

The Normative Analysis of Marriage Age After the Constitutional Court Decision No. 22/PUU-XV/2017

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ABSTRACT

Marriage is a sacred event of mutual love between a woman and a man. Paragraph (1) in Article 7 of Law No. 1 of 1974 determines the minimum age of marriage, i.e. 16 for females and 19 for males. A constitutional review of the law against the 1945's Constitution was requested by three petitioners because they considered that the provision, especially in Article 7, paragraph (1), has disadvantaged them. This research used a normative juridical method to examine the verdicts in the Constitutional Court Decision No. 22/PUU-XV/2017 and the minimum marriage age after the Constitutional Court Decision was issued. The research results showed that the Constitutional Court decided that paragraph (1) in Article 7 of Law No. 1 of 1974 is contrary to the 1945's Constitution, and it does not have legally binding power. The Constitutional Court requested the legislator to amend the law within three years. In conducting an amendment, they should consider several aspects, i.e. education, psychology, social, gender, population, regulation synchronization, human rights, husband and wife dignity, and other aspects.

Keywords: *marriage, Constitutional Court, child protection, constitutional review*

1. INTRODUCTION

Marriage is one of the legal conducts, which has happened since the days of Adam and Eve. Quran in Surah Al-Dharyat Verse 49 explains that "And of all things We created two mates; perhaps you will remember" [1]. Based on the verse, marriage is the nature of a human being, and a human marriage only happens once in a lifetime without any divorce [2].

Through marriage, the bride and bridegroom will be husband and wife in the name of Allah [3]. Marriage is a sacred event based on religious faith, happening because of mutual love between a woman and a man, to establish a family with tranquillity, love and mercy [4].

Marriage creates rights and responsibilities between husband and wife, parents, and among relatives on both sides. A marriage can only be done by a mature person, either physically, psychologically, economically, and socially mature [5]. Article 7, paragraph (1) of Law No. 1 of 1974 states that a marriage is only allowed if the bridegroom is no younger than 19 years, and the bride is at least 16 years old.

In reality, the number of marriages among underaged children has increased across all provinces in Indonesia. Statistics Indonesia reveals that the percentage of child marriage in Indonesia increased up to 15.66% in 2018. The dramatic increase is observed in three provinces, i.e. South Kalimantan (22.77%), West Java (20.93%), and East Java (20.73%) (Sindo News.com, 2019, 1). In

ASEAN countries, Indonesia ranks second with child marriages after Cambodia [6]. According to Statistics Indonesia, underaged married is defined as the marriage between children who are sixteen or younger (Sindo News.com, 2019, 1). The causes of underage marriage are socioeconomic status, low level of education, culture, arranged marriage, and sex before marriage [7]. This condition is now alarming.

Article 7, paragraph (1) of the marriage law is collapsing with Article 28D, paragraph (1) regarding constitutional rights of an Indonesian citizen, where each individual must be treated equally before the law. This article is also considered to conflict with Article 31 of the 1945's Constitution regarding the rights of a citizen to receive primary education of 12 years. Based on these reasons, three persons requested material examination for Article 7, paragraph (1) to the constitutional court by using Article 24C, paragraph (1) of the 1945's Constitution, which reads "The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution", and Article 10, paragraph (1) of Law No. 24 of 2003 regarding the Constitutional Court as amended with Law No. 8 of 2011 regarding the amendment of Law No. 24 of 2003 regarding the Constitutional Court which reads "The Constitutional Court holds jurisdiction of first and final instance, whose decisions shall be final to review a law against the 1945 Constitution of the Republic of Indonesia." Article 7, paragraph (1) of Law No. 1 of 1974 regarding marriage is considered to have created

uncertainty in the law, caused ambiguity in interpretation. In addition, it is not clear and can potentially cause a different interpretation. It also restricts the constitutional rights of a citizen, especially the petitioners so that it disadvantages the constitutional rights of the petitioners.

Based on the application, the Constitutional Court issued Decision No. 22/PUU-XV/2017, that states the phrase “16 years old” in the Article 7, paragraph (1) of Law No. 1 of 1974 regarding marriage, violates the 1945's Constitution and it does not have legally-binding power. Therefore, the Constitutional Court Decision orders the government to establish another law within the maximum of five years to amend Law No. 1 of 1974.

The objective of this research was to analyze the Constitutional Court Decision No. 22/PU-XV/2017, regarding the invalidation of Article 7 paragraph (1) of Law No. 1 of 1974, and to examine the legal certainty regarding the marriage age after the Constitutional Court Decision was made.

2. RESEARCH METHODS

The method used in this research was a normative juridical method, that is to analyze law theoretically by considering legal aspects, law history, and comparative law. In a normative research study, we rely on secondary data (library research), consisting of primary, secondary, and tertiary materials. The primary legal material is Law No. 1 of 1974 regarding marriage, the 1945's Constitution, child protection law, child education law, Laws about ratification of Convention on the elimination of all forms of discrimination against women (CEDAW), education law, and the Constitutional Court Decision No. 22/PUU-XV/2017.

3. DISCUSSION

3.1. Analysis of Decision No. 22/PU-XV/2017 issued by the Constitutional Court of the Republic of Indonesia

a. Facts of the case and subject matter

As the state which respects human rights, it guarantees that every citizen can apply material review for the laws against the 1945's Constitution. Article 51, paragraph (1) of Constitutional Court law in conjunction with Article 3 of Constitutional Court Regulation No. 06/PMK/2005, regarding guideline procedure in reviewing laws, regulates that citizen can apply for a material review of law against the 1945's Constitution. In this case, the petitioners were three people, i.e. Endang Warsinah, Maryanti, and Rasminah, the three of whom were housewives.

The subject matters include the provision in Article 7, paragraph (1) of Law No. 1 of 1974, that has created a

legal uncertainty resulting in ambiguous, unclear, and multiple interpretations as well as has limited the fulfilment of citizen constitutional rights. Therefore, the petitioners requested a review of Article 7, paragraph (1) of Law No. 1 of 1974 against the 1945's Constitution. This request was permitted in Article 24C, paragraph (1) of the 1945's Constitution and Article 10, paragraph (1) of Law No. 24 of 2003 amended by Law No. 8 of 2011. This review request is for the review of law against the 1945's Constitution, and thus the Constitutional Court was authorized to examine and put it on trial.

Based on Article 51, paragraph (1) of Law No. 24 of 2003, as amended by Law No. 8 of 2011, in conjunction with Article 3 of the Constitutional Court Regulation No. 06/PMK/2005, a petitioner is an individual Indonesian citizen who is constitutionally affected by the given law as regulated in Article 51, paragraph (1), of the previously mentioned law. If these are met, the petitioner as legal standing to request for a constitutional review to the Constitutional Court.

Petitioner I, a woman married at the age of 14 to a widower of 37 years old. She was married because her family was poor. The petitioner dropped out of school because she had to take care of her husband and children. She suffered from infection/irritation in her reproduction organ due to sexual intercourse.

Petitioner II married at the age of 14 to a 33 year-old-man. Her parents made her get married because of family financial difficulties. The petitioner had a miscarriage at her first and second pregnancies.

Petitioner III, a woman, married by her parents at the age of 13 to a 25-year-old man due to family financial unfortunate situation. After marriage, the petitioner dropped out to take care of the household and children. The petitioner was abandoned by her husband, and she experienced physical abuse and was not financially supported.

The petitioners requested review for Article 7, paragraph (1) of Law No. 1 of 1974 for the phrase “16 years old”, for child rights and protection, especially females and to provide fair legal certainty for Indonesian citizens, both males and females as mandated by the 1945's Constitution. The provision in Article 7, paragraph (1) above for the phrase “16 years old” has violated the principle of “all people are equal before the law”, so it is contrary to Article 27, paragraph (1) of the 1945's Constitution. A female child who is 16 years old has not reached a mature age to be able to decide, and her reproduction organ has not perfectly developed [6]. The decision to regulate 16 years old was not based on clear justification, apart from gender.

The purpose of a marriage can only be achieved if there is equality in physical and mental maturity of the couple. In the subject matter of their request, the petitioners requested the Constitutional Court to state that the phrase

“16 years old” in the provision in Article 7, paragraph (1) of Law No. 1 of 1974 is contrary to the 1945’s Constitution, and it does not have any legal binding.

b. Legal Consideration

Based on paragraph (1) in Article 24C, of the 1945’s Constitution, point a in Article 10 of Law No. 48 of 2009, the petitioners requested a constitutional review of paragraph (1) in Article 7 of Law No. 1 of 1974 against paragraph (1) in Article 7 of the 1945’s Constitution, the Constitutional Court is authorized to put on trial the request.

The Constitutional Court considers that the petitioners have explained their constitutional rights. They considered that the law requested to review had disadvantaged them. If the request is accepted, the disadvantage should not happen. The difference in age between male and female in Article 7, paragraph (1) of Law No. 1 of 1974 is not an indication of the equality before the law, which is protected by paragraph (1) in Article 27 of the 1945’s Constitution. The determination of marriage age in Law No. 1 of 1974 shows inequality between male and female, especially in terms of physical and mental. Although the determination of minimum age for marriage is a legal policy, it should not treat the citizen unequally based on sex and gender. The different treatment is a type of discrimination.

According to Law No. 23 of 2002 in conjunction with Law, No 35 of 2014, a girl who is 16 years old is considered a child. If the marriage age of 16 for a girl remains, it is not in line with the government program of 12-year compulsory education. If a child is married at the age of 16, she loses an opportunity to receive the 12-year compulsory education. The provision in Article 7, paragraph (1) of Law No. 1 of 1974 provides the possibility for child marriage, and thus enables child exploitation, financially and sexually.

If the amendment regarding minimum marriage age has not been made in the law, the minimum age for marriage, based on the regulation in Article 7, paragraph (1) of Law No. 1 of 1974, shall be synchronized with the child age, as regulated in the law regarding child protection, similar for both males and females.

The judicial verdicts for the request are as follow:

1. The Constitutional Court declared that the phrase “16 years old” in paragraph (1) in Article 7 of Law No 1 of 1974 is contrary to the 1945’s Constitution and it does not have any legally binding power.
2. The Constitutional Court declared that paragraph (1) in Article 7 of Law No. 1 of 1974 is valid until the amendment of the law.
3. The Constitutional Court demanded the legislator to amend Law No. 1 of 1974, especially for articles related to the minimum marriage age for females within three years.

The Constitutional Court, in 2015, has considered the

authority of the petitioners in requesting the review of law No 1 of 1974 against the 1945’s Constitution. The Constitutional Court states that the petitioners are authorized to request for the judicial review because they are Indonesian citizens who were disadvantaged by the provision in Article 7, paragraph (1) of Law No. 1 of 1974. The Constitutional Court also considered their authority to put the request on trial. The Constitutional Court states that what requested by the petitioners, that is a constitutional review of paragraph (1) in Article 7 of Law No. 1 of 1974 against paragraph (1) in Article 27 of the 1945’s Constitution, was under the authorization of the Constitutional Court to put on trial.

In the verdict, the Constitutional Court considered the ages of the petitioners when they got married. They were married when they were under 18 years old. Thus there were still children (14 or 13 years old). As a result, they could not continue their 12-year compulsory education.

The Constitutional Court considered the petitioners’ marriage as child marriage, and they have not reached mental stability and physical maturity. Therefore, they are vulnerable, and marriage can even harm them physically.

The marriage age in Law No 1 of 1974 shows inequality between males and females, especially concerning mental and physical conditions. If the minimum age of 16 for a female is unchanged, it is not in line with the government agenda of 12-year compulsory education. The provision in Article 7 above is a discriminative legal policy in terms of gender. The Constitutional Court did not determine the minimum age for married because it is under the authority of the legislator.

The provision in paragraph (1) Article 7 of Law No. 1 of 1974 allows a chance for child marriage, which can result in child exploitation, both financially and sexually. The age categorization of child age in child protection law should be a reference.

3.2. Marriage Age after the Constitutional Court Decision No. 22/PUU-XV/2017

The welfare of human being or community is guaranteed by marriage. According to the customary law, marriage is not merely a relationship between a man and woman who are married. It is a matter of families and community [8]. People involved in a marriage should meet the requirements regulated in the law. One of the requirements is a minimum marriage age, both for males and females. In Article 7, paragraph (1) of Law No. 1 of 1974, marriage is only allowed for a male when he reaches 19 years old and 16 years old for a female. It explains these ages are essential to maintain the health of husband and wife as well as their children.

In article 15, paragraph (1) of Islamic Law Compilation, for the family and household benefits, marriage can only be done by a bride and bridegroom when they meet the

requirement in Article 7, paragraph (1) of Law No. 1 of 1974, that is the bridegroom is at least 19 years old, and the bride is at least 16 years old. In Article 19 of the Civil Code, the minimum age for a male is 18 years old and female 15 years old. Law No 1 of 1974 determines older age, i.e. 19 years for males and 16 years for females. However, the ages are now considered inappropriate.

Law No 1 of 1974, in its explanation, embraces the principle that bride and bridegroom candidates are old enough physically and mentally for marriage. Marriage is related to population, and thus to prevent high population growth, under-aged marriage should be prevented. Lower minimum marriage age for females causes a high population growth as under-aged marriage contributes to a high birth rate [9].

The provision in Article 7, paragraph (1) of Law No. 1 of 1974 has been invalidated by the Constitutional Court Decision No. 22/PUU-XV/2017. The phrase "16 years old" in Article 7, paragraph (1) is contrary to the 1945's Constitution, and it does not have any legally binding power. However, this article is still valid until the legislator decides minimum age for marriage and passes it in the law. The Constitutional Court allowed the legislator three years to pass a law as an amendment for Law No. 1 of 1974 regarding marriage.

Child marriage contributes to poverty, maternal mortality, born child health, drop out, sexual violence, etc. [6] If a female child who is under 19 years old gets married, she cannot receive the rights guaranteed by the Constitution as a male child can. Commission IX of the House of Representatives (DPR) of Republic of Indonesia, Okky Asokawati, believes that the minimum age of marriage for females should be changed from 16 years old, as regulated in Article 7, paragraph (1) of Law No. 1 of 1974, to 19 years old. This change does not only give equality in terms of minimum age between males and females but also ensures the equal fulfilment of rights. In addition, the change can also allow better protection for women, especially related to reproduction organ and mental readiness to start a family (Thomas Pulungan, December 16, 2018, p.1).

The legislator should consider other laws in determining the minimum age for marriage to avoid conflict. The legislator should take into account child protection law, child court law, laws about ratification of Convention on the elimination of all forms of discrimination against women (CEDAW), and the 1945's Constitution. Other countries have determined the minimum age for marriage, i.e. 18 years old. Some other countries set the age at 19 years without differentiating males from females. The CEDAW rules 18 years old as the minimum marriage age. Meanwhile, Indonesian National Population and Family Planning Board (BKKBN) recommends that the best minimum age for females is 21 and 25 for males [10].

The legislator should also consider other aspects, such as

health, education, psychology, social, gender, population, regulation synchronization, human rights, husband and wife dignity, and other aspects. The legislator should determine the minimum age for marriage, such as 19 for both males and females or 21 for males and 19 for females.

The Indonesian Women's Coalition for Justice and Democracy agrees that revision for marriage law should be done as soon as possible. There is a concern that in a three-year time, more female children will be trapped in the under-aged marriage.

4. CONCLUSION

Paragraph (1) in Article 7 of Law No. 1 of 1974 determines the minimum age for a female to get married, i.e. 16 years old. The Constitutional Court in its Decision No. 22/PUU-XV/2017 declared that the phrase "16 years old" in the provision of Article 7, paragraph (1) of the law is contrary to Article 17, paragraph (1) of the 1945's Constitution, and it does not have any legally binding power. Thus, the legislator should revise the law. In determining the minimum marriage age, the legislator should consider several aspects, such as education, psychology, social, gender, population, regulation synchronization, human rights, husband and wife dignity, and other aspects. The legislator should adopt minimum age in child protection law or the United Nations Convention on the Rights of the Child (UNCROC), which set 18 years as the minimum age. The legislator should consider aspirations from the community and create new norms based on the verdict of the Constitutional Court.

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