such as books, journals, articles relating to the object under study. The results of this study indicated that a large age gap marriage occurred in Karang Endah village was based on emotional factors of the couple. In Islam, this kind of marriage does not contradict the *syari'ah* rules, because Islam does not explicitly explain the age limit to be categorized as an adult. Therefore, referring to the concept of *maqashid al-syari'ah*, it could be concluded that large age disparity marriage occurred in Karang Endah village was carried out to protect religion, lives, and offspring of the couples.

Keywords: Marriage, *Kafa'ah*, Age Disparity, *Maqasid al-Syari'ah*

Introduction

Marriage is one of the most important events in human life, besides birth and death. It is also a *sunnatullah* for all living things. The existence of marriage enables the continuation of survival process in this world. The bond of marriage makes the relationship between man and woman lawful. It also functions to regulate the relationship of men and women to love, respect and honor, in which women are obligated to organize households, educate children, and create a pleasant atmosphere, so that husbands can perform their duties well to meet family needs, both in the world and hereafter (Uwaidah, 2006: 379). It is intended to bring happiness and prosperity in the world and hereafter, and its main purpose is for the survival of the humans and the dignity and purity of their genealogy (Yanggo, 2013: 166).

Kafa'ah that is being discussed among scholars is hardly offended by the marriage law, though it is somewhat offended in the Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI), concerning the prevention of marriage. The criteria of the *Kafa'ah* agreed upon by the scholars and

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recognized by the KHI is the quality of one's religion. Not *se-kufu* should not be an excuse to prevent marriages, unless not *se-kufu* because of religious differences or *ikhtilafu al-dien* (Syarifudin, 2007: 145).

To know whether or not a prospective wife or husband is a good person or descendant can be reflected by his or her religion, occupation, educational background and environment. This is reflected in the *hadith*, a woman is married for four things, namely because of her wealth, descendant, beauty, and religion, then choose a religious one, you will be happy (Al-Bukhari: 242). Thus, Islam rules in details the issue of marriage, especially the selection of spouses in order to achieve a *sakinah, mawaddah, warahmah* marriage.

The issue of marriage that is widely discussed now is a marriage between man and woman with a large age disparity. In Indonesia, this kind of marriage ever happened in 2008, between Sheikh Puji and a 12-year-old girl. This marriage invited a polemic and became a conversation among people, even to the realm of law, because it was considered to have violated the Law No.1 of 1974 concerning Marriage. Sheikh Puji, a wealthy man, was known as a businessman, often showed off his wealth in public. In fact, there were many assumptions that the young girl married by Sheikh Puji was a girl whose parents had a debt with Syehk Puji and could not afford to their debt, although it was not proven (<https://jabar.tribunnews.com>).

Likewise, in 2017, there was a horrendous marriage between 28-year-old Sofian and 82-year-old Martha. Both were from Minahasa. The reason for their marriage began with an accidental telephone connection, then followed by an intense communication, so love arose and finally decided to get married. This followed by a marriage between Darfan (a 24-year-old man) and Rosmiati (a 55-year-old woman). The residents of Wajo, South Sulawesi got into an uproar and busy talked about that marriage. At the time of that marriage, Rosmiati was still single and had never married before, and from the news, it was known that it was an arranged marriage by two families, as they were close relatives (<https://www.idntimes.com>).

In 2019, there was a marriage between *Mbah* Dirgo, an 83-year-old grandfather from Tegal, and a 27-year-old woman, Nuraeni. *Mbah* Dirgo was known as a fortune teller or "*orang pinter*". There was news that *Mbah* Dirgo used *pellet* to marry Nuraeni (<https://jateng.tribunnews.com>). In fact, there were many other cases of age disparity marriages in Indonesia although they were controversial in the society, but cultured and obedient to the state law.

Beginning of the Development of *Kafa'ah* Concept in Marriage in Indonesia

Firstly, the concept of *kafa'ah* began with the emergence of two theories. Firstly, a theory pioneered by Bravman stated that *kafa'ah* concept had existed since pre-Islamic times: Bravman explained the *Bilal's* marriage plan and other cases with the concept of *Kafa'ah* (Bravman, 1972: 302-308). Nasution explained that, Bilal's case, one of the foundations used by Bravman in his theory, showed that there was no *kafa'ah* acknowledgment of differences from any side, except in terms of religion and piety. This indicated that *kafa'ah* existed in pre-Islamic times. The presence of Islam aimed to destroy the *kafa'ah* on the basis of classes or social strata. So, Nasution assumed that the concept of *kafa'ah* reappeared in the time of Abu Hanifah, to answer all issues of pluralism: ethnicities, races, languages and so on. Although *kafa'ah* existed since pre-Islam, but the emergence of this theory

became a legal doctrine as the result of Iraq scholars in answering the problems and conditions of Iraq at that time. With this concept, they could maintain and ensure the integrity of the family life of the Iraq people with the conditions of pluralism and homogeneity problems (Nasution, 2007: 138).

Secondly, a theory pioneered by Caulson and Farhat J. Ziadeh, which claimed that the *kafa'ah* concept originated in Iraq, particularly in Kufa, the birthplace of Abu Hanifah. This theory explained that the concept of *kafa'ah* was not found in Malik's book, *al-Muwatta'*. The concept of the *kafa'ah* was first discovered in the book of Maliki school of thought, *al-Mudawwanah*, that explained very little about the *kafa'ah*, even in its history, it was noted that Imam Malik himself never discussed the matter of *kafa'ah* (Sahnun, 1323: 170). The emergence of this theory was due to the cosmopolitan demands and complexity of the people lived in Iraq at that time because of urbanization, which caused the mixture of ethnic groups, such as Arabs with non-Arabs. *Kafa'ah* was one way to get a good partner, not wrong choice of partner. The emergence of *kafa'ah* concept aimed to respond to the issues of social distinction that ultimately shifted to the issues of legal distinction (Coulson, 1964: 49).

The existence of *kafa'ah* in marriage does not constitute discrimination between people, but is an effort to avoid domestic conflict due to mismatched partners in several ways. It is known that Islam has the mission of equality for all human beings. The concept of *kafa'ah* is advocated by Islam, so prospective wife and husband have the right to determine their respective life partners, both considering the choice based on religious factors, *nasab*, wealth, and other factors. Psychologically, people who marry based on their own choices and desires will greatly help them in the process of socialization to achieve harmony and happiness in the family. Mate selection is a part of the success of a marriage (Latif, 2001: 19). Although *kafa'ah* is very much needed and recommended in marriage, there are differences among scholars or *fuqaha* regarding the *kafa'ah* criteria.

Reconstruction and Implications of *Maqashid Al-Syari'ah* in Large Age Disparity Marriage in Karang Endah Village

Karang Endah Village is one of the villages located in Lengkiti sub-district, Ogan Komering Ulu Regency (OKU), South Sumatera Province, located in the southern part, approximately 200 kilometres from the Capital of the Province (<https://id.wikipedia.org>). OKU Regency is one of 17 districts/cities in South Sumatera province. Geographically, OKU Regency is located between 103°25' up to 104°50' West Longitude and between 3°40' up to 4°55' South Latitude, or located on the Trans-Sumatera Central Transit lane. As an area located on the crossing lane, OKU Regency is an area that connects cities on Sumatera island with cities on Java island (<https://okukab.go.id/geografis/>).

The southern part of OKU Regency is bordered by South OKU, in the northern part by Muara Enim Regency and Ogan Ilir Regency, while in the eastern part bordered by East OKU Regency and in the western part by Muara Enim regency. The majority of the populations living in Lengkiti subdistrict are farmers. They are gardening, such as rubber, coffee, resin, rattan and fruits like oranges, pineapples, and so on. Most of the population come from indigenous tribes. People who live around Lengkiti sub-district

have variety of languages, cultures, customs, and various ethnic groups. As Amzal states that Lengkiti sub-district consists of several tribes, including Komerling, Ogan, Semendo, Javanese, Minang, Batak, and Daya' as found in Karang Endah village. Likewise in terms of language, especially in Karang Endah village, the daily language used in the village is "Dayo" language, which belongs to the family of the Komerling language.

Contributing Factors of Large Age Disparity Marriage

In traditional law marriage, there are three forms of marriage including *endogamy*, *exogamy*, and *eleutherogamy*. Those three forms of marriage are usually strongly influenced by the geographical localisation of the area (Perveen, 2012: 23-27) both the influence of community environmental rules and the influence of families. In relation to the previous discussion on *kafa'ah* marriage, Karang Endah community was not familiar with the term *kafa'ah* marriage or equal marriage. According to the local community, marriage was an act recommended by Islamic law, not only interpreted as the desire, physically and spiritually readiness of a man and woman, but there were rights and obligations to fulfil afterwards. Establishing a marriage was not just to fulfill human being biological needs, or only to fulfill the desire for having sexual relations, but something that to be known and understood by married couples, fulfilling obligations and responsibilities in the family.

A person who was financially, physically, and psychologically ready could get married with the one he loved. For Karang Endah community, social status, educational background, and profession were not required since the concept of comparability itself was not known. So that the form of marriage in Karang Endah village was included in the form of eleutherogamy marriage, which did not limit a person's right to marry anyone.

In general, the social culture of Karang Endah village was similar to other communities. Education was not a requirement for a marriage although it was the most important part to indicate social status in the community. Karang Endah community maintained their marriage custom, although there were no certain customary rules required, in fact family honor was the most important thing. Therefore, when there was a marriage with a large age disparity, they became so excited because this kind of marriage was considered unusual, especially for the bride and groom's families.

From the research results and interviews, it could be concluded that there were several factors that caused this kind of marriage, including:

1. Family Factor

Family is the smallest social unit. It is one of the driving forces for every activity carried out by parents and children. Family tradition is considered as law that must be carried out by all family members, including early marriage tradition, or even the parents' habit of imposing their will to their children to get married early. In this case, it is difficult for the children to reject that tradition, because of fear of being ostracized by their parents and family. Referring to the facts in the field, Slamet, a child of a broken home family, did not get love and care from his parent, but he got attention and affection from Grandma Rohaya instead. This made Grandma Rohaya seemed to be a substitute mother for him.

2. Education Factor

Education is a very important thing to open people's views on current development. Uneducated people tend to do things that make them happy

and comfortable, rather than to see what will happen in the future. The most important thing for them is the present. Living in uneducated families or environments, which do not prioritize education can cause people end their bachelor faster because of feeling bored with their activities. Education is the most important thing for seeing people's mindsets and perspectives of their surroundings.

Slamet was a young man who had attended elementary school, but unfortunately he did not finish his elementary school because of his illness. Slamet's daily activities after dropping out of his school were just playing and occasionally helping his adoptive parent's works in the garden. Slamet's ignorance of the meaning and purpose of marriage caused him to make a decision to marry Grandma Rohaya. Based on the results of the interview, Slamet wanted to have children from Grandma Rohaya, a woman of over seventy years of age, in terms of medical view, it was very difficult for her to have biological children. This indeed had been repeatedly explained to Slamet, but he still decisively decided to marry Grandma Rohaya and expected to get children.

3. Emotional Factor

In Law no. 1 of 1974 on Marriage, article 7, it is stated that the minimum age of marriage for both man and woman is 19 years, if the marriage is carried out under the age as regulated by the law, then it is required to submit a letter of marriage dispensation request to Religious Courts or authorized officials. The rise of underage marriage or disparity age marriage, which contradicts the existing rules, can be due to one's internal emotional impulses such as feelings of love and affection for a partner. Apart from that, achieving the goal of marriage is one of the priorities of a marriage, not just fulfilling biological desires, but for realizing an eternal and happy family.

In Karang Endah village, emotional factor was the biggest reason for someone to get married. The Age disparity relationship existed was purely because of love and affection of one another. Based on the results of the interview, Slamet who was often ill, in his daily life was usually treated and cared by Grandma Rohaya. This caused an emotional relationship between the two, and then resulted in a marriage. Before the marriage, Grandma Rohaya's family and children, and Slamet's family as well had refused and disapproved that marriage as it was considered a disgrace for both families, but this was ignored by Slamet and Grandma Rohaya.

Due to the passionate feelings of this couple, their families and other villagers could not do anything, except to marry the couple immediately. The threat of committing suicide from Slamet worried the villagers. Slamet strongly stated that he loved Grandma Rohaya a lot. Before the marriage, because of his extreme love, he locked Grandma Rohaya in the house, so that Grandma Rohaya could not attend the party in the village, because of being afraid if there would be a man who liked or bothered Grandma Rohaya. This marriage was purely due to love not because of economic factors. The condition of Grandma Rohaya's house was far from good, but still livable. This indicated that she was not a wealthy widow, so it could not be said that Slamet wanted to take her wealth after her death. In fact, Slamet married a poor widow who lived in a very simple house. Those three factors explained

above were considered as the basis of the large age disparity marriage between Slamet and Grandma Rohaya.

Motives of Large Age Disparity Marriages

Viewed from the cultural aspect, the eleutherogamy marriage practiced in Karang Endah village belongs to culture of marriage that has always been practiced from the past until now. Basically, marriage culture in Karang Endah village was not based on economic factors, social status, heredity, and so on. It was based on compatibility between the couples. The marriage would not occur if someone denied having a relationship with the man or woman who claimed to be his or her partner. This could be seen from the explanation given by Amzal and Nasrun, there was a tradition prevailing in the village, before a marriage, one of the processes to carry out was the man's family had to visit the woman's family in order to ascertain whether or not their children had a relationship (wawancara dengan bapak Amzal dan pak Nasrun).

It can be concluded that in the marital tradition in Karang Endah village, there were no specific motives, except those that originated from the drive within the individual to have a happy marriage with his/her own choice, this caused an emotional sense between the two. Culture is dynamic, so it can always change from time to time (Soekanto, 2001: 210). Changes in cultural behavior can be caused by individual or collective motives arise in a community.

Initially the concept of *maqasid al-syari'ah* was first pioneered by Imam Juwaini, then developed by his student, Imam al-Ghazali, and then it was stagnated. At its peak, it was popularized by Imam al-Syatibi and developed by Muhammad Abduh, Rasyid Ridha and al-Maududi, and in the end was also developed by Jasser Auda using a system approach (al-Asyari, 2016: 219). This explanation was based on Yudian Wahyudi's thoughts about *maqasid al-syari'ah* from theory to methodology, which was explained in one of his books.

Maqasid was derived from the words *qasada*, *yaqsidu*, *qasdan* which meant strong desire, firm, and deliberate. The word *maqasid* was the plural form of the word *maqsid* which meant the difficulty of what was indicated or intended (Lihasanah, 2008: 11). While the word *syari'ah* was derived from the words *syara'a*, *yasyri'u*, *syar'an* which meant to start a work (Umar, 2007: 36). Az-Zuhailiy explained that *maqasid al-syari'ah* referred to the meanings and aims of religion monitored in whole or a large number of its laws; or the purpose of the Shari'a and hidden meanings as *asy-Syari'* (Allah) in every Shari'a law (az-Zuhailiy, 1406H/1986M: 1017 dan Indra, 2016: 11). Al-Syatibi concluded that the *maqasid al-syari'ah* was a unity of Islamic law, which meant the unity of its origin, especially in its legal objectives, to achieve this unity, al-Syatibi put forward the concept of the *maqasid al-syari'ah* as the legal goal of goodness and human welfare (Zein, tt: 233). Haroen explained that according to *ahlul ushul fiqh*, the aim of the *maqasid al-syari'ah* was to reach public benefits. Therefore, there were three kinds of benefits that must be achieved according to *ahlul ushul fiqh* (Haroen, 1996: 115), namely, first, *Maslahahad-Daruriyyah*; second, *Maslahah al-Hajiyat*; and third, *Maslahah-Tahsiniyat*.

Viewed from Indonesian *maqasid al-syari'ah*, one of the mechanisms of marital age was that normatively husband and wife must have sociological

and philosophical readiness in order to maintain the perpetuity of their marriage. *Maqasid al-syari'ah* also aimed to protect women from becoming the victims of divorce and early child marriage that might cause disability in the reproductive organs. To avoid the practice of pedophilia, the objectification of marital age regulation for women based on *maqasid al-syari'ah* must be done, because this is as a safeguard for *hifdz an-Nasl*, *hifdz Din*, *hifdz aql* and *hifdz an-Nafs*. The form of safeguarding from *Nasl* is to prevent disability in the female reproductive organs, as well as to protect the *Nafs*, to avoid death of mothers giving birth at very young age (al-Asyari, 2016: 233).

Referring to the practice of large age disparity marriage in Karang Endah village, between a very young man and a 71-year-old woman, the implications of the reconstruction of the concept of *maqasid al-syari'ah* towards age disparity marriages can be seen from several aspects. First to protect religion. Islam is a religion with *rahmatan lil'alamin* teachings. Islam teaches humans to protect the right for freedom of religion and worship (Jauhar, 2017: 1).

So when a pair of men and women want to hold a worship or a marriage, other human beings is supposed not to obstruct the marriage, especially there is no reason justified by Islamic teachings for not being able to do the marriage. This means that there are no conditions and principles that cause them to be prevented from having a marriage.

Second to protect the lives, because the first thing that is considered by Islam is the right to live. The right to live is a right that is sanctified and cannot be destroyed by its glory (Jauhar, 2017: 22). Acts of suicide and death are two different things. Suicide or murder is damage to body structure and release the soul from body. While death is the event of the release of the soul from the body, but the body structure is in a healthy state and only God who gives death not the others (Jauhar, 2017: 27). Slamet's threat of committing suicide was an unjustified act, and considered as a heinous, destructive, and devastating act. In as-Sya'rawi's book quoted by Jauhar, it is stated that someone who commits suicide will be eternal in the hell. This is because humans cannot create themselves, so why do they kill themselves (Jauhar, 2017: 28). To avoid this action, the action of the local government to marry them immediately was the right decision.

Third to protect offsprings, for the sake of preserving offsprings with clear lines and protecting the honor of women, the only way is through a legal marriage. People worried that if this large age disparity marriage prohibited, it would lead to adultery between the two, so this could ruin the sanctity of their offsprings and this was also insulted and opposed Islamic sharia teachings.

Conclusion

The marriage system of the Karang Endah community was eleutherogamy, in which there are no rules or necessities for marriage inside or outside the group. This form of marriage was in line with Islamic law. Where equality and harmony of human beings were not seen from heredity, wealth, independence, profession, but *kafa'ah* in Islamic marriage was only religion that was seen from one's piety against Allah, SWT. However, the case of large age disparity marriage became a debate between the two families and

even among villagers and raised the concerns of many people. Although this kind of marriage was permissible and did not contradict to Islamic sharia, it was considered taboo for the local community.

The practice of large age disparity marriage in Karang Endah village did not have certain motives such as economy and so on, but was purely based on emotional factor from internal impulse of each individual, so that marriage occurred. Viewed from maturity factor, Islam does not explicitly explain the age limit of adulthood, and this also becomes *ikhtilaf* of Islamic scholars. So, the researchers concluded that the large age disparity marriage occurred in Karang Endah village was a marriage that was legally Islamic.

Judging from the concept of *maqasid al-syari'ah*, there were some benefits of this marriage. First, *daruriyyat*, one of the aims of this marriage was to protect religion. If this marriage was not conducted, people worried that adultery would occur between the two. Second, to protect human life, there were threats from both of the bride and groom to commit suicide if they did not marry immediately, so to protect their lives, then the local community forcefully carried out the marriage.

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