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## **Child marriage as a choice: rethinking agency in international human rights**

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## 4 | Laws for ‘harmony’: teenage pregnancy, child marriage, and legal institutions in Bali

### 4.1 INTRODUCTION

The previous chapter explained the state laws regarding child marriage practices. It used studies in West Java to illustrate how local actors navigate these laws to accommodate people’s needs at the grass-roots level. This chapter turns to legal practices in Bali. To understand the roles that the state and *adat* law systems play, I analyse two types of legal cases: marriage dispensation and prosecution for pre-marital sexual intercourse involving a minor (hereafter ‘sex crime’). I begin with Ratna’s story, which illustrates how these two types of legal cases relate to each other in the context of teenage pregnancy and child marriage.

#### 4.1.1 The story of Ratna

Ratna is an 18-year-old mother, living with her parents and her newborn baby in downtown Denpasar. When Ratna found out about her pregnancy, she had already been separated from the baby’s father, Pranata, who is one year younger than her. Ratna’s family then went to Pranata’s family to urge him to “take responsibility” (i.e., to marry her), which Pranata’s family refused. Ratna’s family then decided to report the case to the police as a sex crime (i.e., prosecution for pre-marital sexual intercourse involving a minor), for which Pranata could be imprisoned for years. As the court hearing was approaching, tension grew between the families. Ratna became nervous. I was helping her prepare to testify in court. A few days before the first hearing, I heard from Ratna’s lawyer that Pranata’s family came to Ratna with a marriage proposal, which Ratna’s family accepted. Around this time, Ratna also gave birth. I heard that the baby was ill and hospitalized, so I went to see them in one of Denpasar’s public hospitals. When I entered the room, I saw Ratna and Pranata’s families sitting around the hospital bed where the baby was sleeping. Ratna’s mother, who was previously telling me how evil-minded Pranata’s family was, approached me and asked shyly:

*Mother: “Did you ... hear? About this?” (pointing at Ratna and Pranata)*

*Author: “Yes, I heard.”*

*Mother: “They are back together.”*

*Author: “Will they marry?”*

*Mother: “Yes, but after finishing school.”*

*Author: “Is that so? But when is their adat (customary) wedding?”*

Mother: "Maybe next month, it will just be a small wedding."

Author: "Will you register their marriage in the registration office?"

Mother: "No...only when they are adults (*dewasa*). Pranata is still 16 years old."

Author: "I see ... but you know there is a system of dispensation. You can go to the court and ask for dispensation to register your marriage under the minimum age."

Mother: (Not really understanding what it is) "Yes, we will go to the court next Wednesday. Continuation of the [sex crime] case."

Author: "Oh, so the case is still not finished..."<sup>1</sup>

Remembering this scene still strikes me with confusion. The two families were about to confront each other in a criminal case but settled their marriage agreement. In that sense, they quickly reconciled and cared for their baby together. A few days later, they would meet in court to testify about the crime with which Ratna's family had charged Pranata. In the hospital, Ratna and Pranata were sitting side by side, holding hands and teasing each other, just like young lovers. This episode shows the complexities of extra-marital pregnancies, of interrelations between the state and *adat* marriage system, and of prosecuting pre-marital sexual intercourse involving a minor in Bali. Like Ratna's case, extra-marital pregnancy and birth cause a family two problems, arising from two different legal systems. First, there is no place for the baby in their *adat* community. Second, the baby lacks a birth certificate. In such cases, what international institutions frame as 'child marriage' becomes a solution to both of these problems. State agents such as marriage registrars, judges, and prosecutors facilitate the solution by navigating between the state and *adat* law systems.

#### 4.1.2 Discussions over legal pluralism

What exactly is state law, and what is *adat* law? Debates on legal pluralism have long tried to answer this question (Tamanaha 2007; Benda-Beckmann and Benda-Beckmann 2002; Twining 2010). Some argue it is hardly constructive to see the legal pluralism concept as a theory, explanation, or claim of truth, and consider legal pluralism as a starting point for considering the complexity of multiple legal orders coexisting. From this view, it is useful only as a sensitizing and analytical tool (Benda-Beckmann and Benda-Beckmann 2002: 40; Macdonald 2013: 35; Tamanaha 2000). This perspective propels the use of related concepts and associated theories, such as Moore's (1973) "semi-autonomous social field" and Santos' (1987) "inter-legality", which many researchers have used as a framework for their studies.

In this chapter, I discuss each legal system as a tool for social engineering, designed to achieve ideas of justice, rights, and process (Merry 2014, 120). More specifically, I discuss the state law system as an institution of liberal legalism and the *adat* law system as an institution of locality. This approach

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1 Personal communication, July 2017.

allows me to examine the tension between different ideas stemming within and from these two institutions, and how these ideas interact and transform in the application of both legal systems. I pay particular attention to judges, as they are on the front line of the interaction and tension between liberal legalism and locality.

Dossa (1999: 76, 79) describes liberal legalism as a “rational machine” under the name of judicial formalism, recognizing only the individual interests while scanting the ideals of communal harmony and collective good. Nader (1991) suggests that the “harmony ideology”, the perception that harmonious behaviour is more desirable than disputing behaviour, has roots in colonialism. In Weber’s view, modern law was driven by logic and rational calculation (Calavita 2010: 12). By contrast, customary law “is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent-vernacular characterizations of what happens connected to vernacular imaginings of what can” (Geertz 1985: 215).

Engle (2016), who studied injury cases in Thailand, argues that state tort law has liberal legalism at its core. Therefore, it is not compatible with how a traditional Thai community works, which is based on the “relational self”, shaped by belonging to traditional kin and community (Merry 2009: 404). This conceptualization of the relational self explains why individualistic views of rights and autonomy (rooted in the European tradition of liberal legalism) often fail to explain the grounded research data from Southeast Asian societies (Chua and Engel 2015: 213). These studies suggest a possible blind spot in human rights mechanisms: The protection of individual rights does not necessarily protect the rights of the relational self. These two kinds of rights co-exist and occasionally conflict.

The tension between rights-based liberal legalism and community-based customary law is illuminated by the debate over legal pluralism and human rights. From one perspective, the existence of legal pluralism is in tension with the universalism of human rights: a legally pluralistic society, containing a variety of fragmented sources of legal orders, may conflict with the universal standards prescribed by human rights norms (Sheppard 2013: 142). International bodies acknowledge such challenges. The Committee on the Elimination of Discrimination against Women (2004) stated that the co-existence of legal orders, where customary and religious legal orders prevail over the state legal order, remains a source of great concern for the defence of women’s rights. Regarding child marriage, the report by international human rights organization Equality Now (2014) sees child marriage tolerated by governments and permitted in law because they are defined as cultural norms or traditions, or are viewed as religious practices (ibid: 15). Therefore, “[s]tates must conduct a full review of customary and religious laws and traditional practices and evaluate how these laws and practices affect girls and women and perpetuate child marriage” (ibid: 16). However,

some scholars argue that human rights standards may spread more effectively and with greater legitimacy, if they are adapted to local cultural contexts and customary laws (Sheppard 2010; Abdullahi An-Na'im 1992; Macdonald 2013; Merry 1997).

How should we address legal pluralism for the realization of human rights? Unifying multiple legal orders by completely abolishing the informal justice systems has proven unrealistic and perhaps undesirable: customary law, or informal justice, is prevalent and resilient (see, e.g., Ubink 2011; Kerrigan et al. 2012; Bruce et al. 1994). This chapter thus begins by exploring an alternative, examining what the existence of multiple legal orders means for realizing human rights. Is legal pluralism an obstacle to achieving this goal? The analysis of legal cases regarding child marriage practices offers an excellent opportunity to investigate how a pluralistic legal system affects the process of human rights law implementation and enforcement.

#### 4.1.3 Legal pluralism in Indonesia

An extensive volume of existing literature about the pluralistic nature of the Indonesian legal system discusses the friction that liberal values cause amidst other values. Lubis (1999: 171) explains that liberalism in the Indonesian state law system (i.e., the *rechtsstaat* or the state based on law) is the government officials' commitment (in principle) in modern Indonesia. The *rechtsstaat* guarantees human rights protection, an independent and impartial judiciary, and strict adherence to the principle of legality (Lubis 1999: 172). Fitzpatrick (2008: 502) explains Indonesian criminal law as a Western-style law, which is centralized, inflexible, hierarchical, and of a secular nature. The 1974 Marriage Law specifically commits to liberal values such as establishing the legal equality of Indonesian women (Butt 2008: 282), although these values have also been compromised (see Chapter 3). Liberal ideals of *reformasi* have also influenced Islamic family law (Cammack, Bedner, and Huis 2015). The Child Protection Law is a typical example of aspired liberalism in the state law system, basing its principles of basic rights on the 1945 Constitution and the Convention on the Rights of the Child.<sup>2</sup>

Despite these liberal principles, and influential Islamic values in state law-making (Grijns and Horii 2018), collectivism is also politically strong and practically persistent in Indonesian ideology (Reeve 1987; Bouchier 2015). Such collectivist ideology is often expressed as "harmony". The importance of the "spirit of harmony as a prevailing social value" (Lubis 1999: 179) or the "cultural obsession for harmony" (Fitzpatrick 2008: 503) is at times in tension with the principle of legality. Community interests outweigh those

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2 Elucidation of Law No.23 of 2002 on Child Protection.

of the individual (Hooker 1978: 55), and the application of the *rechtsstaat* principle remains doubtful because of the prevailing notions of *asas kekeluargaan* (communal principles) and harmony (Lubis 1999: 183-4). This ideology is also reflected in Indonesian state law. The 1945 Constitution is an example of the tension and compromise between different ideologies. It commits to *rechtsstaat* principles while granting space for collective ideologies in implementation, e.g., through the loose phrasing of the original text (Bourchier 2008: 100). This somewhat forced integration of two ideologies explains Indonesian state law's minor influence in practice, described as "law without law" (Katz and Katz 1975) or as only having some normative influence as a principle (Fitzpatrick 2008: 512). The more recent constitutional amendments from 1999-2002 reflect the transition of Indonesian legal ideologies from integralism to liberalism, at least in principle (Bedner 2017).

Legal pluralism in Indonesian family law has been explored through various issues: divorce (Van Huis 2015; O'Shaughnessy 2009), polygamy and mixed marriage (Butt 2008), and inheritance (Von Benda-Beckmann 1984; Bowen 2003). In comparison, child marriage in Indonesia remains an under-explored area of study in relation to Indonesia's pluralistic legal system. While child marriage in Indonesia has attracted social and scholarly attention, including rich anthropological accounts, few reports mention studies on marriage dispensations (Eddyono et al. 2016) and scholarly contributions are still limited. Furthermore, studies have not yet connected sex crimes to the study of child marriage, although both primarily result from adolescents' sexual relations outside of marriage. This chapter combines the analysis of the two case types, namely marriage dispensation cases and sex crime cases, to gain a nuanced and accurate understanding of the different legal systems around the issue of child marriage and sexual morality.

#### 4.1.4 Methodology

In this chapter, I focus on understanding how the state institutions and authorities try to manage their rules and norms in practice when confronted with premarital sexual intercourse and teenage pregnancy. While Bali is a multicultural area with tourists and migrants, I mainly focus on the practice of Balinese Hindus to identify the role of their *adat* law. I investigated the cases and functions at *Pengadilan Negeri* (hereafter PN, civil court), which adjudicates marriage-related legal issues among non-Muslims and criminal cases for all citizens. I collected about 30 court decisions, issued between 2013 and 2016 from three different civil courts (PN Bangli, Semarapura, and Denpasar). I analysed these court decisions in light of interviews I conducted with judges and clerks who worked at these three courts (Appendixes 2 and 3). Some were ethnic Balinese and others were non-Balinese. The following sections clarify that the ethnicity of judges has influence on their views and decision-making process.



For this chapter's analysis, I also use other interviews I conducted with various informants, including judges, Civil Marriage Registration Office (KCS) marriage registrars, *adat* law scholars, and families involved in legal cases. Family members included 1) a couple's parents applying for marriage dispensations, 2) a couple who had civil marriage registration by manipulating their age, 3) a girl with an extra-marital pregnancy and her parents who reported the case to the police as a sex crime. I also relied partly on observations and remarks at Focus Group Discussions with local activists and Balinese adolescents.

Section 4.2 discusses the marriage law, including both the 1974 Marriage Law and the Balinese *adat* law on marriage. An analysis of the civil marriage registration practice and marriage dispensation cases demonstrates how state law is used in court practices to accommodate the demands of *adat* law. Section 4.3 investigates sex crime cases, which punish boys for extra-marital sexual intercourse. These two sections provide an analysis of civil and criminal cases, focusing on the use of the Child Protection Law, among others, to examine the roles that state legal agents play in reacting to extra-marital pregnancies. The conclusion returns to the question of what legal pluralism means for the realization of human rights.

#### 4.2 MARRIAGE LAWS: THE MINIMUM AGE FOR MARRIAGE, MARRIAGE REGISTRATION, AND DISPENSATION

##### 4.2.1 Social norms and *adat* law on marriage and pregnancy

In Bali, marrying young is generally not a preferred option. Today's ideal age for marriage for both men and women is in the early 20s. Most prefer to at least finish high school (*SMA*, until the age of 18) and start working before they marry. According to a paralegal I interviewed, people should ideally finish university education before marrying, i.e., after they are 21. In a Focus Group Discussion with adolescent girls in the Denpasar area, one of the participants said, "*I want to continue school, rather than to marry because nowadays it is difficult to find a job. People who only have a bachelor's degree find it difficult to become employed*".<sup>3</sup> The *Niti Sastra* text, a summary of ancient wisdom and a standard of courtesy and good manners (Gonda 1976: 244), writes "*semara ruang puluhing yusa*", that the ideal age for falling in love is 20 years old.<sup>4</sup>

Concern for reproductive health is also a popular discourse in determining the general ideal age for marriage. An official from BKKBN (*Badan Kependudukan dan Keluarga Berencana Nasional*), the national family planning institute, stated that the ideal age to marry is 23 for women and 25 for men,

3 FGD with adolescent girls in a *banjar* in Denpasar, 19<sup>th</sup> July 2017.

4 Interview with a professor of *adat* law in Bali, 25<sup>th</sup> May 2017, Denpasar.



because "The mortality rate of teenage mothers and their babies is high".<sup>5</sup> In an FDG with a group of adolescent girls in Denpasar, most girls expressed that the ideal age for marriage is 25 for girls and 27 for boys. One of the participants said that was because "Reproductive organs are not ready below the age of 20." These remarks indicate that marriage is closely linked with pregnancy in Balinese society.

Despite the public perception that the ideal marital age is rising, people also feel they have to marry before these ideal ages if they become pregnant. Girls who become pregnant as well as their boyfriends are expected to marry. This expectation relates to the Balinese patrilineal kinship system. In Bali, a marriage regulates the transfer of women from one lineage to another (Jennaway 2002: 60) and babies 'belong' to the father's lineage. So in extra-marital pregnancies, marriage under the Balinese *adat* system is a practical necessity to identify the father of the babies (Ibid: 69). A child is considered to 'belong' ("*darah kami*", our blood) to the family of his biological father, so there is strong pressure on and motivation from the paternal family to marry when a woman is pregnant of his child (Van Bemmelen 2015). All of these lineages and marriages are organized around the Balinese *adat* community, i.e., *banjar* (commonly translated as 'hamlet'). This organization is present in both rural and urban parts of Bali. In cases of unwanted teenage pregnancies, the teenagers' parents and the *local banjar* decide on the marriage. In one case, a marriage decision between a pregnant girl and her boyfriend resulted from a mediation process with the *banjar's* leader. Although these youngsters did not want to marry, their parents and the head decided otherwise.<sup>6</sup>

To deviate from *adat* rules is not easy. For instance, consider Article 80 of *Awig-awig banjar Pekandelan Klod, Lingkungan Pekandelan, Kelurahan Semarapura Klod, Kecamatan Klungkung, Kabupaten Klungkung*<sup>7</sup>:

1. Village/Hamlet has an authority to impose sanctions upon residents who commit wrongdoings
2. The imposition is carried out by the Adat Village Head or Chief of Hamlet according to the procedures
3. The degree of sanctions is based on the degree of the wrongdoings by considering the sense of humanity
4. The forms of sanctions are:
  - a. Fines (money or goods)
  - b. Asking for an apology
  - c. Panyangaskaran ceremony
5. The Village/Banjar owns fines or goods derived from sanctions

5 Interview with an officer at BKKBN, 15<sup>th</sup> June 2017, Denpasar.

6 Interview with the head of a local NGO, May 2019.

7 Translated from Balinese by a local research assistant.

The family is expected to perform a ceremony in their *banjar* when a baby is born outside of wedlock. This performance can combine different ceremonies: *mecaru* or the simpler *prascita* (to purify the ‘polluted’ (*kotor, cuntake*) environment) and *meperas* (to adopt the baby born out of wedlock). These ceremonies can be costly, and sometimes involve several people from the community, so they function as both economic and social sanctions. The price of *mecaru* in a village can be up to 13 million rupiah (€770), according to an applicant for marriage dispensation I interviewed. He added: “for me who works as a sculpture artisan, 13 million rupiah is a huge amount of money”.<sup>8</sup>

The ritual regarding pollution (*cuntake*) refers to the sense of communality that is built on genealogy or ancestry. Warren (1993: 4) explains that *adat* law in Bali involves *tata krama* (local practice), *sima* (rules and norms), and *dresta* (*adat*/custom) as “a field of meanings covering ritual obligation, social institution, legal regulation and ancestral evocation”. Accordingly, *adat* law governs not only the bodily aspect of its *adat* members but also the territory’s supernatural aspects. *Adat* law defines the boundary between the sacred and the profane and maintains the positive spiritual influences within the community so that members can live in harmony among each other and with the environment. For example, when a murder occurs in an *adat* territory, it implies that someone has died and the perpetrator shall be sanctioned. It also has the spiritual implication that the killing has “polluted” the village’s positive aura. This may bring a bad spirit to the territory and may influence others to do bad things. Similarly, extra-marital births are believed to bring negative spirituality to both the family and the community as a whole. Present-day human beings are believed to be reincarnated ancestors in their patrilineal family, so the question of fatherhood is social, cosmological, and existential.

Heavy sanctions are imposed on families who fail to perform *mecaru*. The whole family is denied access to the local cemetery and temples, or is ostracized by the entire village community (Ramstedt 2013: 121). A lawyer at KPPAD (*Komisi Pemberdayaan Perempuan dan Anak Daerah*, Regional Commission for Development of Women and Children) explained that for the Balinese, *adat* law is of a greater significance than state law. This is because *adat* is part of Balinese life through the *banjar* (customary hamlet) and *desa adat* (customary village), so its sanctions are imposed collectively on members through *sangkepan* or *paruman* (customary assembly of the *banjar* members).<sup>9</sup> In Bali, *adat* law at the *banjar* level is also codified as *awig-awig*, which includes provisions about *adat* marriage. For instance, Article 63 of *Awig-awig banjar Pekandelan Klod, Lingkungan Pekandelan, Kelurahan Semarapura Klod, Kecamatan Klungkung, Kabupaten Klungkung* regulates *adat* marriage as follows:

8 Interview with parents of children intending to marry in a marriage dispensation case in a district court, June 2017.

9 Interview with a lawyer at KPPAD, 10<sup>th</sup> April 2017, Denpasar.

- (1) Marriage is an engagement between a male (*purusa*) and a female (*pradana*) based on an agreement to live together through love to pursue happiness *sekala niskala* (materially and spiritually) through a *sekala* (physical) and *niskala* (spiritual) witnessing ceremony.
- (2) The two types of marriage ceremony are:
  - a. *Pepadikan*: A marriage that begins when the man and woman's families meet and consent to the marriage
  - b. *Ngerorod*: A marriage without parental consent, for those who already love each other but for some reasons their families disagree about them getting married
- (3) The conditions to get married are:
  - a. The parties are adults
  - b. It should be based on love
  - c. It is conducted based on religious rules
  - d. In the case of inter-religious marriage, there should be a letter from the non-Hindu party mentioning that he/she converts to Hinduism and has conducted *sudi widani* (a religious conversion ritual)
- (4) Marriage should also be conducted following the existing [state] laws and regulations

The case study of Evi demonstrates the difficulties in not adhering to the *adat* rules on marriage. In her case, she gave birth outside of wedlock, but she could obtain an *akta tunggal*, a state certificate of birth without the father's name (see Chapter 3). With it, her child will be able to go to school, although they may experience certain stigmas. However, her situation was problematic for her and her family primarily because of the *adat* system. Her baby boy could not belong to any family temple, so there was no place to pray or perform any *adat* ceremonies for him. In Ratna's case, these *adat* hurdles were also the main motivation for accepting the apology and marriage proposal from Pranata's family.

Previous research on Bali has recorded diverse *adat* marriage practices and rules. Korn (1932, 469-516) documented several types of *adat* marriage in Bali, including *ontmoetingshuwelijk* (an arranged marriage), *schenkuwelijk* (donation marriage<sup>10</sup>), *vluchthuwelijk* (elopement), *schaakhuwelijk* (marriage by kidnap), and *dienhuwelijk* (serving marriage<sup>11</sup>). Boon (1977) has categorized Balinese *adat* marriage into three types: marriage by (mock) capture, arranged marriage for an alliance, and endogamy. *Adat* law is still diverse and differs from one customary village to another. Disputes within the *adat* domain are resolved through an assembly at the *banjar* level.<sup>12</sup>

The philosophy at the foundation of these *adat* rules, sanctions, and systems is that every family in a village will need other families in the community, so

10 A marriage where wealthy people let their servants marry their daughters to show appreciation for their work and loyalty (Korn 1932, 476).

11 A marriage where the husband agrees to work for his wife's father instead of paying the bride price (Korn 1932, 491).

12 Interview with a lawyer at KPPAD, 10<sup>th</sup> April 2017, Denpasar.

they should maintain a good relationship with each other. *Adat* in Bali has “always been embodied in what is essentially community praxis” (Warren 1993: 296). Therefore, rituals are conducted to guarantee the continuation of social order. The infringement of any *adat* rules is believed to endanger the well-being of the collective rather than the individual (Ramstedt 2014a: 62). Furthermore, according to Ramstedt, the Balinese *adat* law constitutes “feeling rules” that require cognitive bodily emotion work to release what the social environment deems inappropriate feelings (Ramstedt 2014b). More specifically, a “calm” feeling in oneself indicates one’s world is in balance (Wikan 1990: 272).

#### 4.2.2 Relationship between adat and state law

Although *adat* law is central to people’s lives in Bali, it does not exist in a vacuum, but is closely interwoven with state law. For instance, as part of a recent decentralizing process, the Indonesian government has enacted a series of laws on provincial governance, which provided the Balinese provincial parliament with new legislative autonomy. The provincial parliament accordingly codified Balinese *adat* law, so that it is now the major source of law at the village level (Ramstedt 2014a: 61). These changes also indicate an increased tension between state and *adat* law, since lower-level legislation challenges state law norms (Ramstedt 2014a: 61).

Today’s civil administration in Bali has two parallel systems. *Desa adat* deals with cultural, social, and spiritual affairs. *Desa dinas* deals with civil registration, such as issuing identity cards and certificates (Putra and Creese 2016: 106-7). Accordingly, *adat* and civil marriage registrations have different procedures, consequences, motivations, and meanings. While *adat* marriage is to be accepted by the community,<sup>13</sup> people engage in civil marriage registrations to have official documentation, mainly marriage and birth certificates. While *adat* marriage is a prerequisite to civil marriage registration, civil marriage registration is a separate step to be completed after *adat* marriage. In this sense, they are two different systems. The civil marriage registrars emphasize that they do not interfere with the *adat* marriage rules and focus on executing state regulation. One civil registrar explained:

*Marriage based on religious ceremony alone is not enough and we regard this as not yet being married in our database. If you want to have religious marriage, well, please go ahead, but these marriages will be blocked (will not be valid) at the Civil Registration Office. (Silahkan menikah agama, tapi tutup di KCS).*<sup>14</sup>

13 To be legitimate under *adat* law, the Balinese marriage requires three witnesses (*Tri Upasaksi*), namely (1) *Dewa Saksi*, God’s witness through a religious ritual, (2) *Manusa Saksi*, the people’s witness by *Bendesa* or *Kelian Adat* or other *adat* officials and families of both parties, and (3) *Bhuta Saksi*, the holy spirit’s witness through a religious ritual.

14 Interview with a marriage registrar at the Civil Marriage Registration Office, 3<sup>rd</sup> July 2017, Denpasar.

Judges also seem to emphasize this clear functional division between the *adat* and state law system. One judge explained that he does not use *adat* law in court decisions. He only uses *adat* law to reduce the penalty, using it for "balancing" (*mempertimbangkan*). By using *adat* law, he does not mean citing written *adat* law such as *awig-awig*, which are different in each area, so are difficult to apply in courts. Instead, he means considering "*adat law process*", i.e., reconciliation or a negotiation process between families, sometimes also with *kelian adat* (a local leader).<sup>15</sup>

One judge I interviewed said that in principle, in criminal cases, state law is above *adat* law. Still, *adat* law is important for balancing. In reality, state law is the solution if *adat* law cannot solve the dispute among people.<sup>16</sup> In civil cases, judges claim that *adat* law is as valid as state law, and they "*mix (campur)*" the use of these two laws depending on cases.<sup>17</sup>

Judges, marriage registrars, and *adat* law professors all accept *adat* marriage as "*sah*" (valid) in Balinese society. Judges are authorized to use *adat* law,<sup>18</sup> although not all judges use it.<sup>19</sup> A judge who is originally from the other province told me that when she needs to apply *adat* law in her judgement, she asks her Balinese colleagues for advice.<sup>20</sup> A good judgement, according to judges, is one that does not neglect social aspects and *adat* law while complying with state law and due process.<sup>21</sup>

In an interview, an *adat* law professor in Bali referred to Article 1 (2) of the Marriage Law that stipulates the validity of a marriage when it is conducted based on the couple's religious law and faith. They explained that in Bali, such religious law is found in *adat* law that derives its rules and principles from the *hukum asli* (living law) and Hindu law. There is no difference between *adat* and religious law in Bali: They are deeply intertwined and indistinguishable. He says that due to marriage's inherently private nature, it is difficult for the state to control it in practice, even when state law regulates it. "*State law cannot intervene in culture or adat. Laws need to be in harmony with culture, and social norms and they come from society*".<sup>22</sup>

15 Interview with a judge (A) at the Denpasar District Court, 16<sup>th</sup> June 2017.

16 Interview with a judge (A) at the Denpasar District Court, 16<sup>th</sup> June 2017.

17 Interview with a judge at the Semarapura District Court, 13<sup>th</sup> July 2017.

18 The Second Amendment to the 1945 Constitution is seen to have acknowledged *adat* law as a legal source (Priambodo 2018), and Article 27 of Law No.15 of 1970 on the Basic Principles of Judicial Powers states that a judge must identify, follow, and understand the values of the living law of the community.

19 Interview with a judge at Bangli District Court, 31<sup>st</sup> May 2017.

20 Interview with a judge at Semarapura District Court, 13<sup>th</sup> July 2017.

21 Interview with a judge at Semarapura District Court, 13<sup>th</sup> July 2017.

22 Interview with a professor of *adat* law in Bali, 25<sup>th</sup> May 2017, Denpasar.

### 4.2.3 Civil marriage registration

Interaction between *adat* law and state law is observed in civil marriage registration practices. Civil marriage registration is becoming increasingly important for people's lives due to increased educational opportunities because it is required for obtaining a birth certificate, which is needed for school attendance. There are two types of birth certificates in the Indonesian civil system: a 'normal' birth certificate (*akta kelahiran*) with the name of two parents, and 'deviant' single birth certificate (*akta tunggal*) with only the mother's name.<sup>23</sup> What enables a child to obtain the normal birth certificate is his or her parents' civil marriage registration before birth.

To obtain the 'normal' birth certificate, what matters is the date of the *adat* marriage ceremony, as the civil marriage at KCS is registered retrospectively at the date of the *adat* marriage ceremony. A civil marriage registrar explains:

*To have the father's name on a birth certificate, a child needs to be born after the adat marriage ceremony. Otherwise, the father can be anybody and we can't know. Even if the baby is born only one day before the adat marriage date, the birth certificate cannot be issued, but only the akta tunggal.*<sup>24</sup>

A child with *akta tunggal* is considered an 'illegitimate child' (*anak luar kawin*). One of the difficulties for children with *akta tunggal* is the absence of inheritance rights. As Bali is a patrilineal society, those who do not have a father's name on their birth certificate have no inheritance rights. Another difficulty is the social stigma attached to unmarried mothers and *akta tunggal*. A judge explained the consequences of having *akta tunggal* in one of the hearings:

*If the marriage is not recorded in KCS, the baby cannot have a status as an "anak bapak" (father's child), he/she will still be an "anak ibu" (single mother's child). Please do not give another burden to the baby just because his parents were being irresponsible. This baby must have a birth certificate with both names of his parents so that in the future he can go to school without problem or minimize the possibility to be bullied.*<sup>25</sup>

The mother's birth certificate and her ID card (KTP) or family card (*kartu keluarga*, a document that contains information such as residency and family members) are required for an *akta tunggal*. As the KTP is available only for those who are above 17 years old, if the mother is under 17 years old, she has to wait until she reaches that age.<sup>26</sup>

23 UU No.24 2013 tentang Administrasi Kependudukan.

24 Interview with a marriage registrar at the Denpasar Civil Marriage Registration Office, 3<sup>rd</sup> July 2017.

25 Court hearing, July 2017.

26 Interview with a marriage registrar at the Denpasar Civil Marriage Registration Office Denpasar, 3<sup>rd</sup> July 2017.



These certificates' functions and roles explain why people try to obtain civil marriage registrations even though an *adat* marriage is sufficient to avoid sanctions against extra-marital pregnancies. Chapter 3 explained the legal and illegal methods for registering marriages below the legal marriageable age. One of my case studies involves age manipulation, which is illegal, called *katrol usia*. When Novi and Angga married according to *adat*, Novi (a girl) was 17 years old, and Angga (a boy) was 15. A few months after their *adat* marriage ceremony, Angga's father asked the head of his community to issue Angga's KTP, listing his age as 19 (4 years older than his actual age). "If I am not mistaken, we paid 300,000 Rp (€18) to issue the marriage certificate", said Novi, but it seemed that this was all arranged by Angga's father.<sup>27</sup>

In their case, they married because Novi's family from North Bali pressured them when the family found out that they were living together in Denpasar. "My family wanted me to get married because their friends and families knew about our relationship. This was to avoid embarrassment (*malu*) in the village", said Novi. To avoid the feeling of *malu*, it is enough to marry according to *adat*. The young bride and groom did not even know the minimum age for marriage under state law until Angga's father told them. However, the marriage registration was important to Angga's father because it allowed them to obtain a birth certificate, which will allow their children to go to school. In another case of extra-marital pregnancy and underage marriage in Bangli (a regency in the east part of Bali), the girl's family wanted to ensure the birth certificate was available for the baby. The girl's uncle, who worked at the KCS in Bangli, arranged a KCS marriage registration by changing the boy's age from 18 to 19.

While such age manipulation operates outside of the state legal system, marriage dispensation is the only legal way to obtain civil marriage registration in the case of underage marriages. Although the 1974 Marriage Law does not specify when judges should grant dispensations, judges do usually grant them, understanding the importance of the certificates. One of the judges added:

*It is also because people are not comfortable and afraid of the stigma attached to pregnancy outside of marriage. There is this idea that if a couple already lives together without being married, the area becomes dirty (cuntake). So as a judge, I consider and balance all the factors (mempertimbangkan)".<sup>28</sup>*

Another judge explained that people mostly apply for marriage dispensations because of extra-marital pregnancies and mutual love relationships

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27 Interview with a couple that had a civil marriage registration by manipulating their age, May 2017.

28 Interview with a judge at Bangli District Court, 31<sup>st</sup> May 2017.



(*suka sama suka*). She granted a dispensation to conform to social norms (*norma sosial*) and the community's law (*hukum dari masyarakat*). She said:

*I have to think about the effect on and pressure from society – they will keep thinking, “who is the husband, who is the father?”, unless the pregnant girl gets married. So, there is the need to clarify the status. If the father's status is not clear, it is painful (sakit) for the baby when he/she grows up. So I feel pity (kasihan) for such situations.<sup>29</sup>*

#### 4.2.4 Marriage Dispensation Cases

To investigate the reasons and justifications for marriage dispensation, I analysed eight cases of marriage dispensation from two District Courts (*PN Bangli* and *PN Semarang*), judged between 2016 and 2017 (see Appendix 2). The applicants were all parent(s) of either the candidate wife or husband, sometimes of both of them. The couples were all young adolescents (14-20 years old). Perhaps surprisingly, in 75% of the cases, the underage party was a boy (i.e., a husband candidate). In the other two cases, the underage parties were girls as young as 14 years old. In three out of eight cases (Cases A, B, and C), the girl was pregnant at the time of the hearing. In the other five cases (Cases D, E, F, G, and H), the couple already had a child who was born after their *adat* marriage, conducted two to five years before the hearings. In these five cases, the couple conducted the *adat* marriage following the pregnancy.

In principle, a couple must obtain a marriage dispensation before an *adat* wedding,<sup>30</sup> but all of the cases were heard after such a wedding. One applicant I interviewed, the father of the wife candidate in a dispensation case, explained the urgency for an *adat* wedding: “We needed to hurry because there are not many ‘good days’ (*hari baik*) – and we were afraid that the baby would be born before the *adat* marriage”.<sup>31</sup> In Bali, an *adat* marriage is to be planned on auspicious days called ‘*hari baik*’, which can make the planning of such a wedding complicated and pressing.

According to a civil marriage registrar, marriage dispensation has been increasingly difficult to obtain, as judges and courts do not want to be seen as legalizing underage marriages.<sup>32</sup> Indeed, some judges sympathize with the liberal values and clarify their point that underage marriages are “strongly discouraged”, as “they risk reproductive health of women who are unprepared and still psychologically unstable”. They emphasize that “it should not be too easy to grant dispensations to underage marriages if there are no logical reasons for the children's interest” (Cases D, F, and G).

29 Interview with a judge at Semarang District Court, 13<sup>th</sup> July 2017.

30 Interview with a judge at Semarang District Court, 13<sup>th</sup> July 2017.

31 Interview with an applicant for marriage dispensation in a district court (parents of the children who were to marry), June 2017.

32 Interview with a marriage registrar at the Denpasar Civil Marriage Registration Office, 3<sup>rd</sup> July 2017.

The court decisions also explicitly denounce certain young sexual relationships. The court decisions often use phrases such as “the relationship over the limit (*hubungan tersebut melewati batas*)” (Case C), “such a free relationship (*pergaulannya yang begitu bebas*)” (Cases D, F, and G), “a relationship as if between husband and wife (*hubungan layaknya suami istri*)” (Case E), to describe the relationship between the couples. They claim such a sexual relationship is caused by “their social freedom and lack of supervision from parents” (Cases D, F, and G).

In spite of such moral condemnation of adolescent relationships and liberal ideals to prevent child marriages, judges granted dispensations in all eight cases. The judges justify their decisions in several ways. First, they rely on the Child Protection Law:

*Their marriage (pregnancy) was caused by their social freedom and lack of supervision from parents, so the future of the newborn baby requires a complete family consisting of father and mother to provide care and devoted love for the baby's growth. Child protection aims to guarantee the fulfilment of children's rights in order to live, grow, develop and participate optimally in accordance with human dignity and values, and to be protected from violence and discrimination (Article 3 of the Child Protection Law) (Case D, F, G).*

A second justification notes the negative consequences of not granting a dispensation. “If the marriage dispensation is not granted, there will be an unfavourable negative impact for both parties, so the judge believes that the best legal solution is to provide marriage dispensation” (Case B). This vague use of ‘negative impact’ resonates with the use of the Islamic concept ‘*kemaslahatan*’ (common good) in the marriage dispensation cases in West Java (Horii 2015; see also Chapter 3). This comparison also illuminates that judges in West Java and Bali use different means (religious law, customary law, and state law) to arrive at the same conclusion (to grant the dispensation). While Bali judges did use the Child Protection Law, the outcome did not differ from the West Java court decisions, where judges relied instead on Islamic and state laws.

Judges also strengthen their reasoning by proving that their decisions do not conflict with state law. Case B writes: “Granting marriage dispensation has been reasoned and is not against state law”. Case A emphasizes that the decision does not contradict with Article 7(1) of the Marriage Law, as “the minimum age limit in the provision means that married persons are expected to have maturity, mental maturity, and adequate physical strength”. Another judge uses Article 2(1) of the Marriage Law, which recognizes the validity of a marriage that took place in accordance with the religious laws of the parties. That judge stated: “Their marriage was a lawful marriage carried out by a Hindu religion, so it has fulfilled the provision” (Cases D, F, and G).

While the judges use various arguments to discourage and justify underage marriage simultaneously, other judges grant dispensations more straightforwardly. For instance, Case E reads, without elaborating: “They were married in October 2014, when they were both 17 years old. As they obtained their parents’ permission for the marriage, and as their marriage was based on mutual love and no-coercion, the marriage was lawful”. This contrast shows the difference in judges’ attitudes and opinions towards underage ‘child’ marriage.

Three out of eight cases mention *adat* / religious law. Some cases discuss the concept of *cuntake/leteh*: “As the girl is pregnant, if she is not immediately married, there will be a *cuntake/leteh* situation according to *adat* and religion” (Cases A and B). They also stated that *adat* law does not prohibit underage marriage: “*Adat* law does not set a certain age limitation on performing marriage” (Case A), “The decision also does not conflict with the rules and legislation in force and *adat* law in the applicants’ residence” (Case A), and “There was no barrier to conducting the marriage either in terms of kinship and *adat* relationships, no prohibition to conduct marriage according to Balinese *Adat* Law and Hinduism” (Case B). Case H lists the elements that validate a Hindu marriage<sup>33</sup> to demonstrate that the underage marriage was religiously valid.

Judges emphasize the relational aspect of marriage in association with *adat* law, to justify the marriage of a child. Case A reads:

*Adat law allows the marriage of children to be executed. This is because in adat law, marriage is not merely the union of both individuals, but also the union of two relatives (keluarga kerabat). An underage marriages or a marriage of children is not a problem in adat law because the wife and husband will be guided by their family, so adat law does not prohibit a marriage of children.*

This communal nature of *adat* marriage was also explained by an *adat* law professor in Bali:

*The structure of adat law starts from the family and goes up to the banjar (hamlet) and the desa (village) levels. Each part of this structure has an equal position. (...) This is why in Bali, marriage is not only marriage among the couple, but also among their extended family, banjar and village, as a marriage involves a number of parties representing these structures and the witnesses at the wedding ceremony.*<sup>34</sup>

33 “Their marriage was conducted according to Hinduism and *adat* so it is legal (*sah*). According to the Decisions (*Keputusan-keputusan dan Ketetapan-ketetapan*) of the Parisada Hindu Dharma (PHDi Kabupaten Badung, 1986): the validity of a Hindu marriage is determined by the presence of *panyangaskara* with *bhuta* witnesses and witnesses as well as *penyaksi* (witness) from *prajuru adat* (*adat* leader) as elements from *manusa saksi*. This is what is often referred to as *tri upasaksi* in a marriage ceremony (*samskara wiwaha*)” (Case H).

34 Interview with a professor of *adat* law in Bali, 25<sup>th</sup> May 2017, Denpasar.

The analysis of dispensation cases demonstrates that judges use both state and *adat* law to justify and strengthen the legal grounds for their decisions to grant marriage dispensation to underage couples. They emphasize the importance of marriage in reaction to extra-marital pregnancies. Marriage practically facilitates participation in the welfare state and education system through civil marriage registration. Meanwhile, it is also of moral importance because it preserves the moral equilibrium of the community.

The Child Protection Law is used in a counter-intuitive way to serve both moral and practical goals. On the one hand, the law is inspired by modern values and liberal principles, inspired by the UN Convention on the Rights of the Child. Article 26(1) stipulates the parental obligation to prevent child marriages. On the other hand, it is used in practice to legalize underage marriages and thus, to protect babies from societal harm. This reasoning highlights that babies are also children, so 'child brides' are not the only 'children' on which international advocacy should focus.

#### 4.3 CRIMINAL LAW: SEX CRIMES

Another way to understand how judges (as state representatives) deal with young people's extra-marital pregnancies is cases of 'sex crimes' involving minors. As discussed, extra-marital pregnancies are the main motivation for marriage dispensations. This section will demonstrate that sex crimes are sometimes used in cases where marriage dispensation fails as a solution to such pregnancies. Therefore, these two types of cases are closely interlinked. Under the current Indonesian Penal Code and the Child Protection Law, it is a criminal offence to "play tricks, tell a series of lies, or persuade" children under age 18 to have sexual intercourse.<sup>35</sup> Pompe's (1994) study on criminal cases of extra-marital sex in Indonesia is illuminating. He observed that in the 1990s, "the judiciary was drawing *adat* more and more into the sphere of state criminal law" (Ibid: 112). For instance, the Supreme Court based its judgements in several Balinese cases on an old Balinese code of law, which specifies that if a man induces a woman to have sexual intercourse with him by making false promises of marriage, he is liable to punishment (Ibid: 116). He concluded that "*adat* is the instrument, the legitimation, and the pretext in the effectuation" of a kind of moral reform by the judiciary "to fight the social reality of extra-marital sexual relations, and, more in particular, the practice of men inducing women by means of a false promise of marriage to have sexual intercourse with them" (Ibid: 118).

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35 Currently, there is a debate about reforming the Penal Code so that extra- and pre-marital sexual intercourse becomes illegal regardless of age.

Today, the media report sex crime cases sensationally, and people in Bali are well aware that premarital sexual intercourse by minors can be a criminal offence. The fear of prosecution and imprisonment has become an incentive for the boy and his family to agree on marrying the girl. The girls' families also use the state legal system to take revenge, to disagree with their daughters' relationship, or to negotiate with the boy's family.

In Ratna's case, her family reported the case to the police when her ex-boyfriend and his family were not willing to marry her. This reporting was her family's way of negotiating. In other cases, however, girls' families report the case even when the boy is willing to marry. A judge explained:

*It is always parents of the girl who bring such cases to the police. Parents who do not agree to marry their daughters. Even though the boy's (defendant's) family often offer to marry the girl. But the girls' family members are angry at the situation of their daughter's pregnancy, and refuse the offer, as they want their daughters to continue school and start working (instead of marrying).<sup>36</sup>*

I documented seven cases of sex crimes regarding sexual intercourse between a boy (16-18 years old) and a girl (13-18 years old), decided between 2013 and 2016 in the District Court Denpasar (see Appendix 3). In six out of seven cases, the boy (defendant) and the girl (victim) were in a romantic relationship (*pacaran*).

The primary source of state law used in these cases is the Child Protection Law, sometimes accompanied by some provisions from the Penal Code (KUHP). Article 82 of the Child Protection Law states:

*(1) Everyone who deliberately commits violence or threats of violence, forcing a child to commit sexual intercourse with him or with others, is subject to a maximum penalty of 15 (fifteen) years of imprisonment and 3 (three) years and a fine of Rp. 300,000,000 (three hundred million) at most and Rp. 60,000,000 (sixty million) at least.*

*(2) The provision of crimes as meant in verse (1) also apply to every man who deliberately plays tricks, tells a series of lies, or persuades a child to commit sexual intercourse with him or others.*

The law does not specify the gender of the defendants ("Everyone who deliberately commits ..."). Still, the analysed cases always involved male defendants, including when the girl was older than the boy, such as in Ratna and Pranata's case. A judge explained in an interview:

*It is because girls are often younger and manipulated. For instance, they are in pacaran, but the boy promises the girl that he will marry. This is an act of lying, and this can be the ground of the charge. [...] Because there is a feeling. At the beginning, they are both*

36 Interview with a judge (B) at Denpasar District Court, 16<sup>th</sup> June 2017.

*happy, but later it is the girl who gets hurt. Girls often say, "I was forced", or "he said he would marry me". This is considered as seduction (bujuk rayu). [...] If the boy reported to the police for being cheated, the police would ask: what did he lose from the sexual intercourse? Male virginity (keperjakaan)?<sup>37</sup>*

The first observation is that, as Pompe (1994) also noted, the boys' promises to marry weigh heavily. Making these promises is considered "playing tricks, telling a series of lies, or persuading a child to commit sexual intercourse" (Child Protection Law, Article 82(2)). Case D's court decision emphasized that when the victim was hesitant to begin sexual intercourse, the defendant convinced her by promising to 'take responsibility' (i.e., to marry her) and by saying that he wants to have sex as a proof of her love towards him. In Case G, the court decision wrote: "[W]hen the victim refused to have sex because of the fear of pregnancy, the defendant insisted and promised her to take responsibility and marry her if she would become pregnant".

Notably, this promise itself falls under 'tricks, lies, or persuasion', and the intention and the outcome did not matter. For instance, in Case A, the defendant was sentenced for imprisonment, although he clearly was willing to marry the victim after she became pregnant. The court decision notes what the defendant said: "I came inside. I will marry you." "If you fail to have [a] miscarriage<sup>38</sup>, we will just marry. I have a house in Buleleng, we [will] just live there." In the end, the victim did not want to marry the defendant. She already had another boyfriend, whom she married by the time of the hearing.

So why did the judge find him guilty? The judgment writes, "Because of the pregnancy, the girl had to marry and become a housewife, ... [so] she cannot enjoy the childhood period with her peers." This "damage to the future of the victim" is an important factor in other cases as well. Cases A, D, E, C, F and G mention this as an aggravating factor.

It should be noted that this 'damage to the future' is caused not necessarily by a pregnancy, but merely by the act of sexual intercourse. Judges place weight on the 'tainted' reputation of the girl and her family. The court decisions emphasize the shame of losing one's virginity, which causes long-term damage to the girl's future. These factors are mentioned in the indictments' reasons, especially in cases of mutual love (*suka-sama-suka*), such as Case E. In these cases, judges justify their decisions with societal factors. Case E reads:

<sup>37</sup> Interview with a judge (B) at Denpasar District Court, 16<sup>th</sup> June 2017.

<sup>38</sup> As abortion is illegal in Indonesia, people often use 'miscarriage' in place of 'abortion' (see also Section 5.3.3).



*Even though intercourse was based on mutual willingness, and there was no compulsion, the defendant's action negatively impacted the victim amid her community. The victim's reputation got tainted. The surrounding community scorns her if she is not a virgin, resulting in prolonged shame for both the victim and her extended family. The defendant's act is not a good example for other children. His act has caused the victim trauma and shame among her community and her school. His act damaged the victim's future. His act disturbed society (masyarakat).*

In addition to basing the indictment on state laws, in Cases A, B, and E, judges also relied on the society's moral code. The court decisions write: "the religious norm that is not to have sexual intercourse outside of husband/wife relationship is violated"; "according to 'religious norms' and 'norms in community', the act is only for legally (*sah*) married adults"; and "sexual intercourse without *adat* marriage is against 'norms of decency' and 'legal norms' that damage the reputation of the girl even if it was a case of mutual love".

The moral codes are also emphasized in hearings. Judges ask questions about the nature of the relationship between the girl as a victim and the boy as a defendant. For example, they ask about the length of their relationship, and how often and where they had sexual intercourse. When the girl would answer, the judge would clearly condemn their actions. "So you were already in a relationship when you were in SMP? What kind of decision is that?" "7 times (you had sexual intercourse)? What did you say to your parents? [...] You told your parents you were 'going out' but in reality you were 'going in'!"<sup>39</sup>

The judge also preached *adat*/religious norms to the youngsters:

*How did you score on the religious subject? I learnt this subject when I was in elementary school, and I still remember it today. It is called "Brahmacari", meaning the phase to study for your future when you are entering the next level, "Grehasta" (marriage life). [...] Have you heard the Balinese word "Luh Luih (perempuan baik-baik, i.e., a good girl)"? But if you can't protect yourself, you just become a "Luh Luhu" (Luhu means rubbish. So Luh Luhu means naughty girl or bitch).<sup>40</sup>*

Such moral and societal elements are fundamental factors for the judges. According to a judge, "It is a matter for the two families. If there is no conflict, there is no problem".<sup>41</sup> I asked him why such defendants could be exempted from the indictment through a settlement since it is technically a fixed criminal charge once reported. Police also turn a blind eye if no one reports the case. He explained the answer was "restorative justice". He said, "That is because it's about two families, and about community. If they get married, the problem is already over. This is because society thinks it's acceptable. It's about

39 Court hearing, July 2017.

40 Court hearing, July 2017.

41 Interview with a judge (A) at Denpasar District Court, 16<sup>th</sup> June 2017.



the environment and the societal connection (*lingkungan*), and the community (*masyarakat*)".<sup>42</sup> In Ratna and Pranata's case, after they agreed to marry, while they could no longer withdraw the case, the judge eventually decided not to indict Pranata. The judicial outcome would have been different, however, if they had continued to be hostile to each other without the marriage plan that reconciled them.

Mediation (*diversi*) plays an important role in this regard. Judges explained: "If the boy and the girl are still in love, they can try mediation. She would decide that the boy does not need to go to jail, and only needs probation (*hukuman percobaan*)".<sup>43</sup> "If the boy's family offers to marry the girl and if the girl's family also accepts it at mediation, the boy will not be charged".<sup>44</sup>

Judges consider a good judgment to note the environment's spiritual balance:

*We have to look at children and their environment. [...] Balancing the feelings of both families is also important. Feelings of justice (rasa keadilan) for the community should also be considered, as a judgment needs to set a good example for the society.*<sup>45</sup>

The analysis of the court decisions and interviews indicates that those judgements aim to calm down familial and communal unrest, rather than technical judicial decisions. Such decisions, according to judges, are to "restore harmony and peace in the community". In this sense, my findings indicate a slightly different perspective than Pompe's (1994) account on how judges handle sex crime cases. While he suggests that judges take a moral approach in using *adat* law to condemn extra-marital sexual relations, my cases show that it is also a pragmatic approach to restoring harmony, choosing solutions that maximize benefits for all parties.

However, imprisoning boys as a solution for 'harmony' can unfairly damage their future, a sacrifice for the community's moral equilibrium. It is an undesirable outcome of over-criminalization (Hermawan 2018) that disproportionately affects boys. In both sex crime and dispensation cases, courts use state laws somewhat differently than how they were designed to be used. The Child Protection Law is meant to protect children regardless of gender, and the specific clause about criminalization of sexual intercourse with a minor is made to protect children from sexual violence (particularly paedophilia). However, in practice, it specifically penalizes boys who had sexual relations with their girlfriends.

42 Interview with a judge (A) at Denpasar District Court, 16<sup>th</sup> June 2017.

43 Interview with a judge (B) at Denpasar District Court, 16<sup>th</sup> June 2017.

44 Interview with a judge (A) at Denpasar District Court, 16<sup>th</sup> June 2017.

45 Interview with a judge (B) at Denpasar District Court, 16<sup>th</sup> June 2017.

#### 4.4 CONCLUSION

In this chapter, I presented two types of legal cases: marriage dispensations and sex crimes. These cases illuminated how state agents in Bali navigate state law through local concerns and *adat* law when dealing with extra-marital teenage pregnancies. When the community's morality is at stake in such 'emergencies', families, *adat* authorities, and state agents collaborate to find a way to solve the situation through a locally accepted normative system.

Marriage dispensation, as part of the state law system, is a solution facilitated by judges, reconciling the state system with local solutions according to *adat*. Judges emphasize both the moral and practical importance of granting dispensations. To be able to grant them, the Child Protection Law is used in a counter-intuitive way. The law is inspired by modern values and is liberal in principle. However, when applied with *adat* law in local courts, it serves communitarian values, mainly maintaining social equilibrium by legalizing underage marriages. When marriage does not work as a solution to the 'emergency', parties sometimes begin a sex crime prosecution, to quell the familial and communal unrest. The possibility of prosecution is occasionally used to pressure boys to marry. The two types of legal cases illuminate that state laws, designed to achieve the goals of liberal legalism, are in practice used by judges to serve the goals of collectivism, to maintain the community's harmony and morality.

What does the existence of multiple legal orders mean for the realization of human rights? In most of the examined cases, judges allowed the legalization of child marriages by navigating different kinds of legal systems. Thus, it might seem that legal pluralism *hinders* the realization of human rights. In other words, it did not contribute to the substantive goals of *eliminating child marriage*, towards which human rights institutions aspire. However, judges' decisions to maintain or restore harmony also seem to help children (at least girls and babies), their families, and their community by saving them from 'emergency'. If Indonesia indeed shares the "harmony ideology" then "a bad compromise is better than a good fight" (Nader 1991: 1), whereas we should also acknowledge that harmony occasionally comes at a cost to individuals (Ibid: 309). Communitarianism is not inconsistent with the idea of human rights unless the community begins to "impinge unduly" on the individual (Henkin 1989: 16).

Even if the compromise for the sake of harmony means hindering the realization of human rights, it seems wrong to blame legal pluralism, since judges used both *adat*/religious law and state law to maintain the harmony. When comparing the marriage dispensation cases in West Java and Bali, it also becomes apparent that even if means are different (e.g., the types of laws the judgements are based on), the outcome is the same (i.e., granting the dispensation). That means allowing the legalization of child marriages

did not stem from legal pluralism. Could it then be that legal pluralism *leads* to the realization of human rights? That depends on how one defines the nature of human rights.

In light of liberal values, the protection of autonomy and individual rights is well embedded in principle but is out of reach in practice. This may be irrelevant. As the analysis has shown, laws in practice in Bali (i.e., judicial decisions) are in favour of social equilibrium and the protection of rights of the 'relational self'. The difficulties Ratna's family faced with Ratna remaining an unmarried mother indicate that compliance with *adat* law is essential to protect relational self rights, both for Ratna and for her baby. This weight on relational rights also has to do with the communal nature of Indonesian marriage (see, e.g., Platt 2017). For those convinced that child marriage is intrinsically harmful, it might be hard to conceive of the practice as serving a protective function. However, there are clearly local logics of child protection, focusing on consolidating family interests and securing the social place (Boyden, Pankhurst, and Tafere 2012).

Considering people's needs for marriage arise from both *adat* and state laws, it is understandable that marriage is the best possible solution to teenage pregnancies. This is the conclusion that all local activists agreed on during a Focus Group Discussion I organized.<sup>46</sup> These activists included a local legal aid association, a government agency for the protection of women and children, and a women's section of a Hindu organization in Bali. They suggested that the two families make a legal agreement that the children will marry, but will continue their education and live in separate households. This is precisely what Ratna and Pranata did. It secures a desirable future for the children within the existing *adat* framework. *Adat* rules are thus somewhat dynamic and flexible. For instance, the Majelis Utama Desa Pakraman Bali (MUDP, Supreme Assembly of the Village Council) has changed the Balinese *adat* law on inheritance so that husbands and wives have the same status and property rights within marriage (Westendorp 2015: 441-2). Given the possibilities for such changes, another solution to child marriage is to adapt the *adat* rules. At the FGD, a female member of the Hindu organization (*Peran Wanita Hindu Dharma Indonesia*, WHDI) suggested changing the Balinese *adat* law regarding divorce, so that child brides and grooms have easier legal means of exiting the marriage.<sup>47</sup>

As this chapter has shown, marriage's communal aspects are extremely important for Balinese people. Marriage impacts their sense of belonging to the local community and the community's moral equilibrium. Therefore, the rights of the relational self should be as protected as modern individual

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46 FGD with local activists, 7<sup>th</sup> August 2017, Denpasar.

47 FGD with local activists, 7<sup>th</sup> August 2017, Denpasar.

rights. Depending on how one defines the nature of rights, as Chua and Engle (2015: 225) write, both state law and customary/traditional law can be both empowering and disempowering, both liberating and constraining. In this sense, it would not be helpful to identify legal pluralism or *adat*/religious law as an obstacle to the realization of human rights. On the contrary, if their realization means it occurs from the perspectives of rights-holders themselves, *adat* law is an essential tool for both understanding what rights mean for them and supporting them in claiming *their* rights.