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ELIMINATION OF CULTURE-BASED DISCRIMINATION AGAINST WOMEN IN INDONESIA: AN ASSESSMENT OF THE IMPLEMENTATION OF STATE PARTIES' OBLIGATIONS UNDER ARTICLE 5(A) OF THE WOMEN'S CONVENTION

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Abstract

The notion of cultural relativism has always been a fundamental challenge to upholding human rights values, especially regarding gender mainstreaming and the equality of both sexes. In this sense, there is a view that cross-cultural moral values are not acceptable given the cultural traits that produce their own modes of thinking and ideology. It is thus understandable that Article 5(a) of the Women's Convention (i.e., The Convention on the Elimination of all Forms of Discrimination Against Women), which is the only provision in international law that seeks to modify cultures that prejudice women, will deal with constant hurdles in countries like Indonesia that firmly embrace cultural values. This is true even though a signal of commitment has been shown by ratification because the signal itself makes no reservation to the obligations stipulated therein. However, these commitments remain highly questionable as discriminatory laws remain in force across the country from the national to the local level and new discriminatory regulations continue to be issued. The Committee of Elimination of Discrimination Against Women (CEDAW) has reminded Indonesia at some occasion that cultural and religious values must not undermine the universality of women's rights. Nevertheless, up until now, the authorities have always failed to create a clear timeframe for revision of laws that institutionalize negative stereotypes against women. Taking this perspective into account, this paper will explore the reasons for and indicators of Indonesia's failure to implement Article 5(a) to modify cultural values and stereotypes against women in its legal system and instruments. In doing so, this paper will also dig deeper into Indonesia's barriers to implementing its state obligations under this article.

Keywords: Human Rights, Universality, Cultural Relativism, Gender, Discrimination Against Women

I. INTRODUCTION

The Convention on the Elimination of all Forms of Discrimination against Women (Women's Convention) is an important human rights instrument that aims to redress the asymmetrical position and power relationship between men and women. The Women's Convention requires States' parties to combat discrimination against women in all aspects of social life, laws, policies, and education, on any grounds, including traditions, customs, religious values, and culture. Discrimination based on

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culture is specifically addressed in Article 5(a), which mandates the modification of social and cultural patterns in order to achieve elimination of prejudice based on the idea that the sexes occupy unequal positions.² Article 5(a) is often seen as a pillar of the convention that aims to mainstream cultural change to achieve gender equality,³ and its scope is important for the interpretation of the object and purpose of the convention.⁴

The notion of cultural relativism has always been a fundamental challenge to upholding human rights values,⁵ especially regarding gender mainstreaming and the equality of both sexes. In this sense, there is a view that cross-cultural moral values are not acceptable given the cultural traits that produce their own modes of thinking and ideology.⁶ It is thus understandable that Article 5(a) of the Women's Convention, which is the only provision in international law that seeks to modify cultures that prejudice the position of women,⁷ will encounter constant hurdles in countries that firmly embrace cultural values. Obviously, implementing an obligation under Article 5(a) to modify a cultural pattern based on gender stereotyping is not a simple matter in a country like Indonesia, which has more than 300 different cultural groups, each with their own cultural identity, matched with enormous geographical diversity.⁸

Article 5(a) is written in neutral language and does not provide details for specific obligations to State parties.⁹ Therefore, what exactly State parties have to do cannot be interpreted solely on the basis of Article 5(a)'s wording; it must be read in conjunction with the other articles in the Women's Convention and the General Recommendations.¹⁰ Article 5(a) has often been compared to Article 2(f), which requires State parties to take all appropriate measures to modify or abolish existing laws, regulations, customs, and practices that discriminate against women.¹¹ This is very reasonable because cultural stereotypes that prejudice women's conduct and position are often formalized through the legal system and legal instruments, so they need to be amended. Furthermore, General Recommendation No 25 links Article 5(a) to its third objective, which is to address prevailing gender-based stereotypes in *inter alia* law, legal, societal structures, and institutions.¹²

Indonesia ratified the Women's Convention on September 13, 1984 by Law

² Rikki Holtmaat, in Marsha A. Freeman et. Al (ed.), *The UN Convention on The Elimination of All Forms of Discrimination against Women: A Commentary*, Oxford University Press, Oxford:2012, p. 142

³ Van Marseveen as cited in Rikki Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5(a) CEDAW for the Elimination of Structural Gender Discrimination*, Leiden:2004, p.11

⁴ Liesbeth Linzaad as cited in Rikki Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination*, Leiden:2004, p.11

⁵ Christopher Joyner, and John Dettling, *Bridging the Cultural Chasm: Cultural Relativism and Future of International Law*, California Western International Law Journal, Vol 20, 1989, p. 276

⁶ *Ibid.*, p. 279

⁷ Elene G. Mountis, *Cultural Relativity and Universalism: Re-evaluating Gender Rights in a Multicultural Context*, Penn State Law Review: Vol. 15: No. 1, 1996, p. 117

⁸ Graeme Hugo, [The International Handbook of the Demography of Race and Ethnicity](#). Volume 4 of the series [International Handbooks of Population](#), Springer, 2010, p. 259

⁹ Elizabeth Sepper, *Confronting The "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns Under The Women's Discrimination Treaty*. University of Pennsylvania Journal of International Law, Vol. 30, 2014, p. 589

¹⁰ Rikki Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination*, Leiden:2004, p.31-32

¹¹ Rikki Holtmaat (n. 9), p.67; Rebecca j. Cook (1994), p.130; Ingrid Westendorp, *Women's Convention turned 30*, Intersensia, Cambride-Antwerp-Poland:2012, p.117

¹² Rikki Holtmaat (n. 9), p. 34

Number 7 of 1984 without making any reservations to the obligations stipulated therein.¹³ However, the commitment to implement its obligations is highly questionable, particularly the obligations under Article 5(a). Discriminatory laws and regulations at the national and local levels remain in force across the country and new discriminatory regulations continue to be issued.¹⁴ Current laws create subordinated positions for women in marriage, legitimize polygamy for men, and even prescribe how women should behave when doing activities outside the house.¹⁵ Up until now, there has been no clear time frame for when these laws will be amended or abolished. In fact, the authorities have consistently failed to prioritize the revision of laws that stereotype the position of women in the national legislative program.

The CEDAW has reminded Indonesia on several occasions to implement Article 5(a). In 1998, it stated:

*"The Committee is convinced that the existence of cultural attitudes that confine women to the roles of mothers and housewives presents a great obstacle to the advancement of women. Policy measures and programs developed on the basis of those stereotypes limit women's participation and entitlements, thereby impeding implementation of the Convention. The Committee expresses the view that cultural and religious values cannot be allowed to undermine the universality of women's rights. It also states its belief that culture is not a static concept and that the core values in Indonesian society are not inconsistent with the advancement of women."*¹⁶

Taking this perspective into account, this paper will analyze the following research questions:

- Why does Indonesia fail to implement Article 5(a) of the Women's Convention to modify cultural values and stereotypes against women in its legal system and instruments?
- What are the barriers for Indonesia to conform to its state obligations under Article 5(a) of the Women's Convention?

To answer these research questions, I will perform normative analysis based on desk research of written sources to identify the political, social, and cultural contexts within which laws are implemented in Indonesia.¹⁷ Written sources consist of primary legal data such as conventions, concluding observations from CEDAW, Indonesian laws, and regulations at the national and regional levels. My analysis also relies on secondary sources such as books, law journals, and previous legal research covering the same topics. I employed both deductive and inductive methods¹⁸ for this research, which examines the application of legal principles in a particular situation. Finally, in order to achieve a holistic understanding rather than a merely hypothetical and descriptive analysis, this research focuses on problematic records on

¹³ <http://cedaw-in-action.org/en/indonesia/>, Accessed on 25th November 2017

¹⁴ Cedaw Working Group of Indonesia (CWGI) and Amnesty International, Open Letter on Indonesia's Lack of Progress in Implementing Recommendations of the UN Committee on the Elimination of Discrimination Against Women, Jakarta: 2013, <http://www.refworld.org/pdfid/521c4f954.pdf>, Accessed in 25th November 2017

¹⁵ *Ibid.*

¹⁶ Indonesia (1998), A/53/38, CEDAW/C/SR. 377, para. 282

¹⁷ Fons Coomans, et. al, *Methods in Human Rights Research*. Intersentia, Antwerp-Oxford-Poland: 2009, p. 15

¹⁸ *Ibid.*, p.15

implementation of state obligations under Article 5(a) in Indonesia.¹⁹

This paper begins with a discussion of state obligations under Article 5(a) of the Women's Convention regarding cultural modification in legal systems and instruments. In Chapter 2, it goes on to describe Indonesia's legal system to understand the status of obligations that arise from international conventions and how they are supposed to be implemented at the national level. Subsequently, in Chapter 3, I will outline the laws and regulations in Indonesia that perpetuate stereotypes and discrimination against women based on cultural values and discuss a few examples of gender bias in court decisions. Then I will focus on the main questions of this paper, discussing the barriers to the implementation of Article 5(a) of the Women's Convention in Indonesia. Lastly, I will conclude this paper by answering the research questions and highlighting my major findings, as well as providing possible suggestions for improvement.

II. STATE OBLIGATIONS UNDER ARTICLE 5(A) REGARDING CULTURAL MODIFICATION IN LEGAL SYSTEMS AND INSTRUMENTS

This chapter explores the State parties' obligations under Article 5(a) of the Women's Convention by looking into the article's wording and context. It will subsequently look at the Indonesian legal system and how obligations under international treaties should be adopted at the national level. Finally, it will analyze how, according to its legal system, Indonesia should implement Article 5(a) of the Women's Convention in order to meet its state obligations.

A. Nature of State Obligations under Article 5(a)

The wording of Article 5(a) does not prescribe in detail what State parties should do to undertake their obligations.²⁰ Article 5(a) states the following:

"State Parties [should] take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

This provision clearly obligates State parties to act to address cultural patterns to eliminate prejudices and stereotypes that marginalize either sex. And States should not only take extra legal measures to overcome these prejudices and stereotypes, but also ensure that these measures result in modification of the legal system to ensure that it does not institutionalize stereotypical discrimination, including discrimination on the basis of cultural and traditional values. Such modification is crucial because it legally justifies positive actions.²¹

As discussed in the introduction, some scholars read Article 5(a) in conjunction with Article 2(f), which explains what State parties should do to redress stereotype patterns.²² Article 2(f) reads:

¹⁹ Ibid, p. 36

²⁰ Rikki Holtmaat, *The UN Convention on The Elimination of All Forms of Discrimination against Women: A Commentary*, Oxford University Press, Oxford: 2011, p.143

²¹ Rikki Holtmaat(n.9), p. 61

²² Ibid,p. 67

"Each state party should] take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women..."

Reading Article 5(a) in conjunction with Article 2(f) of the Women's Convention, we understand that Article 5(a)'s mandates can be achieved by reforming all existing laws and legal instruments to ban all forms of discrimination against women. Furthermore, CEDAW issued several General Recommendations that stress the need to introduce appropriate measures to implement Article 5(a) of the Women's Convention.²³ This process culminates in General Recommendation 25, which is about temporary special measures. This Recommendation elaborates on some of the key points of states' obligations: State parties are obliged to protect women from discrimination and address prevailing gender relationships on the basis of gender-based stereotypes by ensuring there is no direct or indirect discrimination in their laws or committed by public authorities, the judiciary, organizations, enterprises, or private individuals. In addition, State parties are obliged to formulate concrete policies and programs to ameliorate the position of women.²⁴

There are some essential obligations that should be implemented by State parties to perform their duties under this article, *inter alia*: revealing structural discrimination, abolishing and amending laws and public policies that sustain structural discrimination, and adopting new laws and public policies.²⁵ Besides taking these legal actions, it is also essential for the State parties to create and present national plans to influence people's mindsets to eradicate stereotypes and practices that are harmful to women. These obligations will be discussed in further detail below.

1. Revealing Structural Discrimination

Structural discrimination is defined as a combination of policies and behaviors of dominant groups, institutions, or individuals that bring adverse effects to marginalized groups either in intent or impact.²⁶ Structural discrimination happens when an entire system of rules and practices advantages the dominant groups while at the same time disadvantages less empowered groups. This kind of discrimination can happen in any society because it is a system that distributes and maintains social privilege.²⁷ To eliminate structural discrimination, State parties are obliged to evaluate and amend their laws and policies.²⁸ There are at least three measures they must take in order to prevent structural discrimination: *first*, the government should undertake a gender impact assessment and integrate gender perspectives into their strategic plans. These measures certainly need strong commitment from administrative and political leaders and other stakeholders. *Second*, the government should make an effort to clarify the causes of persistent inequality by studying the institutional rules that reinforce gender-role stereotypes.²⁹ *Finally*, it is necessary that stereotypical gender discrimination, which is deeply-rooted in many cultures and sustained in state laws,

²³ Rikki Holtmaat (n. 1), p.144

²⁴ General recommendation 25, para. 7

²⁵ Rikki Holtmaat (n. 1), p.163-164

²⁶ Fred L Pincus, Readings for Diversity and Social Justice. Edited by Maurianne Adams, et. al., Discrimination Comes in Many Forms: Individual, Institutional, and Structural. Readings for Diversity and Social Justice, New York: 2000. p. 31

²⁷ Human Rights Commission's Discussion Paper, A Fair Go For All: Addressing Structural Discrimination in Public Services, 2012, p. 8

²⁸ Rikki Holtmaat (n. 1), p. 163

²⁹ Ibid, p. 163

be brought to surface.³⁰ This requires the government to sensitize the state apparatus and the judiciary on the issues of gender stereotyping.³¹

2. Abolishing and Amending Laws and Policies that Sustain Structural Discrimination

In several concluding observations, CEDAW urges State parties to fulfill their obligations under the Women's Convention, including Article 5, by examining laws from the perspectives of different cultural, ethnic, and religious groups to achieve gender equality.³² The Committee also warns State parties that there are still many stereotyped images in their laws of women playing domestic roles.³³ Therefore, the Committee suggests that State parties deliver the concepts of gender equality clearly by using gender-sensitive language in their constitution.³⁴

3. Adopting New Laws and Public Policies

To abolish stereotyped patterns that have been formalized into law instruments, the government should create a comprehensive constitutional and legislative framework for achieving gender equality. In this sense, the government should not only revise and amend existing laws and policies but also introduce laws and policies that promote the concepts of gender equality. In its concluding observations, CEDAW urges State parties to enact new laws and policies in many areas that support women playing a role in public life instead of only in family and domestic life as a mother and caregiver.³⁵ Through this notion, State parties are asked to ensure that legislation and policies create a structural and systemic framework that ensures women's participation in social life that is equal to men.³⁶

4. Influence People's Mindsets to Eradicate Stereotypes and Practices that are Harmful to Women

Article 5(a) also mandates that State parties take measures to direct society's points of view to eradicate stereotypes and practices that are harmful to women and instead support gender equality. This may require State parties to go the extra mile by implementing non-legal measures such as promotional campaigns or trainings that promote positive images of women's roles. Nevertheless, this objective could actually be realized more effectively if the government imposed legal obligations to introduce codes of ethics and ministerial or institutional decrees that support abolishing damaging stereotypes in mass media and educational materials and instead promote cultural changes with regard to the attribution of men's and women's roles.³⁷ This effort could be advanced if the government stimulates private actors' involvement.³⁸

³⁰ Rikki Holtmaat (n. 9), p. 8

³¹ *Ibid*, p. 8

³² CO India CEDAW/C/IND/CO/3(2007) para 11; CO Indonesia CEDAW/C/EST/IDN/CO/5(2007)para 18; CO Fiji Islands, A/57/38, 26th Session (2002)

³³ CO Ireland, A/54/38, 21st Session (1999) para 193-194

³⁴ *Ibid*

³⁵ *Ibid*

³⁶ Rikki Holtmaat (n. 1), p.164

³⁷ *Ibid*, p. 162

³⁸ *Ibid*, p. 162

B. Implementation at the Domestic Level in Indonesia

Obligations under international conventions should be confirmed at the domestic level to create a legal avenue for those who should be protected by these conventions. This is a logical consequence because the idea of state sovereignty allows nations to determine how international rights and obligations under international law should be realized and met at the domestic level. This includes the level in the hierarchy of domestic law at which these rights and obligations should be addressed.³⁹ This also applies to Indonesia's obligations under Article 5(a) of the Women's Convention. Accordingly, this sub-section addresses the following topics: the theory of the relationship between international law and national law (i.e., monism or dualism) adopted by Indonesia, the hierarchy of laws within the Indonesian legal system, and finally the required implementation of the obligations under Article 5(a) of the Women's Convention in the Indonesian legal system.

It cannot be determined *prima facie* which system (either monist or dualist) Indonesia embraces when adopting international law for its national law system. Indonesia has not made an explicit choice about how international law impacts domestic law.⁴⁰ The Indonesian Constitution and the Law on International Agreements⁴¹ remain silent on the status of international law within the Indonesian legal system. In terms of legal doctrine, some prominent Indonesian scholars indicate that Indonesia is partly or fully monist given that its legal heritage is continental European. This argument is further strengthened by the fact that the Supreme Court directly enforced international law in its decisions several times.⁴² The Supreme Court argued that although the Constitution does not use international law as an independent source of law, the reference to international law is made to fill a legal vacuum because judges are not permitted to refuse examination of a case on the basis of the absence of law or legal clarity.⁴³ However, even though some prominent Indonesian scholars infer that the Indonesian system is partly or fully monist,⁴⁴ in practice, international treaties remain unenforceable and dormant until they are transformed into domestic law. This argument is confirmed by the fact that international law is not mentioned as a source of law in the Constitution or in the Law on Law-Making, which sets out the hierarchy of laws.⁴⁵ Furthermore, the Law on International Agreements mandates that international law becomes legal through being enacted by Parliament (*undang-undang*) or by presidential decree (*keputusan presiden*, now referred to as *peraturan presiden*).⁴⁶ Many government officials will not act on the basis of international

³⁹ Simon Butt, The Position of International Law Within the Indonesian Legal System, *Emory International Law Review*. Vol.28, 2014, p. 2

⁴⁰ *Ibid*, p. 5

⁴¹ Law no 24 of 2000 on International Agreements (Undang-Undang No 24/2000 tentang Perjanjian Internasional),

⁴² *Ibid*, p.13

⁴³ Law no 48 of 2009 on Judicial Power (Undang-Undang No 48/2009 tentang Kekuasaan Kehakiman), Art. 10.

⁴⁴ Damos Dumoli Agusman, Treaties Under Indonesian Law, in *Jurnal Opinio Juris* Vol. 17, January-April 2015, p. 7

⁴⁵ Law no 12 of 2011 on Law-Making (Undang-Undang No 12/2011 tentang Pembentukan Peraturan Perundang-Undangan), Art.7

⁴⁶ Law no 24 of 2000 on International Agreements (Undang-Undang No 24/2000 tentang Perjanjian Internasional), Art. 9(2)

treaties or norms until they are transformed into national law.⁴⁷ Therefore, we can conclude that treaty ratification will not by itself be sufficient to create an obligation or render an enforceable international agreement in Indonesia.⁴⁸

It is important to assess the position of international agreements or conventions in the hierarchy of laws in further detail. It was mentioned previously that international law becomes legal in Indonesia either when Parliament enacts a law or by presidential decree. According to Law No. 12 of 2011 on Law-Making, the hierarchy of Indonesian laws is as follows:

1. The 1945 Constitution (*Undang-Undang Dasar 1945* or UUD 1945, as amended);
2. Decrees of the People's Representative Assembly (*Ketetapan Majelis Permusyawaratan Rakyat* or Tap MPR);
3. Laws enacted by Parliament / Government Regulations in lieu of Law enacted by Parliament (*Undang-Undang* or UU / *Peraturan Pemerintah Pengganti Undang-Undang* or Perpu);
4. Governmental Decrees (*Peraturan Pemerintah* or PP);
5. Presidential Decrees (*Peraturan Presiden* or Perpres);
6. Provincial Regional Bylaws (*Peraturan Daerah Provinsi* or Perda Provinsi);
7. Regency Regional Bylaws (*Peraturan Daerah Kota/Kabupaten* or Perda Kota/Kabupaten).⁴⁹

Apart from these law types, there are also some implementing regulations such as ministerial regulations, commissions' regulations, and other state bodies' regulations, which should be based on and may not contradict the higher legislation.

In summary, several important points can be highlighted from the brief explanation of the status of international law in Indonesia and the State party's obligations under Articles 5(a) and 2(f) of the Women's Convention to abolish existing laws, regulations, and policies containing stereotypes and gender discrimination. *First*, Indonesia has adopted the Women's Convention and transformed it into national law through Law No. 7 of 1984.⁵⁰ Therefore, according to the Indonesian system, this Convention has become part of national law and undoubtedly binds Indonesia to the obligations therein. *Second*, the Women's Convention became legal by the Law enacted by Parliament (*Undang-Undang*), which has the third highest rank in the hierarchy of Indonesian laws. This means that other lower-ranking legislation cannot contradict the Convention's norms and principals. In addition, all regional laws and regulations, which often contain negative gender stereotypes based on tradition, culture, or religious values, can be deemed unconstitutional and therefore should be amended or abolished.

C. Implementation of Indonesia's Obligations in Practice

As previously described, Indonesia has shown its intention to be bound by the

⁴⁷ Simon Butt (n. 38), p. 27

⁴⁸ *Ibid*, p. 10

⁴⁹ Law no 12 of 2011 on Law-Making (n. 44), Art. 7

⁵⁰ Law no 7 of 1982 on the Ratification of Convention On The Elimination of All Forms of Discrimination against Women (*Undang-Undang No. 7/1982 tentang Pengesahan Konvensi mengenai Penghapusan segala Bentuk Diskriminasi terhadap Wanita*).

principles stipulated in the articles of the Women's Convention, including Article 5(a), without any exception. The legal consequences of the prevailing system also denote that the country should harmonize its legal instruments and policies on the basis of the Convention's principles. However, the commitment to implement the obligations stipulated therein remains highly questionable. This chapter will show to what extent Indonesia is not complying with its obligations under the Women's Convention by examining the implementation of laws and policies at various levels. In doing so, it will display Indonesia's legal conditions that still perpetuate discrimination against women based on stereotypes and cultural values at the national and regional levels, in particular but not only in the area of family law, where stereotypes against women are commonplace.⁵¹

A. Regulations

1. Stereotypes in Indonesia's Marriage Law

The Marriage Law⁵² was enacted in 1974, a decade before the ratification of the Women's Convention in 1984⁵³ and the amendment of the 1945 Constitution in 2000 acknowledging an extensive list of human rights. However, this law shows that the government failed to implement the mandates under Articles 5(a) and 2(f) of the Women's Convention; namely, to conduct modification of discriminative stereotypes in law and policies; many provisions of this prevailing law conflict with those in the Women's Convention.

The objective of Indonesia's Marriage Law enactment is to unify the pluralist system of marriage law that was created by the colonial government. The unification attempted to create uniformity in marriage law to support several development goals and demographic policies, including controlling marriage practices and reducing population growth. In practice, the unification never took place because of an additional set of rules, referred to as the Islamic Law Compilation, which only apply to Muslims, who make up 87.2% of Indonesia's total population of more than 250 million people.⁵⁴ As a consequence, it is almost impossible to apply one uniform law that governs all marriage aspects across an entire population. Therefore, the current system is still based on legal pluralism and continues to be the object of political struggles.⁵⁵

Up until now, the legislators have failed to amend or revise this law even though it has been included in the national legislation program (*Prolegnas*) since 2006.⁵⁶ This failure to amend the Marriage Law and thus align it with the Women's Convention also means that Indonesia is not in compliance with CEDAW's recommendation from its concluding observation, in which it strongly suggested that Indonesia revise the Marriage Law due to the Committee's concern that the Marriage Law reflects the

⁵¹ Chiongson, et. al, Role of Law and Justice in Achieving Gender Equality, World Bank Development Report, 2012, p. 6.

⁵² Law no 1 of 1974 on Marriage (Undang-Undang no 1/1974 tentang Perkawinan)

⁵³ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en, Accessed on 27th November 2017

⁵⁴ http://www.indexmundi.com/indonesia/demographics_profile.html. Accessed on 28th November 2017

⁵⁵ Bedner, A.W. & S. van Huis, A Plurality of Marriage Law, Utrecht Law Review, Vol.6 2010, p.176

⁵⁶ Amnesty International, Indonesia Briefing to The UN Committee on The Elimination of Discrimination Against Women, London: 2012, p. 9

persistence of discriminatory laws at the national level.⁵⁷

Indeed, many of the Marriage Law provisions contain negative stereotypes about women's position in society. This is due to a lawmaking process that was dominated by Indonesia's patriarchal culture and by partial interpretation of Islamic law sources.⁵⁸ The Marriage Law determines Indonesian women's role and status in marriage life and codifies women's stereotyping in several aspects; namely their position, function, and roles.⁵⁹

The Marriage Law clearly prescribes the role of women in the family as manager of the household, while men's role is to participate in public life and work as the breadwinner. Relevant provisions read as follows: "*The husband is the head of the family while the wife is the head of the household*" (Art. 31.3); "*The husband has the responsibility of protecting his wife and of providing her with all the necessities of life in a household in accordance with his capabilities*" (Art. 34.1), while the wife "*has the responsibility of taking care of the household to the best of her ability*" (Art. 34.2).

The Marriage Law also promotes the gender stereotypical point of view that women's major role in life is to bear children.⁶⁰ This notion derives from Articles 3–4, which permit a husband to have more than one wife in case the first wife cannot bear children. Article 3.2 reads: "*The court may permit a husband to have more than one wife if the party concerned wishes so.*" Article 4 stipulates that the court may grant permission to a husband who is willing to have more than one wife if his first wife "*cannot perform her conjugal duties, is suffering from physical infirmity or an incurable disease, or cannot bear children.*"⁶¹ This provision clearly reduces women's role in marriage to being the object of reproduction and stigmatizes women who cannot bear children as impaired because they cannot perform their main function in marriage. While stigmatizing married women as responsible for the absence of children borne to the marriage, the Marriage Law also does not provide for a *contrario* interpretation in case it is the husband who is infertile.

Lastly, the Marriage Law implies that the role of women is to be a tool of reproduction and that the primary purpose of marriage is procreation.⁶² Article 7 of the law stipulates different minimum ages at which to marry for women and men: 16 for women and 19 for men, because of the assumption that women have limited biological period within which to bear children. This notion also reinforces the stigma on couples who are unable to become parents and blames women in the absence of children.⁶³ In conclusion, the Marriage Law perpetuates gender stereotypes based on cultural and social constructions that maintain the patriarchal culture and thus fail to implement Indonesia's obligations under Article 5(a) of the Women's Convention.

2. Discrimination against Unmarried Women and Girls in the Population and Family Development Law

Given the entrenched stereotypes in Indonesia women's status is relegated to

⁵⁷ Concluding Observations CEDAW/C/IDN/CO/6-7

⁵⁸ *Ibid*, p.8

⁵⁹ *Ibid*, p.8

⁶⁰ *Ibid*, p.8

⁶¹ *Ibid*, p.8

⁶² *Ibid*, p.8

⁶³ *Ibid*, p.8

marriage and motherhood,⁶⁴ unmarried women and girls across the country continue to face many barriers in realizing their sexual and reproductive rights and accessing related healthcare. These barriers are formalized through the Population and Family Development Law,⁶⁵ which only regulates reproductive health care and contraceptive services for married women only, and which requires a husband's consent for the prescribed contraception type.⁶⁶

In Indonesia, access to sexual and reproductive health services is only provided for married couples. This is clearly stipulated in both the Population and Family Development Law and the Health Law.⁶⁷ Health workers including government officials, midwives, and doctors in Indonesia will not provide reproductive health, family planning, or contraception services to unmarried women. According to an Amnesty International report, district health officers and other government officials affirm that family planning services are intended only for legally married couples.⁶⁸ This stigmatization means that unmarried women are most at risk of sexually transmitted diseases, unwanted pregnancies, and human rights abuses. These problems quite often have other adverse effects on unmarried pregnant girls such as unsafe abortions and dropping out of school early.⁶⁹

The Population and Family Development Law prescribes that family planning decisions should be made jointly by married couples. Furthermore, the law stipulates that husbands and wives have equal rights and obligations in using the family planning program.⁷⁰ However, in practice, health workers tend to interpret this stipulation as needing the husband's consent to access contraception methods, particularly for certain methods such as the Intrauterine Device or IUD.⁷¹ Moreover, health workers' access to contraceptives is often limited as they are only available for married women who already have children.⁷²

The Population and Family Development Law certainly contradicts CEDAW's general principles, especially under Article 12, which requires State parties to take all appropriate measures to eliminate discrimination against women in health care by ensuring that health care services, including family planning, are equally accessible to both men and women.⁷³ The Convention's mandate for accessibility to reproductive healthcare, especially contraception, is one of the key dimensions of a person's right to the highest attainable standards of physical and mental health⁷⁴ and is firmly related to women's bodily integrity.

In summary, the Population and Family Development Law contains stereotypes against unmarried women that hinder accessibility to reproductive healthcare and contraceptives, with negative consequences to the sexual health and social lives of

⁶⁴ Ibid, p.8

⁶⁵ Law no 52 of 2009 on Population and Family Development (Undang-Undang nomor 52 tahun 2009 tentang Perkembangan dan Kependudukan Keluarga), Art. 24

⁶⁶ CEDAW(n. 56), p. 15

⁶⁷ Law no 36 of 2009 on Health(Undang-Undang nomor 36 tahun 2009 tentang Kesehatan)

⁶⁸ Amnesty International, *Left Without Choice: Barriers to Reproductive Health in Indonesia Executive Summary*, Amnesty International Publication, London: 2010, p. 7

⁶⁹ Amnesty International (n.54), p. 13

⁷⁰ Ibid, p. 13

⁷¹ Ibid, p.12

⁷² Ibid, p.12

⁷³ Convention on the Elimination of Discrimination Against Women (Women's Convention), Art. 12

⁷⁴ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254, 2011, paras. 44, 48

unmarried women.

3. Regional Laws Regulating Women's Behavior outside the House

Stereotypes of women on the basis of Indonesia's patriarchal culture are not only reflected at the national level, but they are also prevalent at the local level and amplified by individual regional cultural values. Many regions embrace Islamic conservative values and apply their own interpretation of Sharia law to their local regulations, often ruling how women should behave and dress in public.⁷⁵ Since the decentralization regime began in 1999,⁷⁶ provinces and districts in particular were given substantial powers to make local regulations. There are now more than 422 Sharia-based regulations,⁷⁷ many of which attempt to preserve 'moral values' by disciplining women's conduct in the public sphere.

One of the most prominent examples of Sharia-based local regulations is a governor's instruction on the orderliness of cafés and internet services issued in Nangroe Aceh Darussalam in 2014.⁷⁸ Governor Instruction No. 02/INSTR/2014 of Aceh Province requires heads of districts throughout Nangroe Aceh Darussalam to ensure that all business permits for restaurants and cafés are in compliance with Sharia and that the business permits of restaurants and cafés that contravene this governor instruction are revoked. Some of the provisions of this instruction apply directly to women, since regulating moral equates with regulating women's public behavior, especially after curfew. The instruction *inter alia* orders the owners of local venues, including cafés, internet cafés, and restaurants not to serve women after 9 PM unless they are accompanied by their husband or a family member (*muhrim*).⁷⁹ The governor instruction also prohibits female employees from working night shifts and prohibits cafés from using dim lights⁸⁰ as they can negatively connote the café or restaurant as a place that offers sexual services.

It is not only this controversial governor instruction that shows discriminatory stereotypes perpetuated at the regional level; the National Commission on Violence against Women (*Komisi Nasional Anti Kekerasan terhadap Perempuan*) found that there are as many as 21 regional bylaws about women's dress code that discriminate against women either in intent or impact. These discriminative local bylaws, most of which regulate women's bodies in the name of eradicating pornography and moral amelioration, are spread throughout regions in Indonesia from Aceh and major provinces in Java to Nusa Tenggara.⁸¹ These bylaws are certainly based on the stereotype that women's behavior embodies society's morality; thus,

⁷⁵ Robin Bush, *Regional 'Sharia' Regulations in Indonesia: Anomaly or Symptom?* Institute of Southeast Asian Studies, Singapore: 2008, p.2

⁷⁶ Decentralization was introduced in Indonesia in 1999 following the collapse of previous centralistic Suharto regime, which became a turning point for Indonesia to delegate central power to the regional level

⁷⁷ The New York Times, *As Shariah Experiment Becomes a Model, Indonesia's Secular Face Slips*, 16 January 2017

⁷⁸ Instruction of the Governor of Aceh No 02/Instr/2014 on the orderliness of cafes and internet services (Instruksi Gubernur Aceh Nomor 02/Instr/2014 tentang Penertiban Café dan Layanan Internet Se-Aceh).

⁷⁹ Ibid, Art 3(f)

⁸⁰ Ibid., Art. 3(d), 3(f)

⁸¹ The National Commission on Violence against Women, *In the Name of Regional Autonomy: The Institutionalisation of Discrimination in Indonesia: A Monitoring Report by the National Commission on Violence Against Women's Constitutional Rights in 16 Districts/Municipalities in 7 Provinces*, Jakarta: 2010, p. 124

women's conduct becomes the focus of attention.⁸² It further strengthens the image of women as objects that can be regulated; therefore, efforts to ameliorate "morality" always revolve around ruling women's behavior and bodies.

Clearly, many regional bylaws in Indonesia are not in compliance with the country's obligations under CEDAW's Article 5(a). As the bylaws are lower in hierarchy than Law Number 7 of 1984, which legalized the Women's Convention, the consequence is that the validity of the regional bylaws can be legally challenged.

Although the Women's Convention has been transformed into national legislation, it is the government's obligation to ensure that its principles prevail throughout Indonesia, including at the regional level. The CEDAW Committee's concluding observations include the emphasis on its recommendation that Indonesia implement the Convention across the country by abolishing discriminatory provisions at the provincial and district levels and by urging the Central Government to fulfill its obligations in accordance with international commitments within its jurisdiction. Also noted is that the decentralization of power does not obstruct or reduce a local area's direct responsibility under the Women's Convention.⁸³ Moreover, CEDAW specifically suggested amending all discriminatory bylaws in the province of Aceh and certain districts that restrict women's conduct in daily life (i.e., private, public, and social life) by curbing women's rights through the imposition of dress code and the restriction of freedom of movement. The CEDAW also asked the government to review penal sanctions against alleged immoral relationships.⁸⁴

B. Implementation

In Indonesia, stereotypes and discriminative prejudices against women are not only materialized through written law at the national and regional levels, but they are also prevalent in implementations by the courts, state organs, and law enforcement agencies. Looking at this situation, CEDAW's concern about the failure to systematically incorporate the Convention into Indonesian law can be explained by the state apparatus' lack of awareness of the Convention and Indonesia's obligations thereunder. In its concluding recommendation, CEDAW observes that training should be provided to judges, including those from religious courts, prosecutors, and lawyers, in order to support a legal culture that guarantees gender equality and non-discrimination on the basis of sex. However, it seems that the government has not followed up on this recommendation. This is confirmed by court judgments, administrative decisions, and government treatment, all of which show a lack of sensitivity to the principle of gender equality.

Court decisions in religious courts, which handle family matters for Moslems (mostly with regard to divorce cases), often contain gender biased perspectives that do not provide any solutions for women. With over 200,000 cases handled annually in religious courts, the following typical court decisions affect women adversely in divorce cases:

1. In divorce cases involving domestic violence, female survivors are often denied their right to divorce and asked to reconcile with their husbands.

⁸² Yew Feng Hui, Ed, Rachel Rinaldo, *Encountering Islam: The Politics of Religious Identities in Southeast Asia*, Institute of Southeast Asian Studies, Singapore: 2013, p. 254

⁸³ CEDAW/C/IDN/CO/5, Para 13 and CEDAW/C/IDN/CO/6-7, Para 18

⁸⁴ CEDAW/C/IDN/CO/6-7, Para 18

2. In divorce cases initiated by wives, women are often not granted any property or financial compensation and lose child custody.
3. In many divorce cases initiated by women, they are awarded inadequate alimony payment.
4. Charges of marital rape are often dismissed.⁸⁵

These typical court decisions show that women who file for divorce in Indonesian religious courts are not given fair treatment owing to the stereotype that women are supposedly the agent of maintaining their families' harmony. These decisions also lead to various social problems such as an increase in poverty rates among women, due to the financial insecurity of women who initiate their own divorces.⁸⁶

It is not only court decisions in divorce cases that contain stereotypes against women; the treatment of women by law enforcement agencies shows that negative prejudice against women is also common within the state apparatus. A report based on an investigation by Amnesty International in collaboration with a non-governmental organization in Aceh illustrates this point: a 14-year old girl who reported that she had been raped was accused by the police of having sex with a married man and alleged to have breached legal provisions on adultery.⁸⁷ This is an alarming case of how prejudice against women can worsen female victims' situations, even to the point of criminalizing them.

D. Barriers to the Implementation of Article 5(a) of the Women's Convention in Indonesia

By looking at the failure of the Indonesian government to implement Article 5(a) of the Women's Convention as indicated by the conditions described in the previous chapter, it is crucial to flesh out what factors hinder the implementation of this article. Next, we will look into the characteristics of an Indonesian nation home to more than 300 different cultural groups, each with its own cultural identity, matched with enormous geographical diversity.⁸⁸ This chapter divides these factors into three dispositions: *first*: culture, tradition, and religious values; *second*, decentralization; and *third*, legal pluralism.

1. Culture, Tradition, and Religious Values

As Article 5(a) of the Women's Convention conceives of the notion of cultural modification, it is corollary that it becomes dilemmatic to implement its concept, especially in Indonesia, where cultural values are deeply embedded in the country's social structure. As is commonly known, the debate about culture or cultural relativism always revolves around the universal concept of human rights,⁸⁹ including, in this case, women's human rights. Defining the concept of culture itself is as difficult

⁸⁵ The Asia Foundation, *Religious Courts: Improving Women's Access to Justice in Indonesia*, 2013

⁸⁶ http://factsanddetails.com/indonesia/People_and_Life/sub6_2d/entry-3989.html, accessed on 27th of November 2017

⁸⁷ Amnesty International (n.67), p. 18.

⁸⁸ Graeme Hugo, *The International Handbook of the Demography of Race and Ethnicity* Volume 4 of the series *International Handbooks of Population*, Springer, 2010, p. 259

⁸⁹ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, Cambridge University Press, Cambridge: 2016, p.35

as defining the concept of law. Culture reflects a society's moral notions, ideology, and language; yet it is historically and sociologically specific.⁹⁰ And because of its characteristics, culture usually requires special appreciation. Therefore, to achieve a proper understanding of the reason why culture, tradition, and religious values are hindering the implementation of Article 5(a) of the Women's Convention in Indonesia, it is important to first understand the concept of culture within the context of the Women's Convention in international practice; then to look at the notion of cultural relativism; and finally to explore why culture, tradition, and religious values are factors that hinder the implementation of the Women's Convention in Indonesia.

To understand the concept of culture within the context of the Women's Convention in international practice, Article 5(a) only refers to the modification of cultural patterns without explicitly mentioning tradition or religion. Instead, it addresses culture as *patterns of conduct* and *customary practices*.⁹¹ However, in some of its concluding observations and general recommendations, CEDAW uses the terms *religion*, *culture*, *tradition*, and *customs* to explain the context of obligations under Article 5(a).⁹² This makes sense because traditions and religion can be seen as integral parts of culture.⁹³ Thus, in international forums, religion and tradition are often categorized as part of culture.⁹⁴ Also, in its concluding comments, CEDAW often recommends that State parties stop lawmaking processes and practices that include religious practices, traditions, and cultures that are prejudicial to women.⁹⁵ In addition to CEDAW, the Human Rights Committee in its general comments about equality between women and men states that inequality of women rights throughout the world is embedded in culture, tradition, and religious attitudes, and that State parties should ensure that traditional historical and cultural values are not used to justify the violation of women's rights.⁹⁶

It is worth examining the idea of cultural relativism to understand why cultural values preclude the implementation of the Women's Convention. Two major propositions underline the notion of cultural relativism: first, the idea that that global cultural diversity is impossible to document; and second, that an evaluation of certain behavior or norms depends on the culture within which the person is raised.⁹⁷ There is often a gap between western and nonwestern notions of morality. And international law is often seen as a representation of legal, political, and historical points of view of western societies. Therefore, nonwestern society cannot accept it as such.⁹⁸ Indeed, irreconcilable cultural differences between countries make it difficult to impose international law. It is even harder when international law mandates the modification of cultural patterns the way that Article 5(a) of the Women's Convention tries to do. Many states are even more hesitant to implement the norm if they believe it is based on a western mindset, even if their resistance maintains injustices such as unequal

⁹⁰ Christopher C Joyner and John C Dettling, (n. 4), p. 276

⁹¹ Rikki Holtmaat in Marsha A. Freeman et al. (ed.), (n. 1), p.150

⁹² CEDAW/C/BOT/CO/3, CEDAW/C/IDN/CO/6-7, CEDAW/C/TZA/CO/6, General Recommendation no 19 (Violence Against Women), General Recommendation no 21 (Equality in Marriage and Family Relations), General Recommendation no 24 (Women and Health)

⁹³ Francis Raday. Culture, Religion, and CEDAW's Article 5 (A), 2003, p. 71

⁹⁴ Ibid. p. 76

⁹⁵ CEDAW A/55/38 Jordan 2000 (Para 167), CEDAW A/56/38 Guinea 2001 (para 122-123), CEDAW A/56/38 Singapore 2001 (para 74)

⁹⁶ CCRP/C/21/Rev.1/Add.10, General Comment No. 28, Paras 32, and 5

⁹⁷ Christopher C Joyner and John C Dettling, (n. 4), p.276

⁹⁸ Ibid, p. 276

treatment of either sex.⁹⁹

Finally, to answer why cultural, traditional, and religious values hinder the application of Article 5(a) CEDAW in Indonesia, it is important to understand the structure of Indonesian society. Indonesia consists of more than 300 different cultural groups, each with its own cultural identity, matched with enormous geographical diversity. These conditions certainly make Indonesia a country with one of the richest cultures in the world.¹⁰⁰ With a total population of 253.6 million people, of which 86 percent are registered Muslims, Indonesia is the country with the largest Muslim majority in the world. This does mean Indonesia is an Islamic state: however, religion does play an important role in society.¹⁰¹ Therefore, the government always attempts to regulate issues pertaining to religion, particularly Islam,¹⁰² and bases any moral evaluations mostly on religious values. Moreover, the traditional depiction of gender roles is still based on a patriarchal system.¹⁰³ This affects society's view, which positions women take in society, and how legislators formalize laws and policies. Law is developed on the basis of judicial tradition and legal heritage that are passed along from generation to generation, applying traditional cultural values over time. Accordingly, any legal change will likely be reinterpreted while taking society's cultural background into consideration.¹⁰⁴

In view of the above, it is clear that any mandate to modify cultural patterns under international law is not easily done, and particularly not in a country like Indonesia, in which cultural values, traditions, and religion are deeply entrenched in society's structure, including its law and policies. In its country reports to the CEDAW Committee, Indonesia emphasized that the main factors precluding the obligations of cultural modification and prejudices that marginalize women in its laws and policies were its multi-ethnic, multicultural, and multi-religious population, especially with Islam's place as the largest religion upheld by Indonesians.¹⁰⁵ Indeed, a law or policy can only be successfully implemented if it has cultural and religious legitimacy.

2. Decentralization

The State's task to abolish cultural patterns and stereotypes institutionalized through laws and policies certainly should also apply to regional levels, not only national levels. As CEDAW affirmed in its concluding observation for Indonesia, the Women's Convention binds all branches of government, not only the national level.¹⁰⁶ However, abolishing laws and policies that discriminate against women will remain more challenging as long as the lawmaking process is not centralized. There are often many obstructions, particularly in decentralized lawmaking processes.

⁹⁹ Ingrid Westendorp, *The Women's Convention turned 30*, Intersentia, Cambridge, Antwerp, Portland: 2012, p.126

¹⁰⁰ Graeme Hugo, (n.87), p. 259.

¹⁰¹ Stijn Van Huis, *Islamic Courts and Women's Divorce Rights in Indonesia: the Cases of Cianjur and Bulukumba*, Leiden University Repository:2015, p.2

¹⁰² *Ibid*

¹⁰³ Intan Paramadhita, *Cultural Identity and Female Representation in Indonesian Women's Magazine*, Wacana Vol 3, Universitas Indonesia 2003, p.1

¹⁰⁴ *Ibid*

¹⁰⁵ CEDAW/C/IDN/2-3

¹⁰⁶ CEDAW/C/IDN/CO/6-7/R.1, Para. 10

Therefore, it makes sense to mention decentralization in Indonesia as one of the main factors hindering fulfillment of the country's obligation to modify laws and policies pertaining to gender stereotypes. To understand how decentralization hinders Indonesia in fulfilling its obligations under Article 5(a) of the Women's Convention, this section will first discuss the meaning of decentralization. Next, it will elaborate on the background of decentralization in Indonesia and its impact on government and society in the region, including its lawmaking powers. Finally, it will explain the reason decentralization hinders fulfillment of the obligation to abolish laws and policies that contain stereotypical discrimination against women.

Decentralization involves the transfer of power, responsibility, and/or resources from the central to the regional or local level, resulting in a division of power by the central authority, with the purpose of introducing intergovernmental competition and checks and balances.¹⁰⁷ The era of decentralization in Indonesia began in 1999 following the collapse of the previously centralized government regime; this became a turning point for Indonesia.¹⁰⁸ Indonesia is a unitary state that is divided into the following five levels of government: Central Government, Provinces, Districts/Municipalities (Kabupaten/Kota), Sub-Districts (Kecamatan), and Neighborhoods/Villages (Kelurahan/Desa).¹⁰⁹ This reform granted considerable power, responsibility, and financial resources to the regional level (Provinces and Regencies/Municipalities). As a result of decentralization, regions not only received the authority to manage their own regions, but also gained legislative and executive lawmaking powers, allowing them to develop their own local laws and policies.¹¹⁰

Up until 2013, as part of the decentralization process, the number of provinces increased from 27 to 34; the number of districts increased from 246 to 413; and the number of municipalities increased from 54 to 98. Meanwhile, the number of sub-districts increased from 3,349 to 9,984, and the number of villages rose from 65,372 to 80,414.¹¹¹ This expanding number of regions was accompanied by an increasing number of lawmaking entities. As a result, decision-making processes became more difficult.¹¹² In this sense, Indonesia's Central Government certainly faces more problems in fulfilling its obligation under international law to ensure that all of the regulations and policies made by regional lawmaking bodies comply with Indonesia's state obligations,¹¹³ and we see how decentralization reduces the Central Government's control both normatively and practically.

As a result of decentralization, regional political actors are free to gradually begin using religious and cultural values as their political tools. For example, some regions with firmly-held Islamic values introduce local Sharia-based regional laws pertaining to a range of matters, such as a Muslim dress code for civil servants, night curfews for women, and alcohol bans.¹¹⁴ Many of these regional laws have been criticized as conflicting with provisions of Indonesia's Constitution and human rights law,¹¹⁵ and

¹⁰⁷ Pranab Bardhan, *Decentralization of Governance and Development*, Journal of Economic Perspectives, University California Berkeley, California: 2002, p.185

¹⁰⁸ Stijn van Huis (n. 100), p. 5

¹⁰⁹ Anwar Nasution, *Government Decentralization Program in Indonesia*, Asian Development Bank Institute, Tokyo: 2016, p.2

¹¹⁰ Simon Butt (n. 38), p. 178

¹¹¹ Anwar Nasution (n. 38), p.3

¹¹² Simon Butt (n. 38), p. 178

¹¹³ Anwar Nasution (n. 38), p. 3

¹¹⁴ Stijn van Huis (n. 100), p. 5

¹¹⁵ Amnesty International, *Indonesia Briefing to the UN Committee on the Elimination of Discrimina-*

even as breaching its international obligations.¹¹⁶

A study by Amnesty International shows that one decade of decentralization (between 1999 and 2009) saw the enactment of 154 local bylaws with discriminatory effects on women's rights either in intent or by impact. These local bylaws were enacted at the provincial level (19 policies), district/municipal level (134 policies), and village level (1 policy). Of these 154 regional bylaws, 21 prescribe a certain dress code; 63 restrict the freedom of expression; and 37 prohibit prostitution, resulting in restriction of women's conduct in public places at night.¹¹⁷ More than half of the regional bylaws rule on religious issues that actually fall under the Central Government's jurisdiction, and they restrict rights guaranteed by the Indonesian Constitution such as the freedom of expression and freedom from discriminatory treatment.¹¹⁸ In its concluding observations, CEDAW also expressed deep concern about Indonesia's failure to implement the Women's Convention at the Provincial and District/Municipal levels, even though the Constitution empowers the Central Government to do so.

The discussion of the effects of decentralization in Indonesia helps explain why this process is one of the major impeding factors of Indonesia's implementation of Article 5(a) of the Women's Convention, even though the obligation to implement the Convention rests with all branches of government.¹¹⁹ First, decentralization reduces the power of the Central Government over Regional Governments. Second, because each region in Indonesia has its own cultural traditions and religious values, the transfer of lawmaking powers as part of decentralization causes regions to regulate matters based on their view that all objects and subjects within their territory fall within their jurisdiction and therefore must be regulated in accordance with their regional characteristics.

3. Legal Pluralism

After discussing two factors that hinder the implementation of Article 5(a) of the Women's Convention in Indonesia, it is important to examine another factor that plays a key role in impeding Indonesia from accomplishing its obligations under Article 5(a) of the Women's Convention: legal pluralism. Looking at Indonesia's historical background, legal pluralism has been a part of the character of the Indonesian legal system from long before Indonesian independence in 1945.¹²⁰ This section will look back into the contemporary history of Indonesian legal pluralism and it will

tion against women, London, Amnesty International Publications, 2012, p.10

¹¹⁶ Simon Butt, *Regional Autonomy, and Legal Disorder: The Proliferation of Local Laws in Indonesia*, *Sidney Law Review*, 2010, p.177

¹¹⁷ Districts in six Provinces – West Java, West Sumatra, South Kalimantan, South Sulawesi, West Nusa Tenggara, and East Java – have proved particularly enthusiastic in enforcing discriminatory local bylaws.

¹¹⁸ The National Commission on Violence Against Women (Komnas Perempuan), *In the Name of Regional Autonomy: Institutionalization of Discrimination in Indonesia: A Monitoring Report by the National Commission on Violence Against Women on the Status of Women's Constitutional Rights in 16 Districts/Municipalities in 7 Provinces*, Jakarta, 2010, p.III

¹¹⁹ CEDAW/C/IDN/CO/6-7/R.1. para.10

¹²⁰ Dutch colonial government who colonized Indonesia for more than three hundred years imposed pluralist legal system based on ethnic category (distinguish between 'European' who was ruled by Dutch law and 'Natives' who was ruled by each of their own customary law) - Ward Berenschot and Adriaan Bedner, *An Introduction to Indonesia's Struggle to Make the Law Work for Everyone*, KITLV, HuMa, VVI Leiden University, Epistema Institute, Jakarta: 2013, p. 5.

elaborate on to what extent it impedes the country's obligations under Article 5(a) of the Women's Convention to modify cultural patterns based on negative stereotypes against women embodied in the legal system and legal instruments.

Legal pluralism is generally defined as a situation where more than one legal system coexists in the same social field.¹²¹ In the past, the Indonesian legal system was categorized as pluralistic because different customary laws and traditional courts of ethnic groups coexisted with colonial law and courts. At present, even though almost all the traditional courts were abolished since independence, and there was an attempt to unify laws in order to impose the same law on all citizens,¹²² legal pluralism still exists in Indonesia to a certain extent. *First*, Indonesia's judicial system differentiates between religious courts and civil courts. The religious courts exercise their jurisdiction mostly over family matters (marriage, divorce, inheritance, and child guardianship). The civil courts deal with non-Muslims in family law matters.¹²³ *Second*, Indonesia's laws consist of various layers,¹²⁴ which are amplified by decentralization, as a result of which each region has the authority to make its own regional laws. As discussed in the previous section, many of these regional laws tend to embody cultural traditions and religious values embraced by society. At a certain point, each region 'formalizes' its own customary laws, thus making Indonesia's law system more pluralistic.

It is clear that legal pluralism in Indonesia creates obstacles to conducting mandates under Article 5(a) to abolish discriminative cultural stereotypes against women in legal instruments and policies. Any effort to uphold these mandates will encounter the question of which law instruments should be addressed first. Moreover, the classification of the judicial system for family matters certainly accentuates regional religious characteristics and allows little room for modification of the law when it conflicts with religious values.

E. Conclusion and Suggestions for Improvement

1. Conclusion

This paper has shown that the obligations under Article 5(a) of the Women's Convention to modify cultural patterns based on stereotypes that discriminate against women are not well implemented in Indonesia. This situation is confirmed in particular by the discriminative stereotypes found in culture, tradition, and religious values that are still prevalent and embodied in the country's legal system. To conclude, the research questions asked earlier will be answered by highlighting major findings in this paper.

Based on the findings on this paper, the research questions can be answered as follows:

- *Why does Indonesia fail to implement Article 5(a) of the Women's Convention*

¹²¹ Sally Engle Merry, *Legal Pluralism*, *Law and Society Review*, Vol. 22, no.5, 1988, p. 870

¹²² Ward Berenschot and Adriaan Bedner, *An Introduction to Indonesia's Struggle to Make the Law Work for Everyone*, KITLV, HuMa, VVI Leiden University, Epistema Institute, Jakarta: 2013, p.6

¹²³ Arskal Salim, *Dynamic Legal Pluralism in Indonesia: The Shift in Plural Legal Order in Contemporary Aceh*, Max Planck Institute for Social Anthropology Working Papers, Halle, Germany: 2009, p. 2

¹²⁴ Law no 12 of 2011 "Law-Making" (*Undang-Undang Pembentukan Peraturan Perundang-Undangan*), Art. 7

to modify cultural values and stereotypes against women in its legal system and instruments?

Indonesia fails to implement Article 5(a) of the Women's Convention because it cannot undertake its obligation under Article 5(a) to guarantee an elimination of discrimination based on the cultural stereotypes that marginalize women's positions, which are incorporated in the legal system and committed by public authorities and the judiciary without a mechanism for remedy. It is clear that the Indonesian government is unable and even unwilling to abolish these stereotypes at all levels of legislation (national, regional, and sectoral), even though it has shown an intention to be bound by all principles stipulated in the articles of the Women's Convention and even though it incorporated them in the domestic legal system through Law No. 7 of 1984, which normatively obliges the Indonesian government to align all its laws and policies with the principles of the Women's Convention. This is evident based on the fact that the government allows the discrimination to be perpetuated through laws at the national and regional levels, mostly in but not limited to the areas of family law and also in court decisions. At the national level, the Indonesian Marriage Law (Law No. 1 of 1974) clearly puts women in an inferior position and relegates them to the domestic arena. The law dictates that women's role in the family is to manage the household, while men's role is to participate in public life and to work as the breadwinner. It also authorizes a husband to engage in polygamy if his wife cannot bear a child. Cultural stereotyping is also apparent in the Family Development Law (Law No. 52 of 2009), which creates a dilemma for unmarried women as they are not permitted to access reproductive healthcare or contraceptive services, which are only allowed for married women. Even in the case of married women, the law requires the husband's consent for the use of some types of contraceptive treatments. At the regional level, many local bylaws clearly institutionalize discrimination against women as they mostly attempt to rule how women should behave and dress in the public arena.

- *What are the barriers for Indonesia to conform to its state obligation under Article 5(a) of the Women's Convention?*

There are various barriers impeding Indonesia from conforming to its state obligations under Article 5(a) of the Women's Convention. These barriers can be grouped into three categories: culture, tradition, and religious values; decentralization; and legal pluralism. *First*, Indonesian society's firm grasp on cultural, traditional, and religious values causes its sense of morality and justice to be largely based on those values. *Second*, regional autonomy tends to cause local governments to produce regulations that embody the region's traditional and religious beliefs; this regional autonomy limits the Central Government's opportunity to control the quality of regulations and policies produced by local governments. *Lastly*, legal pluralism in the form of different normative systems existing next to each other creates an additional challenge for the government, as it must decide which norms to prioritize when undertaking legal reform on the basis of Article 5(a) of the Women's Convention.

2. Suggestions for Improvement

After identifying the barriers to implementing Article 5(a) of the Women's Convention, there are several possible suggestions for ameliorating the existing conditions in Indonesia: *first*, to redefine the cultural point of view and use it as an instrument of change; and *second*, to apply the right approach and legal steps

to abolish the gender stereotypes that materialize through the legal system and its policies.

The first step that is needed for improvement is a change in the point of view about the country's culture; that is, the point of view that culture is static, monolithic, and unchangeable should be redressed.¹²⁵ Culture is constructed by humans; thus, it is a living process that is dynamic and can evolve over time. Moreover, Article 5(a) of the Women's Convention implies that cultural change is possible and is even obligatory.¹²⁶ CEDAW also suggests that State parties view culture as a dynamic aspect of a country's social fabric, which makes it subject to change over time.¹²⁷ To change the country's point of view on culture, the government of Indonesia should do the following:

1. Take all possible measures to influence people's mindsets about culture, especially through education (beginning from pre-elementary and elementary levels) and the media, which aims to challenge the traditional point of view that women are inferior.
2. Raise awareness by initiating campaigns or programs in collaboration with artists, activists, and local figures at the grassroots level, which is the closest to people and society, to plant a 'new culture' that supports gender equality.

After examination of the major impediments to the implementation of Article 5 of the Women's Convention in Indonesia; that is, cultural, traditional, and religious values as well as decentralization and legal pluralism, we recommend some possible legal measures and approaches that the government could take to abolish discriminative gender stereotypes in the Indonesian legal system and policies:

1. Amend the Constitution so that it explicitly guarantees equality between men and women. In this sense, explicit inclusion of equal rights between men and women is crucial given that the Constitution has the highest status within the legal hierarchy. This inclusion can be seen as an effort to mainstream the legal system with a legal culture that condemns any forms of stereotypes, including stereotypes that stem from culture, tradition, and religious values. This measure can also be seen as a strong promotion of the gender equality concept, turning it into a fundamental norm;
2. Amend the Regional Autonomy Law as a legal basis of decentralization. The regional autonomy law should be amended to ensure that the government can play a more significant role in supervising the quality of regional laws and limit regional lawmaking powers;
3. Institute 'Bottom Up' approach legal reforms to achieve the goals of Article 5(a) of the Women's Convention to abolish any stereotype that marginalizes women and is embodied in legal systems and instruments. This implies that legal awareness should be built first in society about a concept of law that supports gender equality; what rights emerge based on this concept; and how to claim them. Only then can traditional gender stereotypes and attitudes that discriminate against women be changed.¹²⁸ As a result, any law reform supporting gender equality should not conflict with society's sense of justice.

¹²⁵ R Holtmaat and J Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue*, University of Leiden, 2010, p. 68

¹²⁶ Rikki Holtmaat, in Marsha A. Freeman et al. (ed.), (n.1), p.143

¹²⁷ CEDAW/C/NER/CO/2 NIGER, Para 18

¹²⁸ Leigh Pasqual, *Time for Action: Implementing CEDAW in Southeast Asia*, United Nation Development Fund for Women, Thailand: 2009, p XIV

Finally, despite the mandate to change culture to guarantee no prejudice or stereotypes marginalizing either sex will certainly not be an easy or quick process, it should be undertaken by all states who claim to be civilized nations. Because, although human beings are born with many differences (including sex differences), they are inherently equal; therefore, differences in sex may not be politicized on the grounds of inequality for any reason including culture, traditions, beliefs, and social stereotypes. The fact is that culture is a living process that follows the cycle of life, which is constructed by human beings.

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