



Legal Protection of Child's Rights Who Conducts of Marriage

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Every child must be protected and guarded because in addition to the nation's next-generation, also because children have rights in transition. Unfortunately, children cannot enjoy their rights, such as getting an education, playing rights, rights to be creative and to be creative. Law Number 4 of 1979 concerning Child Welfare, Law Number 39 of 1999 concerning Human Rights, Law Number 23 of 2002 concerning Child Protection which was later amended by Law of Law Number 35 of 2014. Implementation of the legality of child protection does not work effectively needs socialization, so that child marriages do not occur and children can enjoy their rights as a child.

A. Introduction

Man is, by nature, a social animal with the freedom to interact with others. His freedom to interact with others helps him achieve his purposes in life; one of them is to establish a family through marriage. Article 1 of the Law of the Republic of Indonesia Number 1 of 1974 on Marriage stated that the purpose of marriage is to establish a happy and lasting family founded on the belief in God Almighty. Muchtar Kamal further described marriage as follows:¹ (1) to generate legitimate offspring; (2) to keep away from acts prohibited by Allah; (3) to grow intimacy between husband and wife; (4) to obey the *sunnah* of the Prophet PBUH; (5) to keep purity in the offsprings. The two persons of different sex have to synergize with each other to deal with differences in their characters, to be highly committed to building a

¹ Abdi Koro, *Perlindungan Anak di Bawah Umur Dalam Perkawinan Usia Muda dan Perkawinan Siri* (Bandung: Alumnii, 2012), 49.

happy, enduring family. In essence, this means marriage for once in a lifetime.

Marital commitment is very important to maintain the marriage for the rest of life. Therefore, marriage requires physical and mental maturity. This is in line with Abdi Koro's opinion that successful marriage can not be expected from spouses who lacked mental or emotional maturity. It requires responsibility and maturity in both physical and mental aspects.² Maturity in physical and mental is related to the ages of spouses.

The minimum age for marriage is not institutionalized at first then appears in a new form of regulations that must be agreed on nationally, even becoming a marriage according to the state.³ The age limitation for marriage is needed because it is to improve the quality of Indonesian children as a nation's generation. The existence of marital age restrictions, it is expected that Indonesian children can get a more extended education period so that later it can be able to improve the quality of Indonesian human resources.⁴

Concerning the legal age to marry, Article 6 Paragraph (2) of Law Number 1 of 1974 on Marriage stipulated that it is minimally 21 years old and marriage of a person under the age of 21 years old shall require the consent of both parents. Further, Article 7 paragraph (1) of Law Number 1 of 1974 on Marriage stated that a marriage is only allowed when the male and female marriage candidates have reached the age of 19 and 16 years, respectively. In deviation from the provision in paragraph (1) of this article, dispensation may be petitioned to the Court or other authority designated by their parents of both future groom and bride. The provision has been annulled by the decision of Constitutional Court Number 74/PUU-XII/2014 concerning the marriageable age.

From articles stipulated in the Law No. 1 of 1974 on Marriage, we can see that this law does not encourage physical and mental maturity of the prospective spouses because there is no prohibition for them to get married if they still under the age of 21. Yohana Yombise, the Minister for Women's Empowerment and Child Protection, said that West Sulawesi Province again ranked first in child marriage in this country.⁵ The Constitutional Court stated that the problem of child marriage is at emergency levels in Indonesia

² *Ibid.*, 48.

³ Ahmad Masfuful Fuad, "Ketentuan Batas Minimal Usia Kawin: Sejarah, Implikasi Penetapan Undang-Undang Perkawinan," *Petita* 1, No. 1 (2016): 40. <https://doi.org/10.22373/petita.v1i1.77>

⁴ Musyarrofa Rahmawati dkk., "Efektivitas Pembatasan Usia Perkawinan Berdasarkan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan," *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan* 3, No. 1 (2018): 101.

⁵ Nurhadi, "Yohana: Sulbar Nomor 1 Angka Pernikahan Dini di Indonesia", December 13, 2019. Accessed on <http://makassar.tribunnews.com/2018/04/12/yohana-sulbar-nomor-1-angka-pernikahan-dini-di-indonesia>.

as indicated by the 2017 BPS data that the distribution of child marriage achieved more than 25 per cent in 23 out of total 34 provinces in Indonesia.⁶ In 2019 the House of Representatives and the government changed the age limit of marriage for both men and women is the same, namely 19 years.⁷

Not only those child brides lack in physical and emotional maturity required to build a healthy family, but also their rights remained unfulfilled. The Indonesian Government passed Law No. 35 of 2014, which amended Law No. 23 of 2002 concerning Child Protection (next is called by Child Protection Law). Based on the preliminary description above, this paper discusses (1) what the legal consequences of child marriages are? And (2) which children's rights are not overlooked as a result of children marriages? The article uses a normative juridical method that focuses on the applicable laws and regulations. The legal material used in this paper is divided into two, namely: 1) Primary legal material, which is sourced from Indonesian laws and regulations governing children's rights, including Law Number 1 of 1974 concerning Marriage, the Law on Child Protection, and Law Number 39 of 1999 concerning Human Rights; 2) Secondary legal material consists of literature books and journals related to this writing. The writing technique uses descriptive analysis method that is describing the provisions of the applicable laws and regulations and analyzes to be able to demonstrate the ideal application of the protection of children's rights.

B. Discussion

1. Legal Consequences of Child Marriage

Related to the age limit of children in the Child Protection Act stipulates that the age limit of children is 18 years, whereas if you see in Article 1 paragraph 2 of Law Number 4 of 1979 concerning Child Welfare determine the age limit of children is if they have not reached 21 years and have not done marriage. These settings are the same as those set in Article 6 paragraph (2) of Law Number 1 of 1974 on Marriage specifies the minimum age for marriage at 21 years old for the reasons that a person of 21 is considered as an adult with a capacity to think logically for whatever he does, especially in businesses. A business requires logical reasoning to calculate the profit and loss, and a person of 21 is deemed to be able to consider whether what he did for business will give him profits or losses.⁸ If

⁶ Eva Safitri, "MK: Indonesia Darurat Perkawinan Anak", December 13, 2019. Accessed on <https://news.detik.com/berita/d-4342214/mk-indonesia-darurat-perkawinan-anak>.

⁷ Kristian Erdianto, "DPR dan Pemerintah Sepakat Batas Usia Perkawinan Menjadi 19 Tahun", January 20, 2020. Accessed on <https://nasional.kompas.com/reas/2019/09/13/21151951/dpr-dan-pemerintah-sepakat-batas-usia-perkawinan-menjadi-19-tahun>

⁸ Moch. Isaeni, *Op.Cit.*, 109.

we see from Law Number 4 of 1979 concerning Child Welfare, it can be interpreted that if a child marries before the age of 21 years, then he is considered an adult, since his/her marriage has altered his/her responsibility as an adult.

The idea that it would be better for parents to allow their children to marry rather than letting them fall into promiscuity, as stated by Eddy Fadlyana and Shinta Larasaty, is commonly based on the fear of an extramarital pregnancy due to promiscuity or on the desire to strengthen the kinship.⁹ In addition, economic motives can also serve as the driver of child marriage. Children dropping out of school for economic reasons (especially those from low-income families) are prone to enormous parental pressure to marry earlier.¹⁰ Moreover, children who married earlier do not have the skills required to earn a living so that they economically dependent on their family, especially that of the husband's.¹¹ This, in fact, runs contrary to Article 1 of Law Number 1 of 1974 on Marriage where it is stated that the purpose of marriage is to develop a happy, lasting family. This means that they have to be ready to depend on themselves as a family without relying on the help of their relatives.¹²

Marriages are legal events where married couples are subject to legal consequences. Syaidu Syahar argued that marriage is a legal act, followed by legal consequences such as rights and obligations to other parties with whom the married couple made a certain relationship.¹³ Islamic law does not specify the age limit for marriage because the primary condition is only the physical puberty (baligh). The term baligh refers to the physical maturity of a person without defining a specific age limit, but it put more emphasis on mental prowess.¹⁴

This legal consequence is closely related to the rights and obligations that husband and wife must fulfil. The principle of proportionality also applies in marriage, i.e. the rights and obligations of the spouses in a marriage. The principle of proportionality is used normatively in Article 31 paragraph (2) of Law Number 1 of 1974 on Marriage. It stipulates that rights and obligations of the married couples in family and social life are to be fulfilled proportionally. The rights and obligations in family life also include sexual procreation that results in the wife's pregnancy. Marriage is not only about satisfying sexual desire; more than that, it is also about the human

⁹ Eddy Fadlyana and Shinta Larasaty, "Pernikahan Usia Dini dan Permasalahannya," *Sari Pediatri* 11, No. 2 (2009), 138. <http://dx.doi.org/10.14238/sp11.2.2009.136-41>.

¹⁰ Abdi Koro, *Op.Cit.*, 111.

¹¹ Djamilah and Reni Kartikawati, *Op.Cit.*, 13.

¹² Moch. Isnaeni, *Hukum Perkawinan Indonesia* (Surabaya Revka Petra Media, 2016), 56.

¹³ Abdi Koro, *Op.Cit.*, 177.

¹⁴ Faiq Tobroni, "Putusan Nomor 74/PUU-XII/2014 dan Standar Konstitusional Dispensasi Perkawinan," *Jurnal Konstitusi* 14, No. 3 (2017), 590. <https://doi.org/10.31078/jk1436>.

relationship to create a just and prosperous life to form a healthy, smart and equitable generation.¹⁵ While the law stipulates that the rights and obligations of husband are proportional to those of wife's, it is commonly assumed that women are inferior to men. It is a commonplace assumption in a highly patriarchal system where husbands treat wives unfairly.

Looking further into this, the values of justice in the rights and obligations of husband and wife have not been consistently expressed as the associated patriarchal characteristics seem to be more noticeable in Article 21 paragraph (3) of the Law No. 1 of 1974 on Marriage which stipulates that the husband is the head of the family, the wife is the mother of the household. Article 34 paragraph (1) states that the husband shall protect his wife and provide for all necessities of life required in a family to the best of his ability. Likewise, Article 34 paragraph (2) states that the wife shall manage the household to the best of her ability. There seems to be ambiguity in Articles 31, and 34 paragraphs (1) and (2), where it is stated that husband as the head of the family shall provide for all necessities of life required in a family and wife as the mother of the household shall manage the household to the best of her ability. This implies that husbands are for external matters such as to earn for living and wives are for internal issues such as managing the household. The objection from the feminist organization is that the Article portrays women as inferior beings that are socially, economically and legally subordinated.¹⁶

2. Unfulfilled Children's Rights Due to Child Marriage

What makes child protection important is that children are our future. Before the Indonesian government ratified the Convention on the Rights of the Child in 1990, it had already ratified Law Number 4 of 1979 concerning Child Welfare. Chapter III emphasize parent responsibility toward children's welfare, especially Article 9, which states that parents are the first to be responsible for the realization of children's welfare both spiritually, physically and socially. The article tells us that parents have the responsibility toward their children's education and future, both materially and spiritually. A marriage between a child and an adult tends to be considered an exploitation of children and is thought to be detrimental to their thinking and future.¹⁷ Parents are fully responsible for the presence of a child in a family. Parents have the first and foremost duties and

¹⁵ Kaharuddin, *Nilai-Nilai Filosofi Perkawinan Menurut Hukum Perkawinan Islam dan Undang-Undang RI Nomor 1 Tahun 1974 Tentang Perkawinan* (Jakarta: Mitra Wacana Media, 2015), 153.

¹⁶ Ahmad Tholabi Kharlie, *Hukum Keluarga Indonesia* (Jakarta: Sinar Grafika, 2013), 250-251.

¹⁷ Mardi Candra, *Aspek Perlindungan Anak Indonesia Analisis tentang Perkawinan di Bawah Umur* (Jakarta: Kencana, 2018), 4.

responsibilities toward their children's education, such as in religious, moral, sexual, cultural and social matters.¹⁸ Both parents bear the responsibility for the sustenance and education of their children to the best of their ability as stipulated in Article 45 paragraph (1) of Law No 1 of 1974 on Marriage. Those parental duties are supposed to encourage them to guarantee the fulfilment of children's rights. Article 26 paragraph (1) of Child Protection Law stipulates that parents are obliged and responsible for: (a) caregiving, nurturing, educating, and protecting a child; (b) growing and developing a child in line with his/her competencies, talent and interest; (c) preventing early marriage at child's age, and (d) providing character education and cultivating values in children. This study focuses on the duties and responsibilities of parents in preventing child marriage.

It is important to note that after the enactment of Law No 4 of 1979 on Child Welfare, Indonesia ratified the Convention on the Rights of the Child in 1990 by Presidential Decree No. 36 of 1990 on the ratification of the Convention on the Rights of the Child. According to Muhammad Joni and Zulchaina Z. Tanamas, child rights included in the Convention can be classified into four categories:¹⁹ (1) right to survival and to enjoy the highest attainable standard of health and to facilities for the treatment of illness; (2) right to protection; (3) right to development; and (4) right to participation. Provisions regarding child rights are further outlined in Law Number 39 of 1999 concerning Human Rights, which are then specifically regulated in Child Protection Law. The principles of child protection as specifically set forth in the Law of Child Protection are as follows:²⁰ (1) non-discrimination, i.e. children entitled to equal treatment; (2) best interest for children it means that in all child-related actions carried out by the government, community, legislature and judicial body, it is the best interest of the child that must be taken into the primary consideration; (3) rights to live, survive, and develop; and (4) appreciation of child's opinion, every child is entitled to take part and expresses his or her opinion in decision making, especially on the matters that will affect his or her life.

A child is entitled to protection since he was in the prenatal period. This has been stipulated in Article 2 of the Civil Code stating that the unborn shall be considered as born. In the event that a child is stillborn, it shall be deemed to have never existed. This means that the fulfilment of children's rights began when they were unborn. For example, if the father of the unborn dies, then the rightful heirs to the deceased father will be his wife and the

¹⁸ Meikel Kkaliks Leles Kancak, "Perkawinan yang Tak Terceraikan Menurut Hukum Kanonik", *Lex et Societatis* 2, No. 3 (2014): 86.

¹⁹ Abintoro Prakoso., *Hukum Perlindungan Anak* (Yogyakarta: Laksbang Pressindo, 2016), 102-103.

²⁰ Mardi Candra, *Op.Cit.*, 63.

unborn. Article 2 of the Indonesian Civil Code is integrated into Article 52 paragraph (2) of Law No. 39 of 1999 on Human Rights that defined the term children's right as human rights and for their own interest children's rights are recognized and protected by law since they were unborn. Therefore, it is clear that children's rights are recognized not only shortly after they were born, but also when they were unborn. Concerning child protection, Article 20 of Child Protection Law stipulated that State, Government, Local Government, Community, Family, and Parents or Guardians have the duty and responsibility toward child protection. Unfortunately, however, parents who are supposed to protect their children, especially their early married daughter, turned out to be more protective of their daughter's husband to the detriment of their daughter's childhood development.

Article 13, paragraph (1), letter e of Child Protection Law, stipulates that every child under the parent or legal guardian's care or any other party responsible for the child's care is entitled to protection against unfair treatment. It further describes that the examples of unfair treatment can include favouring one child over another, or abusive behaviour toward children. Child marriage is a form of injustice to the children. The reason is that marriage between underage couples can happen only with parental consent in which the parent submitted a request for dispensation to the court as stipulated in Article 7, paragraph (2) of Law No 1 of 1974 on Marriage.

By dispensation, we mean asking for exemption of a person as a legal subject from a rule or usual requirement to do something that is not usually allowed.²¹ Such dispensation for early marriage means legalizing child marriage and, therefore, deprived children of their rights. It is undeniable that among the reasons for this early marriage are: the prospective child brides state that they are physically and mentally ready to marry; no infringement on religious law because they have reached puberty; already engaged to be married; fear of falling into promiscuity; moral or material support from parents; and, even worse, the prospective bride was already pregnant before her parent submitted a dispensation request.²²

The decision of Constitutional Court No 74/PUU-XII/2014 on marriageable age has made Article 7, paragraph (1) of Law No 1 of 1974 on Marriage, stipulating that marriage is allowed if the male couple is 19 years old and the female couple is 16 years no longer valid. It is undeniable that, from socio-cultural perspectives, the age requirement for marriage can have both positive and negative aspects. The positive elements may include saving children from promiscuity and extramarital pregnancy, while the negative ones include physical and mental unpreparedness of the children to

²¹ Faiq Tobroni, *Op.Cit.*, 578.

²² Mardi Candra, *Op.Cit.*, 149-150.

live as married couples.²³ It is important to note that the dispensation request for early marriage is correlated with an increased number of divorces among younger married couples. The data revealed that the number of dispensation requests in 2011 amounted to 1,504 cases, with subsequent increases to 10,093 in 2012, 11,869 in 2013, 12,009 in 2014, 13,518 in 2015, and 13,612 in 2016.²⁴ The number of dispensation request turned out to be correlated with the increased number of divorce cases among underage married couples. As the data tell us, divorce cases among underage married couples amounted to 113 in 2011. The figure was subsequently increased to 7,872 in 2012; 9,495 in 2013; 10,003 in 2014; 10,217 in 2015; and 11,126 in 2016.²⁵ We can see from these figures that younger or underage couples lack physical and mental preparedness to live a family life that is meant to be once in a lifetime and, consequently, many of them are highly likely to end in divorce.

This change in marriageable age limits for men and women shows no discriminatory treatment between men and women in fulfilling their rights. Article 1, paragraph 1 of Child Protection Law, set forth the definition of a child as the person under the age of 18. It makes logical sense that the age limit set forth in Child Protection Law and the decision of Constitutional Court No 74/PUU-XII/2014 on the age limit for a prospective child couple submitting a dispensation request is intended to prepare the prospective couples for the basic 9-year education program provided by the government with minimally high school completion. A number of studies report a correlation between educational level and the marriage age: the older the marriage age, the higher the educational level, and the other way round.²⁶ Low educational attainment will likely lead to a narrow-minded view of marriage.²⁷ This is relevant to the regulation in Article 60, paragraph (1) of Law No 39 of 1999 on Human Rights which stipulates that every child has the right to access to education and schooling as befits his interests, talents, and intellectual capacity. Every child has the right to education, and therefore governments have to ensure access to education for all children. It is confirmed in Article 48 of Child Protection Law, which states that the Government and Local Government are obliged to provide basic education of a minimum nine years for all children. Regrettably, children who are supposed to improve their general knowledge have to experience school dropout due to early marriage.

²³ *Ibid.*, 60.

²⁴ *Ibid.*, 8-9.

²⁵ *Ibid.*, 9.

²⁶ Eddy Fadlyana and Shinta Larasaty, *Op.Cit.*, 138.

²⁷ Ahmad Tholabi Kharlie, *Op.Cit.*, 209.

Children must enjoy their full rights appropriate to their age. A child married at an early age will bear new responsibilities of becoming a husband or wife and, subsequently, prospective father or mother, that deprived him or her of youth life. A girl who married at an early age will sooner or later undergo pregnancy and childbirth. The girl, as a very young wife, faces a higher risk of death during pregnancy and childbirth. It should be pointed out that pregnancy in women of 17 years old or less faces a higher risk of medical complications, affecting either the mother or the unborn. Young girls of 10-14 years old have a five times higher risk of maternal death either during pregnancy or childbirth compared to their 20-25 years counterparts. Such a threat is twice as high in the 15-19 year age group.²⁸ The disadvantages of early marriage for 16 years old girls are:²⁹ (1) Girls at the age of 16 are experiencing puberty, and some of them have just begun their periods, so actually they are not mentally and physically ready to become housewives; (2) At sixteen, girls have just completed the 9-year basic education, and most of them dropped out of school after marriage. This, in consequence, will affect them in various matters, including how they educate their children and the success of family planning and population programs; (3) Married at an early age provides teenage girls with opportunities to get pregnant with high risks of anaemia, preeclampsia, eklamei, abortion, preterm birth, maternal death, prantal, bleeding, and more frequent obstetric surgeries than those of 20 years old or more; and (4) Married at an early age means more extended reproductive period. On the contrary, married later in life involves a shorter reproductive period and living a small family life that will eventually bring a positive effect on the population growth rate.

Teenage pregnancy can be prevented if the government actually implemented the Law No 36 of 2009 on Health by providing teenagers with health-related education, information and services to stay healthy and be responsible for their own health as regulated in Article 137, paragraph (1). This has been normatively set out in the Government Regulation No 61 of 2014 on Reproductive Health intended, among others, to reduce maternal mortality rates. This further confirmed that the central government, local government, and the community bear the responsibility to provide reproductive health-related information and education to the young generation. Article 11, paragraph (1) letter b, states that reproductive health services for teenagers are intended to prepare them for good reproductive health. For such a purpose, physical, psychological, and social preparedness is required to have a good family life and to get pregnant at the right time.

It is unfortunate that a girl who should still be able to hang out and play with friends of her age ends up becoming a mother. In fact, Article 61 of

²⁸ Eddy Fadlyana and Shinta Larasaty, *Op.Cit.*, 138.

²⁹ Mardi Candra, *Op.Cit.*, 128.

Law No 39 of 1999 on Human Rights stipulates that every child is entitled to take rest and hang out with children of his own age, and to play and create as befits his intellectual capacity in the interests of his own development. Furthermore, Article 56 paragraph (1) letter e of Child Protection Law obliged national government and local government to make efforts and help children so that they can be free to rest, play, recreate, create, and produce works of art and; (letter f) to acquire playing facilities which meet the criteria of health and safety. Marriage at an early age is almost certainly affecting the child who supposed to enjoy his time still hanging out with her peers yet forced to live an adult life in her family and kept her away from her peers.

Article 6 paragraph (1) of Law No 1 of 1974 on Marriage stipulates that a marriage shall be founded upon agreement between the marriage candidates. This is relevant to the voluntary principles in marriage law, which in the context of civil code means that there must be no coercion from other parties. If the marriage was held for financial reasons and upon the parent's compulsion, then it is safe to say that the child has been deprived of her right to express her opinion to refuse a marriage proposal. Therefore, this violates the right to express an opinion and to be heard as regulated in Article 24 of Child Protection Law stipulating that the state and the government guarantee a child's rights to express his/her opinions in line with age and level of intelligence. Article 56 further stipulates that the central government and local government are obliged to make efforts and help children so that they can be free to express their thoughts and opinion in line with their conscience and religion. This happens because children are in a subordinate position and dare not to express refusal.

C. Conclusion

Among the causes of child, marriage includes economic factors and parental compulsion to hold marriage because of premarital pregnancy. This deprives children of their rights consisting of the right to protection from parents, right to education in line with his/her competencies, talent and interest, right to stay healthy (if a girl has to be at the right at to marry to make sure that she has good reproductive health to avoid higher risk during pregnancy and childbirth), right to play, recreation and creation with his or her peers, right to express an opinion and to think in accordance with his or her conscience.

From the description we have mentioned above, we can see that Islam does not explicitly mention the minimum age for marriage as physical puberty is the primary condition. However, physical and mental maturity required to live a family life needs to be strictly regulated in the constitutional law to reduce the divorce rate among child couples. As for the children's rights that must be fulfilled considering that they are our next

generation, it is unfortunate that children who are supposed to still enjoying their active life have to serve their role as a husband or a wife.

It can be said, normatively, that the government of Indonesia has set children's rights in the regulation that come into effect with the enactment of Law No 4 of 1979 on Child Welfare, Law No 39 of 1999 on Human Rights, and specifically outlined in the Child Protection Law. However, it is very unfortunate that there is no actual implementation of these laws on the provision of facilities and accessibility to reduce child marriage rate. An example of such implementation includes disseminating information on the fulfilment of children's rights and on the negative effect of child marriage that makes children's rights remain unfulfilled.

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