

Instruments of Marriage Agreements to Reduce Adverse Effects of Child Marriage in Sexual and Reproductive Health Rights

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Abstract

Child marriage has adverse effects, including high school dropout rates, subordination in the family, risk of domestic violence, reproductive health, high maternal mortality rates, marital instability, and child welfare. Provisions regarding the age limit of marriage as an effort to prevent child marriage have not been able to overcome the problem, on the other hand the increase in marriage dispensation permits shows that the case of child marriage is getting higher. Marriage agreements in this study are expected to be a step to anticipate the adverse effects that occur even though child marriage is still forced to do. The results explained that marriage agreements can be implemented in the case of child marriage considering that the parties are still not able to do legal acts in a way under the help of parents or guardians. Forms of marriage agreements that can reduce the impact of child marriage must contain clauses that consider rights that are vulnerable to being violated in child marriage including the right to education, sexual and reproductive health rights, and the importance of marriage counseling.

Keywords: child, marriage agreement, sexual and reproductive health rights, marriage dispensation.

Introduction

Child marriage can be interpreted as a marriage carried out through civil, religious or customary law, and with or without official registration or approval where one or both partners are children under the age of 18 years. The age of 18 years is in accordance with the definition of a child in Law Number 23 of 2002 in conjunction with Law Number 35 of 2014 concerning Child Protection (Bappenas, 2020). The fact is that child marriage has a bad effect, not only on the survival of the child but also on the development of the country considering that children are an asset of a nation. The literature study notes that there are two patterns in the practice of child marriage, namely marrying girls to adult men and matching boys with girls represented by the parents of the two children concerned.

Child marriage has negative impacts, including high school dropout rates, subordination in the family, risk of domestic violence, reproductive health, high maternal mortality rates, marital instability, and child welfare (Djamilah, 2014). Even child marriage can also be categorized as gender-based violence against women because it affects women disproportionately. It includes acts that cause physical, mental, sexual or suffering harm, threats of action and other forms of deprivation of liberty (General Recommendation 19 CEDAW). The marriage of girls can hinder and reduce the fulfillment of their rights as human beings (Komnas Perempuan, 2021). The disproportionately high rate of child marriage between girls compared to boys is recognized by the international community as a reflection of gender discrimination. There is a tendency for health impacts caused by the unequal status of married

girls. Power inequalities related to age gaps can hinder girls' ability to negotiate with their husbands over body control, sexual and reproductive health. With limited control and information about options and pressures to bear children, child marriage is associated with lower contraceptive use (Arthur et al., 2018).

Interpreting a marriage agreement is not only a means of separating marital assets but as an effort to reduce the adverse effects of child marriage is the implementation of progressive legal theory, marriage agreements as a product in the law in this study will go through a process of meaning that can be an answer to child marriage problems. Besides that, it becomes a science and reference for notaries or other authorized officials in the context of serving the community when formulating a marriage agreement. Based on these problems, the formulation of the problem raised in this journal article is first, can a marriage agreement be implemented by a couple in child marriage? And second, what form of marriage agreement can reduce the impact of child marriage?

Literature Review

In relation to the safety and welfare of children, the United Nations agreed to the Convention on the Rights of the Child in 1989 which includes the rights to play, to education, to protection, to a name (identity), to obtain national status, to food, to access health care, to recreation, to equality and to have a role in development (Muntamah et al., 2019). In addition, Indonesia regulates in Law Number 23 of 2002 in conjunction with Law Number 35 of 2014 concerning Child Protection. Some of the normative rights regulated in this law are the rights to life, to grow and develop, to participate, to protection from violence and discrimination, to identity and citizenship status, to worship according to one's beliefs, to parental care, to know their parents, to be raised by one's own parents, to health services, to education according to their needs, to freedom of expression, to information, to rest and vacation, and to play (Rahayu, 2010).

It can be concluded that indirectly child marriage is a violation of human rights. The government and the community have made various efforts, although when viewed from the results, these efforts still cannot be said to be optimal. The policy regarding the age limit for marriage in the Marriage Law is a regulation that aims to reduce the practice of child marriage. The age limit for marriage which was originally a minimum of 16 years for women and a minimum of 19 years for men was changed by Law Number 16 of 2019. The law raises the marriage age limit to a minimum of 19 years for both women and men. However, based on data on cases from the First Level Religious Courts for the last three years, there has been a significant spike in cases of marriage dispensation. In 2018 there were 13,251 cases of marriage dispensation. Continued in 2019, there were 23,126 cases of marriage dispensation. And the last year 2020 data shows 63,231 marriage dispensation cases (Direktorat Jenderal Peradilan Agama, 2020).

This shows that although the regulations regarding the age limit for marriage have been revised, the practice of child marriage still applies. This is due to the fact that it is still easy for judges to grant dispensation on the grounds of an urgent situation, including a girl who is pregnant, a child is at risk or has had sexual intercourse, the child and his/her partner already love each other, as well as the opinion of parents that the child is at risk of violating religious and social norms or to avoid adultery (Komnas Perempuan, 2021). Based on research by Collin & Talbot (2017) from 60 countries found that although there is an increase in legal provisions with the marriage age limit, some countries do not enforce the law and enforcement does not

improve over time. Another recent synthesis of meta-ethnographic approaches has led to the conclusion that despite global progress increasing laws against child marriage, the legal framework in most places is not sufficiently enforced (Kohno et al., 2020). This reality shows that in Indonesia itself the government is still not consistent in implementing regulations related to child marriage. Because if it is likened to, the government has closed access through the front door regarding the practice of child marriage through the age limit in marriage, but on the other hand the government opens access through the back door, namely with a marriage dispensation. This has led to the proliferation of applications for dispensation of marriage in the courts.

Article 53 of the Compilation of Islamic Law regulates the permissibility of marriage for pregnant women out of wedlock. Harahap (2002) said that the purpose of legalizing pregnant marriages was to provide certainty on the position of the child being born, so that the child's lineage could be attributed to the mother and biological father (Anshary, 2010). Even though the reason for the permitting of marriage dispensation on the grounds that the girl is already pregnant is included in the unplanned pregnancy category. Women who experience adverse events can take action decisions regarding their pregnancy, including continuing, intentionally aborting, or having a miscarriage after choosing to continue the pregnancy. KTD can be an indicator of an increased risk of several bad births such as premature birth, premature rupture of membranes and giving birth to babies with low birth weight (Febriana & Sari, 2017). Even according to research, pregnancy at the age of the child is the cause of maternal death during childbirth. This is because the age is not enough to bear the pregnancy (Anggelia & Purwanti, 2020). Although it gives certainty to the position of the child being born, pregnant marriage does not solve the problems that arise in child marriage.

The problem of child marriage does not only occur in Indonesia. Based on research in Benin, Mauritania, Kazakhstan, and Bhutan, changes to the law regarding the age limit for marriage are not effective in dealing with child marriage. In order for the law to be effective, it must be accompanied by better enforcement and supervision to delay marriage and protect the rights of women and children. Other policies that need to be designed must contain certainty in the survival of girls and their participation in society and higher education must be encouraged and protected (Batyra & Pesando, 2021). Solutions to the problem of child marriage still have to be found because its implementation is still difficult to avoid. The marriage agreement is an agreement that can be made by the parties to the marriage before or during the marriage which contains anything related to the marriage as long as it does not conflict with legal, religious and moral norms. Judging from the rules of the marriage agreement, the agreement can be used by the parties in child marriage. The clause in the marriage agreement can contain an agreement to protect the rights and obligations of the parties who are vulnerable to being violated in child marriage. On the other hand, marriage agreements in Indonesia are dominated by marriage agreements which contain the separation of marital assets.

The legal system of Friedman (1975) says that the elements of the legal system consist of legal structure, legal substance, and legal culture. These elements have a relationship with each other and influence each other (Suteki & Taufani 2020). The theory of substantive justice is a type of justice which Werner Menski (2006) calls perfect justice, because in addition to the rules and logic aspects and socio-legal aspects, it is also linked with natural law aspects (moral, ethical, and religion) (Suteki & Taufani 2020). The content of the marriage agreement which is the legal substance in the legal system as mentioned by Lawrence Meir Friedman must pay attention to the values that exist in the theory of substantive justice in order to create perfect justice. The progressive legal theory of Satjipto Rahardjo explains that the law is not a product

that is finished when it is enacted or the law is not finished when it is written into a neat and good sentence, but through a process of meaning that never stops, the law will display its identity, namely as a science (Yusdani, 2015).

Research Methods

The method used in the journal article is the normative juridical method, which is an approach to the problem by selecting secondary data or legal material, then classifying according to the classification of legal materials and compiling research data systematically. This is done logically, meaning that there is a relationship and interrelationship between one legal material and another to get an overview of the research results (Amirudin & Asikin, 2013). In normative juridical research, it only stops at the scope of legal conceptions, legal principles and regulatory rules. It does not come to human behavior that applies these regulations (Achmad & Dewata, 2013). The main legal material in normative juridical analysis uses library materials as a source of research data (Amirudin & Asikin, 2013).

This study aims to discuss the form of marriage agreements that can reduce the impact of child marriage, one of which is domestic violence and its implementation in notarial practice. By exploring previous literature, Nugraha & Asrimayasha (2020) discusses the maturity status of children who carry out underage marriages in carrying out legal actions before a notary and the legal status of marriage agreements made before marriage by minors in notarial practice in Indonesia (Nugraha & Asrimayasha, 2020). Farahzita et al. (2021) examines the effectiveness of the law in Indonesia regarding cases of domestic violence and efforts to prevent domestic violence with the marriage agreement (Farahzita et al., 2021). In addition, Rini (2016) examined about whether the marriage agreement can be used as a legal instrument to prevent domestic violence, especially in terms of Islamic law (Rini, 2016). Some of these previous researches discussed the implementation of marriage agreements made by couples in child marriages as well as agreements whose contents were separated from marital assets, namely in the context of preventing domestic violence.

Results

Implementation of the Marriage Agreement in the Case of Child Marriage

The marriage agreement is an agreement that contains the agreement of the parties in this case is the husband and wife who regulates the principal matters in marriage. The provisions of the marriage agreement in Indonesia are regulated in the Civil Code and the Marriage Law. Basically, the contents of the marriage agreement are about marital assets. The Civil Code stipulates that in the event of a marriage, the implication is the mixing of assets between the two parties. However, the parties can deviate from this provision by making a marriage agreement. Either in the form of an agreement to eliminate the mixing of assets, limit grants, and so on. In contrast to the rules in the Marriage Law, the marriage agreement agreed by the parties can contain anything as long as it does not violate the boundaries of religious law and morality. In addition, the marriage agreement can be made before or during the marriage.

In child marriage, there are problems in terms of skills to make a marriage agreement. Juridically, a person's maturity means that someone has the authority to carry out legal actions on their own without the help of other parties, both parents and guardians of the child. Thus, a person is said to be an adult if the person is legally recognized as carrying out his own legal actions, with his own responsibility for what he did (Sesung & Adji, 2020). Article 1330 of the Civil Code stipulates that minors are not capable of making agreements. The purpose of the

article is shown for all agreements including marriage agreements (Yunanto, 2019). While the parties in child marriages are definitely not yet mature before the marriage takes place. Although according to Article 330 of the Civil Code, a person can be said to be an adult when he has been married, so Article 39 of Law Number 2 of 2014 concerning the Position of a Notary also regulates the requirements for the appearers who will make an agreement, namely the minimum age of 18 years or already married and competent. perform legal actions (Nugraha & Asrimayasha, 2020).

According to this journal article, a marriage agreement in child marriage is expected to be carried out before the marriage takes place because it is to protect the rights of the child during the marriage. If it is done while the marriage has taken place, it is not impossible that the marriage agreement will not be made and provide a loophole for the violation of children's rights.

Based on Article 151 of the Civil Code, for children who are not yet mature but have met the requirements for marriage, they are capable of making a marriage agreement as long as they are assisted by those who are authorized to give marriage permits (parents or guardians). Then, in marriages carried out with the permission of the judge, including a marriage dispensation, the concept of a marriage agreement must be attached when submitting a marriage application (Yunanto, 2019). This requirement for participation from parents or guardians is important because as long as children are not yet adults, they are considered to be still under the care of their guardians. In addition, it is very possible that the parties to child marriages do not understand the implications of a marriage agreement or the marriage itself. So, they do not understand that there is a big risk for their rights to be violated as a result of the marriage. The participation of parents or guardians is needed because they are considered adults, understand the consequences of marriage, and have responsibility for the rights of children under their care.

Child marriage has many risks that can affect the children who do it. In response to this problem, the government has made regulations regarding the age limit for marriage to prevent it, but in practice judges often give permission for marriage dispensation so that child marriages still occur. The legal system of Lawrence Meir Friedman (1975) says that the elements of the legal system consist of legal structure, legal substance, and legal culture. These elements have a relationship with each other and influence each other. In the case of regulations to prevent child marriage, it shows that the legal structure in this case the judge as law enforcer is still weak and inconsistent because it can still pass child marriage by giving a marriage dispensasai permit. What the judge considers is the urgent situation, including a girl who is pregnant, a child is at risk or has had sexual intercourse, the child and his/her partner already love each other, and the parents' assumption that the child is at risk of violating religious and social norms or to avoid adultery (Komnas Perempuan, 2021). Although the element of legal substance in this case, the rules regarding the age limit for marriage are in accordance with the age limit for children who are above 18 years, but there are no sanctions for those who violate it. Moreover, elements of legal culture in a society that prioritizes morality and religious aspects will weaken the legal substance. This is the reason why child marriage is still difficult to avoid even though it has risks and bad impacts.

In the literature found a type of justice called perfect justice. According to Menski (2006), the search for justice through the law has been carried out by people using 3 approaches, namely the philosophical approach which produces ideal justice, the positivist normative which produces formal justice and socio-legal (social aspect) which produces material justice. Menski offers a fourth type of approach called the legal pluralism approach. The type of justice that is

expected to be born from the legal pluralism approach is perfect justice which can be equated with substantive justice. This is in accordance with Menski's statement that through this legal pluralism approach a legal decision maker must always pay attention to the complexity of the problems faced. This complexity is the basis for the construction of legal reasoning before the police, prosecutors and judges decide on certain policies (Suteki, 2016). Legal pluralism is a new approach strategy that must be mastered by law enforcers in order to make legal breakthroughs through the non-enforcement of law. This is because this approach is no longer imprisoned by the provisions of legal formalism, but has jumped to the consideration of living law and natural law.

Based on the theory of substantive justice, the judge in determining the dispensation for marriage seems to have considered living law and natural law. Although in terms of moral values, religious values, and social aspects, the stipulation for the granting of a marriage dispensation appears to have been fulfilled, this stipulation still cannot answer the complexity aspect in the issue of child marriage. Among them are the impacts that risk violating children's human rights for life after marriage. So to reduce the impact of child marriage, the judge should be able to recommend making a marriage agreement that protects the rights of the child who applies for a marriage dispensation permit. So that at least there is a legal umbrella which is a strong enough basis for the dispensation permit issued and is equally understood by the parties to protect the marriage.

Instruments in Reducing the Impact of Child Marriage to Sexual and Reproductive Health Rights

The practice of marriage agreements in Indonesia tends to only contain the status of assets in marriage. Therefore, it is still rare to make a marriage agreement whose contents are specifically to protect the rights of the parties in child marriage. In terms of reducing the impact of child marriage, in addition to rules regarding the age limit for marriage that can prevent child marriage, a marriage agreement can be a rule or law for the parties to anticipate the impact of child marriages that pass because they are given a marriage dispensation permit.

The form of a marriage agreement for child marriage can be based on the principle of freedom of contract. As according to Busro (2013) that the principle of freedom of contract places the articles governing the agreement as complementary law (optional law/anvoellen law) which means that these articles can be set aside if the parties want their own provisions regarding interests, as long as those interests are is not prohibited by law, does not conflict with decency, and does not conflict with public order, then the actions of the parties do not regulate themselves in their interests, which means that the parties are subject to the law.

Article 1338 paragraph (1) of the Civil Code states that all agreements made legally apply as law for those who make them. Mariam Darus Badruzaman (1998) argues that the inclusion of the term "all" in the article contains a principle of autonomy of each party (the principle of freedom of contract). Although a marriage agreement is an instrument made when there are parties who feel the need to make an agreement with the aim of anticipating disputes in the future, However, the marriage agreement if it is reviewed based on Lawrence Meir Friedman's legal system theory is an element of legal substance or as a rule to enforce laws that can strengthen the rule of marriage age limit (Rajamanickam et al., 2019). Strong rules are needed to become a strong legal umbrella to protect the rights of the parties in child marriage. Clauses in child marriage agreements can be based on the basic rights of child protection. Some of the clauses that are options in the child marriage agreement include some matters.

The first is right to education. One of the rights that are vulnerable to being violated in child marriage is the right to education. The right of children to obtain education is stated in Article 9 paragraph (1) of Law Number 23 of 2002 in conjunction with Law Number 35 of 2014 which states that every child has the right to receive education and teaching in the context of personal development and the level of intelligence according to his interests and talents. Not only the law in Indonesia, the United Nations Convention on the Rights of the Child also recognizes in Article 28 paragraph (1) that education is an inherent right of every child (Bahter, 2020). Because the age of 18 years and under is a condition where the age of a child to take education. Child marriage denies children's rights to obtain education, play, and reach their optimal potential because it can disrupt or end important periods of their lives as children. Married boys and girls are forced by circumstances to bear the responsibilities of adults even when they are not mentally, financially or physically ready. The agreement to continue to prioritize each other's education even after marriage is important as a clause in the marriage agreement not only to complete education but will also affect job opportunities.

The second is sexual and reproductive health rights. Based on Article 136 paragraph (2) of Law no. 36 of 2009 concerning Health, efforts to maintain adolescent health as referred to in paragraph (1), including for adolescent reproduction, are carried out so that they are free from various health problems that can hinder the ability to live a healthy reproductive life. In addition, Article 71 of Law Number 36 of 2009 concerning Health states that reproductive health is a healthy state of complete physical, mental and social well-being, not merely free from disease or disability related to systems, functions, and reproductive processes in males and females. The concept of healthy reproduction developed by the BKKBN regulates the age of giving birth between 20-30 years, which means delaying marriage or giving birth until the age of 20 years. This is to increase female reproduction in the most optimal period for the process of pregnancy and childbirth (Inayati, 2015). A research from Plan Indonesia in collaboration with the Center for Population and Policy Studies (PSKK) UGM in 2011 proved that the impact of child marriage is related to reproductive health, because married girls are at risk for high-risk pregnancies. This concludes that child marriage places girls as a vulnerable group related to their reproductive health and sexuality (Muntamah et al., 2019). The choice to have children has a major influence on the lives of children who marry at an early age, especially on children's health. The agreement regarding the postponement of pregnancy is a decision that must be considered wisely. So that this can be a clause that can protect the rights of children who marry early.

The third is marriage counseling. Commitment to jointly participate in marriage counseling is something that is very much needed by the parties in child marriage. Because marriage is not only a matter of romantic relationships between the opposite sex in a halal container. However, there are rights and obligations that must be fully understood. Marriage counseling is an effort of assistance provided by professional counselors in helping maintain household harmony and solving problems that may be faced by married couples. So that harmonious family welfare can be achieved (Ayurinanda, 2017). The marriage counseling process aims to assist couples in solving problems. This is obtained by couples learning new interactive skills, how to reduce conflict, give and take from each other, change the habit of blaming each other, and find new ways of relating (Rahmadiani, 2021). In particular, issues regarding the division of responsibilities and how to deal with complex problems in marriage require broad insights including understanding related to gender justice so that there is no inequality or double burden and even to avoid domestic violence.

Conclusion

The results concluded that child marriage with all the adverse effects of risk is still difficult to avoid, but the marriage agreement as an agreement between the parties in marriage can be used as an instrument as a legal umbrella for children who marry at an early age. The making of a marriage agreement should be done before the marriage takes place. Even though the parties are immature and not yet capable of making agreements, parents as guardians of children can give permission or consent and help children make agreements considering that parents or guardians are adults and are considered to have more understanding of the risks of child marriage.

The form of a marriage agreement in the case of child marriage must contain a clause that can be a legal umbrella that can protect rights that are vulnerable to being violated in child marriage. Some of the things that can become clauses in the agreement are about the right to education, sexual and reproductive health rights, and marriage counseling.

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