

EARLY MARRIAGE, HUMAN RIGHTS, AND THE LIVING FIQH: A *Maqāṣid al-Sharī‘a* Review

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Abstract: Human rights activists and the educated urban society strongly criticize the practice of early marriage, including the classical fiqh on which it is based. They have repeatedly proposed amendments to article 7 of the Marriage Law No. 1 of 1974 concerning age restrictions on marriage. This paper is a response to these groups' views with the formulations, first, what are the factors and the problems of early marriage and their status in the perspective of *maqāṣid al-sharī‘a*?; second, what worldview that projects the human rights activists' criticism in the midst of living fiqh and *maqāṣid al-sharī‘a*'s review on it? This paper is a combination of field and literary studies. Samples are taken from the living fiqh or the doctrine of Shāfi‘ī School which exists in the Malay community of Tebo Ulu, Jambi Province and supported by relevant literature. This paper concludes that, in early marriage, the harms are far greater than the benefits. Hence, according to the holistic understanding of *maqāṣid al-sharī‘a*, the marriageable age needs to be regulated by law. However, the above groups' criticism is not completely justifiable because early marriage is also closely related to the state's failure in improving the welfare of its citizens, providing educational facilities, as well as differences in worldview between human rights activists and article 284 of the Criminal Law Code on adultery and traditional customs of Malay and other Indonesia's indigenous custom that need to be resolved.

Keywords: Early Marriage, Human Rights, Living Fiqh, *Maqāṣid al-Sharī‘a*

Abstrak: Para pegiat HAM dan sekelompok terpelajar masyarakat kota mengkritik keras praktik pernikahan dini termasuk fiqh klasik yang menjadi landasannya, sehingga berkali-kali mereka mengusulkan amandemen terhadap pasal 7 Undang-Undang Perkawinan Nomor 1 tahun 1974 tentang pembatasan usia perkawinan. Tulisan ini merupakan respon terhadap pandangan kelompok ini dengan rumusan, pertama, apa saja faktor-faktor dan problematika nikah dini serta statusnya dalam perspektif *maqāṣid al-sharī‘ah*?; kedua, bagaimana *worldview* (pandangan alam) di balik fenomena HAM di tengah arus living fiqh serta tinjauan *maqāṣid al-sharī‘ah* terhadapnya? Tulisan ini merupakan gabungan antara

kajian lapangan dan pustaka. Sampelnya diambil dari living fiqh atau doktrin fiqh mazhab Shāfi‘ī yang hidup pada masyarakat melayu Tebo Ulu, Provinsi Jambi yang dikuatkan oleh sumber-sumber pustaka yang relevan. Tulisan ini menyimpulkan bahwa, dalam nikah dini, kemudharatannya jauh lebih besar dari kemaslahatannya, sehingga dalam penalaran *maqāṣid al-sharī‘ah* secara utuh, umur pernikahan perlu diatur berdasarkan undang-undang. Namun kritik kelompok di atas tidak seutuhnya benar karena nikah dini juga berkaitan besar dengan fungsi negara dalam mensejahterakan dan memberikan fasilitas pendidikan kepada rakyatnya serta perbedaan *worldview* antara HAM dan pasal 284 Kitab Undang-Undang Hukum Pidana tentang zina dengan adat resam melayu dan berbagai adat Nusantara yang mesti dicari solusinya.

Kata Kunci: Nikah Dini, HAM, Living Fiqh, *Maqāṣid al-Sharī‘ah*

Introduction

In Indonesia child marriage has become an interesting political issue¹ ever since the debate about Article 7 of the Marriage Law No. 1 of 1974 concerning the limitation of marriageable age surfaced. Before being amended in September 2019, this article firmly stated that the minimum marriageable age was 18 for men and 16 for women. But the data tells a different story. In cooperation with The United Nations Children’s Fund (UNICEF), the Central Statistics Agency in 2018 noted that the number of underage marriages - with a standard of 18 years of age and under - was still very high in Indonesia.²

This phenomenon has attracted the attention of many. Whereas Nashahuddin,³ Abd Halim and Muhammad Khaeruddin Hamsin,⁴ Asep Aminuddin,⁵ and Kurd Fa-

dal⁶ have compared the laws and articles with the classical fiqh, the *maṣlaḥa* (benefit) theory and *maqāṣid al-qur’ān* (the purposes of the qur’ān), yet their works are still incomplete and require an in-depth study, particularly on matters between *de jure* and *de facto* that needs to be compromised. That is, what is written in a legal, formal law and what is happening in society have to be sought a solution. In fact, Tatik Hidayati and Basriadi have attempted to find the solution by analyzing the *maqāṣid al-sharī‘a* of child marriage among the peoples of Madura⁷ and Lambandia, East Kolaka Regency, Southeast Sulawesi.⁸ However, they failed to discuss the human rights aspect amidst the stream of the living fiqh of underage marriage or the doc-

¹ On this debate, see: Susan Blackburn and Sharon Bessell, “Marriageable Age: Political Debates on Early Marriage in Twentieth-Century Indonesia,” *Indonesia*, no. 63 (1997): 107–41.

² Badan Pusat Statistik, *Pencegahan Perkawinan Anak* (Jakarta: Kementerian Perencanaan Pembangunan Nasional, 2020).

³ Nashuddin Nashuddin, “Early-Age Marriage in Perspective of Indonesian Islamic Family Law,” *Al-Mawarid Journal of Islamic Law* 15, no. 2 (2015): 97–122.

⁴ Abd Halim and Muhammad Khaeruddin Hamsin, “Kesenjangan Ketentuan Pernikahan Di Bawah Umur Antara Fikih Munakahat Dan UU

No. 1 Tahun 1974 Tentang Perkawinan,” *Al-Mazahib* 5, no. 1 (2017): 53–79.

⁵ Asep Aminudin, “Batas Usia Pernikahan Ditinjau *Maqāṣid Al-Syarī‘ah*: Kajian Atas Pertimbangan Para Pihak Yang Mengusulkan Dinaikkan Batas Minimal Usia Nikah Di Indonesia” (Ph.D Theses: UIN Sunan Gunung Djati Bandung, 2018).

⁶ Kurdi Fadal, “Pernikahan Di Bawah Umur Perspektif Maqashid Al-Qur’an,” *Jurnal Hukum Islam* 14, no. 1 (2016): 65–92.

⁷ Tatik Hidayati, “Pendekatan Maqāṣid Al-Syarī‘ah Pada Tradisi Kawin Anak Di Madura,” *Anil Islam: Jurnal Kebudayaan Dan Ilmu Keislaman* 10, no. 2 (2017): 175–200.

⁸ Basriadi, “Perkawinan Dini Dalam Perspektif Maslahah: Studi Kasus Di Kecamatan Lambandia Kabupaten Kolaka Timur” (Ph.D Theses: IAIN Kendari, 2018).

trinal fiqh that is alive in society, especially among the Shāfi‘ī school followers. This issue is interesting because human rights activists⁹ and a number of educated urban individuals have actively criticized the living fiqh of underage marriage as well as its foundation, the classical fiqh, which are still thriving in Indonesia. They argue that both the classical and the living fiqhs are no longer relevant to the present context and are against human rights.¹⁰ Also, they have repeatedly proposed an amendment to article 7 of the Marriage Law No. 1 of 1974 that in September 2019 the Indonesian House of Representatives (DPR RI) granted it by stipulating: the marriageable age is 19 for both male and female.¹¹ The question is, is it true that fiqh and the living fiqh are no longer relevant?

Herein lies the relevance of this paper, which fits between the living fiqh or the doctrinal fiqh, the study of *maqāṣid al-sharī‘a*, and critical discourse analysis in philosophical studies. Samples were taken through a qualitative study of the Malay community of Tebo Ulu, Jambi Province, which still adheres to the Shāfi‘ī School of fiqh. According to this

school, the marriageable age is not limited.¹² The data obtained were compared with scholarly works which were then analyzed based on *maqāṣid al-sharī‘a*. Critical discourse analysis is used to dismantle the worldview behind the human rights phenomenon.

This paper argues that the question of the classical and the living fiqhs relevance can be judged on the basis of *maqāṣid al-sharī‘a*. It is so because, as stated by Ibn Qayyim, the law does not deny the change of time, places and circumstances.¹³ Also, changes to the law are always related to *maṣlaḥa* (benefit), *munāsaba* (suitability) and *‘illa* (cause), which are essential keys in the discourse of *maqāṣid al-sharī‘a*. As for the strong opposition of the human rights activists amid the stream of the living fiqh, this paper argues that, such a phenomenon implies a worldview that is closely related to Western values, resulting in a conflict with the Malay tradition. Therefore, this paper will discuss, first, what are the factors and the problems of early marriage and their status in the perspective of *maqāṣid al-sharī‘a*?; second, what worldview that projects the human rights activists’ criticism in the midst of living fiqh and *maqāṣid al-sharī‘a*’s review on it?

⁹ For example, see: Sari Damar Ratri, “The Politics of Human Rights in Indonesia’s Child Marriages,” HBS Southeast Asia, 2017, <https://th.boell.org/en/2017/06/01/politics-human-rights-indonesias-child-marriages>; Rudyanti Dorotea Tobing, “Prevention of Child Marriage Age in the Perspective of Human Rights,” *Sriwijaya Law Review* 2, no. 1 (2018): 1–17; Linda Rae Bennett, “Early Marriage, Adolescent Motherhood, and Reproductive Rights for Young Sasak Mothers in Lombok,” *Wacana* 15, no. 1 (2014): 66–86; Zesty Wulan Ayu Widhi Prameswari and Erni Agustin, “Indonesian Marriage Law Reform: The Way to Strengthen the Protection of Children’s Rights against Child Marriage,” *JSEHR* 2, no. 1 (2018): 286–310.

¹⁰ For example, see: Mukti Ali *et al.*, *Fikih Kawin Anak: Membaca Ulang Teks Keagamaan Perkawinan Usia Anak-Anak* (Jakarta: Rumah Kitab, Ford Foundation, dan Norwegian Centre for Human Rights, 2015).

¹¹ Article 7 of the Marriage Law No. 16 of 2019.

Factors and Problems of Early Marriage

This section discusses factors and problems of early marriage with samples taken from the Malay community of Tebo Ulu, which are corroborated by the results of expert studies and relevant surveys. After going through these two processes, it is found that factors and problems of early marriage are as follow:

1. From economy to arranged marriages and dropping out of school

¹² Imām Shāfi‘ī, *al-Umm*, vol.3 (Mesir: Dār al-Fikr, 1991), p. 19.

¹³ Ibn Qayyim Al-Jawziyyah, *I‘lām Al-Muwaqqi‘in*, Vol. III (Bairūt: Dār al-Fikr, n.d.), p. 14.

The Economic factor is a major factor of early marriage. The aim, as explained by Burhan Al-Badri, a Jambu Village Community Figure, Tebo Ulu, is to reduce family's economic burden.¹⁴ Al-Badri's story actually applies to the rural and urban poor of many other Indonesia's regions¹⁵, or of various parts of the world¹⁶, or even of the industrial nations.¹⁷ For example, the 2018 National Statistics Agency survey revealed that poor families considered daughters an economic burden and thus marriage is deemed as a solution to escape poverty.¹⁸

In practice, in the Malay community of Tebo Ulu, the economic factor affects arranged marriages and the urge to get married which finally lures girls to drop out of school. Besides the friendship factor between parents, the practice of arranged marriages, although rare, is mainly motivated by the

economic factor. Families with little economic fortune are inclined to get their children involved in arranged marriages with rich individuals in the hope to boost family's economy.¹⁹ This matchmaking is sometimes through a rather coercive way as experienced by HN who got married at a young age which led her to leave school for good.²⁰ In addition, education is often at stakes due to financial constraints because some people still think it to be less important. For example, a number of children only completed Elementary School (SD) or Junior High School (SMP), a situation which triggered early marriage.²¹

On a broader scale, this pattern generally occurs in poor or developing countries. Marcos et al.'s study in 2015 with a sample of 36 Sub-Saharan African countries and South-west Asia showed that family's economy greatly influenced the level of education among children and educational neglect, which paved way for more early marriages.²² In contrast, Tim B. Heaton et al.'s research on several Indonesia's regions in 2014 exposed that the increasing education trend among adolescents had a great effect on the postponement of marriage. It was also quite effective in reducing the divorce rate in the country.²³

2. From mass media and internet misuses, to the lack of parental supervision and re-

¹⁴ Interview with Burhan Al-Badri, A Community Leader of Jambu Village, Tebo Ulu, Tebo, on 2 February 2020.

¹⁵ Luh Putu Ratih Kumala Dewi and Teguh Dartanto, "Natural Disasters and Girls Vulnerability: Is Child Marriage a Coping Strategy of Economic Shocks in Indonesia?," *Vulnerable Children and Youth Studies* 14, no. 1 (2019): 24-35.

¹⁶ For example, see: Katharine B Silbaugh, "Marriage Contracts and the Family Economy," *Nw. UL Rev.* 93 (1998): 65; Haile Gabriel Dagne, "Early Marriage in Northern Ethiopia," *Reproductive Health Matters* 2, no. 4 (1994): 35-38; Judith-Ann Walker, "Early Marriage in Africa-trends, Harmful Effects and Interventions," *African Journal of Reproductive Health* 16, no. 2 (2012): 231-40; Jensen and Thornton, "Early Female Marriage in the Developing World"; Jiang Hong Li and William Lavelly, "Rural Economy and Male Marriage in China: Jurong, Jiangsu 1933," *Journal of Family History* 20, no. 3 (1995): 289-306.

¹⁷ Shoshana Grossbard-Shechtman, "Marriage and the Economy," in *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies*, ed. Shoshana Grossbard-Shechtman (Cambridge: Cambridge University Press, 2003), 1-37.

¹⁸ Badan Pusat Statistik, *Pencegahan Perkawinan Anak* (Jakarta: Kementerian Perencanaan Pembangunan Nasional, 2020), p. 44.

¹⁹ Interview with Sawadi, a religious leader of Jambu Village, Tebo Ulu, Tebo, on 3 February 2020.

²⁰ Interview with Heni, a resident of Jambu Village, Tebo Ulu, Tebo, on 3 February 2020.

²¹ Interview with Suhairi, Head of Jambu Village, Tebo Ulu, Tebo, on 10 February 2020, at 9 am.

²² Marcos Delprato et al., "On the Impact of Early Marriage on Schooling Outcomes in Sub-Saharan Africa and South West Asia," *International Journal of Educational Development* 44 (2015): 42-55.

²³ Tim B Heaton, Mark Cammack, and Larry Young, "Why Is the Divorce Rate Declining in Indonesia?," *Journal of Marriage and Family* 63, no. 2 (2001): 480-90.

religious education, to premarital pregnancies

These days, mass media and the internet have been massively accessed by the Malay community of Tebo Ulu. Children can easily obtain information, including porn videos.²⁴ Meanwhile, their parents are generally farmers who are out of the homes during the day. This circumstance has left them in a condition of little education supervision as well as an uncontrollable dating relationship like what has happened to MR and HM who got pregnant outside of marriage.²⁵

The above findings are reinforced by Khadijah Alavi *et al.*'s study in Taman Seri Puteri, Cheras, Malaysia that teenagers who get pregnant out of wedlock are caused by their parents' lack of attention or supervision of their environment and unhealthy internet use.²⁶

3. Divorce issues

Besides having an impact on school dropouts and pregnancy outside of marriage, early marriage also has a major effect on divorce. According to Baidori, a Malay person of Tebo Ulu's Jambu, most fights occurred between early marriage couples, resulting in one of them escaping to his or her parents' home.²⁷ This situation then led to a high divorce rate among the Malay people of Tebo Ulu, although most of them reconciled.²⁸

The above condition makes early marriage highly likely take place because the age between 15-18 are not yet mature with re-

gards to thinking and taking action. After conducting a survey of 8.757 Ethiopian women aged between 15-49 years, Dina Tilson and Ulla Larsen revealed that divorce is very vulnerable among young couples.²⁹ In Indonesia, the same results were also shown by a number of other studies: Gavin W Jones *et al.*'s survey in West Java,³⁰ Uswatun Hasanah's studies in the Kisaran Religious Court, North Sumatra,³¹ and Team Heaton & Marck Cammack's statistical analysis of the Indonesian Demographic and Health Survey data between 1987 and 2007.³² What these researchers emphasize is that immature age in a marriage is very vulnerable to divorce.

4. Women's reproductive and health problems

According to Mahendra, a Nurse of Jambu Health Center (*Puskesmas*), early marriage women are at higher risk of cervical cancer.³³ The claim makes sense. After examining the relationship between teenage pregnancy and health in all developing countries in the world, the World Health Organization (WHO), in its 2011 report, strongly opposed marriages under the age of 18. The reason is that it is not good for the health of the womb.³⁴ The same is also recognized by oth-

²⁴ Interview with Suhairi, Head of Jambu Village, Tebo Ulu, Tebo.

²⁵ Interview with Baidori, a resident of Jambu, Tebo Ulu, Tebo.

²⁶ Khadijah Alavi *et al.*, "Hamil Luar Nikah Dalam Kalangan Remaja," *E-BANGI: Jurnal Sains Sosial Dan Kemanusiaan* 7, no. 1 (2012): 131-40.

²⁷ Interview with Burhan Baidori, a resident of Jambu, Tebo Ulu, Tebo.

²⁸ Interview with Burhan Al-Badri, a community leader of Jambu, Tebo Ulu, Tebo.

²⁹ Dana Tilson and Ulla Larsen, "Divorce in Ethiopia: The Impact of Early Marriage and Childlessness," *Journal of Biosocial Science* 32, no. 3 (2000): 355-72.

³⁰ Gavin W Jones, Yahya Asari, and Tuti Djuartika, "Divorce in West Java," *Journal of Comparative Family Studies* 25, no. 3 (1994): 395-416.

³¹ Uswatun Hasanah, "Pengaruh Perkawinan Usia Muda Terhadap Tingkat Perceraian Dini (Studi Kasus Pengadilan Agama Kisaran)," *Journal of Science and Social Research* 1, no. 1 (2018): 13-18.

³² Tim Heaton and Mark Cammack, "Explaining the Recent Upturn in Divorce in Indonesia: Developmental Idealism and the Effect of Political Change," *Asian Journal of Social Science* 39, no. 6 (2011): 776-96.

³³ Interview with Mahendra, a nurse at the *Puskesmas* of Jambu, Tebo Ulu, Tebo, on 12 February 2020.

³⁴ World Health Organization, "WHO Guideline on Preventing Early Pregnancy and Poor

er researchers such as Ravi Prakash et al. based on his studies in India,³⁵ Kazem Muhammad et al.'s studies in Tehran, Iran,³⁶ and Nawal M. Nour's research in Africa.³⁷ These studies show how high the risk is to the womb of early married women.

5. The Positive impact

Besides the above negative impacts, early marriage in the Malay community of Tebo Ulu also has positive impacts, such as training couples to think like adults, living independently, having a life partner early, and avoiding adultery. Young couples will get used to deal with new problems, new burden and new responsibilities that must be addressed and endured wisely.³⁸ In addition, the rapid penetration of social media in the countryside and children being more difficult to control have led many Malay parents in Tebo Ulu worrying their children to commit adultery. Thus, many parents marry off their children as preventive measures.

Maqāṣid al-sharī'a, Early Marriage, and a Human Rights Phenomenon

1. Maqāṣid al-sharī'a Theory in the Reasoning of Islamic Law

Literally, *maqāṣid al-sharī'a* consists of two words: *maqāṣid* and *al-sharī'a*. *Maqāṣid* is the plural form of *maqṣad*, which means a purpose or an objective, while *al-sharī'a* is a source of water or a source of drinking water for people to drink.³⁹ Thus, in the language perspective *maqāṣid al-sharī'a* is a purpose or an objective of Allah *subhānahu wa ta'ālā* in revealing His *sharī'a*.

The terminological meaning of *maqāṣid al-sharī'a* is not clearly found in the discussions of the past *uṣūl al-fiqh* scholars, but its definitions were given by modern scholars such as Ibn 'Āshūr, 'Alāl al-Fāsī and Wahbah al-Zuhaylī. From their definitions it can be concluded that *maqāṣid al-sharī'a* are goals and secrets of *sharī'a* that have been determined by Allah *subhānahu wa ta'ālā*⁴⁰ for the benefit of His servants in the world and the hereafter. The benefit is found through inductive reasoning of *sharī'a* propositions (*al-istiqrā' al-sharī'ah*).⁴¹

Therefore, if the ultimate goal of *maqāṣid al-sharī'a* is benefit or *maṣlaḥa*, some *uṣūl al-fiqh* scholars such as Imam al-Juwaynī, al-Ghazālī, Fakhr al-Dīn al-Rāzī, Sayf al-Dīn al-Āmidī, Ibn Ḥājjib, and al-Shāṭibī have formulated the *maṣlaḥa* theory in the discussion of

Reproductive Outcomes Among Adolescents in Developing Countries: What the Evidence Says" (Switzerland: WHO Press, 2011), p. 3; Lihat juga Venkatraman Chandra-Mouli, Alma Virginia Camacho, and Pierre-André Michaud, "Commentary: WHO Guidelines on Preventing Early Pregnancy and Poor Reproductive Outcomes Among Adolescents in Developing Countries," *Journal of Adolescent Health* 52, no. 5 (2013): 517-22.

³⁵ K G Santhya, Shireen J Jejeebhoy, and Saswata Ghosh, "Early Marriage, Sexual and Reproductive Health Risks: Experiences of Young Women and Men in Andhra Pradesh and Madhya Pradesh, India," 2008.

³⁶ Kazem Mohammad et al., "Sexual Risk-Taking Behaviors Among Boys Aged 15-18 Years in Tehran," *Journal of Adolescent Health* 41, no. 4 (2007): 407-14.

³⁷ Nawal M Nour, "Health Consequences of Child Marriage in Africa," *Emerging Infectious Diseases* 12, no. 11 (2006): 1644-49.

³⁸ Interview with Mawardi, a resident of Jambu, Tebo Ulu, Tebo, on 13 February 2020, at 8 am.

³⁹ Ibn Manẓūr, *Lisān al-'Arab*, ed. 'Abd Allāh 'Alī al-Kabīr, Vol. IV (Cairo: Dār al-Ma'ārif), p. 2238.

⁴⁰ See: Muḥammad al-Ṭāhir ibn 'Āshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah*, ed. Muḥammad al-Ḥabīb Ibn al-Khūjah (Doha: Wizārah al-Awqāf wa al-Shu'ūn al-Islāmiyyah, 2004), p. 165; 'Alāl al-Fāsī, *Maqāṣid al-Sharī'ah al-Islāmiyyah wa Makārimuhā* (Dār al-Gharb al-Islāmī, 1993), p. 7; Wahbah al-Zuhaylī, *Uṣūl al-Fiqh al-Islāmī*, Vol. II (Damaskus: Dār al Fikr, 2011), p. 308.

⁴¹ Al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, ed. 'Abd Allāh al-Darrāz, Vol. II (Beirut: Dār al-Kutub al-'Ilmiyyah, 2005), p. 4.

*maqāsid al-sharī‘a*⁴² that *maṣlaḥa* is divided into three levels, namely *darūriyya*, *ḥājīyya*, and *taḥsīniyya*.

Darūriyya is something that must exist in human’s life that if it is lost or absent, the salvation of humanity will be at risk. This need is incorporated into five main points: the protection of religion (*al-dīn*), soul (*al-nafs*), intellect (*al-‘aql*), descendants (*al-nasl*), and wealth (*al-māl*).⁴³ Al-Ghazālī illustrates it like applying a death sentence against infidels who mislead and *bid‘a* followers who invite others to the path of *bid‘a* to protect the religion (*hifẓ-al-dīn*). Carrying out the punishment of *qiṣāṣ* (retaliation) to those who kill humans without rights or punishing adulterers in order to protect the human’s soul (*hifẓ al-nasl*). Applying the *hudud* punishment against *khamr* (intoxicants) drinkers in order to preserve human’s intellect (*hifẓ al-‘aql*). Finally, preventing extortions and theft from happening in order to protect human’s properties (*hifẓ al-māl*).⁴⁴

However, it should be noted that the five points above are the results of *uṣūl al-fiqh* scholars’ of *ijtihād* (intellectual effort). They agreed upon the points thus it can be said

that they are certain (*qaṭ‘i*), although they are still open for more additions, provided that the additions are based on strong propositions.⁴⁵

Next is *ḥājīyya*, which are secondary needs that can make life better. Without these needs human safety will not be threatened and a person will only experience difficulties. Therefore, to eliminate the difficulties Islam has *rukḥṣa* or relief in performing God's commands or prohibitions. For example, Islam allows people to not fast while on a journey on a condition that they do the fasting on another day. Or people may shorten (*al-qaṣr*) or merge prayers. The absence of this kind of reliefs will not cause chaos to human’s life, but yet they are needed to make life more convenient.⁴⁶

The final level is *taḥsīniyya* or supplementary things in human life that without it life will not be threatened or in difficulty. Its only effect is a feeling of something lacking in life.⁴⁷ This kind of need is principally related to the noble character (*makārim al-akhlāq*) maintaining manners in worship, customs, and *mu‘āmalah*.⁴⁸ In worship the examples are cleaning oneself from impurity (*najāsa*), covering genitals, dressing well when going to the mosque, performing the *sunna* deeds and doing charity.⁴⁹ In *mu‘āmalah*, Islam prohibits wasteful behavior, being stingy, and monopolizing businesses. As for *‘uqūbāt*, Islam forbids the killing of children, women, and performing *musla* (torturing corpses in war-

⁴² For example, see: Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, Vol. II (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1997), pp. 79-80; al-Ghazālī, *Shifā‘ al-Ghalīl fī Bayān al-Shabah wa al-Mukhīl wa Masālik al-Ta‘līl* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1999), pp. 80-83; al-Ghazālī, *al-Mustasfā Min ‘Ilm al-Uṣūl* (Cairo: al-Maktabah al-Tawfiqiyyah, 2010), pp. 322-323; al-Rāzī, *al-Maḥṣūl fī ‘Ilm Uṣūl al-Fiqh*, Vol. III (Cairo: Dār al-Salām, 2011), pp. 1247-1248; Al-Āmidī, *Muntahā al-Sūl fī ‘Ilm al-Uṣūl* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2003), p. 343; al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām*, Vol. III (Saudi Arabiya: Dār al-Ṣamī‘ī, 2003), p. 343; Aḥmad al-Isfahānī, *Bayān al-Mukhtaṣar fī ‘Ilmay al-Uṣūl wa al-Jadal*, Vol. II (Cairo: Dār al-Ḥadīth, 2006), p. 286; Al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī‘ah*, ed. ‘Abd Allāh al-Darrāz, Vol. II (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2005), pp. 3-4; See also, Edi Kurniawan, “Distorsi Terhadap Maqasid al-Syari‘ah al-Syatibi di Indonesia,” *Al-Risalah* 18, no. 2 (2018): 178-79.

⁴³ Al-Ghazālī, *al-Mustasfā Min ‘Ilm al-Uṣūl*, p. 322.

⁴⁴ *Ibid.*, p. 322.

⁴⁵ Eko Saputra and Busyro Busyro, “Kawin Maupah: An Obligation to Get Married After Talak Tiga in the Tradition of Binjai Village in Pasaman District: A Maqasid Al-Shari‘ah Review,” *QIJS (Qudus International Journal of Islamic Studies)* 6, no. 2 (2018): 193-94.

⁴⁶ Al-Ghazālī, *Al-Mustasfā min ‘Ilm al-Uṣūl*, p. 322-323.

⁴⁷ Eko Saputra and Busyro Busyro, “Kawin Maupah...”, p. 196.

⁴⁸ Al-Ghazālī, *al-Mustasfā Min ‘Ilm al-Uṣūl*, p. 322-323.

⁴⁹ ‘Abd Al-Wahhāb Khallaf, *‘Ilm Uṣūl al-Fiqh* (Cairo: Dār al-Ma‘ārif, 1997), p. 236.

fare). Islam also forbids women from roaming the streets displaying clothes that can stimulate sexual appetite.⁵⁰

2. *Maqāṣid al-sharī'a* and Early Marriage: Seeking a Meeting Point

The marriageable age is not specifically determined by Allah in the Qur'an. Therefore, scholars do not justify the law of getting married at an early age that whether it is prohibited or allowed depends on the extent of *maṣlaḥa* and *mafsada*. The following discussion is divided into three: early marriage in terms of *darūriyya*, *ḥājīyya*, and *taḥsīniyya*.

Darūriyya is all things necessary to the existence of a person's life that must exist for his or her benefit. The principle comprise five main points, they are protecting religion, soul, intellect, descendants, and properties.⁵¹ The protection of religion (*ḥifẓ al-dīn*), according to *usūl al-fiqh* scholars, is limited to preserving religion in a formal form such as the implementation of the *qiṣāṣ* law against apostates.⁵² However, with the complexity of problems faced by Muslims these days, the protection of religion can be developed in accordance with the demand of an era. Thus, in the context of early marriage, the low level of parents' education will have an impact on their children's religious education. In fact, parents are required to educate their children. In addition, based on the previous explanation, one dominant factor causing pregnancy out of wedlock is children's low religious education. So, in this context, early marriage is incompatible with the protection of religion (*ḥifẓ al-dīn*). Nonetheless, when viewed using the perspective of the general purpose of marriage, such as taking the teachings of the Prophet into practice, enlarging the Muslim *umma*, and getting com-

fort, of course early marriage is recommended so that religion is well preserved (*ḥifẓ al-dīn*).

Second, the protection of soul (*ḥifẓ al-nafs*). Previous data shows that women who get married early are at higher risk to die during childbirth. Pregnancy at a young age is also at risk of developing a cancer and may cause infant disability during childbirth.⁵³ Therefore, early marriage in this regard is categorized as *mafsada* because it can threaten human life (*ḥifẓ al-nafs*). Unfortunately, as explained by Baidori, some people in Tebo Ulu's Jambu do not care about this matter.⁵⁴

Third, the protection intellect (*ḥifẓ al-'aql*). Although among classical scholars discussions on this issue are more focused on cases that can threaten or damage human's intellect such as intoxicant and the like,⁵⁵ in today's context, the meaning of *ḥifẓ al-'aql* can be extended to education as a means to enlighten human's intellect. As explained previously, early marriage push students to drop out of school like what happened to Trisnawati,⁵⁶ eradicating opportunity for students to develop their intellect potential through formal education. This is reinforced by the findings of the Central Statistics Agency (BPS) in 2018 that 93.60% of women married under the age of 18 dropped out of school, the remaining 5.57% were still in school, and 0.83% did not/never attended school. For men who were married under the age of 18 in 2018, it showed that 91.04% dropped out of school, the remaining 8.16%

⁵⁰ Al-Shāṭibī, *Al-Muwāfaqāt fi Uṣūl al-Sharī'ah*, Vol. II, p. 9.

⁵¹ Al-Ghazālī, *al-Mustaşfā Min 'Ilm al-Uṣūl*, p. 322.

⁵² *Ibid.*, p. 322.

⁵³ Santhya, Jejeebhoy, and Ghosh, "Early Marriage, Sexual and Reproductive Health Risks: Experiences of Young Women and Men in Andhra Pradesh and Madhya Pradesh, India"; Nour, "Health Consequences of Child Marriage in Africa."

⁵⁴ Interview with Baidori, a resident of Jambu, Tebo Ulu, Tebo.

⁵⁵ Al-Ghazālī, *al-Mustaşfā min 'Ilm al-Uṣūl*, p. 322.

⁵⁶ Interview with Mawardi, a resident of Jambu, Tebo Ulu, Tebo.

were still in school, and 0.80% did not/never attended school.⁵⁷ Interestingly, Tim B. Heaton *et al.*'s 2014 studies in several regions of Indonesia showed that the increasing learning trend among adolescents motivated them to postpone marriage, a quite effective factor in reducing the divorce rate in Indonesia.⁵⁸ Thus, in this context, early marriage is incompatible with the protection of intellect (*ḥifẓ al-‘aql*).

Fourth, the protection of descendants (*ḥifẓ al-nasl*). Marriage carried out by an underage man and woman can achieve a noble goal in accordance with what is explained by God in the Qur'an, which is to avoid adultery.⁵⁹ This results in *ḥifẓ al-nasl* being well preserved like what happened to Heni and Taufiq who got married because they did not want to be in a long dating and were afraid to commit adultery.⁶⁰ In this context, early marriage is certainly in accordance with *maqāṣid al-sharī‘a*, which is to protect the descendants (*ḥifẓ al-nasl*).

Fifth, the protection of properties (*ḥifẓ al-māl*). In a marriage, early marriage included, one is required to shoulder a heavy burden and responsibility, especially men who are obliged to support their families. If one is not yet biologically mature, has little skills and work experience, he will certainly threaten *ḥifẓ al-māl*. It is because the uneasy access to work will have an adverse impact on the economy of his family as happened to Iwan who has difficulty supporting his family due to lack of skills and work experience.⁶¹ In

this context, early marriage threatens *ḥifẓ al-māl*. However, when viewed through the lens of early marriage in the Malay community of Tebo Ulu, which is based on the hope that the family's economic burden will slightly be reduced, then early marriage is in accordance with *ḥifẓ al-māl*. This is in fact a motive for early marriage that is in line with the results of the 2018 National Statistics Agency survey. The agency revealed that in poor households girls are considered an economic burden and thus marriage is deemed as a solution to escape poverty.⁶²

Next is *ḥājīyya*. As explained earlier, *ḥājīyya* is understood as secondary needs which, if unavailable, will not threaten human safety, but will only bring about a difficulty. Therefore, Islam provides a solution: *rukḥṣa* (relief), which is easiness in carrying out God's commands. Thus, early marriage in the context of *ḥājīyya* is to quickly have a life partner.

Finally, *taḥsīniyya* or supplementary in the affairs of the world and the hereafter that if it is not fulfilled, it will not threaten human life and will not cause difficulties. Included in this category are arranged marriages that they neither have fatal consequences (*ḍarūriyya*) nor complicate life (*ḥājīyya*).

From the discussion above it can be concluded that on a case by case basis there are indeed some benefits of early marriage, one of which is keeping one away from adultery or related to *ḥifẓ al-nasl*. However, early marriage cannot be carried out due only to the attainment of a single goal only, whereas the protection of other *maqāṣid* is neglected. Therefore, the rule applies: *درأ المفاسد مقدم على جلب المصالح*, which means: "repelling harm takes precedence over procuring benefits".⁶³

⁵⁷ Badan Pusat Statistik, *Pencegahan Perkawinan Anak* (Jakarta: Kementerian Perencanaan Pembangunan Nasional, 2020), p. 13-14.

⁵⁸ Tim B Heaton, Mark Cammack, and Larry Young, "Why Is the Divorce Rate Declining in Indonesia?," *Journal of Marriage and Family* 63, no. 2 (2001): 480-90.

⁵⁹ Al-Isrā' (17) : 32.

⁶⁰ Interview with Heni, a resident of Jambu, Tebo Ulu, Tebo.

⁶¹ Interview with Sawadi, a religious leader of Jambu, Tebo Ulu, Tebo.

⁶² Badan Pusat Statistik, *Pencegahan Perkawinan Anak* (Jakarta: Kementerian Perencanaan Pembangunan Nasional, 2020), p. 44.

⁶³ Muḥammad al-Zarqā, *Sharḥ al-Qawā'id al-Fiqhiyyah* (Damaskus: Dār al-Qalam, 1989), p. 205.

The perspective of the above rules has become guidance in establishing other Islamic laws, such as gambling and intoxicant. Although the Qur'an provides firm explanations on the good and bad sides of the two,⁶⁴ yet the Qur'an is inclined to the evil aspects, therefore they are forbidden.⁶⁵ Likewise, in the case of early marriage, whether it is allowed or not, has to be analyzed based on the benefits obtained and harm caused. The measurement is, first, it has to follow al-Ghazālī's formula that everything that can destroy the five points of religion, namely protecting religion, soul, intellect, descendants, and properties is harm (*mafsada*). And everything that can realize the five points of religion is benefit (*maṣlahah*).⁶⁶ Secondly, as agreed by *uṣūl al-fiqh* scholars, *darūriyya* aspects are more important than aspects of *hājiyya*, and *hājiyya* aspects are more important than *taḥsīniyya*. Thus, according to the aspect of preserving these five religious points as well as the priority scale between *darūriyya*, *hājiyya*, dan *taḥsīniyya*, albeit early marriage has a positive value, the harms are nonetheless far more abundant than the benefits. For this reason, in the context of Indonesia, the limit of marriageable age based on amendments to the Marriage Law No. 1 of 1974, in particular Article 7 which turns into Marriage Law No. 16 of 2019 that both male and female are allowed to get married if they are at least 19 years of age is very relevant. For that very reason, the classical fiqh which does not stipulate a marriageable age limit, based on the argument of *maqāṣid al-sharī'a*, finds its relevance in the Indonesia's marriage law. It is because the law does not deny the changing of time, places, and conditions.⁶⁷ Also, changes in law are always related to the benefit (*al-maṣlahah*), the suitability (*al-munāsaba*) and the cause (*al-'illa*),

which are vital keys in the discourse of *maqāṣid al-sharī'a*.

3. Human Rights Phenomenon amid the Living Fiqh: A Response

The campaign perpetrated by human rights activists and a number of educated urban communities against the practice of early marriage is not entirely justifiable. The authors of *Fikih Kawin Anak: Membaca Ulang Teks Keagamaan Perkawinan Usia Anak-Anak* book, for example, who assess the classical and living fiqhs of early marriage only focus on negative aspects.⁶⁸ Other studies such as by Linda Rae Bennet⁶⁹ and Rudyanti Dorotea Tobing⁷⁰ are also full of Western worldview that is forced on the people of Lombok and the legal system of Indonesia. Furthermore, the Women's Health Foundation (YKP), a key think tank in the judicial review of Marriage Law No. 1 of 1974, in collaboration with the Asian-Pacific Resource and Research Center for Women (ARROW), released its report in 2017 in which it portrayed the Indonesian Ulema Council (MUI), Nahdhatul Ulama (NU), and Muhammadiyah negatively owing to the organizations' rejection of the article 7 judicial review.⁷¹ In fact, early marriage is not merely related to the classical and living fiqhs, but also to the dysfunction of the state in fulfilling the welfare rights of its citizens which is closely related to the protection of properties (*hifz al-*

⁶⁴ Al-Baqarah (2) : 219.

⁶⁵ Al-Mā'idah (5) : 90.

⁶⁶ Al-Ghazālī, *al-Mustaṣfā Min 'Ilm al-Uṣūl*, p. 322.

⁶⁷ Ibn Qayyim al-Jawziyyah, *I'lām Al-Muwaqqi'in*, Vol. III, p. 14.

⁶⁸ Mukti Ali et al., *Fikih Kawin Anak: Membaca Ulang Teks Keagamaan Perkawinan Usia Anak-Anak* (Jakarta: Rumah Kitab, Ford Foundation, dan Norwegian Centre for Human Rights, 2015).

⁶⁹ Bennett, "Early Marriage, Adolescent Motherhood, and Reproductive Rights for Young Sasak Mothers in Lombok."

⁷⁰ Tobing, "Prevention of Child Marriage Age in the Perspective of Human Rights."

⁷¹ Atashendartini Habsjah, "The Influence of Conservative Religious Interpretations on Child Marriage in West Java and East Java," *Rural Women's Social Education Centre (RUWSEC) - Asian-Pacific Resource and Research Centre for Women (ARROW)* (Jakarta - Kuala Lumpur, 2017).

māl) and the education rights which is closely related to the protection of intellect (*hifz al-'aql*) in the discourse of *maqāṣid al-sharī'a*. The 2011 WHO report reveals that countries with the biggest numbers of early marriage were developing countries.⁷² The reasons lie in two aspects: economy and cultural-religious values.

From the economic aspect, Marcos et al.'s study in 2015 with a sample of 36 Sub-Saharan African countries and Southwest Asia demonstrates that family economy greatly influences children's education level and stimulates early marriage among the young.⁷³ In Indonesia, the 2018's National Statistics Agency survey indicates that poor households had a tendency to marry off their children early.⁷⁴ The same also occurs to the Malay people of Tebo Ulu that poverty is a major factor of early marriage. Besides, poverty has a big impact on the low education attainment of some. In remote villages in which elementary school is oftentimes an only education institution, distance and finance become the primary constraints for people to continue their education to a higher level. Finally, most of them are unemployed and yet still get married in such a dire economic setting, though they are still very young.

Therefore, these groups' lawsuit should have been directed towards a state that does not fulfill its function to bring about prosperity and educational facilities to its people. As the saying goes, "all means that can fulfill the accomplishment of an act, its law is the

same as its purpose" (*li al-wasā'il hukm al-maqāṣid*). Hence, because the means to reduce or how people obey Law No. 16 on Marriage in 2019 article 7 (previously No. 1 of 1974) is to make them prosperous and provide adequate education facilities, the state is also obliged to fulfill these two needs.

Furthermore, cultural-religious values, especially those adhered to by indigenous peoples in Indonesia, need to be assessed fairly. For instance, differences in meaning of adultery between state and religion cannot be assessed partially through the lens of human rights and Article 284 of the Criminal Code (KUHP) alone. In the *maqāṣid al-sharī'a* perspective, keeping descendants away from falling into adultery (*hifz al-nasl*) has long inspired the traditional customs of the Malay people of Tebo Ulu as well as some other indigenous communities in the archipelago. It is wrong in the sense of committing adultery between a single woman and man and then they are married off, although they are still under 19 years of age. Thus far there has been no state protection for unmarried adolescents who undertake sexual intercourse. It is because Article 284 of the Criminal Code (KUHP) can only be applied to adulterers who are married. For unmarried couples, they are not considered to have committed adultery and cannot be prosecuted if they undertake a sexual intercourse with consent.⁷⁵ In relation to this aspect, however, human rights activists observe the relation between men and women through the secular lens. In fact, the Western and Eastern societies are different. Living together before marriage and teaching sex education to children, which are normal in the West, cannot be applied to the Eastern world, especially to the Malay people of Tebo Ulu as well as to other Indonesian communities. Therefore, a solution to this conflicting value must be sought for.

⁷² World Health Organization, "WHO Guideline on Preventing Early Pregnancy and Poor Reproductive Outcomes Among Adolescents in Developing Countries: What the Evidence Says" (Switzerland: WHO Press, 2011).

⁷³ Marcos Delprato et al., "On the Impact of Early Marriage on Schooling Outcomes in Sub-Saharan Africa and South West Asia," *International Journal of Educational Development* 44 (2015): 42–55.

⁷⁴ Badan Pusat Statistik, *Pencegahan Perkawinan Anak* (Jakarta: Kementerian Perencanaan Pembangunan Nasional, 2020), p. 44.

⁷⁵ See Article 284 of the Criminal Code

Conclusion

Early marriage, both in the Malay community of Tebo Ulu, in communities of other Indonesia's regions and in developing countries at large are caused by financial constraints and family education, resulting in child marriage, parents' insistence to get married, and school dropouts. In addition, mass media, the internet, and the lack of supervision and religious education have contributed to pregnancy outside of marriage. These two are global issues which trigger divorce, adultery, dropping out of school, cervical cancer and damage to women's reproductive system. Imperfect births and many other negative impacts are also caused by these issues.

Therefore, in the perspective of *maqāsid al-sharī'a* as a whole, the harms of early marriage are far greater than the benefits, thus the marriage age restriction based on article 7 of the Marriage Law of 2019, which is 19 for men male and female, is very relevant. Meanwhile, the classical fiqh which does not provide a marriage age limit finds the marriage law relevant because the law always changes according to time, places, and conditions based on the *maṣlahā* (benefit), *munāsa-ba* (suitability), and *'illa* (cause) surrounding it.

But the problem is human rights activists and the educated urban society adopt a polarizing political view in assessing this phenomenon. Their studies are aimed at criticizing the practice of living fiqh of early marriage and the fiqh on which it is based, but ignores the fact that early marriage is also closely related to state's failure to improve the economy of its citizens, which is linked to the protection of properties (*ḥifẓ al-māl*), provide proper education facilities, which is related to the protection of intellect (*ḥifẓ al-'aql*), as well as the blurred meaning of adultery in human rights and in article 284 of the Criminal Code (KUHP), which in contradiction with the custom of Tebo Ulu and other

traditions in various regions of the archipelago as a result of an intermarriage between religions - specifically the concept of *ḥifẓ al-nasl* in the perspective of *maqāsid al-sharī'a* - with cultures.

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