



## Legal protection for women in transcendental-based Marriage (Analysis of Underage Marriage)

Widihartati Setiasih<sup>1</sup>, Khudzaifah Dimiyati<sup>2</sup>, Absori<sup>3</sup>

<sup>1</sup> Dosen Fakultas Hukum UNDARIS Ungaran (Lecturer of Law at Law Faculty, UNDARIS Ungaran, Indonesia)

<sup>2,3</sup> Professor of Law at the Doctoral Program in Law, Muhammadiyah University of Surakarta, Indonesia

### Abstract

Legal protection for woman in transcendental-based is an effort to protect every women's right starting from daughter to adult in having the equal of treatment, protection and legal certainty, based on the views of Islamic law, international and national human rights law and law positive in Indonesia. This study aimed to describe and explore the concept of legal protection for women in transcendental-based marriages. This particular research used two approaches method: (a) Statute Approach and (b) case approach; i.e. statue approach and the content of transcendental meaning. The type of data in the study was secondary data. Data collection technique was literature review, through lists of main various literatures and supporting material related to the focus of problem. Data analysis techniques are processed and discussed using deductive methods. The results showed that the marriage law does not contain international and national human rights issues related to the protection for women in transcendental-based.

**Keywords:** legal protection for women, underage marriage, protection for women in transcendental-based

### 1. Introduction

The arising of woman marginalization shows that gender of female becomes the second sex. The dichotomy of nature and culture is used to denote the separation between those genders which is one gender having lower status than other. Women are considered to have a nature attitude which should be teaching in order they are more culturally (cultural). The effort of women's "civilize" has led to the process of production and reproduction the inequality between male and female<sup>[1]</sup>.

As a democracy nation and member of the United Nations, Indonesia has a juridical obligation to uphold the values and concepts of human rights, both in national and international territory. Conceptual democratic thinking is rooted in the differences of the freedom concept, called as negative freedom and positive freedom. The concept of negative freedom is described as "freedom from", it imply a minimal role of state, especially on the security issue protection and freedom of speech and political. In contrast, the concept of positive freedom is defined as "freedom to". By this theory, freedom means the consequences of state's guarantees to give an equal effective freedom among citizens to be use and develop their capacity<sup>[2]</sup>.

The dilemma of law in Indonesia become reason; the parameters of 'maturity' trigger the emergence of debate opinion toward the marriage age limit, as the contents of Article 6 Paragraph 2, Article 7 Paragraph 1, Article 7 Paragraph 2, Article 47 Paragraph 1, Article 50 Paragraph 1, and Article 20 and 21 in Law No. 1 of 1974 on Marriage, those references are clearly stated to answer the marriage age

limit. That mention, the marriage recording officers are not allowed to establish or assist the marriage if they know any violation of the minimum of marriage age limit<sup>[3]</sup>.

According to international law, a child's marriage is categorized as a form of violence against women and constitutes a violation to human rights. Article 16 paragraph (2) of the Universal Declaration of Human Rights states: "Marriage shall be entered into with the free and full consents of the intending spouse". Indonesia's commitment in ensuring the children's protection, especially girls/female, was manifested by the ratification of several international conventions. The Convention on the Rights of the Child (CRC) or *Konvensi Hak Anak (KHA)* through Presidential Decree No.36 of 1990 and the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW), was ratified by Act No.7 of 1984<sup>[4]</sup>.

Indonesia's commitment in ensuring the protection of child's rights is also reflected by the enactment of laws and regulations, such as Law No.23 of 2002 on child's protection and Law No.39 of 1999 on human rights. In practice, Indonesia is obliged to fulfill the child's rights as written in KHA and CEDAW Convention<sup>[5]</sup>.

Based on the background, aiming to examine, solve the problems and find a marriage law that is paradigm of legal protection for woman in transcendental-based, this particular article use the Development Theory by Mochtar Kusumaatmadja, Legislation Theory, Lawrence M. Friedman theory and Feminist Legal Theory either as the main theory or

<sup>1</sup> Chand, Hari. 1994. *Modern Jurisprudence (Feminist Legal Theory)*. Kuala Lumpur: International Law Book Services. Hal 315.

<sup>2</sup> Aidul Fitriaciada Azhari, 2005. *Menemukan Demokrasi*. Surakarta: Muhammadiyah University Press (Universitas Muhammadiyah Surakarta). Cet. 1. Hal. 132.

<sup>3</sup> Undang-Undang Perkawinan Indonesia. Edisi lengkap. (Himpunan Peraturan Perundang-undangan), 2009. Wacana Intelektual. (Indonesian Marriage Law. Full Edition. Law compilation 2009. Wacana Intelektual)

<sup>4</sup> Dewi Candraningrum, 2016. Status Anak Perempuan dalam Pernikahan Anak. Jakarta: Jurnal Perempuan. Vol.21, No.1. ISSN 1410-153X. Edisi.88.

<sup>5</sup> Dewi Candraningrum, 2016. Ibid. Hal. 153.

supporting theory. Thus, the article title “Legal Protection for Women in Transcendental Based Marriage”.

## 2. Legal Protection for Women

Consider both the concept of positive law and Islamic law, the article seeks to integrate the base of transcendental values on the legal protection for women in marriage law related to the implementation of underage marriages. There are principles of legal protection for women.

**Protection to Reproductive Health Protection.** Protection of the right of health of a person is found in Indonesia national legal instrument, i.e. Article 4 of Law No.23 of 1992 on Health which states “everyone has equal rights in obtaining an optimal health protection and service”. So, when the protection does not occur, it occur the violation of the right. As consequences, the government must guarantee the protection of the law for all parties including women.

**Protection to Education and teaching.** Education is the most important foundation for human life. The law that ensures on education protection is found in international and national instruments. Specifically, the law on woman’s right protection is found in Article 48 of the Human Rights Law which states “Women have rights to follow the education and teaching in all types, levels, and educational paths according to predetermined requirements”.

**Protection to Childhood** toward the case of underage marriages, which the rights of children when the status changed from a child into a housewife or head of the family who have different rights and duties before having legal maturity. And it has negative impact on the future development of children<sup>[6]</sup>.

**Protection of Personal Freedom.** It is viewed on the principles of the establishment of this law: there are rights that must be implementing, i.e. personnel freedom at the age of children or adolescents. It defined as freedom to rest and doing in spare time, communicate with peers, play, expression, creativity, and the right to have protection. But, the parties will participate of the interest in the implementation of the personal freedom protection.

**Protection to Women against Opportunity to Develop Self-potency Completely.** The children’s right to have protection is mentioned in Law no. 23 of 2002, accordance with Article 2 Paragraph (3), and (4) UURI No.4 of 1979 on Child Welfare, state: “The child has right to have cared and protection, both during the womb and after birth. The child has the right toward the safe environmental which may endanger and impede the growth and development<sup>[7]</sup>. Then, it is the parents’ duty to give children’s protection, education, and financing until adulthood.

## 3. Dispensation of Underage Marriage

Married dispensation is a leniency granted by the courts to potential married couples who have not reached the minimum

age of marriage<sup>[8]</sup>.

The non-regulation of justifiable reasons for dispensation of underage married is based on Article 7 Paragraph (2) of the Marriage Law, has reduced the concept of dispensation itself, which is explained the dispensation is a decision of limited state administration to exclude the prohibitions in special cases. Therefore, the formulation of the acceptable reasons becomes the most basic reason to give a dispensation. In sum, the dispensation is intended to settle the certain cases which may further clarify the general statement of the purpose of law, namely the common good<sup>[9]</sup>.

## 4. Woman Protection of Transcendental-Based

One of the main themes and fundamental principles in the teachings of Islam is the equality among humans without discriminating of sexes, states, nations, tribes and descendants: all are in equal. Islam is a divine religion as well as a religion of humanity and society (Surah Ali-Imron<sup>[3]</sup>: 112). In the Islam perspective, human has 2 (two) capacities, namely as servant (*‘abid*) and as a representation of God (*khalifah*), regardless of sex, ethnicity and color of skin (Surat al-Hujurat<sup>[49]</sup>: 13). The quality of piety are not only obtained through self-purification (*riyadlah nafsiyah*), but also through caring to others (Surat al-Ma’un [107]: 1-7). Since the beginning, Islam also clearly state that discrimination of gender roles and relationships is one of the human rights violations and must be abolished (Surat al-Maidah [4]: 75)<sup>[10]</sup>. Furthermore, Islam glorifies the woman as a human being which is also given the duty (*taklif*) and responsibility as well as the man, who will get reward or punishment in return. Since the first time, the duty that was given by God the Almighty (Allah SWT) is not specific to men only, but the duty also to women, namely Adam and his wife<sup>[11]</sup>. Islam commands the humans to care to the concept of balance, harmony, unity, and wholeness, both among human beings and their environment. The concept of gender relations in Islam is not mere about justice in society, but theologically, Islam also care to the microcosm (human), macrocosm (nature), and God relationship. By those, human being can perform his function as *khalifah* (representation of God). And only good caliphs can attain the real *‘abid* (servant) degree<sup>[12]</sup>. Government as the authority, through the law, need also to participate in marriage affairs due to marriage is a kind of social problem (*hablum min al-naasi*) which is very influence to the peace of society.

## 5. Research Method

In this sub-section, will present a brief description of the research type which is categorized into doctrinal legal research (normative, trasendental and juridical). Through juridical-normative and transcendental research, a juridical

<sup>6</sup> Himpunan Undang-undang Republik Indonesia. Palangkaraya: Citra Medika Wacana. Hal. 337 (Indonesian Law Compilation. Palangkaraya: Citra Medika Wacana. Hal. 337)

<sup>7</sup> Arif. Gosita. 1987. Masalah Perlindungan Anak. Jakarta: CV. Akademika Pressindo. Hal. 17.

<sup>8</sup> Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 tentang Perkawinan. Wipress. Hal. 459. (Indonesian Law No 1 of 1974 on marriage. Wipress. Hal. 459)

<sup>9</sup> E.Sumaryono, 2002. Etika Hukum Dan Relevansi Teori Hukum Kodrat Thomas Aquinas. Kanisius: Hal. 105.

<sup>10</sup> Al-Jawi, Muhammad Shiddiq. Menyoal Feminisme dan Gerakan Perempuan. (<http://www.baitijannati.wordpress.com/2007/02/02>).

<sup>11</sup> Yusuf Qardhawi, 1999. Ibid. Hal. 351.

<sup>12</sup> Al-Jawi, Muhammad Shiddiq. Ibid.

and transcendental study was conducted. The research used two approaches: (a) Statutory approach<sup>[13]</sup> and (b) case approach<sup>[14]</sup>. The data type in the study was secondary data, consisting of primary legal materials, secondary legal materials, and tertiary legal materials (supporting legal material). Data collection technique was literature review (library research), through lists of main various literatures and supporting material related to the focus of problem<sup>[15]</sup> Qualitative Data analysis techniques are processed and discussed using deductive methods<sup>[16]</sup>.

## 6. Discussion

### 6.1 The Concept of Women Protection in Transcendental-Based Indonesian Marriage Law

The improving of women's access to education and public participation has led to the awareness of the fulfillment of the rights and legal protection to women and children. The implications for underage marriage, is an unbalanced positioning has become a power within the segregation of the life sector, into domestic and public sectors. Where women are considered as people who take part in the domestic sector and men are placed in a group who has right to take part in the public sector.

Based on the previous description, this dissertation carries out the relevant thinking to the times changing, with a firm adherence to the legal sources in Indonesia. The perspective of women protection in transcendental -based is directed at the protection of women's rights, especially on the marriage practice. The theoretical implication is the development of a new paradigm that adapts the human rights knowledge of women in transcendental based.

Because Indonesia is a country with culture and religious values, thus, the cases of underage marriages actually can be solved through the rule of marriage law, that is combination of positive law and transcendental value; refer the faith to Allah and introduces the prophetic knowledge, humanization (*ta'muruna bilma'ruf*), liberation (*tanhauna anil munkar*) and transendesi (*tu'minuna billah*). In this case, the transcendental element must become the foundation of other elements in the science development and human civilization.

Viewed from the legal drafting rules, marriage law has possibility to be established as transcendental-based marriage laws, whereas the marriage law has separated regulated. Thus, the juridical argument of the marriage laws in the determination of minimum age limit should not be contrary to human rights, which the currently law makes the debate of argument. Legal drafting is the beginning process of the laws; then the society began to follow the legal order<sup>[17]</sup>. But, it must be followed by the implementation concretely in the life of everyday society. And, it called as the law enforcement.

Transcendental values that recognize the divine authority are an integral part of the modern Indonesian society's life, in the opening of the 1945 Constitution of the State of the Republic

of Indonesia states that: "On the blessing of Allah's Mercy and driven by a lofty desire, in order has freedom nation, then the people of Indonesia declared with this independence". The concept of God's mercy is the reasons for the freedom from all colonialism and at the same time shows the Transcendental Postulates that accompany the struggle for independence<sup>[18]</sup>. The contribution of Islamic transcendence in the establishment of national law is a part of history. In the Dutch colonial era, *Indische Staatregeling S. 1855-2* which contains the law of the Dutch implemented in Indonesia. In the *regeling*, it clearly accommodated the three of legal systems: Islamic law, customary law, and Western law<sup>[19]</sup>.

This divine dictum is followed by other pillars (five pillar), which become the foundation of the ideology of Indonesia. Moreover, Pancasila (five pillars) with all its aspects is regarded as the source, purpose, and ideals of the law, which means, Pancasila is an ideal idea in the life of the nation and state. The view of life in Pancasila provides various understanding and has discussed to be a guide to conduct in everyday life. Pancasila - both as a view of life and basic ideology of the State - is a collective agreement that unites various views and groups<sup>[20]</sup>.

The differences between ideoly Pancasila and religion, first; the function of religion is to unite people from various countries who are 'bound' with their own ideology. In contrary, ideology unites people from different religions. Ideology also serves to overcome the conflicts or social tensions. Religion and ideology from interpretation of religion will create solidarity, such in Islam. Through this way, it will have implications for wider order and create the worldview of humanity, unity as a nation, *musyawarah* (discussion) and social justice. The values in ideology are values that have shared by their followers in order it will be realized in real life<sup>[21]</sup>.

Thus, there is nothing wrong with Pancasila. Honestly, in the past time, Pancasila was used as a political tool to defend the power<sup>[22]</sup>. At that time, there was also a monopoly of the truth in interpreting Pancasila, and then, it socialized through indoctrinative ways in the form of a single principle<sup>[23]</sup>.

Not only in the opening, but also in the body of the 1945 Constitution determine the concept of Human Rights, which is in Articles 28 - 28 J and the confirmation of the divine

<sup>18</sup> Absori, *et al* (ed), 2016. *Transendensi Hukum: Prospek dan Implementasinya*. Yogyakarta: Genta Publishing. Hal. 92.

<sup>19</sup> Maedani, 2013. *Kumpulan tentang Hukum Islam di Indonesia*. Jakarta: Kencana Prenada Media Group. Hal.14.

<sup>20</sup> Darpito Pudyastunggoro, 2010. "Wawasan Kebangsaan, Pancasila dan Persatuan Bangsa" dalam Bunga Rampai Jimmy Oentoro, *Indonesia Satu, Indonesia Beda, Indonesia Bisa 'Membangun Bhinneka Tunggal Ika di Bumi Nusantara'*. Jakarta: Kompas Gramedia. Hal. 34.

<sup>21</sup> *Ibid.* hal. 34

<sup>22</sup> Pada masa Orde Baru, Pancasila dijadikan satu-satunya asas dan seluruh anggaran dasar dan anggaran rumah tangga organisasi kemasyarakatan harus berdasarkan Pancasila. Resistensi atas asas tunggal demikian berakibat dapat dibubarkannya organisasi massa yang tidak menerima Pancasila sebagai prinsip dasar maupun ideologi organisasi tersebut. (In the New Oder (Orba) time in Indonesia, Pancasila or five pillars is one and only foundation and must to adapt in social organization. By the resistance of pancasila as one and only foundation, social organization or any organization which reject Pancasila or five pillar as the ideology will be disperse by the government)

<sup>23</sup> Douglas E. Ramage, *Politics in Indonesia: Democracy, Islam and the Ideology of Tolerance*. (New York: Routledge, 1995). Hal. 38 dan 191.

<sup>13</sup> Peter Mahmud Marzuki, 2010. *Penelitian Hukum*. Jakarta: Kencana. Hal. 93.

<sup>14</sup> Peter Mahmud Marzuki, 2010. *Ibid.* Hal. 94.

<sup>15</sup> Soerjono Soekanto, 2010. *Op. Cit.* Hal. 1.

<sup>16</sup> Lexy Moleong, 2006. *Op. Cit.* Hal. 1.

<sup>17</sup> Satjipto Rahardjo, 2012. *Ilmu Hukum*. Bandung: PT. Citra Aditya Bakti. Hal. 186.

concept in Article 29, state: *The state is based on the God the Almighty (divine)*. This means, *God (divine)* is a transcendent postulate of the state, where the people has religion and beliefs protected by the state<sup>[24]</sup>.

Transcendental law as an Indonesian legal paradigm is set as the framework of preserving the beliefs and expectations of the society, Pancasila as the source of all sources of law (Staats fundamental norm). There are two reasons to explain this problem: (1) Pancasila is the platform of the nation's life to overcome the plurality of Indonesian society. (2) Pancasila is contained in the opening of the 1945 Constitution that declares the independence of the Indonesian nation<sup>[25]</sup>.

Transcendental thinking can be seen from religious, spiritual, ethical, and moral values which fill with the dynamics and struggles of thought and are born within a long historical period. In this case, transcendental thinking begins to elevate the irrational and metaphysical things (emotions, feelings, intuitions, personal experience values, and speculation), morals, and spirituals as an integral part to understand the knowledge<sup>[26]</sup>.

In the juridical level, in Law No 48 of 2009 on Judicial Power, the God view in the judicial institution can not be denied. Article 2 states: The judiciary is conducted to "FOR THE SAKE OF JUSTICE UNDER GOD THE ALMIGHTY". And Article 3 states: "*The state judiciary implements and enforces the law and justice according to Pancasila*". The relevance of the first and second norms is correlated due to the phrase: "*For the sake of Justice under God the Almighty*" is parallel and mutually supportive with the fragment of the word in the second norm of "Pancasila". Pancasila especially in the First sila (pillar) - as previously described - is the foundation for the presence of God in the life of nation and state.

The importance of the approach of religious wisdom (transcendental) in National Law Development is also stated by legal experts in Indonesia, among others:

Prof. O. Notohamidjojo<sup>[27]</sup> states that "the jurist's responsibility is to bring the spiritual into the law," and "judgment of scientia juris must be profound and based on the constientia" (values of truth, justice, honesty, love each other, ect). Prof. Barda Nawawi Arief<sup>[28]</sup> when explains the meaning of Article 4 of Law No.4 of 2004, which states that "the demands of justice based on the divinity of God the Almighty, not only limited to "knowledge / cognitive" but are also expected to animate their beliefs and attitudes, that if the justice which is based on the divine guidance are not followed and implemented, then it will become corrupted society". Furthermore, Prof. Hazairin<sup>[29]</sup> states that "in the State of the

Republic of Indonesia shall not occur or implement anything that is contrary to Islamic norms for Muslims or contrary to Christian Religion norm for Christians/Catholics or contrary the Hindu Bali norm for Hindu Bali people or contrary to the decency of Buddhism for Buddhists".

Theoretical aspect: Chiba in Werner Menski (Menski 2012), states the religion and customary norms of society are the actual and potential elements to make the official law that is the law established by the legitimate authority of a country, these elements can be accepted and adopted in a formula of official law undergoes a process of dialectics and interaction. Scoot C. Idleman (Idleman, 1993) explains the role of religion in a law-making. The research results indicate that legal reforms are necessary but need to consider the role of religion because not only actor but also religion has a significant influence in law reform campaigns<sup>[30]</sup>.

The perspective of M. Amin Abdullah has obtained a support from Parvez Mansoor who proposed the necessity of integrating knowledge and values in order the human being become wise to nature and creatures. Then, the knowledge and methods which is being developed should be based on the values, i.e.: *first, ketauhidan* (God), that the entire universe, the sky and earth and all the content of those are created for human beings, and human can know and understand the good and bad things with the knowledge. By the free will, human choose the choice of doing good or bad deeds. Seeking the conformity with Allah's will; *second, Leadership*, ie the purpose of human presence in the earth are to perform the function of the caliph, to be a leader on earth (Surah 2: 30); *third, Amanah and Dedication*, when a leader is given a trust and power by Allah swt (God) to love and care everything on earth and sky, those are framework of devotion to Allah swt (Surah 51: 56); *fourth, Sharia* for the realization of goodness and justice, human must perform the conduct in daily life accordance with the rules of sharia which gives peace and tranquility of human life<sup>[31]</sup>.

Previously, it has arose a question about the National Legal Sciences which is expected to be realized as the embodiment of the life order of the nation, it would be necessary to read to Barda Nawawi Arif's view toward the effort of law science development, that the National Law Science (Pancasila Law Science) is a Law that oriented to the Three Pillars of Pancasila, namely: a. Divinity-oriented Law Science (moral-religious), b. Humanitarian-oriented Law Science, c. Society-oriented legal science (nationalistic, democratic, social justice). It means the law science that is not oriented to the three pillars / values / approaches / souls (spirit) are not the national legal science<sup>[32]</sup>.

Based on the previous views, it can be argued that the law transcendental-based is a law that refers to the process of legal formation through religious doctrines constitutionally recognized in Indonesia. The values of each religion are manifested into the norms which implemented by the society. Heddy Shri Ahimsa transform the faith riddles, when it

<sup>24</sup> Absori, *et al* (ed), 2016. *Transendensi Hukum: Prospek dan Implementasinya*. Yogyakarta: Genta Publishing. Hal. 92.

<sup>25</sup> Moh. Mahfud. MD., 2006. *Membangun Politik Hukum Menegakkan Konstitusi*. Jakarta: LP3ES. Hal. 51-52.

<sup>26</sup> Absori, *et al*. *Transendensi Hukum...Op. Cit.* hal. 93.

<sup>27</sup> Pendapat O. Notohamidjojo yang dikutip Barda Nawawi Arief, dalam Barda Nawawi Arif, 2008. *Pembaharuan/Rekonstruksi Pendidikan dan Pengembangan Ilmu Hukum Pidana Dalam Konteks Wawasan Nasional dan Global*, Makalah disampaikan pada Seminar dan Konggres ASPEHUPIKI. Bandung, 17 Maret 2008. Hal. 30.

<sup>28</sup> Barda Nawawi Arief, 2008. *Pembaharuan/Rekonstruksi Pendidikan dan Pengembangan Ilmu Hukum Pidana Dalam Konteks Wawasan Nasional dan Global*, op-cit.,Hal. 30.

<sup>29</sup> Hazairin, 1985. *Demokrasi Pancasila*. Jakarta: Bina Aksara. Hal. 34.

<sup>30</sup> Absori et.al. *Log. Cit.* Hal. 130.

<sup>31</sup> Absori, *Hakikat Filsafat Ilmu*, bahan ajar kuliah Filsafat Ilmu S3 Ilmu Hukum UMS.

<sup>32</sup> Barda Nawawi Arief, 2008. *Pembangunan Sistem Hukum Nasional... Op. Cit.* Hal. 30-32

manifested into transcendental law, there will rise ideas <sup>[33]</sup>. (1) In relation to God, the relation is devotion; (2) In relation to angels - in the context of transcendental law - means the law seeks to create a collegial relationship between the law enforcement as authority to holds of its conscience; (3) In relation to the book (revelation) - in the context of transcendental law – means the law must be part of and derived from the scientific structure and its application based on scientific evidence; (4) In relation to the prophets, it is the real schools as the absolute authority of science, the consequences of law enforcement shall consider the integrity of its law enforcement in relation to the fate of a person; (5) In relation to the eschatological faith toward the end of the world Day (doomsday), science must make improvements to strengthen itself in order its decision does not lose the touch with human history; (6) In relation to destiny, law and the law enforcement must consider the extra-legal aspects through the law become a multiperspective part of the scientific rules.

## 6.2 The Regulation of Women Protection in Transcendental-Based Marriage Law

In confront the globalization era, Indonesian national law must be able to answer the challenges of global phenomena accompanied by Islamic rules (law); added with the intrinsic values of customary law and positive modernization in western law, then the national law is a modification tool for the realization of state's life in Indonesia. Therefore, there need a reidentification and reinterpretation of Islamic perceptions since Islam was promoted as a religion of liberation, including liberation of women. Islam is a divine religion as well as a religion of humanity and society (Surah Ali Imran <sup>[31]</sup>: 112).

In the Islamic view, human beings have two capacities; as servant (*'abid*) and as a representation of God (*khalifah*), regardless of sex, ethnicity, and color of skin (Surat al-Hujurat [49]: 13). The quality of piety is not only obtained through self-purification (*riyadlah nafsiyyah*) but also through caring to others (Surat al-Ma'un [107]: 1-7). Since the beginning, Islam also clearly state that discrimination of gender roles and relationships is one of the human rights violations and must be abolished (Surat al-Maidah [4]: 75). Islam commands the humans to care to the concept of balance, harmony, unity, and wholeness, both among human beings and their environment. Consider both the concept of positive law and Islamic law, the article seeks to integrate the foundation of transcendental values on the legal protection for women in marriage law related to the implementation of underage marriages. There are principles of legal protection for women:

### i) Protection to Reproduction Health

The protection to woman's health right in the context of International and National Human Right in Indonesia is women's protection to reproduction health. It relates to woman nature in a marriage through pregnancy and childbirth, and continues to care, nurture and educate the children. Adult woman are ready to this task both physically and mentally. If there are underage married, there is a violation of health right.

<sup>33</sup> Heddy Shri Ahimsa-Putera, 2016. Paradigma Profetik Islam: Epistemologi, Etos dan Model. Yogyakarta: Gajah Mada University Press. Hal. 163-173.

The protection to helath right is found in Indonesian's law in Article 4 of Law No.23 of 1992 on Health which states that "everyone has equal rights in obtaining an optimal health protection and service <sup>[34]</sup>.

### ii) Protection to Education and teaching

Education is foundation and important to human's life in order to increase the life's quality, both intelligence, thinking, behavior and economic. Then, all human being has equal right to have education and teaching, including women. The women protection to education and teaching is found in Article 48 of the Human Rights Law which states "Women have rights to follow the education and teaching in all types, levels, and educational paths according to predetermined requirements <sup>[35]</sup>.

### iii) Protection to Childhood

By the underage marriage, the status of children's right are changed to be housewife or head of family who have different rights and duties before having legal maturity. And it has negative impact on the future development of children. In the development, law no 23 of 2002 on children protection states: "Parent are obligate and responsible to prevent the underage marriage <sup>[36]</sup>.

### iv) Protection of Personal Freedom

Law no 23 of 2002 on children protection seriously discuss about age of marriage. It is viewed on the principles of the establishment of this law: there are rights that must be implementing, i.e. personnel freedom at the age of children or adolescents. It defined as freedom to rest and doing in spare time, communicate with peers, play, expression, creativity, and the right to have protection. But, the parties will participate of the interest in the implementation of the personal freedom protection.

### v) Protection to Women against Opportunity to Develop Self-potency Completely.

The children's right to have protection is mentioned in Law no. 23 of 2002, accordance with Article 2 Paragraph (3), and (4) UURI No.4 of 1979 on Child Welfare, state: "The child has right to have cared and protection, both during the womb and after birth. The child has the right toward the safe environmental which may endanger and impede the growth and development <sup>[37]</sup>.

Then, it is the parents' duty to give children's protection, education, and financing until adulthood. Children must be protected to anything that will give negative effect to the developmental period, both physically and mentally. In underage marriage, the parent's protection and care decrease because the duty of protection and care are changed to

<sup>34</sup> Undang-Undang Republik Indonesia Nomor 23 Tahun 1992 tentang Kesehatan. (Indonesian Law No 23 of 1992 on health)

<sup>35</sup> Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia. (Indonesian Law No 39 of 1999 on human rights)

<sup>36</sup> Himpunan Undang-undang Republik Indonesia. Palangkaraya: Citra Medika Wacana. Hal. 337 (Indonesian Law Compilation. Palangkaraya: Citra Medika Wacana. Hal. 337)

<sup>37</sup> Arif. Gosita. 1987. Masalah Perlindungan Anak. Jakarta: CV. Akademika Pressindo. Hal. 17.

husband. Children must be protected to the underage marriage practice which it will have impact to her developmental period both physically and mentally. Through the negative effect of underage marriage from many perspectives, it might understand the maturity concept to practice the marriage that must be consider and prioritize as act form of legal protection to women.

The problems related to underage marriage show that in the terms of legal substance is not sufficient for children, especially women. This aims to achieve the goal of marriage, which is “family on happy and eternal”<sup>[38]</sup>.

Government as the authority, through the law, need also to participate in marriage affairs due to marriage is a kind of social problem (*hablum min al-naasi*) which is very influence to the peace of society.

## 7. Conclusion

Based on the discussion, it concluded that the legal protection for women in transcendental-based marriage is the result of collaboration among the Islamic law, human rights law, and positive law. Consider the concept of positive law and Islamic law, the article seeks to integrate the base of transcendental values on the legal protection for women in marriage law related to the implementation of underage marriages. There are principles of legal protection for women: protection to reproduction health, education and teaching, childhood, personal freedom, and self-development completely.

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<sup>38</sup> Sesuai dengan Pasal 1 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan. (according to Article 1, law No 1 of 1974 on marriage)