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

Edi Kurniawan, Handesman, Rahmadi & Khairun Najib
State Islamic University (UIN) of Sulthan Thaha Saifuddin Jambi, Indonesia
Jl. Lintas Jambi-Ma. Bulian KM. 16, Muaro Jambi, 3631 Indonesia
e-mail: edikurniawan@uinjambi.ac.id

DOI: 10.30631/al-risalah.v20i1.565
Submitted: April 14, 2020; Revised: May 02, 2020; Accepted: May 02, 2020

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 a formulation, 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‘i 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
Introduction

In Indonesia child marriage has become an interesting political issue 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.

This phenomenon has attracted the attention of many. Whereas Nashahuddin, Abd Halim and Muhammad Khaeruddin Hamsin, Asep Aminuddin, and Kurd Fadal have compared the laws and articles with the classical fiqh, the maḥṣula (benefit) theory and maqāṣīd 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 maqāṣīd al-sharī‘a of child marriage among the peoples of Madura and Lambandia, East Kolaka Regency, Southeast Sulawesi. However, they failed to discuss the human rights aspect amidst the stream of the living fiqh of underage marriage or the doc-

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

4 Abd Halim and Muhammad Khaeruddin Hamsin, “Kesenjangan Ketentuan Pernikahan Di Bawah Umur Antara Fikih Munakahat Dan UU
trinal fiqh that is alive in society, especially among the Shāfi‘i school followers. This issue is interesting because human rights activists 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. 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. 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 classical fiqh and the living fiqh. Samples were taken through a qualitative study of the Malay community of Tebo Ulu, Jambi Province, which still adheres to the Shāfi‘i School of fiqh. According to this school, the marriageable age is not limited. The data obtained were compared with scholarly works which were then analyzed based on maqāṣid al-shari‘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-shari‘a. It is so because, as stated by Ibn Qayyim, the law does not deny the change of time, places and circumstances. Also, changes to the law are always related to mašlaḥa (benefit), munāsaba (suitability) and ‘illa (cause), which are essential keys in the discourse of maqāṣid al-shari‘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-shari‘a?; second, what worldview that projects the human rights activists’ criticism in the midst of living fiqh and maqāṣid al-shari‘a’s review on it?

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

---


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


Early Marriage, Human Rights, and the Living Fiqh ...

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. Al-Badri’s story actually applies to the rural and urban poor of many other Indonesia’s regions, or of various parts of the world, or even of the industrial nations. 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.

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. 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. In addition, education is often at stake 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.

On a broader scale, this pattern generally occurs in poor or developing countries. Marco 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. 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.

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.
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. 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.

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.

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. This situation then led to a high divorce rate among the Malay people of Tebo Ulu, although most of them reconciled.

The above condition makes early marriage highly likely take place because the age between 15-18 are not yet mature with regards 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. In Indonesia, the same results were also shown by a number of other studies: Gavin W Jones et al.’s survey in West Java, Uswatun Hasanah’s studies in the Kisaran Religious Court, North Sumatra, and Team Heaton & Marck Cammack’s statistical analysis of the Indonesian Demographic and Health Survey data between 1987 and 2007. 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. 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. The same is also recognized by others.

24 Interview with Suhairi, Head of Jambu Village, Tebo Ulu, Tebo.
25 Interview with Baidori, a resident of Jambu, Tebo Ulu, Tebo.
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.
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, Kazem Muhammad et al.’s studies in Tehran, Iran, and Nawal M. Nour’s research in Africa. 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. 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.


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

Maqāṣid al-shari‘a, Early Marriage, and a Human Rights Phenomenon

1. Maqāṣid al-shari‘a Theory in the Reasoning of Islamic Law

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

The terminological meaning of maqāṣid al-shari‘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 ‘Ashūr, ‘Alāl al-Fāsī and Wahbah al-Zuḥaylī. From their definitions it can be concluded that maqāṣid al-shari‘a are goals and secrets of shari‘a that have been determined by Allah subhānahu wa ta‘ālā for the benefit of His servants in the world and the hereafter. The benefit is found through inductive reasoning of shari‘a propositions (al-istiqrā‘ ‘al-shari‘ah).

Therefore, if the ultimate goal of maqāṣid al-shari‘a is benefit or mašāla, some uṣūl al-fiqh scholars such as Imam al-Juwaynī, al-Ghazālī, Fakhir al-Dīn al-Rāzī, Sayf al-Dīn al-Āmīdī, Ibn Ḥajīb, and al-Shāṭibī have formulated the mašāla theory in the discussion of


maqāsid al-shari‘a⁴² that maṣlaḥa is divided into three levels, namely darūriyya, ḥājiyya, and tahsinīyya.

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), descendents (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 (ḥifz al-dīn). Carrying out the punishment of qisās (retaliation) to those who kill humans without rights or punishing adulterers in order to protect the human’s soul (ḥifz al-nasl). Applying the hudud punishment against khamr (intoxicants) drinkers in order to preserve human’s intellect (ḥifz al-aql). Finally, preventing extortions and theft from happening in order to protect human’s properties (ḥifz al-māl).⁴⁴

However, it should be noted that the five points above are the results of ʿusūl 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 ḥājiyya, 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 rukhsa 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-qasr) 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 tahsinīyya 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-akhlaq) maintaining manners in worship, customs, and mu‘āmala.⁴⁸ In worship the examples are cleaning oneself from impurity (naqṣa), covering genitals, dressing well when going to the mosque, performing the sunna deeds and doing charity.⁴⁹ In mu‘āmala, Islam prohibits wasteful behavior, being stingy, and monopolizing businesses. As for ‘uqūbit, Islam forbids the killing of children, women, and performing musla (torturing corpses in war-


⁴³ Al-Ghazālī, al-Mustasfā Min ʿIlm al-Uṣūl, p. 322.

⁴⁴ Ibid., p. 322.


⁴⁶ Al-Ghazālī, al-Mustasfā Min ʿIlm al-Uṣūl, p. 322-323.

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

⁴⁸ Al-Ghazālī, al-Mustasfā Min ʿIlm al-Uṣūl, p. 322-323.

Early Marriage, Human Rights, and the Living Fiqh...

fate). 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 maslahā and mafsada. The following discussion is divided into three: early marriage in terms of darūriyya, ḥājiyya, and tahnīyya.

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 (hifż al-dīn), according to usūl al-fiqh scholars, is limited to preserving religion in a formal form such as the implementation of the qisās 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 (hifż 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 recommend-

Second, the protection of soul (hifż 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 child-

Third, the protection intellect (hifż 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,53 in today’s context, the meaning of hifż 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%

52 Ibid., p. 322.
54 Interview with Baidori, a resident of Jambu, Tebo Ulu, Tebo.
55 Al-Ghazālī, al-Mustaṣfā 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. 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. Thus, in this context, early marriage is incompatible with the protection of intellect (ḥifż al-‘aql).

Fourth, the protection of descendants (ḥifż al-nasl). Marriage carried out by an under-age 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. This results in ḥifż 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. In this context, early marriage is certainly in accordance with maqāṣid al-shari‘a, which is to protect the descendants (ḥifż al-nasl).

Fifth, the protection of properties (ḥifż 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 ḥifż 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. In this context, early marriage threatens ḥifż 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 ḥifż 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.

Next is ḥājiyya. As explained earlier, ḥājiyya 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: rukhsa (relief), which is easiness in carrying out God’s commands. Thus, early marriage in the context of ḥājiyya is to quickly have a life partner.

Finally, taḥsiniyya 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 (darūriyya) nor complicate life (ḥājiyya).

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 ḥifż 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".

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.
Early Marriage, Human Rights, and the Living Fiqh ...

The perspective of the above rules has become guidance in establishing other Islamic laws, such as gambling and intoxicant. Although the Qurʾān provides firm explanations on the good and bad sides of the two, yet the Qurʾān is inclined to the evil aspects, therefore they are forbidden. 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-Ghazâlī’s formula that everything that can destroy the five points of religion, namely protecting religion, soul, intellect, descendants, and properties is harm (maṣlaḥa). And everything that can realize the five points of religion is benefit (maṣlaḥa). Secondly, as agreed by uṣūl al-fiqh scholars, ḍarūriyya aspects are more important than aspects of ḥājiyya, and ḥājiyya aspects are more important than taksīniyya. Thus, according to the aspect of preserving these five religious points as well as the priority scale between ḍarūriyya, ḥājiyya, dan taksīniyya, 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-shari’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. Also, changes in law are always related to the benefit (al-maṣlaḥa), the suitability (al-munāsaba) and the cause (al-ʾilla), which are vital keys in the discourse of maqāṣid al-shari’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. Other studies such as by Linda Rae Bennett and Rudyanti Dorotea Tobing 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. 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 (ḥifẓ al-

---

64 Al-Baqarah (2) : 219.
65 Al-Ma’īdah (5) : 90.
66 Al-Ghazâlī, al-Muṣtaṣfâ Min ilm al-Uṣūl, p. 322.
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.”
māl) and the education rights which is closely related to the protection of intellect (ḥifz 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. 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. In Indonesia, the 2018’s National Statistics Agency survey indicates that poor households had a tendency to marry off their children early. 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 ḥukm 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 (ḥifz 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.

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.

---


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 maqāṣid al-shari‘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 maslahah (benefit), munāsaba (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 (hifż al-māl), provide proper education facilities, which is related to the protection of intellect (hifż 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 hifż al-nasl in the perspective of maqāṣid al-shari‘a - with cultures.

Acknowledgment

The authors would like to thank Prof. Dr. Wan Mohd Wan Daud, Prof. Dr. Phil Asep Saefuddin Jahar, and Dr. Busyro for their valuable comments which helped to improve the manuscript.

Bibliography

Journals

https://doi.org/https://doi.org/10.17510/24076899-01501005.


Kurniawan, Edi. “Distorsi Terhadap Maqasid al-Syari’ah al-Syatibi di Indonesia.” Al-
Early Marriage, Human Rights, and the Living Fiqh...


Books


Vol. 20, No. 1, June 2020

Al-Risalah


**Dissertations**


http://digilib.iainkendari.ac.id/1392/.

**Laws**

Marriage Law Number 16 of 2019
Marriage Law Number 1 of 1974
Kitab Undang-Undang Hukum Pidana (Criminal Code Book)

**Interviews**

Baidori, Jambu Resident, Tebo Ulu, Tebo.

Burhan Al-Badrī, Jambu Community Leader, Tebo Ulu, Tebo.

Heni, Jambu Resident, Tebo Ulu, Tebo.

Mahendra, Jambu *Puskesmas* Nurse, Tebo Ulu, Tebo.

Mawardi, Jambu Resident, Tebo Ulu, Tebo.

Suhairi, Head of Jambu Village, Tebo Ulu-Tebo District.

Sawadi, Jambu Religious Leader, Tebo Ulu, Tebo.

Suhairi, Jambu Village Head, Tebo Ulu, Tebo.