



## Indonesian Children Protection against Commercial Sexual Exploitation through *Siri* Marriage Practices in *Maqashid Al-Shariah* Perspective

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**Abstract:** *In Indonesia, the mode development of commercial children sexual exploitation has been carried out through the practice of Siri marriage. The lack of literacy in children, economic conditions of the family, environment and social status are the reasons why children are vulnerable to sexual exploitation. The research aims to examine the protection of children against commercial sexual exploitation through the Siri marriage mode from the Maqashid Al-Shariah perspective. This research uses normative juridical research methods with the statutory approach, conceptual approach, and normative theological approach. This research shows that Siri marriage based on Islamic law is permissible if it meets the requirements of marriage, but based on Indonesian national law, Siri marriage is prohibited if the purpose is to obtain material benefits for parents or the party to marry off children at an early age. Siri marriage can be used as a criminal offense if it is done against a child. Whereas in the Maqashid Al-Shariah perspective, marriage with children through Siri marriage is legal or permissible. However, the marriage will only produce part of the marriage purpose, while other objectives in perspective Maqashid Al-Sharia tend to be ignored because early marriage is prone to psychological problems and lack of skills in the family. As a result, marriage is considered to have the risk of producing bad things in the family, which can reduce the noble values that are the main mission of Islam.*

**Keywords:** *Child Protection; Sexual Exploitation; Siri Marriage; Maqashid Al-Syariah.*

### I. INTRODUCTION

Nowadays, problems regarding children in Indonesia are endless, even more, interesting to study because there are

interesting facts about children's problems.<sup>1</sup> Generally what is called a child is a person born from a marriage between a woman and a man. Children are the forerunners of the

<sup>1</sup> Muhammad Fachri Said, 'Perlindungan Hukum Terhadap Anak Dalam Perspektif Hak Asasi Manusia' (2018) 4(1) *JCH (Jurnal Cendekia*

*Hukum*) 141 <<http://e-jurnal.stih-pm.ac.id/index.php/cendekeahukum/article/view/97>>, 143.

birth of a new generation that is a successor to the ideals of the struggle of the nation and human resources for national development.<sup>2</sup> Children are the nation's assets, where the future of the state will come in the hands of the children. The better the child's personality now, the better the future life of the nation. Vice versa, if the personality of the child is bad, it will also be bad for the life of the state to come.<sup>3</sup>

Religious perspectives, especially Islam, mention children as '*dhaif*' or glorified creatures, whose existence is the authority of the will of God (Allah SWT) through the process of creation.<sup>4</sup> Because children have a noble life in the view of the Islamic religion, the child must be treated humanely as given a living both physically and mentally, so that later the child grows up to be noble as can be responsible for socializing himself to achieve the needs of his life in the future.<sup>5</sup> In the sense of Islam, children are entrusted by Allah SWT to parents, the nation and state that will prosper the world as *rahmatan lila'lamin* and as heirs of Islamic teachings this understanding implies that every child born must be recognized, believed, and secured as implementation of the deeds received by will be from parents, society, nation, and state.<sup>6</sup>

Whereas in Indonesian law, a child is someone who is not yet 18 (eighteen) years

old, including children who are still in the mother's womb. This provision is contained in Article 1 of Law Number 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection (Child Protection Law). The existence of the Child Protection Law emphasizes the legal legitimacy of child protection and the need to provide criminal sanctions for perpetrators of crimes against children in which the sanctions aim to provide a deterrent effect and encourage concrete steps to restore physical, psychological, and social recovery of children.<sup>7</sup>

The issue of child protection which is considered important today to be studied is the problem of protecting children from unscrupulous acts of trafficking children for commercial sexual exploitation purposes. Through Press Release Number: B-020/Set/Rokum/MP 01/02/2020, the Ministry of Women's Empowerment and Child Protection has found 40 (forty) children who were victims of sexual exploitation during the period January-February 2020. Children are traded by irresponsible persons with various abusive and inhumane treatment of the perpetrators of children. Generally, sending areas for child trafficking for the purpose of commercial sexual exploitation are generally from disadvantaged areas or higher levels of poverty, while the receiving areas are big

<sup>2</sup> Rahmat Fauzi, 'Upaya Penanggulangan Tindak Pidana Pencabulan Terhadap Anak Di Kota Padang' (2020) 14(1) *KERTHA WICAKSANA: Sarana Komunikasi Dosen dan Mahasiswa* 1 <<https://www.ejournal.warmadewa.ac.id/index.php/kertawicaksana/article/view/1529>>, 4.

<sup>3</sup> Andy Lesmana, *Definisi Anak* (2015) <<https://www.kompasiana.com/alesmana/55107a56813311573bbc6520/definisi-anak>>, Accessed 3 June 2020.

<sup>4</sup> Hani Sholihah, 'Perlindungan Anak Dalam Perspektif Hukum Islam' (2018) 1(1) *al-Afkar, Journal For Islamic Studies* 38 <[https://al-afkar.com/index.php/Afkar\\_Journal/article/view/3](https://al-afkar.com/index.php/Afkar_Journal/article/view/3)>, 43.

<sup>5</sup> Fadli Andi Natsif, 'Problematika Perkawinan Anak (Perspektif Hukum Islam Dan Hukum Positif)' (2018) 5(2) *Jurnal Al-Qadau: Peradilan dan Hukum Keluarga Islam* 175 <<http://journal.uin-alauddin.ac.id/index.php/al-qadau/article/view/7101>>, 180.

<sup>6</sup> Lesmana, above n 3, Accessed 3 June 2020.

<sup>7</sup> Nur Afdhaliyah, Ismansyah and Fadillah Sabri, 'Perlindungan Hukum Terhadap Anak Sebagai Korban Pencabulan' (2019) 21(1) *Kanun Jurnal Ilmu Hukum* 109 <<http://jurnal.unsyiah.ac.id/kanun/article/view/12082>>, 114.

cities, industrial cities, or tourist areas. Then, the parties involved in commercial sexual exploitation of children are irresponsible parties such as commercial sex syndicate organizations, pedophiles, drug distributors, and even those closest to children such as families.<sup>8</sup>

However, in its development, the commercial sexual exploitation of children in Indonesia has now been carried out through the practice of *Siri* marriage. Children who are vulnerable to sexual exploitation through ‘*Siri* marriage’ mode are not only due to the lack of literacy in children and the economic condition of the family, but also because of their environment and social status. So it can be said, the lower the social status of children or children’s families, the potential for children to be manipulated, made into sexual objects in the name of *Siri* marriage is high because it is socially in a ‘powerless’ condition.<sup>9</sup> In addition to financial conditions and social status, the rise of commercial sexual exploitation of children in the community’s life is also caused by the omission from the authorities, such as village officials. The village officials actually have the authority to develop culture and traditions for protecting children.<sup>10</sup>

Considering *Siri* marriage’s is a legal marriage according to Islamic law because *Siri* marriage has fulfilled the criteria for the validity of the marriage, namely an agreement through ‘*ijab* and *qabul*’, two

brides, a marriage guardian, and two witnesses.<sup>11</sup> However, *Siri* marriage is still often used as an alternative to anticipating free promiscuity between men and women who are morally and materially judged not to have the readiness to get married formally.<sup>12</sup> In fact, this has led to new problems in the community such as betel marital practices used as an excuse to legalize commercial sexual exploitation of children, which has exploited the provisions of the Child Protection Law.

Susanto as Chairman of the Indonesian Child Protection Commission (*KPAI*) on Tuesday, May 19, 2020, through a *Webinar* with the theme ‘*Perlindungan Anak Terhadap Eksploitasi Seksual Melalui Nikah Siri*’ said that *Siri* marriage to children would be interpreted as violating the law if there were elements of economic marriage. Susanto further revealed that there are *Siri* marriages with children that are not based on religious motives, but many cases of *Siri* marriages are used to legalize sexual relations. Academics from the Faculty of Law of Diponegoro University, Pujiyono also said that *Siri* marriage in a religious perspective is not a criminal offense. However, the marriage becomes a criminal offense if it is carried out against a child with the motive to legalize sexual relations.<sup>13</sup>

Various cases of commercial sexual exploitation of children, especially through *Siri* marriage, are a sign for all parties to

<sup>8</sup> Kementerian Hukum dan HAM RI, *Eksploitasi Seksual Komersial Mengintai Anak Kita* <<http://ditjenpp.kemendukham.go.id/hukum-pidana/648-eksploitasi-seksual-komersial-mengintai-anak-kita.html>>, Accessed 3 June 2020.

<sup>9</sup> Anugrah Andriansyah, *Nikah Siri Dan Eksploitasi Seksual Terhadap Anak* (2020) <<https://www.voaindonesia.com/a/nikah-Siri-dan-eksploitasi-seksual-terhadap-anak/5426023.html>>, Accessed 4 June 2020.

<sup>10</sup> Arist Merdeka Sirait, ‘Eksploitasi Seksual Komersial Mengintai Anak Kita’ (2018) 5(3) *Jurnal Legislasi Indonesia* 87 <[\[jurnal.peraturan.go.id/index.php/jli/article/view/300\]\(http://jurnal.peraturan.go.id/index.php/jli/article/view/300\)>, 89.](http://e-</a></p>
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<sup>11</sup> M. Ali Rusdi, ‘Status Hukum Pernikahan Kontroversial Di Indonesia (Telaah Terhadap Nikah Siri, Usia Dini Dan Mut’ah)’ (2016) 9(1) *Al-’Adl* 37 <<http://ejournal.iainkendari.ac.id/al-adl/article/view/667>>, 41.

<sup>12</sup> Rihlatul Khoiriyah, ‘Aspek Hukum Perlindungan Perempuan Dan Anak Dalam Nikah Siri’ (2018) 12(3) *Sawwa: Jurnal Studi Gender* 397 <<http://journal.walisongo.ac.id/index.php/sawwa/article/view/2094>>, 401.

<sup>13</sup> Andriansyah, above n 9, Accessed 4 June 2020.

optimize the function of prevention and protection of children according to the mandate in the Child Protection Act and Islamic Law perspective. Based on the explanation above, this research becomes important considering there are still many cases of commercial sexual exploitation of children which are legalized through the practice of marital *Siri*. Previous research related to current research has been carried out by 1). Satrio Ageng Rihardi in 2018 focused on the form of legal protection for girls who are victims of child exploitation and what rights victims of child exploitation will receive<sup>14</sup>; 2). Ariyadi in 2019 this research focuses on the legal provisions of the crime of sexual exploitation of children according to Islamic law which includes the form, elements, and legal sanctions<sup>15</sup>; 3). Rusmilawati Windari in 2019 focusing on tackling commercial sexual exploitation of children in Indonesia based on a global-local based approach. The global side is shown by the ratification of several conventions and related protocols, as well as the implementation of bilateral and multilateral cooperation. While on the local side, through the application of the Child Protection Law<sup>16</sup>; and 4). Laurensius Arliman S. in 2017 which focused on the pattern of structuring law enforcement and the continued protection of children from sexual exploitation crimes.<sup>17</sup>

Based on the previous research, there is a different focus on this research, namely

regarding the protection of children against exploitation carried out through *Siri* marriage based on the *Maqashid Al-Shariah* perspective. This is because marriage through *Siri* marriage in the perspective of Islamic law is legal and not a criminal act. However, this marriage becomes a criminal offense if it is committed against a child with the motive of legalizing sexual relations. For this reason, the *Maqashid Al-Syariah* perspective is used in this study. This research aims to uncover forms of child protection against commercial sexual exploitation from the perspective of positive Indonesian law and the *Maqashid Al-Shariah* perspective. Also, this research aims to support the literacy of child protection to the community and contribute to the literature on the protection of children against sexual exploitation through *Siri* marriage practices based on positive law in Indonesia and the *Maqashid Al-Syariah* perspective.

## II. LEGAL MATERIALS AND METHODS

The specifications of this research are descriptive-analytical with normative doctrinal or juridical research types. Descriptive-analytical research is intended to describe, examine, and explain the problem to be studied, namely the protection of children against commercial sexual exploitation through *Siri* marriage in the *Maqashid Al-Shariah* perspective. The

<sup>14</sup> Satrio Ageng Rihardi, 'Perlindungan Hukum Terhadap Hak-Hak Anak Perempuan Sebagai Korban Eksploitasi Seksual' (2018) 2(1) *Literasi Hukum* 61 <<https://jurnal.untidar.ac.id/index.php/literasihukum/article/view/762>>, 61.

<sup>15</sup> Ariyadi, 'Tindak Pidana Pelaku Eksploitasi Seksual Pada Anak Di Tinjau Dari Hukum Positif' (2018) 5(2) *Jurnal Hadratul Madaniyah* 73 <<http://journal.umpalangkaraya.ac.id/index.php/jhm/article/view/888>>, 73.

<sup>16</sup> Rusmilawati Windari, 'Penanggulangan Eksploitasi Seksual Komersial Anak (ESKA)

Berdasarkan Global - Local Based Approach (Glocalization)' (2019) 2(2) *Soumatara Law Review* 282 <<http://ejournal.kopertis10.or.id/index.php/soumlaw/article/view/4369>>, 282.

<sup>17</sup> Laurensius Arliman S., 'Reformasi Penegakan Hukum Kekerasan Seksual Terhadap Anak Sebagai Bentuk Perlindungan Anak Berkelanjutan' (2017) 19(2) *Kanun: Jurnal Ilmu Hukum* 305 <<http://www.jurnal.unsyiah.ac.id/kanun/article/view/7983>>.

research approach used is the statutory approach, conceptual approach and normative theological approach. The statutory approach is carried out by examining all laws and regulations that are related to the problem (legal issue) is being faced. The conceptual approach departs from the views and doctrines developed in the science of law. This approach is crucial because understanding the views/doctrines that develop in legal science can be a basis for building legal arguments when resolving legal issues at hand. Meanwhile, the normative theological approach is to understand religion literally, which can be interpreted as an effort to understand religion by using divine science based on the belief that being is empirical. This research relies on secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials obtained through literature research as a data collection technique, which are then analyzed using theological analysis and qualitative analysis techniques to obtain actual conclusions.

### III. RESULT AND DISCUSSION

#### **Children as Victims of Commercial Sexual Exploitation through *Siri* Marriage Practices in Indonesia**

Indonesia as a state party in the Convention on the Rights of the Child and has ratified the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child, has responsibility to protect the children in Indonesia. The ratification is a concrete manifestation of the government's commitment to providing guarantees for the fulfillment of the rights and protection of all

Indonesian children. The ratification also requires Indonesia to prevent all forms of commercial sexual exploitation of children by taking preventive measures or preventing, protecting, or eradicating these crimes against humanity. Because one of the fundamental rights inherent in the child is the right to receive adequate protection (rights) from the state.<sup>18</sup>

Referring to the provisions of Article 34, Article 35, and Article 36 of the Convention on the Rights of the Child, every country in the world that has ratified the Convention on the Rights of the Child, including Indonesia, is obliged to protect children from all forms of sexual exploitation, and sexual abuse. Then to implement the purpose of Article 34, Article 35, and Article 36 of the Convention on the Rights of the Child, the Convention on the Rights of the Child provisions require participating countries to take all national, bilateral and multilateral steps to prevent the inducement or coercion of children to engage in all forms of sexual activity, the abuse of children exploitative children in the form of prostitution or other sexual practices and the use of children for pornographic performances and pornographic materials.

To implement the Convention on the Rights of the Child, the Government of Indonesia has enacted various laws and regulations, including Law Number 23 of 2002 concerning Child Protection and Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (Child Protection Law) as well as other laws and regulations governing child welfare, juvenile justice, child labor, eliminating violence against children, and child trafficking. This reinforces the

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<sup>18</sup> Kementrian Hukum dan HAM RI, above n 8, Accessed 3 June 2020.

statement that the fulfillment of children's rights and protection is necessary because starting from the international and national levels they already have legal instruments. Also, because the handling of children's issues is cross-sectoral in development, holistic and integrative handling is very important, including engagement and cooperation with all stakeholders from government, community, media and business sectors.<sup>19</sup>

Article 1 of the Child Protection Law states that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. Whereas, what is meant by victims are those who suffer physically and spiritually as a result of the actions of others who seek fulfillment of themselves or others who are contrary to the human rights of the sufferer.<sup>20</sup> Therefore, what is meant by a child as a victim of sexual exploitation is a child who is not yet 18 years of age who suffers suffering as a result of a crime namely sexual exploitation where the child is used arbitrarily for sexual purposes in exchange for cash or other forms between children, sex service buyers, intermediaries or agents, and other parties who benefit from sexuality trafficking.<sup>21</sup>

The term sexual exploitation is also referred to as Commercial Sexual Exploitation of Children (ESKA), is a sexual crime against children, or a form of sexual activity that is very abominable against

children and women. Other terms are sexual activities of an adult or their peers using physical coercion or threats, emotional deception or manipulation in the form of rape, sexual exploitation (use of children for sexual purposes), fondling a child's genitals, sodomy, showing genitalia (*exhibitionist*).<sup>22</sup> Commercial Sexual Exploitation of Children (ESKA) is also interpreted as a fundamental violation of children's rights. These violations consist of sexual violence by adults and the provision of rewards in the form of cash or goods against a child, or a third person, or others. The child is treated as a sexual object and as a commercial object.<sup>23</sup>

Commercial sexual exploitation of children is the dark side of globalization in the midst of world society. Globalization which is identical with interconnectedness and interdependence, as well as the birth of the movement of economic flows, goods, capital, as well as information and ideas on an international scale, has indirectly become a criminal factor in the emergence of various types of crimes that are globalized and do not recognize boundaries countries, such as human trafficking for sexual exploitation.<sup>24</sup>

As a reality, globalization refers to the emergence of globalized development throughout the world, which occurs in

<sup>19</sup> Andika Panduwina, *Peringatan 25 Tahun Ratifikasi Konvensi Hak Anak Indonesia* (2015) <<https://wartakota.tribunnews.com/2015/12/15/peringatan-25-tahun-ratifikasi-konvensi-hak-anak-indonesia>>, Accessed 10 May 2020.

<sup>20</sup> Bambang Waluyo, *Viktimologi Perlindungan Korban Dan Saksi* (Sinar Grafika, 2012), 6.

<sup>21</sup> Ida Ayu Kade Karina Putri and Ni Nyoman Sukerti, 'Perlindungan Hukum Terhadap Anak Korban Eksploitasi Seksual Dalam Perspektif Undang-Undang No. 23 Tahun 2002 Tentang Perlindungan Anak' (2015) 4(3) *Kertha Wicara: Journal Ilmu Hukum* 1

<<https://ojs.unud.ac.id/index.php/kerthawicara/article/view/15357>>, 3.

<sup>22</sup> Alit Kurniasari, 'Faktor Risiko Anak Menjadi Korban Eksploitasi Seksual (Kasus Di Kota Surabaya)' (2016) 5(3) *Sosio Konsepsia* 113 <<https://ejournal.kemsos.go.id/index.php/SosioKonsepsia/article/view/251>>, 122.

<sup>23</sup> Mutiara Nastya Rizky et al, 'Perlindungan Hukum Terhadap Anak Korban Eksploitasi Seksual Komersial Melalui Media Sosial' (2019) 2(2) *Media Iuris* 197 <<https://ejournal.unair.ac.id/MI/article/view/13193>>, 204.

<sup>24</sup> Windari, above n 16, 286.

interdependent relations between countries.<sup>25</sup> This globalized development is illustrated by the existence of trade and global markets (liberalization of trade), global communication with indicators of massive internet use, global travel and movement, global networks, global environmental damage and climate change, and the emergence of hybrid culture. The influence of the dominance of American values as an indicator of globalization in the world.<sup>26</sup>

As a result of the sexual exploitation of children, the child suffers physical and spiritual suffering as a result of the actions of others who seek fulfillment of their self-interest in ways that are contrary to the human rights of the victim.<sup>27</sup> Children as victims also suffer losses, firstly, mentally, where victims feel that their actions must be contrary to their rights and obligations as a child, but victims cannot fight, secondly, physically, where victims must give up their physical needs for the sexual satisfaction of others and third, socially where the victim is ostracized in social relations, where the community considers the real perpetrators of a crime even though the child is only a victim of sexual exploitation of children who can come from his parents, family, or members of the surrounding community.<sup>28</sup>

The forms of commercial sexual activity against children both in the provisions of the CRC and the Child Protection Law explain that commercial

sexual exploitation of children includes sexual abuse of children by adults by coercion, giving money or the like to the child concerned or parties third, children are made as sex objects and commercial objects. Commercial sexual exploitation of children can also be seen in the form of coercion and violence against children, in the form of forced labor and modern forms of slavery (a contemporary form of slavery).<sup>29</sup>

Today, commercial sexual exploitation of children in Indonesia, in particular, is done in various ways or modes, one of which is the *Siri* marriage mode. Susanto as the Chairperson of KPAI revealed that children are vulnerable to being sexually exploited through the *Siri* marriage mode due to the lack of literacy in children, economic conditions of the family, and also because of the environment and social status.<sup>30</sup> In Indonesia, the definition of *Siri* marriage does not exist but *Siri* marriage can be understood as a marriage conducted by a man and a woman who has fulfilled the requirements and the harmony of the marriage,<sup>31</sup> but not officially recorded at the Office of Religious Affairs (*KUA*) for those who are Muslim and civil disability offices for those who are not Muslim.<sup>32</sup>

Al-Qur'an as a guide for Muslims, normatively many people encourages people to live in pairs that aim to create a happy and

<sup>25</sup> J Agung Indratmoko, 'Pengaruh Globalisasi Terhadap Kenakalan Remaja Di Desa Sidomukti Kecamatan Mayang Kabupaten Jember' (2017) 5(2) *Citizenship Jurnal Pancasila dan Kewarganegaraan* 121 <<http://ejournal.unipma.ac.id/index.php/citizenship/article/view/1646>>, 129.

<sup>26</sup> Windari, above n 16, 286.

<sup>27</sup> Ariyadi, above n 15, 78.

<sup>28</sup> Kurniasari, above n 22, 124.

<sup>29</sup> Kementerian Hukum dan HAM RI, above n 8, Accessed 3 June 2020.

<sup>30</sup> Andriansyah, above n 9, Accessed 4 June 2020.

<sup>31</sup> Dahlia Haliah, 'Nikah Sirri Dan Perlindungan Hak-Hak Wanita Dan Anak (Analisis Dan Solusi Dalam Bingkai Syariah)' (2016) 1(1) *Al-Ahkam: Jurnal Ilmu Syari'ah dan Hukum* 35 <<http://ejournal.iainsurakarta.ac.id/index.php/al-ahkam/article/view/81>>, 36.

<sup>32</sup> Aidil Alfin and Busyro, 'Nikah Siri Dalam Tinjauan Hukum Teoritis Dan Sosiologi Hukum Islam Indonesia' (2018) 11(1) *Al-Manahij: Jurnal Kajian Hukum Islam* 60 <<http://ejournal.iainpurwokerto.ac.id/index.php/al-manahij/article/view/1268>>, 64.

peaceful family.<sup>33</sup> Regarding marital status, the Al-Qur'an also mentions in the letter An-Nisa (4): 21, that marriage is '*mitsaqan galidhan*', which is a strong bond. The bond began to be recognized after the saying of an agreement contained in the form of *ijab* and *qabul*. Based on the Qur'an and the hadith, the scholars concluded that the things that included the conditions or the harmony of marriage are the prospective husband and future wife, the marriage guardian, the existence of two witnesses, as well as an agreement through *ijab* and *qabul*.<sup>34</sup> Therefore, every marriage that has been carried out by a Muslim who has fulfilled the above conditions or requirements is 'legal' according to Islamic law, even though there is no record of marriage as an administrative requirement by the state.<sup>35</sup>

There is an understanding that *Siri* marriage is legal according to Islamic law which triggers many people engaging in *Siri* marriage. Such conditions open up opportunities for parties not responsible for making *Siri* marriage as a 'tool' in legalizing an illegal act such as commercial sexual exploitation of children. In line with Pujiono's expression which states '*Siri* marriage in a religious perspective is not a criminal offense. However, marriage becomes a criminal offense if it is carried out against a child'.<sup>36</sup>

Based on the national law perspective that marrying a child at an early age either

through the practice of *Siri* marriage is an act that violates the law so that the act is illegal. Marriage at an early age can be said to be illegal or not legally valid if it is contrary to positive law in Indonesia, especially in violation of Law Number 16 of 2019 concerning Amendment of Law Number 1 of 1974 concerning Marriage (Marriage Law). The amendment to the Marriage Law of 1974 became the starting point for changes and renewal of marital arrangements in Indonesia. Amendments to the Marriage Law amend several things, one of which is the minimum age limit for women to get married.<sup>37</sup>

The Marriage Law determines the age limit for women to be the same as the minimum marriage age limit for men which is 19 years old. Marriage at an early age or less than a predetermined age limit certainly occurs with a variety of factors that influence it, mentioned earlier the factors of betel marriage to children who are not yet 19 years old due to lack of literacy in children, economic conditions of the family, as well as environmental conditions and social status. For irresponsible parties and for parents who allow and benefit materially from a child marriage through serial marriages can be categorized as a crime that has violated Article 7 of the Marriage Law.

Criminal sanctions are given to parents or other parties who intentionally marry off children who have not reached the age limit determined by the Marriage Law is a form of

<sup>33</sup> Candra Ulfatun Nisa, Hari Sutra Disemadi and Ani Purwanti, 'Adat Kejawan Ngalor-Ngetan Sebagai Alasan Adhalnya Wali Ditinjau Dari Perspektif 'Urf Dalam Hukum Islam' (2020) 9(1) *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 153 <<https://ojs.unud.ac.id/index.php/jmhu/article/view/55721>>, 154.

<sup>34</sup> Syukri Fathudin Ahmad Widodo and Vita Fitria, 'Problematika Nikah Siri Dan Akibat Hukumnya Bagi Perempuan' (2010) 15(1) *Jurnal Penelitian Humaniora* 1

<<https://journal.uny.ac.id/index.php/humaniora/article/view/5030>>, 6-7.

<sup>35</sup> Alfin and Busyro, above n 32, 67.

<sup>36</sup> Andriansyah, above n 9, Accessed 4 June 2020.

<sup>37</sup> Sahuri Lasmadi, Kartika Sasi Wahyuningrum and Hari Sutra Disemadi, 'Kebijakan Perbaikan Norma Dalam Menjangkau Batasan Minimal Umur Perkawinan' (2020) 3(1) *Gorontalo Law Review* 1 <<http://jurnal.unigo.ac.id/index.php/golrev/article/view/846>>, 8.



legal certainty in Indonesia. Therefore, any regulation regarding early childhood marriage must refer to positive law which has a higher legal level. Therefore, all Indonesian people must obey and obey the national positive law. Penalties for perpetrators who allow or who are involved in early child marriage through *Siri* marriages whose purpose is to obtain profits (commercial) must be enforced, considering that child marriage that is not yet mature enough is considered to have an impact or risk, as follows: 1). It causes death in mothers giving birth. This death is caused due to childbirth so often occurs in young mothers under the age of 20 years old. Lack of preparation for childbirth and weak physical condition are the main causes of death; 2). It causes death in infants. Mothers who give birth to babies at a young age, often suffer unfavorable fate. The events can be different such as premature delivery, weight loss, and someone who dies immediately; 3). Hampered the process of pregnancy and childbirth. Mothers who get married at an early age can experience bleeding, lack of blood, make it difficult and take a long time in the delivery process so that it can cause cancer in the cervix later in life<sup>38</sup>; 4). Economic problems which are generally a person who is married at an early age still do not have mature knowledge and skills, consequently, it becomes difficult to find work with sufficient income to meet household needs. Low-income can damage and render households out of harmony, and

5). The problem of maturity, in which a person is said to be an adult is strongly influenced by his age, young age (12-19 years old) shows that the soul is still unstable, so the age of marriage that is too early can have an impact with increasing divorce cases, due to lack of awareness to take responsibility in the household.<sup>39</sup>

### **Protection of Children against Commercial Sexual Exploitation through *Siri* Marriage Practices in *Maqashid Al-Syariah* Perspective**

Every human being born naturally will surely get basic rights, namely freedom, right to life, protected rights, and other rights.<sup>40</sup> Human rights are fundamental rights that are inherently inherent in every human being, are universal and forever so that the need for respect, protection and can not be reduced by anyone. Human rights are an appreciation of the degree and dignity of humans which is a clear recognition that humans are humans.<sup>41</sup> Human rights are interrelated with the dimensions of human life because human rights arise because of their dignity and human dignity. Human rights continue to develop along with the development of the face and human self itself which currently tends to be influenced by the environment of the community.<sup>42</sup>

The State of Indonesia is a country guaranteeing human rights through the welfare of each of its citizens, including the protection of children's rights. Basically,

<sup>38</sup> Tania Savitri, *Bahaya Kesehatan Yang Timbul Akibat Pernikahan Dini* (2018) <<https://hellosehat.com/hidup-sehat/tips-sehat/bahaya-kesehatan-akibat-pernikahan-dini/>>, Accessed 15 May 2020.

<sup>39</sup> Suara.com, *Angka Pernikahan Dini Di Indonesia Memprihatinkan* (2019) <<https://www.ayocirebon.com/read/2019/12/16/4032/angka-pernikahan-dini-di-indonesia-memprihatinkan>> Accessed 20 May 2020.

<sup>40</sup> Rihardi, above n 14, 68.

<sup>41</sup> Bobi Aswandi and Kholis Roisah, 'Negara Hukum Dan Demokrasi Pancasila Dalam Kaitannya Dengan Hak Asasi Manusia (HAM)' (2019) 1(1) *Jurnal Pembangunan Hukum Indonesia* 128 <<https://ejournal2.undip.ac.id/index.php/jphi/article/view/4286>>, 130.

<sup>42</sup> Madja El Muhtaj, *Hak Asasi Manusia Dalam Konstitusi Indonesia (Dari UUD 1945 Sampai Dengan Perubahan UUD 1945 Tahun 2002)* (Kencana Prenada Media Group, 2005), 27.

child protection is able to guarantee and protect the rights of children to be able to live, grow, develop in accordance with their dignity and dignity as whole human beings. The principle of legal protection for human rights because according to its history in the West, the birth of the concepts of the recognition and protection of human rights is directed at the limitations and laying down of community and government obligations.<sup>43</sup>

The problem of child protection is complex and can cause a variety of problems, where the problem cannot be solved individually, but rather must be addressed together.<sup>44</sup> Based on positive law in Indonesia, child protection has been accommodated in Article 28B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia and regulated in Law Number 23 of 2002 concerning Child Protection and Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 on Child Protection (Child Protection Law). With the Child Protection Act, Indonesia has endeavored to preventive protection of children with an effort that establishes a condition where every child can exercise his rights and obligations through the Child Protection Law.

Children have special rights or special protection as victims of work according to the law, which is regulated in Article 59 of the Child Protection Law, which states that the Government of Indonesia and other State institutions have the obligation and responsibility to provide special protection to children in emergency situations; children in conflict with the law; children from minority and isolated groups; children who are exploited economically and/or sexually; children who are victims of narcotics, alcohol, psychotropic and other addictive substances;

children who are victims of pornography; children with HIV/AIDS; child victims of abduction, sale and/or trafficking; child victims of physical and/or psychological abuse; child victims of sexual crimes; child victims of terrorism networks; children with disabilities; child victims of mistreatment and neglect; children with deviant social behavior; and children who are victims of stigmatization from labeling are related to the condition of their parents. Then special rights or other special protections are regulated in Article 66 of the Child Protection Law, whereby the Government of Indonesia and other State Institutions are obliged to protect children from commercial sexual exploitation preventively through legislation or repressive protection, that is, they must protect the rights of children who are victims of commercial sexual exploitation with different forms of protection depending on the suffering/loss suffered by victims of child exploitation.

Related to the act of marrying a child through a *Siri* marriage with the intent and purpose of sexual exploitation certainly does not just happen, but the need for further research relating to the factors that influence the occurrence of the act. This form of repressive protection can also be done by providing a deterrent effect through sanctions to parents or other parties who deliberately allow and utilize it to obtain benefits in child marriages through serial marriages which can be categorized as criminal acts, therefore in criminal law perspective it can be incorporated as a criminal to parents who have any involvement in the act of marrying off children at an early age so that criminal sanctions can provide legal certainty. As for the form of repressive protection contained in Article 290 of the Indonesian Criminal Code

<sup>43</sup> Rihardi, above n 14, 68.

<sup>44</sup> Putri and Sukerti, above n 21, 4.

(KUHP) Jo. Article 56 of the Criminal Code (KUHP), and Article 88 of the Law on Child Protection with the maximum imprisonment of 10 (ten) years and/or a maximum fine of IDR.200,000,000 (two hundred million rupiahs).

Another alternative strategy is needed in protecting children against sexual exploitation through the practice of *Siri* marriage. At this point, the *Maqashid Al-Shariah* perspective can be used as an alternative in protecting children in Indonesia, who are predominantly Muslim. In Islam, children are the responsibility of parents to protect them and not let children work or employ them. Islam forbids the killing of children for any reason, whether due to poverty, the threat of poverty, or an excessive passion for honor.<sup>45</sup> Muslims have a general obligation to protect families including children as stipulated in the *Al-Qur'an* letter *Al-Tahrim* (66): 6; Children must be protected because parents are obliged to protect and provide for living contained in letter *Al-Baqarah* (2): 233; and if parents are unable, the closest relative who has to protect because it is related to the inheritance is stated in letter *Al-Baqarah* (2): 233. This is where the implication of the child's right to obtain his needs or the rights of the child then a reverse relationship emerges from the obligations of people parents to provide good care for them, so they can develop well for the future of the nation and state.

The responsibility of Muslims to look after children and the obligation to carry out these tasks as a concrete manifestation of obedience to God (Allah SWT), is one of the principles of *shari'ah* (Islamic law) which he spelled out in the concept of '*Maqashid Al-Shari'ah*'.<sup>46</sup> The word *Maqashid Al-Shariah* is derived from the word 'maqsud' which means demands, intentions, or goals. '*Shari'ah*' is a policy (wisdom) and the achievement of protection for everyone in the life of this world and the hereafter. The meaning of *Maqashid Al-Shariah* in terms is '*al-ma'ani al-lati syuri'at laha al-ahkam*' which means values which are the purpose of determining the law.<sup>47</sup> So *Maqashid Al-Shariah* is a study that concentrates on dissecting the essence behind both the *Al-Qur'an* and *Sunnah* religious texts, elaborating on the wisdom and purpose of Islamic laws that have been imposed on humanity. In establishing Islamic law, this goal can be traced from the *Al-Qur'an* and *Sunnah* of the Prophet Muhammad, as a logical reason for the formulation of a law which is oriented to the benefit of mankind.<sup>48</sup>

*Maqashid Al-Shariah* have many objective in *maslahah* concept. *Maslahah* means something that brings goodness (benefit, and so on), benefit, and useful. *Maslahah* can also be interpreted as maintaining the objectives of Islamic law by rejecting disasters/damage/things that harm humans. However, this research will study

<sup>45</sup> Indar Wahyuni, 'Permasalahan Pekerja Anak: Perspektif Maqashid Syari'ah' (2015) 9(1) *Mahkamah: Jurnal Kajian Hukum Islam* 84 <<http://syekhnujati.ac.id/jurnal/index.php/mahkamah/article/view/292>>, 87.

<sup>46</sup> Iqbal Kamalludin and Barda Nawawi Arief, 'Kebijakan Reformasi Maqashid Al-Syar'ah Dan Kontribusinya Dalam Formulasi Alternatif Keringanan Pidana Penjara' (2018) 15(1) *AL-ADALAH* 182 <<http://ejournal.radenintan.ac.id/index.php/adalah/article/view/2931>>, 187.

<sup>47</sup> M Hasbi Umar and Bahrul Ma'ani, 'Urgensi Hak Dan Perlindungan Anak Dalam Perspektif Maqashid Al-Syariah' (2018) 17(2) *Al-Risalah* 201 <<http://ejournal.lp2m.uinjambi.ac.id/ojs/index.php/al-risalah/article/view/64>>, 204.

<sup>48</sup> Ahmad Yani Nasution, 'Perlindungan Jiwa Anak Yatim Dalam Pergub Sumsel Nomor 6 Tahun 2017 Tentang Perlindungan Anak Yatim' (2020) 3(1) *Jurnal Madani: Ilmu Pengetahuan, Teknologi, dan Humaniora* 104 <<http://www.jurnalmadani.org/index.php/madani/article/view/94>>, 111.

about five main objectives *Maqashid Al-Syariah*, namely in the context of protecting religion, life, reason, descent, and wealth.<sup>49</sup> To establish the law, the five main objectives are categorized into three levels, namely: 1). *Dharuriyyah*, namely maintaining primary needs for human survival<sup>50</sup>, those primary needs are ‘*Hifz Din*’ or preserving religion, ‘*Hifz Nafs*’ or preserving the soul, ‘*Hifz Aql*’ or preserving reason, ‘*Hifz Nasl*’ or maintaining offspring, and ‘*Hifz Mal*’ or preserving property.<sup>51</sup> The five main objectives must be ensured to be safe for every human being. So that it will create the nuances of a human being who is well-off and fulfilled his rights as a human being. At the level of ‘*dhuriyyah*’ all that is primary must be realized for the upholding of human life. If this fails to materialize then one’s worldly life will not be stable, experience chaos and damage can even lead to the emptiness of life, and in the hereafter will lose the happiness and enjoyment of heaven and return to his Lord in a state of loss<sup>52</sup>; 2). *Hajiyyah*, which is the level of needs that are not basic or said to be secondary needs. Needs that are ‘*hajiyyah*’ are not to eliminate his life except needs that can keep people from difficulties in their lives. Although the needs of the ‘*hajiyyah*’ are not met will not threaten the survival of the five points mentioned earlier, but will only cause difficulties; and 3). *Tahsiniyyah*, which is the level of tertiary needs, that is complementary needs. The function is to support the improvement of one’s dignity in the

community and before his Lord following obedience.<sup>53</sup>

Islamic teachings attach great importance to the maintenance of five things namely religion, reason, descent, and wealth. Maintaining honor and protecting it from various threats means maintaining the existence of the honor of mankind. It is very clear that the criminal sanction of sexual exploitation through the practice of *Siri* marriage in Article 88 of the Child Protection Act with the maximum penalty of imprisonment of 10 (ten) years and/or a maximum fine of IDR. 200,000,000 (two hundred million rupiahs) is considered to be relevant because it is considered that the benefit of the people, and the achievement of hereditary protection and honor, especially in children as victims of sexual exploitation through *Siri* marriage, which in Islam described in the *Maqashid Al-Shariah* protect such descent and honor are one of the five main pillars which must be protected. The punishment is intended to provide a deterrent effect on the perpetrators, to bring good for the community as a whole and preventive functions against the possibility of repetition of the same type of crime, and repressive protection is intended to educate the offender to become a better person and aware of mistakes.

*Siri* marriages that have been mentioned are legal or legal according to Islamic law, will be highly invalid if they occur at an early age and the purpose is to obtain material benefits through the crime of

<sup>49</sup> Dyah Ochterina Susanti, ‘Perjanjian Kawin Sebagai Bentuk Perlindungan Hukum Bagi Pasangan Suami Istri (Perspektif Maqashid Syari’ah)’ (2018) 1(2) *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* 1 <<http://jurnal.unissula.ac.id/index.php/ua/article/view/2456>>, 24.

<sup>50</sup> Umar and Ma’ani, above n 47, 204.

<sup>51</sup> Rizkiyah Hasanah, ‘Penetapan Dispensasi Kawin Akibat Hamil Pra-Nikah Ditinjau Dari Aspek

Maqashid Syari’ah’ (2018) 1(1) *Aktualita (Jurnal Hukum)* 295 <<https://ejournal.unisba.ac.id/index.php/aktualita/article/view/3724>>, 305.

<sup>52</sup> Kurdi Fadal, ‘Pernikahan Di Bawah Umur Perspektif Maqashid Al-Qur’an’ (2016) 14(1) *Jurnal Hukum Islam* 65 <<http://ejournal.iainpekalongan.ac.id/index.php/jhi/article/view/673>>, 79.

<sup>53</sup> Nasution, above n 48, 111-112.

commercial sexual exploitation. *Siri* marriage to children is still considered to often experience impaired balance in thinking. Children who are still in the period of looking for identity are considered not stable in acting so that it triggers conflict in the family.<sup>54</sup> From the aspect of '*Hifz Aql*', namely protection of reason, *Siri* marriage to children also has the potential to fail the education of the child concerned. If marriages occur during school age, the threat of dropping out is huge. Low education certainly has implications for the lack of knowledge for someone. Therefore, early marriage can seize the opportunity to develop the potential of reason and knowledge.<sup>55</sup> As mentioned earlier, *Siri* marriage to children who are not ready for sexual intercourse, pregnancy, and childbirth will be at risk of suffering from cancer, even impacting on the death of the mother. Another risk is the potential for birth defects or the risk of infant death.<sup>56</sup> Of course, the existence of these risks threatens the realization of protection of the soul (*Hifz Nafs*) and threatens the realization of protection of offspring or '*Hifz Nasl*'.

*Siri* marriage to children is also considered to threaten the protection of religion or '*Hifz Din*' aspects. Making the best decisions requires thinking skills and maturity. Therefore, married couples with young age (premature) will experience serious difficulties in living it so that it can disrupt the process of growth and development of children, which causes

children to lack education in general, including religious education which also means threatening '*Hifz Din*' for him.<sup>57</sup> *Siri* marriage to children also results in limitations in accessing work that will force him to work unprofessionally because of his lack of ability to work (skills) and the knowledge he has. Thus, underage marriages can threaten the protection of property or '*Hifz Mal*' so that the low access will have an impact on the difficulties of the family economy. When conditions are getting worse and economic access is getting heavier then gradually such conditions will lead to conditions of poverty, which are conditions that can cause the neglect of something very basic in family life.<sup>58</sup>

Based on the *Maqashid Al-Shariah* perspective described above, therefore, as an effort to protect minors against underage marriages must still refer to Article 26 paragraph (1) letter c of the Child Protection Law, then parents are obliged and responsible to prevent marriages from occurring at a young age. In addition to the Child Protection Act, parents or other parties must comply with Article 7 of the Marriage Law which determines the age limit of marriage is 19 (nineteen) years old for women who have been equated with the minimum age of marriage for men. Anyone who ignores this regulation deserves strict sanctions so that early marriage can be kept to a minimum in the community.

#### IV. CONCLUSION

<sup>54</sup> Suhadi, Baidhowi and Cahya Wulandari, 'Pencegahan Meningkatnya Angka Pernikahan Dini Dengan Inisiasi Pembentukan Kadarkum Di Dusun Cemanggal Desa Munding Kecamatan Bergas' (2018) 1(1) *Jurnal Pengabdian Hukum Indonesia (Indonesian Journal of Legal Community Engagement) JPHI* 31 <<https://journal.unnes.ac.id/sju/index.php/JPHI/article/view/27277>>, 34.

<sup>55</sup> Fadal, above n 52, 83-84.

<sup>56</sup> Muhamad Dani Somantri, Dahwadin Dahwadin and Faisal Faisal, 'Analisa Hukum Menunda Kehamilan Perkawinan Usia Dini Perspektif Istihsan Sebuah Upaya Membangun Keluarga Berkualitas' (2018) 3(2) *Mahkamah: Jurnal Kajian Hukum Islam* 203 <<http://www.syekhnujati.ac.id/jurnal/index.php/mahkamah/article/view/3413>>, 210.

<sup>57</sup> Fadal, above n 52, 84.

<sup>58</sup> Ibid, 85.

It is known that the regulation on the prohibition of sexual exploitation in child marriages through the practice of *Siri* marriage is not strictly regulated in legislation, but its actions are prohibited if the aim is to obtain material benefits for parents or other parties who also marry children. Based on Islamic law or religious perspectives *Siri* marriage is permissible if it meets the requirements or the harmony of marriage. However, *Siri* marriage will be considered or used as a criminal offense if it is carried out against a child. Protection of children against sexual exploitation through the practice of *Siri* marriage in a preventive and repressive manner. Preventive child protection has been carried out by the State of Indonesia by ratifying the Convention on the Rights of the Child and issuing laws and regulations aimed at protecting children's rights through the Child Protection Law and also through changing the age limit of child marriages to 19 years which are regulated in the Marriage Law. So that perpetrators of commercial sexual exploitation of children through the practice of serial marriages do not escape from the snares of the law, these perpetrators can be held liable for criminal liability by applying Article 290 of the Criminal Code jo. Article 56 of the Indonesian Criminal Code (KUHP), and Article 88 of the Child Protection Law with the threat of imprisonment for a maximum of 10 (ten) imprisonment year and / or a maximum fine of IDR. 200,000,000.00 (two hundred million rupiahs).

Marriage to children through a series of marriages from the perspective of *Maqashid Al-Sharia* is legal or legal but child marriage will only produce a portion of the purpose of marriage, while other objectives in *Maqashid Al-Sharia* tend to be ignored. *Siri* marriage to children is said to be legal in Islamic law which the marriage will prevent from

forbidden acts (adultery) and the marriage is intended to produce offspring or '*Hifz Nasl*'. However, other goals in *Maqashid Al-Syariah* are vulnerable to problems if psychological maturity and other skills are not yet possessed by children. As a result, marriage is considered to be at risk of giving birth to various bad things in the family which can reduce the noble values which are the main mission of Islam.

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