



# AL-SHAJARAH

JOURNAL OF ISLAMIC THOUGHT AND CIVILIZATION  
OF  
THE INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA (IIUM)

2019 Volume 24 Number 2

# AL-SHAJARAH

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MINIMUM AGE OF MARRIAGE UNDER ISLAMIC LAW  
AND THE ISLAMIC FAMILY LAW (FEDERAL  
TERRITORIES) ACT 1984: A PRELIMINARY STUDY ON  
THE IDEAL AGE OF MARRIAGE IN MALAYSIA

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**Abstract**

*Marriage is a sacred institution, a union entered into in the pursuit of mutual partnership and happiness between a couple. As a religious covenant, the marriage contract is based on several essential requirements and conditions. Under Islamic law, the age factor is not one of the requirements for a valid marriage because neither the Qur'an nor the Sunnah indicates a specific age of marriage that may affect its validity. This has led to an assumption that there is no specific age of marriage under the Islamic law. Nevertheless, Muslim jurists agreed that a person is recommended to marry at an age when he or she understands the nature of the marriage contract so that the marriage goals can be achieved. The issue then arises as to what is the minimum age of marriage when a person is able to comprehend such marriage relationship. This paper seeks to primarily study the issue of minimum age of marriage in Malaysia and the most suitable age of marriage under Islamic law that governs Muslims in Malaysia. The study includes a juristic discourse on the matter, the incorporation of the Hanafi view and its significance on the minimum age of marriage as recognised by Malaysian law. The research adopts a qualitative research methodology which includes an examination of the primary and secondary sources relating to the subject matter. The research provides suggestions for improvement of the law on the minimum age of marriage in Malaysia where relevant and necessary.*

**Keywords:** Minimum age of marriage, Child marriage, Islamic law

## Introduction

In Islam marriage is a sacred institution that significantly establishes a child's paternity and legitimacy.<sup>1</sup> Islamic law prohibits sexual intercourse outside marriage as it is considered immoral and compromises the marriage institution and lineage. Fornication and adultery are sinful<sup>2</sup> so a child born out of wedlock is considered illegitimate. In Malaysia the birth of illegitimate children is an acute social problem faced by the country and the growing number of such cases is worrying especially when the majority of the Malaysian population are Muslims. A recent court decision that allowed a father to give his surname to an illegitimate child's last name instead of using "Abdullah" had sparked a controversy among Malaysian Muslims.<sup>3</sup> The media more often than not report cases about babies or infants abandoned in dumps, toilets, mosques and other places.<sup>4</sup> In 2017 there were 59 reported cases of abandoned babies from January to June of which Selangor recorded the highest number with 23 cases.<sup>5</sup> The National Registration Department's statistics show that

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<sup>1</sup> David Pearl and Werner Menski, *Muslim Family Law*, 3<sup>rd</sup> ed. (London: Sweet & Maxwell, 1998), 399-400. See also Shabnam Ishaque, "Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity," *International Journal of Law, Policy and the Family* 22, no. 3 (2008): 404, <https://doi.org/10.1093/lawfam/ebn009> (describing that the child in Islam has the right to be born to married parents and therefore is entitled to the right to legitimacy).

<sup>2</sup> See Amira al-Azhary Sonbol, "Adoption in Islamic Society: A Historical Survey in Children," in the *Muslim Middle East*, ed. Elizabeth Warnock Fernea (Austin: University of Texas Press, 1995), 49 (citing Imām al-ḥāfiẓ Shams al-Dīn Ibn al-Dhahabī, *al-Kabāir*, (Alexandria: Maktabāt Hāmidu, 1987), 42-45, who listed *zina* (illicit sexual relationship) as the tenth great sin by quoting Qur'ān of *Surah* 24:2 which states: "the woman and the man guilty of fornication, flog each of them with a hundred stripes; Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day; And let a party of the believers witness their punishment.

<sup>3</sup> Shanon Teoh, "Court Ruling on Illegitimate Kids Divide Muslims in Malaysia," *The Straits Times*, July 29, 2017, <http://www.straitstimes.com/asia/se-asia/court-ruling-on-illegitimate-kids-divides-muslims-in-malaysia>.

<sup>4</sup> Taufiq Mahmud, "Anak Tidak Sah Taraf," Portal Rasmi Kementerian Kesihatan Malaysia, last modified August 15, 2017, <http://www.myhealth.gov.my/98311/>.

<sup>5</sup> "59 Kes Buang Bayi Direkodkan pada Januari hingga Jun 2017 – KPWK," *Kosmo Online*, November 7, 2017, <http://www.kosmo.com.my/terkini/59-kes->

159,725 children were registered as illegitimate from 2013 to 2015 mostly born to teenagers.<sup>6</sup> In this regard, the Ministry of Health's statistics show that 16, 270 teenage pregnancies from 2012 to 2015 were out of wedlock.<sup>7</sup> Pregnancy out of wedlock is thus one of the factors that contribute to underage marriages in Malaysia.<sup>8</sup>

Marriage at a young age is preferred by parents who believe that marriage may prevent their young daughters from an out of wedlock pregnancy which would lead to a life of disgrace and humiliation. Subsequently both parents and children are likely to opt for marriage as the best solution to cover their shame.<sup>9</sup> For instance, a study in Pahang reveals that the main factor for child marriage is infatuation. The other reasons for early age marriage are accidental pregnancy (54%), mutual affection and prevention of immorality (30%), sexual involvement not leading to pregnancy (8%), eagerness to get married early (4%) and sexual involvement with multiple partners.<sup>10</sup> The Malaysian Shari'ah Justice Department's statistics show that 50% of underage marriage applications are due to young couples wanting to cover their shame from being involved in a sexual relationship and 4% are rape cases.<sup>11</sup> It should be noted that rampant and random sexual relations between minors has also led them to opt for early marriage.<sup>12</sup>

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buang-bayi-direkodkan-pada-januari-hingga-jun-2017-kpwkm-1.548519.

<sup>6</sup> Mahmud, "Anak Tidak Sah Taraf."

<sup>7</sup> "Lebih 500,000 Anak Luar Nikah Didaftar Dalam Tempoh 10 Tahun," *Malaysian Digest*, November 11, 2016, <http://www.malaysiandigest.com/bahasa-malaysia/642470-lebih-500-000-anak-luar-nikah-didaftar-dalam-tempoh-10-tahun.html>.

<sup>8</sup> See Md Zawawi Abu Bakar, Wan Ibrahim Wan Ahmad and Mahyuddin Abu Bakar, "Registration Problems of Illegitimate Children among Muslims in Malaysia," *Journal of Islamic Studies and Culture* 5, no. 1 (2017): 10, <https://doi.org/10.15640/jisc.v5n1a2>.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid* (citing Jamil, S. Observation: Youth Marriage, 2010, <http://nihayahsaidah-skyjamil.blogspot.com/2010/11/pemerhatian-isu-kahwin-mua.html>).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* (citing Muhammad Naim, *The Law of Marriage in Malaysia and the Implications on Underaged Children*, 2013, <http://naimpital.blogspot.com/2013/11/Undang-undang-perkahwinan-dimalaysia/htm>).

## The Age of Marriage in the Qur'ān and Sunnah and Juristic Discourse

Although there is no prescribed minimum age for marriage, several indications in the Qur'ān and Sunnah of the Prophet (ﷺ) provide a guideline in determining the appropriate age for marriage. The Qur'ān states:

“Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up. If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable. When ye release their property to them, take witnesses in their presence. But all-sufficient is Allah in taking account.”<sup>13</sup>

According to Ibn Kathir the term “until they reach the age of marriage” as viewed by Mujahid refers to “the age of puberty (*al-hulum*).” The majority of scholars agree that the discharge of semen in sleep is considered an indication of puberty for males. This is based on a *ḥadīth* which says that, “There is no orphan after attaining puberty.”<sup>14</sup> Another *ḥadīth* states that, “The pen has been lifted from three; ‘From the insane person whose mind is deranged

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I#Vah70WwVjIU). See also Rodly Fadly, “Anak Terlanjur...,” *myMetro*, March 8, 2017, <https://www.hmetro.com.my/node/211794> (describing the incidents of sexual relationship outside marriage among teenage Muslims girls); Zakiyyah Jamaluddin, “Premarital Pregnancy and Abortion among Adolescent,” *Advances in Natural and Applied Sciences* 7, no. 4 (2013): 367-368, accessed Feb 21, 2018, [https://www.researchgate.net/publication/281061588\\_Premarital\\_Pregnancy\\_and\\_Abortion\\_among\\_Adolescent](https://www.researchgate.net/publication/281061588_Premarital_Pregnancy_and_Abortion_among_Adolescent) (describing excessive freedom and substance abuse that lead to premarital pregnancy).

<sup>13</sup> Qur'ān 4: 6.

<sup>14</sup> See Imam Hafiz Abu Dawud Sulaiman bin Ash'ath, *Sunan Abu Dawud: English translation of Sunan Abu Dawud*, vol. iii, trans. Nasiruddin al-Khattab (Riyadh: Darussalam, 2008), 418-419, *ḥadīth* no. 2873 (describing in the comments section of the *ḥadīth* that a child ceases to be legally an “orphan” upon reaching the age of puberty and therefore he is responsible for his own affairs. If he is found to possess a sound judgment, then his view on matters pertaining to business and marriage will be preferable and decisive).



until he comes to his senses, from the sleeping person until he awakens, and from the child until he reaches puberty.”<sup>15</sup> Continuing further he says the term “sound judgment” in the verse means “good in religion and wise with money.”<sup>16</sup>

*Tafsīr Ibn Abbas* further states that marriageable age refers to the age of puberty while sound judgment refers to righteousness in religion and a tendency to safeguard the fortune.<sup>17</sup> In *Tafsīr al-Maraghīy*, the age of marriage means the age that qualifies children to get married and that is the age of majority or puberty. One of the qualifications is when one can be a good husband and father as well as responsible towards his family. Alternatively, sound judgment could be tested on a child by giving him a small portion of his property to spend and if he shows wisdom in how he spends it then this means he has begun thinking like an adult. If he is said to be matured but does not know how to manage a property wisely his maturity has no meaning. Therefore the ability to manage one’s property well is said to represent mental and intellectual health.<sup>18</sup>

In yet another book of *Tafsīr al-Jalalayn*, he states that the term “until they reach the age of marriage” refers to when they have become eligible for it by means of puberty or legal age which, according to the Shafi’i jurists, is fifteen years of age. With regard to sound judgment, it refers to the right judgment in matters pertaining to religion and property.<sup>19</sup> On this issue, al-Qurtubi also states that the term “until they reach the age of marriage” refers to *al-hulūm* based on the words of Allah “But when the children among you come

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<sup>15</sup> See Imam Hafiz Abu Dawud Sulaiman bin Ash’ath, *Sunan Abu Dawud: English translation of Sunan Abu Dawud*, vol. v, trans. Nasiruddin al-Khattab (Riyadh: Darussalam, 2008), 43, *ḥadīth* no. 4401.

<sup>16</sup> Ismā’īl ibn ‘Umar Ibn Kathīr, *Tafsīr al-Qur’ān al-‘Aẓīm*, vol. ii (al-Mamlākah Al-Arabiyyah As-Su’udīyyah: Dār Toybah li al-Nashar wa al-Tauzi’, 1999), 215-216.

<sup>17</sup> Muhammad ibn Ya’qub al-Firuzabadi, *Tafsīr Ibn Abbas Great Commentaries on the Holy Qur’ān*, vol. ii, trans. Mokrane Guezzou (Louisville: Royal Aal al-Bayt Institute for Islamic Thought, 2008), 99.

<sup>18</sup> Ahmad Mustafa al-Maraghīy, *Tafsīr Al-Maraghīy*, vol. ii (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2001), 1091-1092.

<sup>19</sup> Jalal al-Din Muhammad ibn Ahmad al-Mahalli, *Tafsīr al-Jalalayn, Great Commentaries on the Holy Qur’ān*, trans. Feras Hamza (Louisville: Royal Aal al-Bayt Institute for Islamic Thought, 2008), 73.

of age,”<sup>20</sup> which also means puberty (*al-bulūgh*) and state of marriage (*wa hal al-nikāh*).<sup>21</sup>

The above discussion shows that in general there is a difference of opinion regarding the allegorical interpretations (*ta’wil*) of sound judgment or maturity of mind. For instance, some Muslim jurists say that it means righteous in terms of mind and religion whilst Ibn Abbas and al-Hasan are of the view that the term refers to the ability to think well and manage property on their own. Others say that it refers in particular to a clear state of mind.<sup>22</sup>

The above discussion also shows that under the *Sharī’ah*, marriage is recommended at the age of puberty or maturity (*baligh*) and sound judgment (*rushdah*). For instance, the maturity age for a girl is established upon reaching menstruation when she has developed into full womanhood, physically and mentally. Alternatively, sound judgment is acquired through education, formally or informally. It follows that the ability to understand the responsibilities of marriage and having the competence to perform the duties of a wife and mother are crucial for a woman. It remains a fact that a child knows nothing about the intricacies of marriage and the emotional weight of bearing a child.<sup>23</sup>

Some jurists are of the opinion that there are Quranic verses which indicate marriage could be below the age of puberty as the Qur’ān states to the effect:

“Such of your women as have passed the age of such monthly courses, for them the prescribed period, if ye

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<sup>20</sup> Qur’ān 24: 59.

<sup>21</sup> Muḥammad ibn Aḥmad Qurṭubī, *al-Jāmi’ li-ahkām al-Qur’ān*, vol. v (al-Qāhirah: Dār al-Ḥadīth, 2002), 35.

<sup>22</sup> Ibid; Abū Ja’far Muḥammad ibn Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī: Jāmi’ al-bayān ‘an ta’wīl āy al-Qur’ān*, vol. iii (Bayrūt: Dār Iḥyā’ al-Turāth al-‘Arabī, 2001), 313-314.

<sup>23</sup> Kamal-deen Olawole Sulaiman, “Islamic Responses to the Raging Controversy of Child Marriage in Nigeria,” accessed January 24, 2018, <http://jhss-khazar.org/wp-content/uploads/2016/02/ISLAMIC-RESPONSES-TO-TH E-RAGING-CONTROVERSY-OF-CHILD-MARRIAGE-IN-NIGERIA.doc>.

have any doubts, is three months, and for those who have no courses (it is the same).<sup>24</sup>

The above verse provides the waiting period (*'iddah*) following a divorce for menopausal women and for those who do not have menses. In this respect, there would be no divorce without a marriage in the first place. Subsequently, these jurists have opined that aside from being applicable to menopausal women, it also applies to the waiting period (*'iddah*) for a divorced girl who has not had menstruation or who has not yet attained puberty which according to them would be three months.<sup>25</sup> Al-Tabari also mentions that Allah has prescribed a three-month waiting period for divorced females who have yet to menstruate or attain the age of puberty.<sup>26</sup> It also refers to those who have not menstruated because they are still young and have been divorced by their husbands after the marriage is consummated.<sup>27</sup>

Al-Qurtubi commented that the verse also refers to young girl whom do not have menses. In such a situation, their waiting period for divorce is three months based on the count of months since they do not have *quru'* like those who have menstruated.<sup>28</sup> Similarly, Ibn Kathir states that for the young who have not attained the age of menstruation, their waiting period is three months.<sup>29</sup> Based on this verse also, some Muslim jurists opine that it is permitted for persons who have yet to reach maturity to marry lawfully as long as they fulfil the conditions of marriage.<sup>30</sup>

They have taken it further to say that since the verse suggests

<sup>24</sup> Qur'ān 65:4.

<sup>25</sup> Muwaffaq al-Dīn 'Abd Allāh ibn Aḥmad Ibn Qudāmah, *al-Mughnī*, vol. ix (al-Qāhīrah: Dār al-Ḥadīth, 2004), 169.

<sup>26</sup> Abū Ja'far Muḥammad ibn Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī: Jāmi' al-bayān 'an ta'wīl āy al-Qur'ān*, vol. vii-x (Bayrūt: Dār Iḥyā' al-Turāth al-'Arabī, 2000), 158.

<sup>27</sup> *Ibid.*, 159.

<sup>28</sup> Muḥammad ibn Aḥmad Qurtubī, *al-Jāmi' li-aḥkām al-Qur'ān*, vol. xxi (Bayrūt: Muassasah al-Risālah, 2002), 51.

<sup>29</sup> Ismā'īl ibn 'Umar Ibn Kathīr, *Tafsīr al-Qur'ān al-'Azīm*, vol. viii (al-Mamlākah Al-'Arabīyyah AsSu'udīyyah: Dār Toybah li al-Nashar wa al-Tauzi', 1999), 149.

<sup>30</sup> Dar al-Iftaa Al-Missriyyah, "What is the Ruling on Marrying a Minor?" accessed February 19, 2018, <http://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=8184&text=minimum%20age>.

that a minor or a young girl who has not attained puberty can marry, accordingly the guardian may give her in marriage and following a divorce she has three months of *'iddah*. Based on the above verse, the majority of Muslim jurists that support this say that a minor may also marry before she reaches the age of puberty under the guardian's supervision.<sup>31</sup>

The Quranic verse above validates the Prophetic Ḥadīth below that does not restrict a minor from marrying:

“Narrated ‘A’ishah (رضي الله عنها) that The Prophet (ﷺ) wrote the marriage contract with her when she was six years old and he consummated his marriage when she was nine years old, and then she remained with him for nine years (i.e. till his death)”<sup>32</sup>

In general the proponents of this view have taken this Ḥadīth as the legal authority for allowing marriages to minors because it has not specifically prohibited marriage to a minor, similar to the Quranic verse mentioned above regarding the *'iddah* period for a girl who has not yet menstruated after a divorce. One of the proponents of this view, Al-Muhallab states that this also means a father is allowed to give his young daughter in marriage though she has not menstruated.<sup>33</sup>

However, other Muslim jurists such as At-Thawawi narrated from Ibnu Syubrumah the prohibition of marrying a minor or a young child. Ibnu Hazm also narrated from Ibnu Syubrumah the absolute prohibition of a father giving a young daughter in marriage until she has attained puberty and has consented to the marriage. He claimed that the Prophet's (ﷺ) marriage to six-year-old ‘A’ishah was exceptional for the Prophet (ﷺ) only. A different opinion comes

<sup>31</sup> See Ibn Qudāmah, *al-Mughnī*, vol. ix, 169.

<sup>32</sup> Muhammad ibn Isma'il al-Bukhari, *Sahih al-Bukhari: The Translation of the Meanings of Sahih al-Bukhari Arabic-English*, vol. vii, trans. Muhammad Muhsin Khan (Riyadh: Dar as-Salam, 1997), 67, *ḥadīth* no. 5133. See also Imam Abu Hussain Muslim bin al-Hajjaj, *Sahih Muslim: English Translation of Sahih Muslim*, trans. Nasiruddin al-Khattab, vol. iv (Riyadh: Darussalam, 2007), 46, *ḥadīth* no. 3480.

<sup>33</sup> Aḥmad ibn ‘Alī Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī fī Sharḥ Ṣaḥīḥ al-Bukhārī* (Bayrūt: Maktabah al-'Asriyah, 2009), 6068.

from Al-Hasan an Nakha'i who was of the view that a father is allowed to force his daughter to marry whether she is a minor or an adult, and whether she is a virgin or not.<sup>34</sup>

The majority of Muslim jurists however hold the view that marriage of a young girl before puberty is permitted only if it is contracted on her behalf by her father or grandfather in her best interests. If that is the case, then the Maliki and Shafi'i jurists extended the explanation further by saying that the child does not have an option to rescind the marriage upon reaching puberty. The Shafi'i jurists argue that the father and grandfather possess an informed judgment and an overflowing fondness towards the minor and the marriage is treated as if it were concluded with her consent after she has reached puberty. Most scholars as well as those from the Shafi'i and Maliki schools agree that the marriage of a minor contracted by his or her guardian other than the father and grandfather is invalid; however, there is a view that allows the minor to rescind the marriage upon reaching puberty. The exception is Abu Yusof who says there is no such option.<sup>35</sup>

### **An Overview of the Juristic Discourse on the Age of Puberty and the Age of Marriage**

Islamic law basically refers to an infant (*tiflu*) and a boy (*sabiy*) as children who have yet to reach the age of puberty or maturity.<sup>36</sup> From an Islamic point of view a minor or a child is a person who has not reached puberty, and he or she is considered to have attained the age of majority at the onset of puberty. There are two methods to determine the age of puberty namely, by natural evidence or age

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<sup>34</sup> Ibid.

<sup>35</sup> Abū Zakariyyā Yahyā ibn Sharaf al-Nawawī, *Ṣaḥīḥ Muslim bi-sharḥ al-Nawawī* (Bayrūt: Dār al-Ma'rifah, 2004), 210, 9/206; Ibn Qudāmah, *al-Mughnī*, vol. ix, 172, Abū Zakariyyā Yahyā ibn Sharaf al-Nawawī, *Minhāj al-Ṭālibīn*, vol. iii (Bayrūt: Dār al-Bashā'ir al-Islāmīyah, 2000), 426-427; Ali ibn Abi Bakr Marghinani, *The Hedaya Commentary on the Islamic Laws*, trans. Charles Hamilton (New Delhi: Kitab Bhavan, 1994), 36-37.

<sup>36</sup> Sulaiman, "Islamic Responses" (citing Y.O. Azeez, "Guidance and Counseling from the concept of the Qur'ān," M.A Project Department of Arabic and Islamic Studies, University of Ibadan, 35-38).

factor.<sup>37</sup> There are however differences of opinion among the jurists regarding natural evidence.

According to the Hanafi jurists, puberty reaches a boy through *ihtilam* which is the discharge of *mani* by which he can impregnate a woman. *Ihtilam* means the discharge of sperm (*mani*) at night time. This is based on the Quranic verse which says to the effect,

“But when the children among you come of age let them also ask for permission.”<sup>38</sup>

The term “come of age” refers to the age of puberty. Apart from that, there is also a *ḥadīth* regarding three people whose actions were not recorded until one of them who was a minor reached puberty.<sup>39</sup> Another *ḥadīth* narrated by Abu Dawud from Ibnu Abi Thalib (رضي الله عنه) states among others there is no status of orphan after *ihtilam*. The age of puberty is attained by *ihtilam* when sperm has been discharged, and this is equated with the ability to impregnate a woman. With regard to girls, puberty is attained through menses when they are able to become pregnant. The minimum age of puberty for a boy is twelve years old and for a girl it is nine years old according to the selected opinion of the Hanafi jurists. If a child has not attained puberty by this natural evidence, it is then established by the age criterion which is fifteen years for both sexes. This age criterion is based on the opinions of two disciples Abu Yusuf and Muhammad. Alternatively, according to Imam Abu Hanifah the age of puberty refers to the completion of eighteen years for males and seventeen years for females.<sup>40</sup>

The Maliki school propounds seven types of natural evidence. Five of them are shared between the two sexes and two of them are specifically for females which are, menses and the ability to become pregnant. Other natural evidence for either male and/or female includes absolute ejaculation while awake or asleep, coarse pubic hair, unpleasant smell under the armpits, protruding tip of the nose and deep voice. When the above natural evidence are not manifested

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<sup>37</sup> Wahbah al Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuhu*, vol. v (Dimashq, Sūrīyah: Dār al-Fikr, 1989), 422.

<sup>38</sup> Qur’ān 24: 59.

<sup>39</sup> See Abu Dawud, *Sunan Abu Dawud*, vol. v, 43, *ḥadīth* no. 4401.

<sup>40</sup> Al-Zuḥaylī, *al-Fiqh al-Islāmī*, 423; Al-Marghinani, *The Hedaya*, 329-330.

in a male or female, he or she is said to reach the age of puberty at eighteen years old.<sup>41</sup>

According to the Shafi'i school a child attains puberty when he or she has reached fifteen years that is, when a boy has the ability to discharge sperm during ejaculation which can impregnate a woman, and when a girl reaches nine years of age or grows coarse pubic hair<sup>42</sup> which requires shaving to remove. The armpit hair or beard is not a sign of puberty since it rarely grows before the age of fifteen. Similar to the opinions of the Hanafi and Maliki jurists, the two specific signs of puberty for a female are also menses and pregnancy.<sup>43</sup>

Hence according to the juristic opinions above, there are five things to consider when dealing with the issue of puberty. Three of them generally occur with both sexes which include the discharge of sperm or ejaculation for boys and menstrual period for girls, the growth of pubic hair and age (the completion of fifteen years old). There is also consensus in the juristic opinions that menses and pregnancy are natural evidence of puberty for females. The age of fifteen years is based on the *ḥadīth* about Abdullah Ibn Umar who was not allowed to participate in the battle of Uhud at the age of fourteen, but at the age of fifteen the Prophet (ﷺ) had allowed him to

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<sup>41</sup> Al-Zuhaylī, *al-Fiḥ al-Islāmī*, 423-424. See also, Muwaffaq al-Dīn 'Abd Allāh ibn Aḥmad Ibn Qudāmah, *al-Mughnī*, vol. vi (al-Qāhirah: Dār al-Ḥadīth, 2004), 204 (describing the opinion of Malikis on the age of puberty is seventeen or eighteen years in the absence of natural evidences); Al-Qurṭubī, *al-Jāmi' li-aḥkām*, vol. v, 36 (describing the age of puberty according to Malikis is seventeen years old).

<sup>42</sup> See Abu Dawud, *Sunan Abu Dawud*, vol. v, 45-46, *ḥadīth* no. 4404 (describing that growth of hair below the naval is a sign of puberty in which the *ḥadīth* states to the effect that:

It was narrated from Sufyan: "Abdul Malik bin Umair narrated to us; "Atiyyah Al-Qurazi narrated to me, he said: I was among the captives of Banu Quraiza, and they examined (us). Those whose pubes had started to grow were executed, and those whose pubes had not started to grow were not executed. I was among those whose pubes had not started to grow."

<sup>43</sup> Al-Zuhaylī, *al-Fiḥ al-Islāmī*, 424; Abū Ishāq Ibrāhīm ibn 'Alī ibn Yūsuf Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fi fiḥ al-Imām al-Shāfi'ī*, vol. ii (Bayrūt: Dār al-Kutub al-'Ilmiyah, 1995), 130; Ibn Qudāmah, *al-Mughnī*, vol. vi, 202-203; Al-Nawawī, *Minhāj al-Ṭālibīn*, 120-121.

participate in the battle of al-Khandaq.<sup>44</sup> This *ḥadīth* later reached ‘Umar bin Abdul Aziz who stated that such is the difference between a child and an adult.<sup>45</sup> The Hanbali jurists also have the same opinion as the Shafī‘i jurists<sup>46</sup> that is, if natural evidence is not established the puberty of a child is determined by the age criterion. In this regard the Hanafi, Shafī‘i and Hanbali schools agree that the age of puberty for both a boy and a girl is fifteen years while the Maliki school is of the view that puberty is at eighteen years. All the schools agree that no child is considered to have attained puberty before the age of nine<sup>47</sup> regardless of any physical development of the body.

It appears there is no consensus among the Muslim scholars with respect to the age that determines a child’s maturity as it is based on the onset of puberty. In this regard, Abdul-Hamid Siddiqi in his commentary of *Sahih Muslim* says:

“Islam has laid down no age limit for puberty for it varies with countries and races due to the climate, hereditary, physical and social conditions. Those who live in cold regions attain puberty at a much later age as compared with those living in hot regions where both male and female attain it at a quite early age.”<sup>48</sup>

This suggests that a child’s maturity is not the same for all as there are distinguishable elements in human physiology which may differ according to each country and race. Eating habits and environmental factors of a person also affect and sometimes influence their physical development which may bring forth earlier maturity.<sup>49</sup> To contrast with the western legal tradition, the age of

<sup>44</sup> Al-Zuḥaylī, *al-Fiqh al-Islāmī*, 424; Al-Shīrāzī, *al-Muḥadhdhab*, 130; Ibn Qudāmah, *al-Mughnī*, vol. vi, 204; Al-Qurṭubī, *al-Jāmi‘ li-ahkām*, vol. v, 35-36.

<sup>45</sup> Abu Dawud, *Sunan Abu Dawud*, vol. v, 46, *ḥadīth* no. 4406-4407. See also, Muhammad ibn Isma‘il al-Bukhari, *Sahih al-Bukhari: The Translation of the Meanings of Sahih al-Bukhari Arabic-English*, vol. v, trans. Muhammad Muhsin Khan (Riyadh: Dar as-Salam, 1997), 259, *ḥadīth* no. 4097.

<sup>46</sup> Al-Zuḥaylī, *al-Fiqh al-Islāmī*, 424.

<sup>47</sup> Al-Nawawī, *Minhāj al-Ṭālibīn*, 120.

<sup>48</sup> Muslim ibn al-Hajjaj al-Qushayri, *Sahih Muslim Arabic – English with Explanation Notes and Brief Biographical Sketches of Major Narrators*, vol II-A, trans. Abdul Hamid Siddiqi (Delhi: Adam Publishers & Distributors, 1999), 353-354 [hereinafter Abdul Hamid Siddiqi, *Sahih Muslim Commentary*].

<sup>49</sup> Sulaiman, “Islamic Responses,” 4.



majority of a Muslim child is not decided at a certain age but when the child has attained puberty hence making him or her marriageable. Consequently, there is no religious restriction to a child's early marriage after he or she has reached puberty and can be fully developed physically, mentally and intellectually.

### **An Analysis of the Age of Marriage based on the Prophet's (ﷺ) Marriage to Saidatina 'A'ishah (رضي الله عنها)**

This part of the article analyses the *ḥadīth* quoted earlier that the Prophet (ﷺ) married 'A'ishah (رضي الله عنها) when she was six years old and the marriage was consummated when she turned nine.<sup>50</sup> 'A'ishah was the daughter of Abu Bakr (رضي الله عنه), one of the closest friends and dedicated followers of the Prophet (ﷺ) as well as one of the earliest converts to Islam. The purpose of the marriage was generally for sociopolitical reasons which was to strengthen the relationship between the Prophet (ﷺ) and Abu Bakr (رضي الله عنه).<sup>51</sup> Based on the culture at that time, getting married at puberty was an acceptable historical norm. According to Ibn Al-Mundhir, there is no difference of opinion among the reliable people of knowledge regarding the permissibility of a father to give his young virgin daughter in marriage to an eligible man even if she is reluctant or unwilling. There were companions who acted on early marriage; Ali Ibn Abi Talib married his daughter Ummu Kulthum to Omar Ibn Al-Khattab, as did Zubair with his daughter when she was very young.<sup>52</sup> Marriage at an early age was widespread among the companions and no one denied its permissibility as it was consistent with the social norms of the time.

Apart from this, the Prophet's (ﷺ) proposal to 'A'ishah was suggested by Khawlah bint Hakim to be a symbol of strengthening the relationship between him and Abu Bakr (ra) as well as to bestow the Prophet's (ﷺ) favour on him (Abu Bakr). According to some historians, Jubair ibn Mut'am was actually 'A'ishah's first suitor and

<sup>50</sup> See Al-Bukhari, *Sahih al-Bukhari*, vol. vii, 67, *ḥadīth* no. 5133.

<sup>51</sup> Abu Iman Abd ar-Rahman Robert Squires, "The Young Marriage of 'Aishah Mother of The Believers," accessed February 26, 2018, <http://www.islamic-awareness.org/Polemics/aishah.html>.

<sup>52</sup> Ibn Qudāmah, *al-Mughnī*, vol. ix, 169-170.

not the Prophet (ﷺ). This shows that she was mature enough to be given in marriage following the predominant tradition at that time. The news of the Prophet's (ﷺ) marriage to 'A'ishah was received by the community including the Quraish people as something natural and even expected because many girls got married at the same age as 'A'ishah.<sup>53</sup>

At another level the Prophet's (ﷺ) marriage to young 'A'ishah represented a divine purpose behind it like the other acts of the Prophet (ﷺ). 'A'ishah who was an intelligent and bright young girl was developing physically and mentally and at the onset of puberty she was placed under the Prophet's (ﷺ) care and received his guidance during the formative years of her life. During the period when learning and development generally occur, the sensibilities and growth of 'A'ishah's mental faculties were nurtured by the Prophet (ﷺ) until she became a significant figure in the history of Islam. 'A'ishah's potential did not only support the Prophet (ﷺ) in his mission and the Islamic cause but she also became a role model for Muslim women. Interestingly 'A'ishah was also the only virgin among the Prophet's (ﷺ) wives and was able to comprehend the feelings of young ladies who had various questions to ask the Prophet (ﷺ) regarding sexual ethics and morality. They were hesitant and shy to ask those questions through the Prophet's (ﷺ) elderly wives but were more forthright with 'A'ishah as she was around their age. Furthermore, the marriage was ordained to correctly explain the notion that marrying the daughter of a man who is one's brother in Islam is not the same as marrying the daughter of a blood-related brother. It follows that the Prophet's (ﷺ) act of marriage to 'A'ishah, the daughter of Abu Bakar who was the Prophet's (ﷺ) known brother-in-faith was different, and significantly the *hadith* also notes that the marriage was a blissful one.<sup>54</sup>

In that period of time it appeared natural for a girl like 'A'ishah to be betrothed in marriage early as it was part of the prevailing standards of society in the Arabian Peninsular. It should be highlighted that the marriage consummation was delayed for three

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<sup>53</sup> Islam Online, "Addressing Misconceptions about Prophet's Marriage to 'Aisha," accessed January 25, 2018, <https://archive.islamonline.net/?p=778>.

<sup>54</sup> Abdul Hamid Siddiqi, *Sahih Muslim Commentary*, 354.

years until ‘A‘ishah attained the age of puberty as this signals the physiological maturity of a girl after which her physical and mental developments will naturally follow. There are also contrary arguments to this *ḥadīth* which regarded ‘A‘ishah’s age as being other than nine years old at the time of her marriage to the Prophet (ﷺ).<sup>55</sup>

Based on the above discussion, the age factor is not an essential element of marriage and a father or grandfather has the authority to give his daughter or granddaughter in marriage even though she has not reached the age of puberty. Nevertheless, a pious and concerned father should not give his young daughter in marriage without taking her best interests into account.<sup>56</sup> Significantly, Shafi’i jurists are of the opinion that the father and grandfather are encouraged to wait until the girl has reached puberty and ask for her consent before arranging a marriage. The benefit of such a marriage must be highlighted and a father is assumed to act in his daughter’s best welfare. There must be no harm against the daughter in such a marriage.<sup>57</sup>

The Hanafi school argues that the reason why the authority is vested in the father to contract a marriage for a young child is to ensure that a partner of good character and status is suitably found.<sup>58</sup> This suggests that a minor is given in marriage before she has attained puberty in order to secure a husband of equal or higher status. The Maliki, Shafi’i and Imam Abu Hanifah are of the view that a restriction or limit should be placed on intimacy between marriage partners until they reach maturity that is, when they are able to handle sexual intercourse. According to al-Dawudi in the case of ‘A‘ishah’s marriage to the Prophet (ﷺ), her physique had matured

<sup>55</sup> See e.g. Ridhwan ibn Muhammad Saleem, “Age of Al-Sayyida Aisha When She Married the Prophet Muhammad (peace and mercy of God be upon him),” accessed January 24, 2018, [http://www.discoveringislam.org/aisha\\_age.htm](http://www.discoveringislam.org/aisha_age.htm) (arguing that ‘A‘ishah (ra) was fifteen to nineteen years when the marriage was consummated based on historical events that took place).

<sup>56</sup> Islam Question and Answer (IslamQA) (General Supervisor: Shaykh Muhammad Saalih al-Munajjid), “146882: Is there a set age for marriage in Islam?” accessed January 18, 2018, <https://islamqa.info/en/146882>.

<sup>57</sup> Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, 210, 9/206.

<sup>58</sup> Al-Marghinani, *The Hedaya*, 36-37.

into ‘good youthfulness’ (*shabaaban husna*).<sup>59</sup> It seems that ‘A‘ishah had attained maturity or womanhood when she married the Prophet (ﷺ) at the age of nine. It follows that the permission to marry a minor who has not reached the puberty age does not consequently reflect the permission to consummate the marriage, rather it should only be done when she is capable or when she comes of age, which seems to be the reason why the Prophet (ﷺ) delayed the consummation of his marriage to ‘A‘ishah.<sup>60</sup>

### **The Age of Marriage under the Islamic Family Law (Federal Territories) Act 1984**

In Malaysia, the Islamic Federal Territories Act 1984<sup>61</sup> (IFLA) provides for the minimum age of marriage. The IFLA states that “no marriage shall be solemnised under this Act where either the man is under the age of eighteen or the woman is under the age of sixteen except where the *Shari‘ah* judge has granted his permission in writing in certain circumstances.”<sup>62</sup> This provision is in line with the Hanafi’s age of puberty where no natural symptoms appear<sup>63</sup> and shows that the IFLA’s provision for the marriageable age is based on the puberty age as prescribed by Islamic law.

There is however no clear guideline or standard procedure as to how the Syariah judges grant their permission for the marriage of candidates below eighteen or sixteen years of age.<sup>64</sup> Similarly, ‘certain circumstances’ in the above provision have no statutory guideline and are merely based on the discretion of *Shari‘ah* judges.<sup>65</sup>

<sup>59</sup> Al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, 210, 9/206.

<sup>60</sup> Islam Question and Answer (IslamQA) (General Supervisor: Shaykh Muhammad Saalih al-Munajjid), “22442: On Acting; And the Ruling on Marrying Young Girls,” accessed January 18, 2018, <https://islamqa.info/en/22442>.

<sup>61</sup> Act 303.

<sup>62</sup> Islamic Federal Territories Act 1984, sec. 8.

<sup>63</sup> See the Annotated Statutes of Islamic Federal Territories Act 1984, 106.

<sup>64</sup> See e.g. Noor Aziah Mohd Awal, “Child Marriage in Malaysia,” University Kebangsaan Malaysia for UNICEF, 2018, 3, accessed October 27, 2018, [https://www.unicef.org/malaysia/ChildMarriage\\_Malaysia\\_WorkingPaper\\_v2.pdf](https://www.unicef.org/malaysia/ChildMarriage_Malaysia_WorkingPaper_v2.pdf).

<sup>65</sup> See also Rafeah Saidon et al., “Developing a New Model of Underage Marriage Governance for Muslims in Malaysia,” *Middle-East Journal of Scientific Research* 23, no. 4 (2015): 642, DOI: 10.5829/idosi.mejsr.2015.23.04.21762.

It is contended and proposed that among the main reasons *Sharī'ah* judges allow underage marriages are to curtail pregnancies out of wedlock and the problem of abandoned babies. These propositions however are not well received by women activists and politicians.<sup>66</sup> One of the arguments offered is that child marriages mostly occur because the couple had indulged in premarital sex which leads to the girl being allowed by her family to marry the partner.<sup>67</sup> This is evident for example in the case of *Kamariah bt Ahmad v Nur Asmira bte Abdullah*<sup>68</sup> where the mother and her daughter (aged fifteen years and two months) had made an application to the Malacca Syariah Subordinate Court to marry on the grounds of avoiding “evil acts” as the daughter and partner were often out together. In this case, the Syariah Court had allowed the marriage as it was in line with Islamic law. Furthermore, the child had reached the age of puberty based on Islamic law and was ready to get married with approval from both families. The girl who was still in school had also planned to continue her studies. So far there are no other reported case of underage marriages allowed by the Malacca Syariah Court. One recent case reported by myMetro was an application to marry by a fifteen year old girl made to the Syariah Lower Court in Tumpat, Kelantan.<sup>69</sup> The girl was the thirteenth child in her family and due to life’s hardships, her family had planned to give her in marriage to a man aged forty four who was a divorcee in order to have a better life.

Other considerations for underage marriage according to a recent study by Noor Aziah Mohd Awal include the child’s ability to support a family and manage a household, understanding of basic Islamic teachings and the availability of family support after marriage.<sup>70</sup>

<sup>66</sup> “Malaysia State Backs Child Marriage,” *The Irish Times*, August 4, 2010, <https://www.irishtimes.com/news/malaysia-state-backs-child-marriage-1.862097>.

<sup>67</sup> “Minors Must Get Written Consent from MB, CM to Marry,” *Astro Awani*, April 12, 2016, <http://english.astroawani.com/malaysia-news/minors-must-get-written-consent-mb-cm-marry-102155>.

<sup>68</sup> See *Kamariah bt Ahmad v Nur Asmira bte Abdullah* [2015] 3 SHLR 21.

<sup>69</sup> Sharifah Mahsinah Abdullah, “Remaja 15 tahun File Permohonan Nikah,” *myMetro*, September 20, 2018, <https://www.hmetro.com.my/utama/2018/09/378926/remaja-15-tahun-fail-permohonan-nikah>

<sup>70</sup> Mohd Awal, “Child Marriage in Malaysia,” 3.

Despite the stipulated minimum age of sixteen for a girl to marry under the IFLA, the Age of Majority Act 1971<sup>71</sup> prescribes eighteen as the age of majority for all males and females in Malaysia<sup>72</sup> - a provision which has not affected the provisions in the IFLA.<sup>73</sup> Furthermore, the Child Act 2001<sup>74</sup> also provides that child refers to a minor below the age of eighteen years.<sup>75</sup> Based on the majority age determined by these statutes marriage with a child under eighteen years old is considered as a child marriage, a practice that is prohibited under international law.<sup>76</sup> In contrast to Islamic law discussed earlier, the age of majority is determined based on reaching puberty and is not defined by age. Due to these conflicting views, there is pressure from international groups and child activists to increase the minimum age of marriage in Malaysia to eighteen years.

### **The Debate in Raising the Minimum Age of Marriage**

The media coverage on the marriage of young girls especially those under the age of sixteen has often outraged advocates for children and women which have led to calls to ban such practices. For instance, a marriage between an eleven-year-old Muslim girl to a forty one year old man as his fourth wife in Kelantan was held unlawful after the Syariah Court judge found that the girl's father had not consented to the marriage. There were also elements of threat and force. The judge had decided the union was unlawful not because of the child's age but because the couple had failed to follow the requirements under Islamic law. Nonetheless, this case prompted women's rights groups in Malaysia to urge the government to increase the minimum age of marriage to eighteen years.<sup>77</sup> In another

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<sup>71</sup> Act 21.

<sup>72</sup> Age of Majority Act 1971, sec. 2.

<sup>73</sup> Age of Majority Act 1971, sec. 4.

<sup>74</sup> Act 611.

<sup>75</sup> Child Act 2001, sec. 2 (1).

<sup>76</sup> See generally Rafeah Saidon et.al," Reappraisal of Governance for Underage Marriage in Malaysia," in *Contemporary Issues and Development in the Global Halal Industry Selected Papers from the International Halal Conference 2014*, eds. Siti Khadijah Ab. Manan, Fadilah Abd Rahman and Mardhiyyah Sahri, 2009, 108-109, [https://doi.org/10.1007/978-981-10-1452-9\\_10](https://doi.org/10.1007/978-981-10-1452-9_10).

<sup>77</sup> Jennifer Pak, "Malaysia court rules child marriage 'illegal'," *BBC News*,

case, the marriage of a twelve year old girl to her boyfriend of nineteen years in Kedah had also prompted children and women activists to call for a ban on child marriages. The marriage was solemnised by the parents with the Syariah Court's<sup>78</sup> permission to prevent the couple from committing an 'improper' act.

In 2012 the Malaysian government stated that it would consider amending the civil and *Shari'ah* laws with the purpose of banning underage marriages. Notably Syariah Court fall under the auspices of state governments but as far as the federal government's position is concerned, it does not condone child marriages because those under sixteen or eighteen years are considered too young to marry. However, the government noted that the development of legislation requires time and persuasion as well as the need to consider cultural barriers and stereotyping.<sup>79</sup>

In 2016 the Ministry of Women, Family and Community Development had engaged stakeholders including various state religious affairs authorities in the proposal to raise the minimum age of marriage to eighteen years for Muslim girls.<sup>80</sup> However, in the amendments to the Child Act 2001 in the same year, The Human Rights Commission of Malaysia (SUHAKAM) had expressed their concern about the lack of any specific provision prohibiting child

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December 23, 2010, <http://www.bbc.com/news/world-asia-pacific-12066910>. See also, Zainah Anwar, "Nothing divine in child marriage," - *The Star - Sharing the Nation*, accessed January 23, 2018, <http://www.sistersinislam.org.my/news.php?item.618.6>.

<sup>78</sup> Liz Gooch, "Calls to end child marriages in Malaysia after 12-year-old weds," *The New York Times*, November 26, 2012, <http://www.nytimes.com/2012/11/27/world/asia/calls-to-end-child-marriages-in-malaysia-after-12-year-old-weds.html>.

<sup>79</sup> "Malaysia considers banning child marriage," *ABC Radio Australia*, January 18, 2012, <http://www.radioaustralia.net.au/international/radio/onairhighlights/malaysia-considers-banning-child-marriage>.

<sup>80</sup> Melissa Goh, "Malaysia Proposes Raising Marriage Age for Muslim Girls," *Channel NewsAsia*, November 8, 2016, <https://www.channelnewsasia.com/news/asiapacific/malaysia-proposes-raising-marriage-age-for-muslim-girls-7720472>. See also Lim May Lee, "Amend Syariah Law, Curb Child Marriages," *The Star Online*, October 9, 2016, <https://www.thestar.com.my/news/nation/2016/10/09/amend-syariah-law-curb-child-marriages-standardise-marriage-laws-and-set-minimum-age-t-o-18-years-say/> (describing a call for the amendment of the *Shari'ah* law by a former Syariah judge to curb child marriages).

marriages. The commission urged the government to amend all domestic laws to raise the legal age of marriage to eighteen years in compliance with the Child Act 2001 which defines children as those below eighteen years.<sup>81</sup> Recently a lawmaker said the government should ban child marriages in its proposed new law to stop sexual abuse against children, since Malaysia had adopted the United Nations resolution at the Human Rights Council in October 2013 to end child marriages. The lawmaker pointed out that child marriages are still allowed in Malaysia under special provisions of the *Shari'ah* or native courts though it is a crime under the Penal Code to have sexual intercourse with a girl under the age of sixteen.<sup>82</sup> The government is urged to seriously consider including the matter of child marriage in the new Bill. Although the IFLA is clear on the marriageable age there are still concerns that it can be subjected to abuse if appropriate measures are not taken. It is believed that by including the matter in the proposed new Bill on child sexual crimes, it would give wider protection for children in Malaysia.<sup>83</sup>

The pressure to ban child marriages in Malaysia has been initiated at the international level as well.<sup>84</sup> In response to recent calls to incorporate provisions for child marriage in the new Bill on Sexual Offences Against Children, United Nations Children's Funds (UNICEF) reiterates its call for the marriageable age to be determined at eighteen years without exemptions by amending the Child Act, the Law Reform (Marriage and Divorce) Act and the Islamic family laws in each state in Malaysia. UNICEF has reminded

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<sup>81</sup> "Child marriages not prohibited in Malaysia's Amended Act," *AsiaOne*, April 19, 2016, <http://www.asiaone.com/malaysia/child-marriages-not-prohibited-malaysias-amended-act>.

<sup>82</sup> "Ban Child Marriage in New Law against Sex Abuse of Minors," *malaysiakini*, March 14, 2017, <https://www.malaysiakini.com/news/375642>. See also Melati A. Jalil and Yasmin Ramlan, "Make 18 Minimum Marriage Age, Say Female Lawmakers," *The Malaysian Insight*, July 20, 2017, <https://www.themalaysianinsight.com/s/8120/>.

<sup>83</sup> Muzaffar Syah Mellow, "Include Child Marriage in Proposed Bill" (Letters)," *The Star Online*, March 17, 2017 <https://www.thestar.com.my/opinion/letters/2017/03/17/include-child-marriage-in-proposed-bill/>.

<sup>84</sup> See Heather Barr and Linda Lakhdir, "Time to Ban Child Marriage," *Human Rights Watch*, April 29, 2016, <https://www.hrw.org/news/2016/04/29/time-ban-child-marriage-malaysia>.



Malaysia that “child marriage under the age of eighteen years old is grossly wrong as it goes against the basis of human rights.” In this regard, UNICEF emphasises that child marriages denies the rights of those below eighteen years old to education as well as exposes them to potential domestic violence and health concerns such as childbirth related complications. It states that the preferred age of marriage is above eighteen.<sup>85</sup> Malaysia has passed the law on sexual offences against children but without banning child marriage.<sup>86</sup>

Perhaps realising the negative impact of child marriage on the couple and its implications for society have influenced efforts by several states in Malaysia to revise the marriageable age for girls. To mention a few, the Selangor State Legislative Assembly has tabled the amendment to raise the marriageable age of girls from sixteen to eighteen years old but Syariah Court judges still have the power to consider an application to marry from candidates below eighteen years old provided that certain conditions are met including the filing of application by the parents or guardian of the child.<sup>87</sup> This effort seems reasonable even with the increased age of marriage because the Syariah Court’s exercise of its discretionary powers in

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<sup>85</sup> “Child Marriage is No More Than a Custom; It is Not Part of Sharia or Worship, Says UNICEF,” *Malaysian Digest*, April 7, 2017, <http://www.malaysiandigest.com/frontpage/29-4-tile/668188-child-marriage-is-no-more-than-a-custom-it-is-not-part-of-sharia-or-worship-says-unicef.html>. See also UNICEF, “Early Marriage Child Spouses,” *Innocenti Digesti*, No. 7, March 2001, 1-29, <https://www.unicef-irc.org/publications/pdf/digest7e.pdf> (describing the negative effects of child marriage, such as, psychosocial disadvantage, adolescent health and reproduction, denial of education and violence and abandonment).

<sup>86</sup> “Malaysia Passes Child Sex Crimes Law, Does Not Ban Child Marriage,” *Reuters*, April 5, 2017, <https://www.reuters.com/article/us-malaysia-sexcrimes-law/malaysia-passes-child-sex-crimes-law-does-not-ban-child-marriage-idUSKBN1770ZH>; “Malaysian Parliament Votes against a Ban on Child Marriage,” *Theirworld*, April 6, 2017, <http://theirworld.org/news/malaysia-fails-to-ban-child-marriage>. See also “Child Marriages Expose ‘Loophole’ in Child Sexual Crime Bill,” *FMT News*, April 26, 2017, [www.freemalaysiatoday.com/category/nation/2017/04/26/child-marriages-expose-loophole-in-child-sexual-crime-bill/](http://www.freemalaysiatoday.com/category/nation/2017/04/26/child-marriages-expose-loophole-in-child-sexual-crime-bill/) (describing child marriage as a loophole in the new law on sexual offences against children).

<sup>87</sup> See Soo Sim, “Child Marriage in Malaysia: Selangor First State to Raise Minimum Legal Age for Muslim Marriages,” *The Independent*, September 7, 2018, <http://theindependent.sg/child-marriage-in-malaysia-selangor-first-state-to-raise-minimum-legal-age-for-muslim-marriages>.

exceptional circumstances for underage marriage will, to some extent, be safeguarding the welfare and interest of the parties and families. In addition, it is reported that the State of Kedah is also ready to increase the age of marriage to eighteen years old;<sup>88</sup> similarly with the State of Malacca for the purpose of protecting children's rights.<sup>89</sup>

Recent studies on child marriage support raising the marriageable age to eighteen because underage marriage is impractical and has negative effects on a child's health. Furthermore, there is no proper support system for underage marriage.<sup>90</sup>

### ***Fatwā* on Child Marriage in Malaysia**

In 2014 the National Fatwa Council Committee stated that child marriage is not a new issue but is considered an 'unhealthy' marriage. It asserts that the Prophet's (ﷺ) marriage to 'A'ishah (رضي الله عنها) should no longer be the reason to encourage or facilitate the marriage of underage girls. Although the Islamic family law in Malaysia allows underage marriages, it cannot be easily carried out without taking into account the child's best interest. Furthermore, there is evidence that child marriages here are mostly due to the intimacy between young couples that leads to an illicit sexual relationship and out of wedlock pregnancy. The research findings show that child marriages in Malaysia occur due to young people crossing the religious moral boundaries, and the need to conceal the disgrace and protect the family from shame. The marriage is thus solemnised without considering how it will benefit or affect the child.<sup>91</sup>

<sup>88</sup> Petah Wazan Iskandar, "Kedah Sedia Naikkan Had Umur Berkahwin," *myMetro*, September 21, 2018, <https://www.hmetro.com.my/mutakhir/2018/09/379357/kedah-sedia-naikkan-had-umur-kahwin>.

<sup>89</sup> "Melaka Naikkan Had Umur Perkahwinan Perempuan Islam Kepada 18 Tahun," *Kosmo Online*, October 25, 2018, <http://www.kosmo.com.my/negara/melaka-naikkan-had-umur-perkahwinan-perempuan-islam-kepada-18-tahun-1.774812>.

<sup>90</sup> See Saidon et al., "Developing a New Model of Underage Marriage"; Mohd Awal, "Child Marriage in Malaysia," 78-79.

<sup>91</sup> Jabatan Kemajuan Islam Malaysia (JAKIM), "Kompilasi Pandangan Hukum Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia," 2015, 167-169, accessed January 25, 2018, [http://www.islam.gov.my/images/ePenerbitan/KOMPILASI\\_MUZAKARAH\\_MKI\\_2016.pdf](http://www.islam.gov.my/images/ePenerbitan/KOMPILASI_MUZAKARAH_MKI_2016.pdf). See also Jabatan

Expert evidence reveals that underage girls are negatively affected physically and mentally as a result of such marriage. The National Fatwa Council Committee's *fatwā* stresses that child marriages are not a matter of obligation (*wajib*) or recommendation (*mandub*) and there is no *ḥadīth* from the Prophet (ﷺ) that promotes such marriages. Child marriage was practised during the time of the Prophet (ﷺ) and his companions to protect the children's welfare. The *fatwā* further emphasises the Islamic principles of staying away from harm (*dar' al-mafāsīd*) and taking into account the benefits (*jalb al-masālih*). The Committee agrees to restrict the conditions on child marriage and to only allow it based on the child's welfare.<sup>92</sup> Unfortunately, this *fatwā* does not specify clearly the age of marriage and the age at which it is considered a child marriage. Rather; it is generally understood that child marriage refers to all marriages below the age of eighteen years as the Child Act 2001 defines a child to be a person below the age of eighteen. The *fatwā* therefore does not strictly prohibit child marriage most likely because there is no such prohibition in the *Sharī'ah*.

### **Provisions of the Law or *Fatwā* in Some Muslim Countries**

Several Muslim countries have prescribed the minimum age of marriage in their legislation to prevent rampant child marriages. In Morocco the 2004 reform of the Moudawana sets the age limit of marriage to eighteen years for males and females.<sup>93</sup> Marriage below this age is allowed but subjected to judicial authorisation if there are legitimate grounds justifying the marriage. The courts before granting its permission must refer to the opinions of parents or guardians and the outcome of a medical evaluation or a social

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Kemajuan Islam Malaysia, *Penjelasan Terhadap Umur Perkahwinan Saidatina 'Aishah R.A.*, (Putrajaya: Jabatan Kemajuan Islam Malaysia, 2012).

<sup>92</sup> Ibid.

<sup>93</sup> Moudawana of 2004, art. 19. See generally, Andrea Buchler and Christina Schlatter, "Marriage Age in Islamic and Contemporary Muslim Family Laws: A Comparative Survey," *Electronic Journal of Islamic and Middle Eastern Law* (EJIMEL) 1, (2013): 46-51, accessed January 18, 2018, [http://www.zora.uzh.ch/id/eprint/78204/1/Beitrag\\_Buechler\\_Schlatter\\_final.pdf](http://www.zora.uzh.ch/id/eprint/78204/1/Beitrag_Buechler_Schlatter_final.pdf) (describing the evolution of law on minimum age of marriage in Morocco).

inquiry.<sup>94</sup> Before the 2004 reform the minimum age of marriage was fifteen for females and eighteen for males while allowing the courts to give permission to marry at an earlier age in cases of hardship.<sup>95</sup>

In Iran the Civil Code 1935 generally prohibited marriage of females below the age of fifteen years and males below eighteen years provided that judicial authorisation was granted.<sup>96</sup> However, the revision of the Family Protection Law in 1975 came into force and the minimum age of marriage for females was increased to eighteen years and males to twenty years. Females could be given in marriage earlier than this age but not below fifteen years provided that they had attained puberty and approval was granted by the public prosecutor and the courts.<sup>97</sup> After the Islamic revolution in 1979, the minimum marriageable age in the Civil Code was revised in 1983 to nine years for females and fifteen for males<sup>98</sup> but in the year 2000, the redrafted Civil Code then raised the minimum marriageable age to thirteen years for females but maintained fifteen years for males.<sup>99</sup>

Personal status and family law have not been codified in Saudi Arabia since the authoritative rules are generally based on the Qur'ān and Sunnah as interpreted by the Hanbali school of law and Wahhabi ideology. Here physical evidence of the onset of puberty will determine the marriageable age and in the absence of such signs, the Hanbali school assumes that puberty is attained at the age of fifteen for both males and females.<sup>100</sup> Though there was international pressure on the Saudi Arabian government to set the marriageable age at eighteen years for both males and females, the issue was excluded from the debate of the new legislation on child protection and it seems very unlikely that a minimum age of marriage will be introduced.<sup>101</sup> Nonetheless, Saudi Arabia's Shura Council has recommended four conditions in allowing early marriage of girls

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<sup>94</sup> Moudawana of 2004, art. 20.

<sup>95</sup> Buchler & Schlatter, "Marriage Age," 47.

<sup>96</sup> Civil Code Of 1935, art. 1041. See also, Buchler & Schlatter, "Marriage Age," 60-64 (describing the evolution of law on minimum age of marriage in Iran).

<sup>97</sup> Family Protection Law as revised in 1975, art. 23.

<sup>98</sup> Civil Code of 1935 as amended in 1983, art. 1041.

<sup>99</sup> Buchler & Schlatter, "Marriage Age," 63.

<sup>100</sup> *Ibid.*, 58.

<sup>101</sup> *Ibid.*, 59.

between fifteen and eighteen years: firstly, no girl below the age of fifteen years should be allowed to marry under any circumstances; secondly, the marriage of a girl above the age of fifteen years but below eighteen years must have obtained the consent from the girl and her mother with a medical report declaring that the girl is fit for marriage physically, psychologically and socially; thirdly, the groom's age should not be more than double the bride's age; and finally, the marriage contract should be drafted by expert judges.<sup>102</sup>

In Egypt the law established in 1931 had regulated the minimum age of marriage for a long time although there was a call in 1971 to raise the age to eighteen years for females and twenty-one years for males. The new law in 2000 has only reaffirmed the 1931 minimum age of sixteen years for females and eighteen years for males.<sup>103</sup> However, the recent reform in 2008 had increased the minimum age for females to eighteen years.<sup>104</sup> According to a *fatwā* issued by Dar al-Iftaa Al-Missriyyah, setting an age limit for marriage by the government benefits both parties particularly to protect the psychological and physical wellbeing of the couple and to ensure both of them are able to carry out the duties accorded by the marriage. The age limit is good provided all relevant circumstances are taken into account with the legal guardians acting in the best interest of the children especially when they are too young. Although there is no minimum age of marriage, the *fatwā* further notes that it is better for a marriage to take place after a person attains puberty when both male and female become physically mature for their own protection. A marriage entails commitment from both parties and marriage before puberty may cause suffering as it would be unreasonable to expect intellectual maturity from an individual who has not yet reached puberty. Nonetheless, a girl normally attains womanhood before a boy of the same age and is normally physically and mentally more mature. Following this it seems more sensible that

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<sup>102</sup> Habib Toumi, "Saudi Shura Tightens Rules on Early Marriages," *Gulf News*, July 23, 2017, <http://gulfnews.com/news/gulf/saudi-arabia/saudi-shura-tightens-rules-on-early-marriages-1.2062961>.

<sup>103</sup> Law No. 1 of 2000, art. 17. See also Buchler & Schlatter, "Marriage Age," 51-56 (describing the evolution of law on minimum age of marriage in Egypt).

<sup>104</sup> Law No. 143 of 1994 as stipulated by Law No. 126 of 2008, art. 31<sup>bis</sup>.

she may marry at sixteen years while the boy should wait until he is at least eighteen years old. In short, it is important to note there is no fixed legal age for marriage in the *Sharī'ah*.<sup>105</sup>

In Algeria the minimum age of marriage is eighteen years for females and twenty one years for males. In Iraq and Jordan the minimum age is eighteen, in Tunisia it is twenty and in Yemen it is fifteen.<sup>106</sup> The minimum marriageable age in other Muslim countries is similar to Morocco in being the same for both males and females.

Interestingly a group of Indonesian female Muslim clerics in West Java had issued a *fatwā* that preventing early marriage is an obligation since the practice would bring more harm than good. This is based on the Islamic principle of the prevention of harm that is, too much harm would not lead to the benefit (*maslahah*) of a peaceful family. It further states that early marriages have been proven to bring harm and is therefore un-Islamic.<sup>107</sup>

## Conclusion

The discussion above reveals that generally there are no legal or religious impediments regarding early marriage. The marriageable age under Islamic law is usually based on the physical evidence of reaching puberty, the criteria of which differ according to each society. It follows that each Islamic country determines its own minimum age of marriage taking account of varying maturity levels and social conditions, but it should not be below the age of puberty. This indicates that the age of puberty may coincide with the marriageable age.

In Malaysia the IFLA that represents all state enactments provides a reasonable minimum age of marriage which is eighteen

<sup>105</sup> Dar al-Iftaa Al-Missriyyah, "What is the ruling."

<sup>106</sup> Touni, "Saudi Shura Tightens Rules." See also "Child Marriage' Bill Stirs Outrage in Iraq," *Malay Mail Online*, November 23, 2017, <http://www.themalaymailonline.com/world/article/child-marriage-bill-stirs-outrage-in-iraq#SOFEjwBhmF0cAkbe.99> (describing a proposal in Iraq's parliament to do away with minimum marriageable age of eighteen years has stirred outraged in the country).

<sup>107</sup> Nurul Fitri Ramadhani, "Female Ulema Issues Fatwa Obliging Muslims to Fight Early Marriage," *The Jakarta Post*, April 27, 2017, <http://www.thejakartapost.com/news/2017/04/27/female-ulema-issues-fatwa-obliging-muslims-to-fight-early-marriage.html>.

years for males and sixteen years for females in line with the *Shari'ah* and in conformity with a few Islamic countries like Saudi Arabia and Yemen. To accommodate certain exceptional circumstances, the *Shari'ah* judge is given the power to grant permission of marriage to those below the minimum age of marriage. It is fair and reasonable to accommodate remote cases where marriage is necessary due to reasons such as either the bride or groom has already left school, financial needs or family support, illicit sexual relationship as well as out of wedlock pregnancy. Nonetheless due to increased calls to raise the minimum age of marriage, efforts have been initiated and Selangor is the first state in Malaysia to take the step by raising the marriageable age of females from sixteen to eighteen with the Syariah Court maintaining its powers to allow underage marriage in exceptional circumstances. This effort by the Selangor state seems sensible and strikes a balance in protecting the children's interest when they might be forced to end their education at secondary level, and in preventing harm to them if they are involved in social problems or illicit relationships.

The contention that early age marriage has negative effects on young children physically and emotionally calls for a crucial examination of the real causes of child marriages in Malaysia and whether raising the minimum age could effectively resolve other social and child marriage problems. It seems hard to determine the appropriate marriageable age as people differ from one another physically, environmentally and in their experiences. Eighteen years appears to be the most ideal minimum age of marriage because adolescents at this stage would have just finished high school and would begin to decide on their future either in their studies, career or marriage. That being so then the *Shari'ah* judge's discretionary power to grant permission for underage marriage like the governing provision in IFLA and legislation in some other Muslim countries should be retained. Nevertheless, there must be certain guidelines or standard procedures for the judges in deciding whether a person below the age of eighteen is allowed to get married or not.

Proposals include the following; the age should not be below puberty, the child is fit for marriage physically, mentally and psychologically, and the groom's age should not be more than double

the bride's age as established in Saudi Arabia and Morocco. It is imperative to ensure that such marriages are made in accordance with the law and on the principle of the child's best interest or welfare. The *Shari'ah* judge must ensure that such a marriage does not demonstrate any malign tendencies associated with the negative effects of child marriage. Apart from that, raising public awareness on early age marriage is also vital in guiding parents to decide whether or not marrying their children at a young age is really the best option.

#### ACKNOWLEDGEMENT

This article was partly presented in ICLAS 7, 201, 11-13 April 2018, UMS, Kota Kinabalu, Sabah. The research was funded by IIUM RIGS 17-019-0594.



## TRANSLITERATION TABLE

### CONSONANTS

Ar=Arabic, Pr=Persian, OT=Ottoman Turkish, Ur=Urdu

Ar	Pr	OT	UR	Ar	Pr	OT	UR	Ar	Pr	OT	UR	
ء	ء	ء	ء	ز	z	z	z	گ	—	g	g	g
ب	b	b	b	ژ	—	—	ʀ	ل	l	l	l	l
پ	—	p	p	ژ	—	zh	j	م	m	m	m	m
ت	t	t	t	س	s	s	s	ن	n	n	n	n
ث	—	—	ṭ	ش	sh	sh	ş	ه	h	h	h¹	h¹
ث	th	th	th	ص	ş	ş	ş	و	w	v/u	v	v/u
ج	j	j	c	ض	ḏ	ḏ	ḏ	ی	y	y	y	y
چ	—	ch	çh	ط	ṭ	ṭ	ṭ	ة	-ah	—	—	-a²
ح	ḥ	ḥ	ḥ	ظ	ẓ	ẓ	ẓ	ال	al³	—	—	—
خ	kh	kh	kh	ع	‘	‘	‘	—	—	—	—	—
د	d	d	d	غ	gh	gh	ğ	gh	—	—	—	—
ڈ	—	—	d	ف	f	f	f	f	—	—	—	—
ذ	dh	dh	dh	ق	q	q	k	q	—	—	—	—
ر	r	r	r	ك	k	k/g	k/ñ	k	—	—	—	—

<sup>1</sup> – when not final

<sup>2</sup> – at in construct state

<sup>3</sup> – (article) al - or l-

### VOWELS

	Arabic and Persian	Urdu	Ottoman Turkish
Long	ا	ā	ā
	آ	Ā	—
	و	ū	ū
	ي	ī	ī
Doubled	ي	iy (final form ī)	iy (final form ī)
	و	uww (final form ū)	uvv
	و	uvv (for Persian)	uvv
Diphthongs	و	au or aw	ev
	ی	ai or ay	ey
Short	ا	a	a or e
	ا	u	u or ū
	ا	i	o or ö
	ا	i	i

### URDU ASPIRATED SOUNDS

For aspirated sounds not used in Arabic, Persian, and Turkish add h after the letter and underline both the letters e.g. چ jh گ gh

For Ottoman Turkish, modern Turkish orthography may be used.

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WoS-Indexed under Arts & Humanities Citation Index, Current Contents/Arts and Humanities and Scopus

ISSN 1394-6870



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