

The Law of Health and Underage Marriage in the Transcendental Perspective

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ABSTRACT

Underage marriage is deemed to be a serious problem as brings controversies. Indonesia is one of the countries in the world with a high rate of underage marriage. The health impacts of this dangerous traditional practice include the increase of the mother and baby death rate, and also the rate of reproductive health diseases. The method in this research is the qualitative method. The underage marriage still happens often as there is a high tolerance given by the Constitution of Marriage, which gives the minimum age of 16 years for marriage. There needs to be an effort of harmonization between the various systems of marriage laws which apply in Indonesia so that the legislative challenges which happen because of the constitutional regulations' disparity regarding the underage marriage may be solved. Revisions of the Constitution of Marriage and the Maturity of Marriage Age are proposed as part of the effort to prevent underage marriage. Viewed from the aspect of reproductive health, underage child marriage poses much risks and dangers because physically and mentally, children are not ready to give birth, so it may cause diseases in the reproductive system, and it may even lead to the death of the baby and child. There needs to be the government's commitment to stop the dangerous traditional practices which affect the health of women and children and ratify the regulations related to their protection. The socialization of the reproductive health and sex education for teenagers must be done intensively by integrating it in the study curriculum at school.

Keywords: Health law, Underage marriage, Transcendental.

INTRODUCTION

Underage marriage is thought to be a serious problem as it causes controversy within the society, not only in Indonesia, but it has also become an international issue. Underage marriage becomes a problem as factually, it still develops in the society. According to the Council of Foreign Relations, Indonesia is one of the ten countries in Indonesia with the highest absolute rate of underage marriage, and the second highest in ASEAN after Cambodia. It is estimated that one in five female children in Indonesia gets married before 18 years of age.⁽¹⁾ The Center of Statistics stated that the five provinces which have the highest rates of underage marriage are East Java (28 %), West Java (27,2%), South Borneo (27 %), Jambi (23%), Central Sulawesi (20,8 %).

Based on the Indonesian Survey of Demography and Health (SDKI) 2012, the Age Specific Fertility Rate (ASFR) of women aged 15-19 years reaches 48/1000. The rate of women aged 15-19 years who get married in the cities have increased from 26% to 30%, whereas in the villages, it has decreased from 61% to 58%, based on the Indonesian Survey of Demography and Health 2007. UNICEF has also reported that this prevalence has shifted, especially in the cities, where on 2014, 25% of women aged 20-24 got married under the age of 18. In fact, the underage marriage often happens because of several reasons and views from the aspects of law, religion, and culture within the society. Based on the Marriage Laws in the Constitution No. 1 year 1974, the legal age for marriage is 16 years for women, and 19 years for men. In the religious views, there is also a negative justification from the religious views which have positive connotation, if done based on the consideration of morals and religion. Because of that, the society which undergoes underage marriage obtains legitimization from the religion in which they have faith upon. In the cultural and traditional perspectives, underage marriage often happens because of the cultural motivations in a community which views women as second-class citizens. They try to avoid the stigma of "Old Virgin" and tries to accelerate the marriage with various excuses.

The UNICEF literacy study shows that the interaction of various factors leads children to be in risk of facing underage marriage. It is widely known that child marriage is strongly related to tradition and culture, thus it is not so easily eradicated. Other reasons include the hope for the children to reach a certain level of social and financial security after marriage. This may lead parents to push children to marry in a young age.⁽²⁾

In the aspect of health impacts, underage marriage is a dangerous traditional practice, as it increases the risk of reproductive health disorders, such as the death of the mother. The ignorance towards the female children's basic human rights are violated if they get married at the age of 15-18 as it increases the rate of the baby mortality. They may give birth to babies with malnutrition; thus, it may eliminate the generation which is of quality for the future of the nation. The constitutional regulation which regulate marriage are not parallel with the various child protection law instruments, such as the Convention of Children's Rights, the Constitution of Child Protection, the CEDAW convention and the Constitution regarding the Eradication of Household Violence.⁽³⁾

Juridically, there are three important problems which develop in the concept of underage marriage. First, marriage of underage children is thought to be against the Constitution No. 35 year 2014 regarding Child Protection. In this constitution, it is mentioned that children are defined as people under 18 years of age, including those still in the womb. Meanwhile, the Constitution of Marriage gives a huge tolerance towards the underage marriage as the minimum age of marriage for females is 16 years of age, whereas for males is 19 years. In the Constitution No. 1 year 1974 regarding Marriage Article 7 paragraph (1), it is stated that: "Marriage is only legal if the man has reached 19 (nineteen) years of age and that the woman has reached 16 (sixteen) years of age." This Article is thought to violate the Constitution No. 35 year 2014 regarding Child Protection which states the age range of children, as stated in Article 1 paragraph (1), "Children are people who have not reached the age of 18 (eighteen) years, including those still in the womb". This Article states clearly that those under 18 are still children, and so the age range written in the Constitution of Marriage are still considered as children.⁽⁴⁾

The impact is that underage marriage often happens in the society as there is a legitimization from the Constitution. The underage marriage is deemed as wrong if referenced to the Constitution No. `year`974 regarding marriage. So long as the marriage is done based on that regulation, thus can it be thought as wrong? We cannot accuse wrong of underage marriage as it is based on the constitutional regulations which apply. Both the Constitution on Marriage and the Constitution on Child Protection have the same degree and they cannot be accused wrong. Someone who undergoes underage marriage may be deemed as right as they are obeying the rules which apply.

If underage marriage which is tolerated by the Constitution on Marriage is against the Constitution on Child Protection, it should be considered that the Constitution on Marriage has been issued beforehand in this country. Thus, why is it that underage marriage is deemed wrong as it gives some tolerance and is against the Constitution on Child Protection? Thirdly, how is this case in the view of the human rights and the law of health on the practices and the traditions of underage marriage. The United Nations convention states clearly that the main principle is respect of the human rights, as written in the Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Article 2, "Striving on goodness to eliminate discrimination towards women through all efforts and work to end it". In this case, the allied countries are obligated to eliminate all forms of injustice and inequality towards women. In our country, through the Constitution No. 30 year 2009 Article 133 paragraph (1), it is stated that, "All babies and children have the right to be protected and prevented from all kinds of discrimination and violence which may harm their health". Based on the problems above, the writer would like to analyze further on the problems in child marriages in the perspectives of law, human rights, and health.

METHODS

This research uses a qualitative method with a juridical-normative approach which is focused on analyzing the implication of the positive law principles and norms. The starting point of this research is analysis on the constitutional regulations. The approaches taken are the statute and the conceptual approaches. The statute approach is done to analyze the regulations in which its norms are conclusive and concepts in its relations with underage marriage. This research is presented with a descriptive research specification. The data is collected from literal materials as secondary data with literature review and study of documentation. The analysis is done with a normative/doctrinal approach based on the understanding which develops during the data interpretation.

RESULTS

Law protection in the aspect of the women's health to prevent the underage marriage phenomena may be seen in the definition of Article 1 paragraph (2) of the Constitution No. 23 year 2002 regarding Child Protection which says that, "Child protection is all activities which guarantees the protection of children and their rights so that they may live, grow, develop, and participate optimally based on their humane dignities and they must obtain protection from violence and discrimination."⁽⁵⁾ "The forms of protection in the aspect of health in the Human Rights concept include the rights to live, to reproduce, to grow and develop, to obtain guarantees and certainty of law, to raise a family, and the rights of children. There are some views regarding legal protection for women to prevent underage marriage from happening.

DISCUSSION

First, Women Protection in the Perspective of the Human Rights. The state appreciates the views of justice and gender equality. This appreciation arises in various public policies both in the levels of the constitution and the regulations underneath them.⁽⁶⁾ The discussion on legal protection cannot be separated from the understanding regarding the human right.⁽⁷⁾ Indonesia has participated in the ratification of international agreements. One of them is that of the Convention on the Elimination of All Forms of Discrimination Against Women/CEDAW, which is supported by the constitution No. 7 year 1984 regarding the the ratification of the CEDAW agreement.

This is done as a form of the state's responsibility based on the mandate of the 1945 Constitution which states clearly that all citizens have equal position in the face of the law and the government. Because of that, all forms of discrimination towards women must be eliminated as it is not according to the Pancasila and the 1945 Constitution. The citizen's constitutional rights is written in the Human Rights, which is the principal material for the draft of modern countries' constitution. Also, the citizens' rights and responsibilities are also the main materials which are regulated in all Constitutions based on the constitutional ideals of modern countries. Because of that, the human rights is different from the definition of the citizen's rights. Yet, the human rights is included strictly in the 1945 Constitution. Yet, because of that, it becomes a constitutional right of every citizen.

Second, Women Protection in the Concept of Gender. The effort to give solution towards the social gap, discrimination, and dehumanization which happens in the reality of human beings include those which happen to women, who are usually victims of social systems which are developed by the patriarchic culture, and is maintained by the ideological myths and religious idioms. According to Erich Fromm, this cannot be separated from the history of conflict between the patriarchic and the matriarchic cultures.⁽⁸⁾

In the perspective of gender equality and equity, men and women have the same opportunities in their roles in different aspects of life, both those which are in the domestic or in the public sectors, according to their choices. These choices are determined and influenced by various factors,⁽⁹⁾ Each gender has functional differences. For example, the reproductive cycle of women certainly influences their functions and their roles in life, both in the domestic and in the public sectors. Thus, the differences between men and women are merely functional differences, not essential differences, thus such differences do not influence gender equality.

Every country has different definitions on children. The United Nations in the Convention on the Right of the Child (CRC) defines children as, "Every human being under the age of 18, except if according to the constitution which applies on children, maturity is reached earlier."⁽¹⁰⁾ According to the United Nations in the Convention on the Right of the Child (CRC), underage women are included as children as the definition states that this applies to "Every human" – thus it includes underage women, as women are also human beings in which their existence must be acknowledged in a country.

The Constitution No. 23 year 2002 on Child Protection states that, "Children are those under 18 years of age, including those still in the womb." This is a universal definition which still applies based on the state's ratification, which is the constitution which specially applies to children.⁽⁵⁾ In the society, everyone has different interests, which are sometimes opposed to eachother. Because of that, there needs to be a set of legal regulations which manages those interests. The children's interests are regulated by constitutional regulations which regards child protection, which is called the Law on Child Protection, and it includes underage women. The Law on Child Protection guarantees the rights of children so that they may experience growth and may develop rightly according to their rights.

The responsibility of the child protection is written in Article 20 of the Constitution No. 23 year 2002, which states that, "The state, the government, the society, families, and parents have the responsibility to establish child protection". The state's commitment towards the child protection has actually existed since the

establishment of the State of Indonesia.⁽¹¹⁾ Meanwhile, amendment of the 1945 Constitution created a new article regarding children, which is clearly influenced by the Children's Rights Convention, which is a special protection for children.⁽¹²⁾

The Concept of Legal Protection for Underage Females in Marriages:

Both in the positive law and in the Islamic law, also in international issues regarding the human rights, there is an integration of legal protection regarding the establishment of marriages which influence the reproductive health factors of underage children. All legal regulations (both that of the state's and that of Islam's) orders human beings to pay attention to the concept of balance, harmony, and unity between human beings and their environment. In this case, the limitation of the marriable ages may be done for the sake of the health factor.

The marriage of underage women in the aspect of reproductive health; the legal protection for the rights of reproduction and the reproductive health has been accepted as part of the human rights. From the view of the reproductive health, a woman is only deemed to be ready for reproduction when she is at least 18 years of age. The ideal age for women to be pregnant is from 20 until 35 years old.⁽¹³⁾

CONCLUSION

Underage marriage is deemed to be a serious problem as it causes controversies in the society. Based on the research conducted, it can be concluded that there are three categories of the Religious Court's Judge Consideration regarding underage marriage. The first agrees upon underage marriage after considering that it brings good to the family. The second is based on the concept of gender-based human rights protection, in which the sources are Pancasila and the 1945 Constitution. Every legal regulation order human being to consider the concept of harmony, balance, and unity between the human beings and the environment. Thus, the limitation of the marital age may be done with the consideration of the health factors.

REFERENCES

1. Shufiyah F. Early Marriage According to Hadith and its Impact (Pernikahan Dini Menurut Hadis dan Dampaknya). *Jurnal Living Hadis*. 2018;3(1):350- 233.
2. Adhim, M. F. The Beauty of Early Marriage (Indahnya Pernikahan Dini). Jakarta: Gema Insani; 2002.
3. Rohmat. Early Marriage and Its Impact on Household Integrity (Pernikahan Dini dan Dampaknya terhadap Keutuhan Rumah Tangga). Yogyakarta: Fakultas Syariah UIN Sunan Kalijaga; 2009.
4. Amsori I. Child Protection According to Islamic Perspective (Perlindungan Anak Menurut Perspektif Islam). Yogyakarta: Liberty; 2010.
5. The Government of Republic of Indonesia. Law Number 23 of 2002 concerning Child Protection (Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak). Jakarta: The Government of Republic of Indonesia; 2002.
6. Abdullah MA. Regulation of Women's Rights in the Law on Gender Equality and Justice (RUU KKG) in Indonesia (Pengaturan Hak-Hak Perempuan dalam Undang-Undang Kesetaraan dan Keadilan Gender (RUU KKG) di Indonesia. 2015.
7. Soehino. Hak Asasi Manusia: Perkembangan Pengaturan dan Pelaksanaan Hak Asasi Manusia di Indonesia (Human Rights: Development of Regulations and Implementation of Human Rights in Indonesia). Yogyakarta: BPFE; 2013.
8. Erich Fromm. Love, Sexuality, Gender Matriarchy (Cinta, Seksualitas, Matriarki Gender). Yogyakarta: Jalasutra; 2002.
9. Ilyas Y. Tajdid Muhammadiyah on Women's Issues (Tajdid Muhammadiyah dalam Persoalan Perempuan). Yogyakarta: Universitas Muhammadiyah Yogyakarta; 2015.
10. Supeno H. Criminalization of Children: Offering Radical Ideas for Children Without Criminalization (Kriminalisasi Anak: Tawaran Gagasan Radikal Anak Tanpa Pidanaan). Jakarta: Gramedia; 2010.
11. Republic of Indonesia. Preamble of the 1945 Constitution (Pembukaan Undang-Undang Dasar 1945). Jakarta: Republic of Indonesia; 1945.
12. Republic of Indonesia. The 1945 Constitution, Article 28B Paragraph (2): "Every child has the right to survival, growth and development, and to obtain protection from violence and discrimination. (Undang-Undang Dasar 1945, Pasal 28B Ayat (2): "Setiap anak berhak atas kelangsungan hidup, tumbuh dan berkembang, serta memperoleh perlindungan dari kekerasan dan diskriminasi"). Jakarta: Republic of Indonesia; 1945.

13. Sahala S. Women's Rights in the Family [Women and Children] (Hak-hak Perempuan dalam Keluarga [Wanita dan Anak]). Jakarta: BPHN Dept. Hukum dan HAM RI; 2006.