

**UNDERAGE MARRIAGE
IN THE PERSPECTIVE OF WOMEN'S PROTECTION**

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ABSTRACT : Underage marriage is marriage committed by underage children or adolescents in which it must obtain the permission from the Judges of the Religious Court. This study aims at describing and exploring underage marriage dispensations based on the decision of the religious court judges in the Province of Central Java. This research uses juridical-normative method with qualitative and descriptive research type. The data of this research is secondary data that are related directly to the research object. Technique of collecting data is literature study, i.e. various main and supporting materials related to the problem. Data analysis techniques are processed and discussed using deductive methods. The results of the research indicate that the judges' ruling only concerns with the doctrine of positive law with the aim at obtaining clear legal status. Therefore, their decision does not take into account the aspects of the future interests of children and women.

Keywords : Marriage, Underage Marriage, Decisions of Religious Court Judges, Legal Protection for Women.

INTRODUCTION

The long struggle of women's freedom and movement in all aspects of life has continued to flourish in the last thirty years. It aims at erasing the facts that women's right are always differentiated and overridden on a gender basis.¹

1 K. Kurdi, M. Ghufuran H, 2013. *HAM tentang Kewarganegaraan, Pengungsi, Keluarga & Perempuan (Kompilasi Instrumen Hak Asasi Manusia Nasional & Internasional)*. Yogyakarta: Graha Ilmu, p. viii. First edition.

The subsequent marginalization of women shows that women become the second or the inferior sex.² The dichotomy of nature and culture has always been used to indicate the separation between these two sexes, with women having lower status than men. Women who are considered to have a natural attitude (*nature*) should be subordinated to men so that women could become more cultural.³ The effort to 'cultivate' women has led to the inequality of relation between men and women.⁴

As a democratic country and a member of the United Nations, Indonesia has a juridical obligation to uphold the values and concepts of human rights, both in national and international level. Conceptual democratic thinking is rooted in differences in the concept of freedom, either in its negative or positive meaning. The concept of negative freedom is described as "being free from," implying a minimal state role, especially of the protection of citizens, political security and freedom. Meanwhile, the concept of positive freedom is defined as "being free to." In this view, freedom contains consequences that there are guarantees from the state for effective freedom of the citizens to make use and develop their potentials.⁵

Marriage is a legal event and a fundamental human right; therefore it must have the protection in terms of human rights. An example of this would be underage marriage in relation to the legal protection for women.⁶

The dilemma of legislation in Indonesia has become one of the causes of the debate about the age limit to get married. The parameter of maturity seems to have triggered different opinions that manifest in the issue of the marriage age limit clearly, as it is postulated in Act Number 1, 1974,⁷ which regulates the age limit of marriage in Indonesia as follows:

1. Article 6 Paragraph 2 states there must be parental permission for anyone who will get married if they have not reached the age of 21 years;
2. Article 7 Paragraph 1 states that the minimum age for marriage is 19-year-old for man and 16-year-old for woman;
3. Article 7 Paragraph 2 clearly legitimizes the dispensation of marriage to file a petition to allow underage marriage for anyone who has not reached the age of marriage; this legal loophole is often used to perform underage marriage;
4. Article 47 Paragraph 1 states that a child who has not reached the age of 18 years or has been married is under the authority of parents;
5. Article 50 Paragraph 1 states that a child who has not reached the age of 18 years or has never got married and who is not under the authority of his or her parents is under the authority of a guardian.

2 Rosmarie Putnam Tong, 1998. *Feminist Thought: A More Comprehensive Introduction*. Second Edition. Westview Press: Colorado.

3 Julia Cleves Mosse, 1993. *Half The World, Half A Change* (An Introduction to Gender and Development). Oxford: Oxfam.

4 Chand, Hari. 1994. *Modern Jurisprudence (Feminist Legal Theory)*. Kuala Lumpur: International Law Book Services, p. 315.

5 Aidul Fitriaciada Azhari, 2005. *Menemukan Demokrasi*. Surakarta: Muhammadiyah University Press, First edition, p.132.

6 Melkianus E.N. Benu, 2012 *Perlindungan Terhadap Hak Reproduksi Perempuan Dalam Rangka Hak Asasi Manusia Nasional dan Internasional Di Negara Kesatuan Republik Indonesia*. A Paper. 11/15/2013. 11:44 AM.

7 Ibid, p. 11

Based on the background of the problem, to examine and solve the problems and to find marriage laws that give the legal protection for women—in this case to prevent underage marriage, the authors draw on Lawrence M. Friedman's theory as the main theory and feminist legal theory as the supporting theory.

The enforcement process of the law essentially contains the supremacy of substantial value, i.e. justice. According to Lawrence M. Friedman, there are factors that determine the law enforcement process: the legal substance (consisting of both written and unwritten legal rules, including court decisions), legal structures (law enforcement institutions, including law enforcers), and legal culture (including opinions, habits, ways of thinking and ways of acting, both from law enforcers and from citizens).⁸

Meanwhile, we use the feminist legal theory⁹ as the supporting theory to review the legal rights of women in marriage especially in relation with the dispensation of marriage in religious court decisions.

The fore the title of this paper is “Underage Marriage in the Perspective of Women's Protection.”

Underage Marriage Dispensation

Marriage dispensation is a leniency granted by the courts to prospective married couples who have not reached the lowest limit of age in marriage. The marriage age dispensation has been regulated in the Marriage Act in Article 7 Paragraph (2) which reads: “In the case of irregularities, Paragraph 1 states that “Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years.” This Article may allow a couple to request a dispensation of a court or other officers appointed by both the male and the female's parents.¹⁰

Whereas, the Compilation of Islamic Law (in the Indonesian language it is called compilation of law Islam, shortened as KHI) Article 15 states that the age limit of marriage is the same as arranged in Article 7 paragraph (2) of Act No. 1, 1974, but with an additional reason, i.e. for the benefit of families and households.¹¹

The fact that the justifiable reasons for the filing of a dispensation under Article 7 Paragraph (2) of the Marriage Act are not arranged has reduced the concept of dispensation itself, as it is explained that dispensation is a limited decision of the state administration to exclude prohibitions on special matters. Therefore, the formulation of the permissible reason becomes the most fundamental element for a dispensation to be given. Thus the dispensation is intended to settle certain cases which may further clarify the general statement of the purpose of law, namely the general good.¹²

Decisions of Religious Court Judges

Sudikno Mertokusumo argues that the judge's decision is a statement which the judge, as a State official authorized for it, pronounces in court and aims to end or settle a case or dispute between the parties. It is not just the utterance mentioned in the judge's decision, but also the

8 M. Khoidin, 2008. *Hukum Politik dan Kepentingan*. Yogyakarta: Laksbang Pressindo. First ed., p. 70.

9 Chand, Hari, 1994. *Modern Jurisprudence (Feminist Legal Theory)*. Kuala Lumpur: International Law Book Services.

10 Act Number 1, 1974 of the Republic of Indonesia on Marriage. Wipress, p. 459.

11 Soemiyati, 2007. *Hukum Perkawinan Islam dan Undang-Undang Perkawinan Nomor 1 Tahun 1974*. Yogyakarta: Liberty. Sixth ed., p. 12.

12 E. Sumaryono, 2002. *Etika Hukum Dan Relevansi Teori Hukum Kodrat Thomas Aquinas*. Kanisius: p. 105.

statement in written form and then uttered by the judge in the hearing. The concept of a written decision has no power as a verdict before it is pronounced in court by a judge. This means that the verdict uttered (*Uitpraak*), must be the same as the written one (*verdict*). If the verdict is pronounced differently from the written one, then the legitimate decision is the one spoken before the court. The final verdict here is a verdict that ends a case in a certain judicial level.¹³

This final verdict could be a punishment (*Condemnatoir*) or could be either explaining or declaring what is legitimate (*Declaratoir*). The pure Declaratoir's decision has no forceful effects because it already has legal consequences without the help of the defeated opponents or other institutions. Therefore, according to the law, the decision of the Declaratoir has only a binding legal force. In addition, it also has legal consequences since the verdict obtained has a permanent legal force, and no execution is needed. The legal effect of it is in accordance with the content of the verdict.¹⁴

The definition of a Religious Court Judge is a person who is given the authority and power over his/her position by the state to resolve and decide a case as fair as possible in accordance with the provisions mandated in the prevailing laws and regulations. These authority and power should be carried out in accordance with the needs of the people. Thus it is expected that every decision always provides benefits and protects the community.

There are 2 (two) decisions of the Religious Courts, i.e. the decision to grant a case and to decline it.

1. The decision to grant a case

The decision to grant a case is given by a judge when, viewed from the nature of the case and its legal considerations, it is in accordance with the provisions of Islamic law and the applicable legislation.

2. The decision to decline the dispensation

The decision to decline a case is given by a judge when, viewed from the nature of the case and its legal considerations, it is not in accordance with the provisions of Islamic law or the applicable legislation.

The judge's consideration in deciding whether a case is granted or declined can not be separated from the judge's judicial reasoning. This reasoning is associated with a variety of *Motivering* (argument-charged considerations) in which it is always within the vortex of the diversity of the framework of juridical-minded orientation maintained within a system so that it can develop according to its own logic and can develop as a unique model of reasoning according to his/her professional duties.¹⁵

Perspective of Legal Protection for Women

Definition of protection shall mean any effort aimed at providing a sense of security to victims by family, advocates, social institutions, police, prosecutors, courts or other parties, either temporarily or based on the court decision. Temporary protection is the immediate protection provided by the police and/or social institutions or other parties, prior to the issuance of the order of protection from the court.¹⁶

13 Sudikno Mertokusumo, 1998. *Hukum Acara Perdata Indonesia*. Yogyakarta: Liberty. p. 74.

14 Sudikno Mertokusumo, 1998. *Ibid*

15 Khudzaifah Dimiyati, 2010. *Potret Profesional Hakim Dalam Putusan*. Jakarta: Komisi Yudisial Republik Indonesia. p. 39.

16 M. Ghufuran H. Kordi K. 2008. *HAM tentang Kewarganegaraan, Pengungsi, Keluarga & Perempuan*. Yogyakarta: Graha Ilmu. First ed. p. 194.

Definition of legal protection is an attempt to protect the right of everyone to obtain equal treatment and protection by law and legislation.¹⁷

According to the authors, it can be concluded that the legal protection for women is an effort to protect the rights of every woman, irrespective of their age, to get equal treatment and protection by law and the applicable legislation.

From the above explanation, to comprehend the legal protection for women comprehensively, the authors draw on the Principles of Law in Indonesia that regulate the human rights.

Research Method

This research strategy shows the type of qualitative and descriptive research using the juridical-normative approach method. The data of this research are secondary data, namely the decisions of religious court judges, legislative rules, books, journals, articles, and others that relate directly to the object of research. A technique of collecting data is done through library research, i.e. various main library materials and their supporting documents related to the focus of the problem.¹⁸

Qualitative data analysis is processed and carried out by using deductive methods.¹⁹

Discussion

There are two decisions of the Religious Courts, i.e. to grant a dispensation and to decline dispensation request. The authors describe these decisions based on the case determination which has been decided by the Religious Court in the following several cases:

A. Judgments of Religious Court Judges which grant the dispensation to the following cases: Case Number 087/Pdt.P/2014/PA.Ba (Banjarnegara), Case Number: 0010/Pdt.P/2014/PA.Amb (Ambarawa), Case Number: 0107/Pdt.P/2013/ PA.Wsb (Wonosobo), Case Number: 0201/Pdt.P/2013/PA.Tmg (Temanggung), Case Number: 0395/Pdt.P/2015/PA.Pwd (Purwodadi), Case Number: 004/Pdt.P/2014/PA.Kbm (Kebumen).²⁰

Below is an analysis of why several decisions granted the petition, i.e. the dispensation of underage marriage by the Religious Court Judge. The consideration and legal facts underlying the granting of the petition are as follows:

a. Legal Considerations

1. Under the provisions of Islamic law or under the legislation, it has been fulfilled; unless the age requirement for the child to get married has not reached the age of marriage;
2. No provision concerning a prohibited marriage that has been violated (Syar'i);
3. Low education;
4. Ready to be housewives for women and ready to become head of household for men;
5. The men already have regular income (as laborers, traders, construction laborers, working in factories, etc.);
6. Parents of both the man and the woman who are going to get married have given their consent;

17 NurRochaeti, 2005. CEDAW dan Hukum Nasional Tentang Hak Asasi Perempuan. Semarang: 7-8 February. A paper for the Training of Human Rights Education from the Gender Perspective.

18 Soerjono, Soekanto, 2010. Op. Cit. p. 1.

19 Lexy Moleong, 2006. Op. Cit. p. 1.

20 Result of the Research of the Religious Court Verdicts.

7. The woman is pregnant out of wedlock;
 8. Concerns about something that is not desired;
 9. There are more problems than solution if a couple is not immediately married.
- b. The facts in the trial are reinforced by:
1. A description of the parents of the prospective spouse, the testimony of the prospective spouse, the testimony of witnesses from the prospective spouse who are directly heard and recorded in court;
 2. Other written evidence such as copy of the Marriage Certificate of parents of the prospective spouse, a copy of Birth Certificate of the prospective spouse, a copy of Family Card, a copy of Identity Card, and the rejection letter from the Office of the Religious Affairs.

Based on the above matters, the Chief Justice of the Religious Court shall immediately adjudicate the case and subsequently impose the stipulation:

1. To grant the Petitioner's petition;
2. To give a dispensation to the child of the petitioner to get married with the prospective husband/wife;
3. Establish legal fees according to the law.

Based on the results of the research and data analysis, it can be understood that the Judgments of Religious Court Judges are based on the followings:

1. Qaidah Fiqhiyah

The definition of Qaidah Fiqhiyah is: "Rules (regulation) that are related to the principle of law based on the by Syar'ias well as the purposes as mentioned in the Syar'i, or "As a way of gaining the benefit and rejecting the destruction."²¹

The discussion of Qaidah Fiqhiyah is based on the basis of the validity of the rules, on the basis of alphabet, and fiqh's systematization. In principle, according to Imam Muhammad Izzudin bin Abdis, it is called as "refusing the damage and gaining the benefit." This rule is the rule of the Imams (Leaders) of the School. Asasiah rule consists of 5 kinds (five kaidah), i.e.:

- a. Any problem must serve the purpose;
- b. Harm should be eliminated;
- c. The habit can be made law;
- d. Being convinced can not be removed with doubt;
- e. The difficulties may be turned into ease.²²

Thus, the judge uses the basis of Qaidah Fiqhiyah in setting the dispensation of marriage age which means avoiding damage/mafsadah should take the precedence rather than maintaining goodness/maslahah. In practice, especially in the Religious Courts, the opinions of each judge are in accordance with the fiqh he refers to. This is a result of the absence of the standard in the Religious Courts. The judges' decisions are often different even in the same case, so that the judge's subjectivity is very high. In terms of legal theory, this means that the products of the

21 Ahmad Mukhamad Asy-Syafi'i, 1998. *Ilmu Ushu lFiqh*. Pustaka Setia: Bandung. p.5.

22 Ibid. p.3

Religious Courts are contrary to the principle of legal certainty.²³

2. Article 7 Paragraph (2) of Law No.1 Year 1974

In the context of legal positivism, the provision of marriage age as set forth in the Marriage Act No. 1, 1974 shows that there one most prominent problematic indication of marriage age. This arises when the provision is confronted with Article 7 paragraph (2) of the marriage dispensation whose juridical authority for that purpose is given to Religious Courts appointed by parents of both the man and the woman.²⁴

Thus, this law still provides “gaps” for couples who have not reached that age as mentioned in Article 7 paragraph (1) requesting dispensation to the court or appointed official if necessary.

3. Compilation of Islamic Law (KHI) Article 15

The Compilation of Islamic Law (KHI) disseminated through the President's Instruction No. 1 of 1991 reinforces the provisions of Article 15 of KHI mentioning that the age limit of marriage is the same as that of Article 7 paragraph (2) of Act No.1 Year 1974, but with an additional reason: for the benefit of family and household . Therefore it does not explicitly state the prohibition for underage marriage. If the Marriage Law establishes the reasons for a dispensation it can be given in a limited manner, for example a dispensation can only be granted if the bride has been pregnant out of wedlock, which is more popularly termed “married by accident.

The fact that justifiable reasons for filing a dispensation under Article 7 Paragraph (2) of the Marriage Law are not regulated clearly has reduced the concept of dispensation itself. As described above, dispensation is a limited state administration decision to exclude prohibitions on specific matters. Therefore, the formulation of the permissible reason becomes the most fundamental element for granting a dispensation. This is also a reason that differentiates between the concept of dispensation and exception. With the exception an individual may be exempt from the applicable law, but by dispensation a person obtains legal leniency granted by a particular authority for a particular case. Thus this dispensation is intended to solve certain cases which may further clarify the general statement of the purpose of the law, namely the general good.²⁵

In the Religious Courts of Central Java, there are many categories of marriage dispensation applications. In the period of 2013 to 2015, the Religious Courts in Central Java recorded that there is always an increase of 15 (fifteen) to 70 (seventy) percent of marriage dispensation applications every year such as in Cilacap and Ambarawa.²⁶

In this case, the Judges decided to grant dispensation based on several elements, namely: Legal certainty, benefit, and justice. The three elements above are the reason why the judges give the dispensation of the age to get married. Article 7 Paragraph 2 of Act Number 1 Year 1974, among others, states:

1. Sense of Justice

23 MunirFuady, 2007. *Sosiologi Hukum Kontemporer (InteraksiHukum, Kekuasaan, danMasyarakat)*. Bandung. PT.CitraAdityaBakti.p. 76.*The Scholastic Era believes that the law comes from God. Realization of law is not important in this case because it is the words of God that are important, as all happen in the Holy Scripts*

24 Soemiyati, 2007.*Hukum Perkawinan Islam Dan Undang-Undang Perkawinan Nomor 1 Tahun 1974*. Yogyakarta: Liberty. Sixth ed. p. 12.

25 E. Sumaryono. 2002. *Etika Hukum dan RelevansiTeori Hukum Kodrat Thomas Aquinas*. Kanisius.p. 105.

26 *Result of the Research of the Religious Court Verdicts*.

Dispensation of the age limit to get married is proposed because the woman is pregnant before the couple gets married legally. It is the most dominant in Central Java. On average, 90 (ninety) to 98 (ninety eight) percent of the dispensation request is received because of pregnancy. Thus the judge gives dispensation because they realize that it is considered to be the shame for the elderly in the community.

Judges are of opinion that parents who apply for dispensation are those who understand the law. They choose to take a legal action rather than allowing their children to get married under the provisions of religious law meaning without the registration at the marriage registry office.

2. Legal utilization for the community

The dispensation of marriage age limit is given in urgently required conditions and it may provide benefits to the applicants. If the dispensation request is not given then the impact will be greater. According to the authors this is called a must do condition in the sense that a marriage is done because it has to be done. From the legal perspective, this makes the marriage legally valid. With the marriage, both women and children born of women who have been pregnant before they get married will be clearly legal.

B. Decisions of Religious Court Judges Rejecting the Dispensation among others are:

Case Number: 0236/Pdt.P/2015/PA.Pwd (Purwodadi), Case Number: 0014/Pdt.P/2014/PA.Amb (Ambarawa).²⁷

An analysis of several decisions to grant the Petitioner's petition regarding the dispensation of underage marriage by the Religious Court Judge based on the legal consideration and on legal facts are as follows:

a. Legal Considerations

1. The requirements for conducting such marriage, whether under the provisions of Islamic law or applicable legislation, have been fulfilled; unless the age requirement for the person who will get married has not reached the age of marriage;
2. There is no provision concerning the prohibition of marriage (Syar'i) which is violated;
3. Low education;
4. Ready to be housewives for women and ready to become heads of household for men;
5. The would be bridegroom has no job/income;
6. Both parties' parents have given their consent;
7. High urgency because the parents concern with something undesirable;
8. No pregnancy and no intercourse.

b. The facts in the trial are reinforced by:

1. Information from the parents of the prospective spouse, the testimony of the spouse-to-be, the testimony of witnesses from the prospective spouse who are directly heard and recorded in court;
2. Other written evidence such as copy of Marriage Certificate of both Parents of the spouse-to-be, a copy of Birth Certificate of both wanting to get married, a copy of

²⁷ *Result of the Research of the Religious Court Verdicts.*

Family Card, a copy of Identity Card, the Rejection Letter from the Office of Religious Affairs.

Based on the above matters, the Chief Justice of the Religious Courts immediately adjudicates the case and subsequently passes the stipulation which reads as follows:

1. Rejecting of the Petitioner's petition;
2. Determining legal fees according to the law.

The result of the study shows that judges rejected the Application for the Dispensation of Underage Marriage for the case Number: 004/Pdt.P/2014/PA. Amb (Ambarawa) and the case Number: 0236/Pdt.P/2015 PA. Pwd (Purwodadi).

The judges of Ambarawa and Purwodadi Religious Courts rejected the apased on some considerations such as the prospective husband has no job yet, the prospective spouse have never had sex, and both agree to delay the marriage until they reach the age limit allowed to marry according to the law.

The age limit of marriage according to Act No.1 Year 1974 has and contains benefits for the concerned, especially the prospective wife who is still underage. In association with the rate of population growth, the age limit of marriage must be obeyed by every citizen of Indonesia, including judges as law enforcers. Usually the concern of the applicant regarding the underage marriage application is that if the marriage is not immediately carried out there will happen things that are not desirable. However, this has nothing to do with the law and seems to be unreasonable. It is the obligation and responsibility of parents to avoid such problems as mentioned in Act No.23 Year 2002 on Child Protection, Article 26, point c. Parents can guide their children to do positive things in terms of religious and other activities that support their better future. The Assembly deems it necessary to postpone the marriage since the prospective spouses are still children who should be under parental protection.

Legal Protection for Women in the Decisions of Judges of the Religious Courts.

1. Protection of Women under the Positive Law of Indonesia
 - a. Protection of Women in the 1945 Constitution of the Republic of Indonesia

The 1945 Constitution of the Republic of Indonesia (UUD RI 1945), which has been amended with provisions, take into account the principles of non-discrimination and gender equality.²⁸
 - b. Act No.7 of 1984 on Convention on the Elimination of All Forms of Discrimination against Women;

The support from the Government of the Republic of Indonesia toward the objective of the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) was stated in the Government's statement in Parliament in Jakarta on 27 February 1984.²⁹
 - c. Act Number 23 of 1992 concerning Health;

The protection of women's health rights in the context of national and international human rights in Indonesia is the protection of women in the right of reproductive

28 The 1945 *Constitution of the Republic of Indonesia. The Complete Result of Amendmend& Process of Amendmend of the 1945 Constitution of the Republic of Indonesia* (First to fourth, 1999-2002).

29 Act No. 7, 1984 *on the Convention of Elimination of All Forms of Discrimination towards Women (Women Convention)*

health. Health is a prosperous state of body and soul that allows everyone to live socially and economically productive. This definition is in accordance with that of WHO which states that health is not only related to physical health, but also mental and social health, so that everyone will be able to live productively, both economically and socially. Thus, the definition of health is very broad, including the quality of life.³⁰

d. Protection of Women according to Human Rights Act Number 39, 1999;

Discussing the legal protection can not be separated from the understanding of Human Rights (HAM) because human rights are a set of rights attached to the nature and existence of human beings as creatures of God the Almighty and is a gift that must be respected, upheld and protected by the State, Law, Government, and everyone for the honor and protection of human dignity and prestige.³¹

Women's rights are the rights that women possess. In the context of human rights law, there are various legal systems of human rights. In that sense, the regulation of the recognition of the rights of a woman is contained in various legal systems on human rights. The legal system on human rights is a system of human rights law in both the international³² and national³³ spheres.

e. Law Number 23 Year 2002 regarding Child Protection;

Act No. 23, 2002 is about Child Protection. Article 1 mentions that a child is "A person who is not yet 18 years of age, including a child who is still in the womb." In line with Underage Marriage, Article 26 Paragraph 1 Sub-Paragraph c of this Act states that parents are responsible for preventing the occurrence of marriage at the age of the children.³⁴

With reference to Article 6 Paragraph 2 of Act No. 1, 1974 concerning Marriage, it is stated that to hold a marriage a person who has not reached 21 years must obtain permission from both parents.³⁵

From several opinions above and refers to the Child Protection Act, thus underage marriage and conditions of a person may engage in marriage contained in Law No. 1, 1974 on Marriage, Article 7 Paragraph (1 and 2) is not relevant to the UUPA and Article 6 Paragraph 2 of the Marriage Law itself constitutes an inconsistency of the current Marriage Law. Therefore, it is necessary to amend this article in order to have a synchronization of article by article in UUP and harmonization with UUPA or acts enforced after the marriage law.

30 Melkianus E.N. Benu, 2012. *Perlindungan Terhadap Hak Kesehatan Reproduksi Perempuan Dalam Kerangka Hak Asasi Manusia Nasional Dan Internasional Di Negara Kesatuan Republik Indonesia*. A Paper: Lecturer of Faculty of Law Kupang.

31 Soehino, 2013. *Hak Asasi Manusia. (Perkembangan Pengaturan Dan Pelaksanaan Hak Asasi Manusia Di Indonesia)*. Yogyakarta: BPFE. First ed. p. 77.

32 International Human Rights Legal System on Women: *Convention of United Nations Charter on December 18, 1979 on Elimination of all Forms of Discrimination toward Women*.

33 Akbar Muzaqir, 2015. Hak-Hak Perempuan. Bandung: Faculty Of Law University. @BAYMUZAQIR. Accessed on Monday, 29 April 2015. PM.07.45. *West Indonesia Time*. National Human Rights legal system on Women could be uses as the basis for the protection for and recognition of women' rights: Act No. 7, 1984 of the Republic of Indonesia on the Ratification of the United Nations Convention on the Elimination of all forms of Discrimination toward Women (or commonly called as Women's Convention). With the ratification, all forms of discrimination based on the sex (man and woman) have to be eliminated.

34 Act No. 23, 2002 on Children's Protection.

35 Sumiyati, 2007. Op. Cit. p. 12

Conclusion

2. There are two decisions by Judges in Religious Courts in Central Java Province, namely granting the dispensation and refusing the dispensation.

- a. Decision to grant the dispensation

In granting the dispensation of underage marriage, the judges were guided by Act No. 1, 1974 on Marriage and Compilation of Islamic Law. The Panel of Judges did not pay attention to the values contained in Act No. 7/1984 on the Convention on the Elimination of All Forms of Discrimination Against Women, Act No.4, 1979 on Child Welfare, Act No. 23,1992 on Health, TAP. No. XVII/ MPR/1998 on Human Rights, Act No. 39, 1999 on Human Rights, and Act No.23, 2002 on Child Protection.

The Panel of Judges have to refer to the doctrine of positive law and do not pay attention to the aspects of the child's future interests, whether in the aspects of education, health, equal access in obtaining employment and others. Therefore there is no legal breakthrough for the protection of women's future. However, in the case of pregnancy before the marriage, the judges have consideration in granting the application of the dispensation of underage marriage because it is urgent. In addition, the judges also have to provide for an assurance of protection and legal certainty, so that children born from this relationship have a clear legal status. And if the dispensation is not granted, it will lead to wider problems for both the family and spouse pairs. Thus the judges' consideration is the last resort.

The differences of the decision of the Panel of Judges happen because the way of taking legal considerations does not refer to legal principles, as well as progressive and responsive legal norms that are consistent with the development of the law itself. Act No. 1, 1974 has not been revised so that it does not contain more articles to respond to legal developments. In the meantime, the Judge does not fill the legal void with interpretation through legal principles to construct into clearer and more detailed laws. The judge always uses the articles stipulated in Act No. 1, 1974 to grant the Marriage Dispensation.

- b. Decision to decline the dispensation

In declining the marriage dispensation, the Panel of Judges only consider the aspect of the prospective husband; for instance, the prospective husband is still jobless. This consideration is based on the provisions of Act No. 1, 1974, Article 7 Paragraph (1) concerning the age limit of marriage. In addition, usually the prospective husband is willing to accept the advice of the Panel of Judges. But, in declining the marriage dispensation, there is nothing in the opinion of the Panel of Judges that is based on the Legal Protection for Women, either related to education, welfare, or health.

3. Legal protection to prevent underage marriage

Speaking of legal protection Women (especially Women's Rights) and Marriage Law based on Islamic Law, there is no such contradiction in the case of this decision, because in fact Islam itself also upholds human rights, especially protection for women and children, because women have duty which is very difficult, i.e. as mothers, as wives, as children, and as members of society. All of which can only be done better if women do not get married before they are matured or are grownup.

But in its implementation, concerning with the underage marriage, it appears that there is

actually disharmony in the application both in terms of rules and in practice, if we look at the characteristics of the law especially the modern law of Marc Galanter which, among others, include:

- a. Modern law consists of uniform and consistent rules in its application. Its application is more territorial than personal, meaning it does not distinguish religion, race, caste and gender;
- b. Modern law is universal. Adherence to specific matters is also independent of generally accepted standards. Therefore intuitive and unique are not set here. Thus, the application of the law can also be run repeatedly and can also be predicted earlier about what will happen.

Of the two characteristics of modern law is also of course the legal system of Indonesia, especially the law of Marriage of Indonesia as the only National Law regulating the Marriage. The authors hope for its change into modern law that is uniform and the system of its application is universal. Therefore, efforts to prevent underage marriage, through the amendment of Marriage Act No.1, 1974 become Law of Marriage having a Paradigm of Legal Protection for Women based on the Legal Principles of Indonesia.

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