



Transformation of Child Marriage Law in Indonesia: From Private Law to Public Law

Ja'far Shodiq^{1*}
Hadziqotun Nahdliyah²
Aisyah Nur Mahdiah³

¹⁻³ Fakultas Hukum, Universitas Islam Lamongan, Veteran 53A Street, Lamongan, Indonesia,

*Corresponding Author. Email. jafarsodiq@unisla.ac.id

Abstract: This article addresses how Indonesian marriage legislation changed from being private to being public, focussing especially on child marriage. The author of this study employs juridical-normative research techniques. This research combines conceptual analysis with legislation, there are two main topics studied, namely; (1) criminal rules regarding forced marriage to children; and (2) criminal rules regarding intercourse with children. Forced marriage to minors is a criminal offence that is covered in the first debate. The Law Number 12 of 2022 Concerning Criminal Acts of Sexual Violence governs forced marriage against minors, Article 10. Article 39, establishes regulations the reporting process for criminal acts of forced marriage and gives judges the chance to report to the authorities if they become aware of forced marriage. The second discussion describes the criminal offense of child copulation. While Article 76 D of Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning child protection regulates the prohibition of forced child copulation. Crimes concerning child protection are ordinary offenses that also provide opportunities for judges to become reporters if they find the fact that there is coercion of child sexual intercourse committed. Hopefully, this research can encourage the parties to pay more attention for children, in addition to marriage dispensation.

Keywords: dispensation of marriage; forced marriage; sexual intercourse with a child;

1. Introduction

Child marriage is still a problem for the government and Indonesian society and There has to be an instant answer identified. Numerous parties have always been interested in the topic of child marriage, particularly in relation to marriage dispensation, which on the one hand also involves issues of child protection. A youngster who is younger than the legal age restriction may with their particular jurisdictions.[1].

On March 8, 2024 Kompas.Com reported that Based on information, the number of underage weddings has remained constant over the previous ten years. In Indonesia, the annual percentage of child marriages is approximately 10.5%. The province with the highest child marriage rate last year was West Nusa Tenggara, which amounted to 17.32 percent, followed by South Sumatra 11.41 percent, and West Kalimantan 11.29 percent. (Kompas.com dated March 8, 2024).

Child marriage has adverse impacts on children, including economic impacts, health impacts and psychological impacts. Economically, children under the age of 18 often do not have decent jobs because their education level is still low. In terms of health, Getting married young carries the risk of not being prepared to parent and give birth, and having an abortion carries the risk of putting, restless and sometimes often angry for no reason. (Rahmalia, Haryati, & Suroso, 2023). However, from a religious perspective, child marriage (early age) can avoid adultery. [2]

Child marriage can be caused by a variety of circumstances, such as customs, economic factors, and unmarried pregnancy. (In addition to these three factors, one more reason why child marriage occurs is religious beliefs) , that religion provides positive legitimacy when child marriage is carried out on the basis of moral and religious considerations. Therefore, people who perform underage marriages are legitimized. [3]

To address child marriage, the Indonesian government has implemented several measures. This aligns with the national strategy to combat child marriage, the government wants to reduce the rate of child marriage from 11.21% (2018) to 8.74% by the end of 2024 marriage prevention. [4]

As a preventive measure, the Indonesian government has also passed legislation that can penalize parties involved in child marriage, especially those related to forced marriage and child copulation. This is a strategic step by the government to bring the issue of marriage from private law to public law. Marriage is not only seen as private law. But at one point it can become public law, so that the state can be present to participate.

However, the government continues to allow minor marriages under the marriage dispensation system outoutline. In order to get permission to marry a person under the age of 19, parents or guardians may apply to the court. A someone who is still 16 years old, for instance (child age) wants to get married, his His parents may petition the court for a dispensation to marry, but the judge will ultimately determine whether or not to approve the request.

Regarding instances involving marital dispensation, child marriage seems to be viewed only as private law, to the exclusion of matters relating to child marriage, including forced marriage and child copulation. Judges should also look at laws and regulations that protect children, at least in the articles that regulate these two criminal offenses.

Theoretically, God has made provisions for marriage that are applicable to all living things, including plants, animals, and humans. But God does not wish for people to resemble other animals, who can live freely, heeding their instincts, and relating to between males and females in anarchy, and there is no one rule. [5]. With marriage humans can multiply and preserve offspring. Because marriage is the only way justified by Islam in order to fulfill its biological needs. [6] [7]

Many studies have discussed child marriage. Research conducted by Nanda Cita Rahmalia et al. describes the impact of the increasing number of child marriages in East Java Province. [8] Research conducted by Juvani Leonardo Fiore Mongkaren et al. analyzed forced marriage according to Law Number 12 of 2022 which contains forced marriage in children.[9]. And research conducted by Cahya Yustianugraha analyzed Child Marriage in North Lombok in the Perspective of Criminal Law and Custom. [3] The focus of the study of these three studies is limited to the impact and punishment of forced marriage on children. Meanwhile, this study, in addition to reaching out to the criminal coercion of marriage in children, will also reach out to child copulation which is the cause of child marriage.

2. Research Method

This study examines legal issues as a system of norms that need to be analysed. It is statutory and conceptually based normative legal study. The purpose of legal normative research is to generate novel theories, conceptions, or arguments that are prescriptive for the issue at hand. [10]

Primary legal sources are consulted in this study, including:

1. Marriage Law No. 1 of 1974
2. The 2002 Child Protection Law No. 23
3. The 2014 Law Number 35 about the Amending of Law Number 23 of 2002 about the Protection of Children.
4. The Second Amendment to Law No. 23 of 2002 on Child Protection, now known as Law No. 17 of 2016 on the Stipulation of Government Regulation, was signed into law in lieu of Law No. 1 of 2016.
5. Law No. 16 of 2019 on Modification of Marriage Law No. 1 of 1974.
6. The Crime of Sexual Violence Law, Number 12 of 2022.
7. The Criminal Code Law Number 1 of 2023.

3. Results And Discussion

3.1 Devinition of Children

Children are essential to both the survival of the human race and the viability of the state and nation. They have to be ready to take on the role of guardians of the country and state. The state must safeguard children and guarantee their right to a healthy life in order to secure their survival. The state's guarantee of children's survival and development is essential to produce a quality generation.

Since they are the country's future, children require extra protection from a variety of forms of violence, whether physical, psychological, or sexual violence. Currently, there are still many children who have not received protection from physical and sexual violence, due to the wrong paradigm regarding children. The prevailing paradigm normalises violence against children by regarding them as the parents' property, capable of receiving any kind of education—including incorrect ones. Every kid has the right to the greatest opportunity for healthy physical, mental, and social development. As a result, safeguards to guarantee children's rights are upheld without bias are required, to realize their welfare. [11]

Many laws explain the definition of children, which have similarities and differences from one another. On Human Rights states in Article 1 Paragraph 5 that "A child is any human being under the age of 18 (eighteen) years and unmarried, including a child still in the womb if it is in his/her interest." Citizens who have married but are under the age of eighteen are not included in this article, so they are not categorized as children.

Section 1(1) of Rules for Determining Marriage Dispensation Petitions, Regulation No. 5 of 2019 defines "a child is a person who is not yet 19 years old or has never been married according to statutory regulations". Article 1 paragraph 5 of Law Number 39 of 1999 on Human Rights is comparable to this article, which contains the clause "never married". However, the minimum age limit to be considered a child in this Supreme Court Circular Letter is 19 years old.

Another definition is provided in Article 1 paragraph 5 of Law No. 21/2007 Addressing the elimination of human trafficking crimes involves comprehensive strategies to prevent, that "A child is a person under the age of 18 (eighteen) years, including children still in the womb." Unlike the Human Rights Law, this law does not include the clause "unmarried".

Both Article 1 Paragraph 1 of Law Number 35 of 2014, which amends Law Number 23 of 2002 concerning Child Protection, and Article 1 Paragraph 5 of Law Number 12 of 2022 regarding Criminal Acts of Sexual Violence clarify the same meaning, "A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb".

3.2 Dispensation of marriage

Islamic law says that if all of the requirements and principles of Islam are followed, a marriage is deemed lawful. However, the law also says that a marriage is only deemed lawful if it complies with the regulations of each partner's specific faith and belief and is registered with the relevant authorities. [12] Law Number 1 of 1974 regulating Marriage explains in Article 1 that, "Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on God Almighty".

The lawful The minimal age to get married is nineteen. Law Number 16 of 2019, which modifies Marriage Law Number 1 of 1974, notably in Article 7, provides a thorough explanation of this, Paragraph 1. "Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years." This regulation does, however, take into account the interests of those who wish to be married before turning 19. Amendments to Law Number 1 of 1974 concerning Matrimony: Law Number 16 of 2019, namely Article 7, paragraph (2), provides an explanation, that "In the event of a deviation from the age provisions as referred to in paragraph (1), the parents of the male party and/or the parents of the female party may request dispensation to the Court on very urgent grounds accompanied by sufficient supporting evidence".

According to the article's explanation, "very urgent reasons" refers to circumstances in which getting married is absolutely necessary and there is no other option. In addition, the Supreme The court provides guidelines that judges could utilise as a point of reference when determining the dispensation of marriage applications. Article 2 of Supreme Court of the Regulation Number 5 of 2019 of the Republic of Indonesia on the Guidelines for Assessing Applications for Marriage Dispensation describes that:

The following principles are used by the judge to decide whether to grant a marriage dispensation application:

- a. The child's optimal outcomes
- b. The child's entitlement to growth and life;
- c. Consideration viewpoint;
- d. Nondiscrimination;
- e. Parity between the sexes;
- f. Justice and equality;
- g. Fairness;
- h. Hastiness; and
- i. Clarity of law.

Judges must have a strong basis and foundation in deciding marriage dispensation applications. Before deciding a case, the Court judge is need to research, adhere to, and comprehend the societal norms of justice and the law, particularly as they relate to the implementation of marital dispensation. Judges are free to investigate the application's justifications legally and to interpret, categorise, and choose the rules that are pertinent to the marriage dispensation case. These actions will be utilised as the foundation for a decision that will either approve or deny the dispensation application. [13].

3.3 Forced Marriage in Dispensation of Marriage

The author has included sources that clarify that a man and a woman, or one of the two, To be married, a person must be at least 19 years old. However, it still allows individuals who wish to get married but are under 19 to do. Understandably, this also enables kids to be married before they turn 18, which is a problem. The decision will be made by the court's judge. Whether or whether the judge would deem it urgent will depend on the justifications provided by the applicant.

When deciding whether to grant marriage dispensation, judges also consult according to Regulation Number 5 of 2019 of the Supreme Court for Determining the Approved Marriage Dispensation Applications. As per Article 3, determining whether or not compulsion was involved in the marriage dispensation application is one of the goals of these elements for making the decision.

In a marriage dispensation hearing, the applicants will convey the reasons on which the application is based. If the judge finds that there are indications of forced marriage, the judge can make it the first step to proceed to the criminal stage.

According to Article 10 of Law Number 12 of 2022 Concerning the Offence of Sexual Assault:

- 1) Any Anybody who forcibly coerces someone into getting married, either by using their own or another person's violence or power, or by performing or permitting a marriage between them and another person, faces a maximum sentence of nine (9) years in prison.
- 2) Includes marital compulsion mentioned paragraph (1): a forced union between the offender and the victim, a child marriage, or a forced marriage carried out under the pretence of cultural customs.

Referring to the article above, forced marriage of children is a form of forced marriage that can be punished with forced marriage, including the custom of forcing youngsters into marriage against their will due to communal customs. Additionally, if the forced marriage is performed on a pregnant girl, According to Law Number 12 of 2022's Article 15, there will be an additional criminal penalty for criminal acts of sexual violence. (1) The following offences will result in a 1/3 (one third) increase in the penalty for a crime as specified in Articles 5, 6, and 8 through Article 14: i. perpetrated against a pregnant woman.

The reporting process for crimes related to Forcible marriages are covered by Article 39 of Law Number 12 of 2022 on Criminal Acts of Sexual Violence;

- (1) Victims or persons who know, see, and/or witness events that constitute Crimes of Sexual Violence shall report the incident to the police, Community Based Service Provider Institutions, Technical Implementation Units and Regional Technical Implementation Units in the Social Sector, and/or the UPTD PPAI, both at the victim's location and the crime scene.
- (2) Medical personnel or health personnel are obliged to inform UPTD PPA, community-based service provider institutions, regional and technical implementation units in the social sector, and/or the police in the event that they discover claims of sexual violence.

This article provides an opportunity for judges hearing marriage dispensation cases to encourage the parties concerned to make a report that a crime of sexual violence, namely forced marriage, has occurred.

In actuality, victims of forced marriage occasionally lack the bravery to come out until after the marriage has taken place. The handling of instances involving the reporting of victims of forced marriage after the Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence does not govern marriages and does not specify how long the reporting period is after a marriage. Thus, as long as the existing regulations do not contradict with the Law on Criminal Acts of Sexual Violence, the other restrictions will continue to apply. This suggests that Article 78 paragraph (1) of the Criminal Code's consideration of the prosecution's expiration date ultimately determines the deadline for reporting crimes involving forced marriage. The expiration date is determined by the sentence administered, as per Article 10 of Law Number 12 of 2022, then if the victim of forced marriage has undergone his marriage and wants to report the occurrence of forced marriage against him, the grace period is 12 (twelve) years since the forced marriage occurred. [14]

3.4 Child Sexual Intercourse in Dispensation of Marriage

The same can be done by judges when discovering the criminal offence of forced marriage, if the judge finds the fact that there was forced intercourse with a child that preceded. The court may order the pertinent parties to submit a report on forced sexual relations with minors. The prohibition of forced child copulation is regulated by Law Number 35 of 2014 concerning the reform of Law Number 23 of 2002 with child protection, specifically Article 76 D:

"Every person is prohibited from committing violence or threatening violence to force a child to have sexual intercourse with him/her or with another person".

Crimes related to child protection, such as Article 76E, are ordinary offenses. [15] This provides an opportunity for anyone to report that he or she has seen, heard or knows that a criminal offense has occurred. Judges who are aware of forced intercourse can also report the suspect to the relevant agencies.

Rather than Law Number 1 of 2016, Article 81, concerning government stipulations, outlines the penalties for forced child sexual activities. These penalties are further detailed in Law Number 17 of 2016, which amends Law Number 23 of 2002 pertaining to regulations for child protection. The article explains that:

- 1) Any individual who disobeys Any individual who disobeys identified in Article 76D is punishable by a minimum jail term of five years, a fine of up to Rp 5,000,000,000.00 (five billion rupiah) and a maximum jail sentence of fifteen years.
- 2) The criminal offences listed in paragraph (1) will also apply to those who intentionally fabricate or deceive, or coerces a child into engaging in sexual activity with them or with another individual.
- 3) If the criminal offence specified is committed in paragraph (1) by guardians, parents, relatives, child carers, teachers, staff members, officials in charge of child safety, or by multiple people acting in concert.
- 4) A further 1/3 (one-third) of the punishment will be meted out to offenders who have been found guilty of committing a crime covered by Article 76D, in addition to those mentioned in paragraph (3).
- 5) The offender shall be sentenced to death, If the criminal offence specified in Article 76D results in several victims, causes significant harm or infection, impairs or eliminates reproductive function, and/or the victim faces life in prison, then the penalty is at least 10 (ten) years and up to 20 (twenty) years of imprisonment passes away.

- 6) The offender can face further punishment in the form of having their identity revealed, in addition to the penalties mentioned in paragraphs (1), (3), (4), and (5)
- 7) The offenders mentioned may be susceptible to measures such as the application of electronic monitoring devices and chemical castration.
- 8) The measures mentioned in paragraph (7) will be determined in conjunction with the primary penalty by including the duration of the measures' implementation.
- 9) For young offenders, further sanctions and actions are not applicable..

Consensual child copulation still gets a different response from the judge handling the case. Research conducted by Syafera Febrianti, Annie Myranika and Siti Humulhaer with the title "Juridical analysis of acquittal regarding the crime of child copulation on the basis of mutual consent (Case Study of Decision Number: 51/PID_SUS/2016/PN KBU)" can be used as a reference. The author clarifies that the charges utilised in verdict number 51/Pid_Sus/ 2016/PN Kbu were alternative charges. Article 64 of the Criminal Code, The First Indictment alleges violations of Article 81(1) and Article 76D of Law No. 35 of 2014, which amends Indonesian Law No. 23 of 2002 on Child Protection. Furthermore, there is an additional charge of breaching the same amended law, specifically Law No. 35 of 2014, as well as Article 64(2) of the Indonesian Penal Code. The third indictment involves a violation of Article 82(1) of Law No. 35 of 2014, Article 76E of the amended Law No. 23 of 2002 on Child Protection, and Article 64 of the Criminal Code. Based on the three charges above, the essence of which needs to be proven is whether or not the defendant has acted intentionally by deceiving, so that later what needs to be proven is the act and not only in terms of the intercourse. When viewed in the final result, the panel of judges stated that from the results of the three charges no elements were proven so that the defendant was declared acquitted. [16]

The judge in Pangkajene Unlike the finding previously noted, District Court Decision Number 157/Pid.B/2011/PN felt that the primary criteria included in the Child Protection Law—the regulation that is the subject of this case—differs from the Criminal Code's provisions regarding criminal acts of decency. The judge declared that must face physical or threatened physical punishment. Thus, this aspect of compulsion will be eliminated if, in the future, the sexual activity is the result of the victim and the offender's joint consent. This means that the basis of mutual consent in sexual intercourse involving children cannot be used as an excuse for the perpetrator to be able to avoid legal bondage. [16]

The Penal Code Law No. 1 of 2023 will go into effect in 2026, already regulates sexual intercourse outside of a legal marriage. Article 41 explains;

- 1) Every person who commits coitus with Adultery punishes a person who is not their spouse or partner having a maximum penalty of category II fines or one (1) year in prison .
- 2) For the offence mentioned in paragraph (1), no prosecution will begin unless the complainant:
 - a. spouse once more of an individual bound by matrimony.
 - b. Parents or children for persons who are not bound by marriage.

The Article provides an opportunity for parents to report a person who has had sexual intercourse with their child, even if it is consensual.

4. Conclusion

Children are given protection and justice under Indonesian law, including when it comes to marriage. They must both be 19 years old to get into marriage. Because the child is less than eighteen, he or she must petition to the court for permission to marry. To determine whether to approve or deny the application, the judge will hold several hearings. One of the grounds that judges use to decide Marriage Dispensation Applications is the concept of justice.

The judge may utilise the facts discovered to bring the child marriage case under criminal law if they include evidence of coerced marriage and child copulation and occur prior. The judge may report to the police as someone who is aware that forced marriage and underage copulation are crimes. At the very least, the judge urges the victim to call the police. Not only must the offender submit an application for marriage dispensation, but criminal law must also be provided. This could provide kids greater justice.

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