Legislative Review

Law No. 16 of 2019 on the Amendment towards Law No. 1 of 1974 on Marriage

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I. INTRODUCTION

Family is often an issue close to the heart and home of many people, and it begins with marriage.[1] Marriage in Indonesia has historically and socially been a matter involving not only personal relations between two individuals but also religion and culture. It must be noted that centuries ago, Adat and Islamic law were the prevailing laws over the Nusantara archipelago until the Dutch came and enforced their legal system as colonisers.[2] During the colonial period, Adat and Islamic law were heavily reduced, yet even then, Adat and Islamic marriage laws were still applied.[3]

Law No. 1 of 1974 on Marriage (hereinafter, the Marriage Law) unified the national regulation while attempting to accommodate the diversity in marriage customs across different segments of Indonesian society (Muslims, Adat, Christians, and Chinese).[4] Article 1 of this law emphasises explicitly

[1]Sri Rahmawati, "Batas Usia Minimal Pernikahan (Studi Komparatif Hukum Islam Dan Hukum Positif)," *Syakhsia: Jurnal Hukum Perdata Islam* 21, no. 1 (2020): 85.

[2]Ramlah, "Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama Di Indonesia," *Jurnal Kajian Hukum Islam* 12, no. 1 (2012): 387–89.

[3]*Ibid.*, 394.

[4]Aristoni Aristoni, "4 Dekade Hukum Perkawinan Di Indonesia: Menelisik Problematika Hukum Dalam Perkawinan Di Era Modernisasi," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 7, no. 1 (2016): 85.

the spiritual-religious nature of marriage. Such a character of marriage would naturally come in conflict with the secular nature of the human rights regime,[5] and this adds prospects and challenges to the discourse.

Our problem centres around Article 7 of the Marriage Law. Article 7(1) rules that the minimum age of marriage for men and women is nineteen (19) and sixteen (16) years, respectively, and Article 7(1) allows the possibility for dispensation for younger people to be married.[6] This provision has been challenged twice before the Constitutional Court. The first judicial review was submitted in 2014 and rejected in 2015.[7] Another challenge in the 2017 approach found success through the Constitutional Court decision 2018.[8]

The Constitutional Court decision required the legislators to amend the Marriage Law, notably Article 7, within three years after the decision was announced. The legislator only took about a year to pass Law No. 16 of 2019 on the Amendment of Law No. 1 of 1974 on marriage (hereinafter, the Marriage Law Amendment). Two substantial amendments were made to Article 7:

1. The minimum age for marriage for both men and women is nineteen (19) years old and
2. The granting of dispensation requests by the court has more requirements.

II. UNDERSTANDING THE CONTEXT TOWARDS THE AMENDMENT

As context, we must remember that the Marriage Law was first passed in 1974. Relevant international conventions were nonexistent, had yet to enter into force, and/or still needed to be ratified by Indonesia. The International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR) did not enter into force until 1976. Neither was ratified by Indonesia until 2006.[9] The Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)

[5]Michael Freeman, "The Problem of Secularism in Human Rights Theory," *Human Rights Quarterly* 26, no. 2 (2004): 375–400.

[6]Article 7(3) discusses the consent of parents who are deceased or incapable of Article 6 in case of dispensation requests.

[7]Constitutional Court Decision No. 30-74/PUU/XII/2014.

[8]Constitutional Court Decision No. 22/PUU/XV/2017.

[9]Law No. 12 of 2005 on the Ratification of ICCPR and Law No. 11 of 2005 on the Ratification of the ICESCR.

will not enter into force until 1981 and ratified by Indonesia in 1984.[10] Also, the Convention on the Rights of the Child 1989 (CRC) did not enter into force until 1990, and Indonesia ratified it the same year.[11]

History reveals that the pre-existing social, cultural, and religious context surrounding marriage in the Indonesian society captured and endorsed at the time the Marriage Law was enacted did, over time, face challenges from the incoming international human rights law provisions. Where is the balance between engineering society to conform to positive lessons from international law and filtering the adoption of norms that contradict existing societal norms? Alas, this will forever be a complex discourse. In ratifying the CRC, Indonesia submitted a declaration stating that implementing specific articles of the CRC would conform to the Indonesian Constitution.[12] Indonesia did not submit any declaration or reservations to Articles 2 and 16 of CEDAW as numerous Muslim-majorities did,[13] but the explanation appended to Law No. 7 of 1984 emphasised that implementing CEDAW would conform to the values and norms in Indonesian society.

The problematic debate eventually found its way to the Constitutional Court. The petitioners of the judicial review at the Constitutional Court in 2014 (case No. 30-74/PUU/XII/2014) felt that the minimum age of sixteen years old for women was too low and would cause discrimination and harm towards women, so they requested it to be increased to eighteen years old. They claimed this contradicted various constitutional rights, which are also protected per Indonesia's treaty obligations in CEDAW and the CRC. Most experts and parties invited to testify appear to support the increase of this minimum age, but the split occurs among the different Islamic scholars.[14] In the end, the Court rejected the petition[15] because the judges felt that there are so many dimensions relevant to marriage, age alone cannot be the sole cause of the problems brought

[10]Law No. 7 of 1984 on the Ratification of CEDAW.

[11]Presidential Decree No. 36 of 1990 on the Ratification of CRC.

[12]Appendix to Presidential Decree No. 36 of 1990.

[13]"Reservations to CEDAW," United Nations Entity for Gender Equality and the Empowerment of Women, accessed 26 October, 2017, http://www.un.org/womenwatch/daw/cedaw/reservations.htm.

[14]Compare the testimonials of Quraish Shihab, Maria Ulfah Anshor, and Majelis Ulama Indonesia in Constitutional Court Decision No. 30-74/PUU/XII/2014.

[15]A majority, as there was one dissenting opinion by Justice Maria Farida Indrati.

by the petitioners. Instead, it would address the problem via legislative review rather than as a legal policy.

The petitioners of case No. 22/PUU/XV/2017 came with a different ground to challenge Article 7(1) of the Marriage Law. While also noting the problems incurred by child marriage, as was argued by the petitioners of the 2014 case, the 2017 petitioners submitted that the different minimum age limits constituted discrimination against women. Once again, CEDAW and the CRC were cited as a basis, this time also focusing on the unfairness of the distinction between men's and women's minimum age for marriage. The Constitutional Court considered that different treatment between men and women is not discriminatory. However, it will become so if it incurs harm to women, as is the case at hand. Therefore, they unanimously decided Article 7(1) to be unconstitutional but shifted the burden to the legislators to set an equal minimum age limit for marriage.

The Marriage Law Amendment was enacted on 14 October 2019, increasing the minimum age for women's marriage to nineteen years old, making it the same with men. The explanation appended to the Law did not explain why the adjustment was made this way except to make the minimum ages equal between the sexes simply. It is possible that the legislators felt it less harmful to equalise to nineteen than eighteen-year-olds.

With the enactment of this law, the opposition from some Islamic scholars may be resolved to a large extent. It must be noted that the primary sources of Islamic law do not determine a definite minimum age for marriage, causing classical literature of jurisprudence to have different opinions when concluding definite age limits,[16] therefore, it is natural that Islamic scholars had different opinions in the 2014 Constitutional Court case. However, an Islamic legal maxim dictates *hukum al-hakim yarfa'u al-khilaf* (ruler decrees remove differences of opinion).[17] One might reasonably assume that an *Adat* perspective might be against a strict increase in the minimum age of marriage.[18] However, none of

[16]Ahmad Asrori, "Batas Usia Perkawinan Menurut Fukaha Dan Penerapannya Dalam Undang-Undang Perkawinan Di Dunia Muslim," *Al-'Adalah* 12, no. 2 (2015): 807–26.

[17]Muḥammad ibn Aḥmad Al-Dasuqi, *Ḥāshiyah Al-Dasūqi Al-Sharḥ Al-Kabīr*, vol. 4 (Beirut: Dar Al-Fikr, 2016), 228.

[18]See *inter alia* I Ketut Sudantra and I Gusti Ngurah Dharma Laksana, "Di Balik Prevalensi Perkawinan Usia Anak Yang Menggelisahkan: Hukum Negara Versus Hukum Adat," *Jurnal IUS Kajian Hukum Dan Keadilan* 7, no. 1 (2019): 65–66; Muhammad Ghufron, "Makna Kedewasaan Dalam Perkawinan," *Jurnal Al-Hukama* 6 (2016): 331–32.

their representatives were invited to any of the Constitutional Court hearings on this matter, and it is not easy to find any vocal *Adat* voices against it.

III. THE QUESTION OF DISPENSATION

The Constitutional Court judges did not deny the complexity of marriage resulting in people marrying very young, although the 2014 and 2017 panels approached the matter slightly differently. One leeway The Marriage Law provides to handle these complexities is the possibility of dispensation to allow persons under the prescribed age to marry, as per Article 7(2).

The petitioners of the 2014 Constitutional Court case requested two things concerning dispensation: that dispensation is only allowed in case of pregnancy out of wedlock and that only the Court can grant dispensations.[19] The Constitutional Court rejected this request because dispensation may still be needed for various reasons, and the 'other officials' are still needed where access to courts is difficult. Meanwhile, the 2017 Case did not appear even to mention the issue, other than listing an article titled "Menyingkap Tabir Dispensasi Perkawinan" (trans: Unveiling Marriage Dispensations) as one of the evidence[20] but the judge's decision did not explain its significance.

The new Articles 7(2) and 7(3) of The Marriage Law Amendment have provided a few updates to the rules related to dispensation. First, now the Court must hear from the persons who intend to marry after only requiring the parents to submit a request for dispensation. Second, only the Court may grant a dispensation, and no more 'other officials' nodding positively to the 2014 Constitutional Court case petitioners. Third, the Court may only grant dispensation requests based on 'urgent grounds' supported by sufficient evidence. The explanation appended to the Law elaborates that 'urgent grounds' means a situation where there is no other way (for the couple) other than to marry. This answers some concerns by scholars who, after the 2017 Constitutional Court decision but before The Marriage Law Amendment, were concerned that the lack of criteria for granting requests would render the decision useless.[21]

[19]The article stipulates that dispensation can be granted by the Court of 'other officials'.

[20]See Para 2.2 of the Constitutional Court Decision No. 22/PUU/XV/2017.

[21]See: Haniah Ilhami, "Relevansi Putusan Mahkamah Konstitusi Nomor 22/PUU-XV/2017 Dalam Upaya Mencegah Perkawinan Usia Anak," *Jurnal Konstitusi* 17, no. 2 (2020): 284–308.

There are some critics of this revision, especially concerning the third point above offered by Lisman Lubis and Syamsul Bahri[22] who are interesting judges of the Religious Court of Medan and Watansoppeng, respectively. The judges argue that the term 'urgent grounds' can be very widely and loosely interpreted so that granting dispensation is still very easy. The Supreme Court Regulation No. 5 of 2019 on the Guidelines for Granting Marriage Dispensation Requests, according to Lubis and Bahri, does not help much due to two reasons:

1. The Marriage Law Amendment and the Supreme Court Regulation in Articles 7(2) and 17(a), respectively, appear to have different spirits, namely preventing underage marriage and following unwritten laws (legal values and local wisdom). Lubis and Basri suggest that these two spirits may appear to contradict each other because underage marriage may be the product of local wisdom and unwritten laws.
2. Article 15 of the Supreme Court Regulation stipulates that to understand 'urgent', the Court 'may' (*dapat*) consider expert opinions from psychologists, doctors/midwives, professional social workers, and others. The use of 'may' (*dapat*) instead of 'must', according to Lubis and Bahri, indicates that such a requirement is non-binding and, therefore, can be easily disregarded.

These critics are, *prima facie,* curious.[23] Regarding spirit, the two do not seem contradictory if we consider Article 17(a) of the Supreme Court Regulation and Article 2 (principles governing dispensation requests, which starts with 'best interest of the child' and 'the child's rights to life and develop'). These 'unwritten laws' do not even appear in the list of principles, so Article 17(a) indicates a needed addition as such laws also need to be considered together with all other aspects.

Furthermore, Article 15 of the Supreme Court Regulation says 'may,' which indicates a non-binding nature. However, Article 15 is only in the context of examining the underage person intending to marry, which is just one part of

[22]Lisman Lubis, "Dispensasi Kawin Jelang Dua Tahun Pasca Perubahan Undang-Undang Perkawinan," *Jurnal Ilmiah Penelitian Law Journal* 2, no. 1 (2021): 1–9; Syamsul Bahri, "Dispensasi Kawin Jelang Dua Tahun Pasca Perubahan Undang-Undang Perkawinan," Pengadilan Agama Tual, accessed August 30, 2022, https://pa-tual.go.id/berita/berita-terkini/541-dispensasi-kawin-jelang-dua-tahun-pasca-perubahan-undang-undang-perkawinan-oleh-syamsul-bahri-s-h-i.

[23]Almost as curious as how very similar are large portions of Lubis and Bahri's articles are to each other, albeit having a few differences.

the whole consideration. Other articles in the Supreme Court Regulation do provide imposition towards such duties to properly examine the state of the underage persons intending to marry. Article 12 obliges the judge to advise all parties, including the parents and persons intending to marry, about the risks and consequences of marriage so that they all understand. Article 14 requires the judge to identify the nature of consent, psychological and health conditions, and potential psychological/physical/sexual/economic coercion surrounding the marriage. The things that may be done during the session examining the person intending to marry, as per Article 15, are legally required for the judge to consider the 'best interest of the child' in Article 16.

Only after all that does Article 17(a) require the judge to consider unwritten laws inseparable from the Indonesian legal system. Additionally, Article 17(b) requires the judge to refer to international conventions related to child protection. This is important because the first international Convention on the subject of child protection that comes to mind is the CRC, which does not explicitly mention marriage. However, the Office of the High Commissioner for Human Rights issued the CRC General Comment No. 4 (CRC/GC/2003/4) explaining that 'early marriage' is harmful and abolishing it should be part of CRC obligations.[24] This is overwhelming evidence against the alleged contradicting spirits between the two instruments.

Be that as it may, Lubis and Bahri's critics are reflections of actual judges of religious courts who deal with dispensation requests on the ground, each representing areas separated by many islands from each other. Is this what is happening on the ground in the practice of granting dispensation requests? On the other hand, others offer more sympathetic comments towards the dispensation process. For example, Ahmad Rizza Habibi (candidate judge at the Giri Menang Religious Court) indicates the necessity of the 'best interest' principle in considering dispensation requests per the newly amended Marriage Law supplemented by the Supreme Court Regulation.[25]

[24]Soft laws like this are not formally binding, but they may be seen as authoritative interpretations of treaties. See Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007), 213. Nonetheless, 'may' means that the authoritativeness of specific soft laws is still open to criticism and debate. See: Fajri Matahati Muhammadin et al., "Lashing in Qanun Aceh and the Convention Against Torture," *Malaysian Journal of Syariah and Law* 7, no. 1 (2019): 17–20.

[25]Ahmad Rizza Habibi, "Dialektika Pembuktian Alasan Mendesak Dalam Dispensasi Nikah

IV. CONCLUSION

The Marriage Law Amendment is a happy change for those who wish to end child marriage and demand equality between men and women. The legal minimum age for women to be married is increased from below adulthood as per the CRC to above that age, previously the minimum age for men. Alternatively, at least, that is so on paper.

It is essential to periodically evaluate whether the changes brought by succeed in alleviating the problems it intends to solve. Marriage dispensation requests for those who are legally underage were meant to be an exception for exceptional cases. However, the rate of its use may have dramatically increased post-Marriage Law Amendment. Nation-wide marriage dispensation requests have almost doubled (13.822 to 24.864) between 2018 and 2019 and almost tripled (to 64.196) in 2020,[26] but there is a slight reduction in 2021 (to 59.709).[27]

It is important to note that the above is several requests. It is difficult to find complete data on approved or rejected dispensation requests. Our little data indicates a tendency of easeness in obtaining approval. For example, 99% of the dispensation requests in November 2019 (i.e. the month after The Marriage Law Amendment was issued) were approved.[28] With time, perhaps more data will reveal the actual efficacy of this amendment for the government's future policy consideration.

Dan Korelasinya Terhadap Kepentingan Terbaik Bagi Anak," Pengadilan Agama Purworejo, 2022, https://www.pa-purworejo.go.id/publikasi/artikel-peradilan/485-dialektika-pembuktian-alasan-mendesak-dalam-dispensasi-nikah-dan-korelasinya-terhadap-kepentingan-terbaik-bagi-anak.

[26]Data was obtained from Lubis and Bahri's articles ending in 2020, as they were both published in 2021. It is prudent to note that both Lubis and Bahri suggest that the increase between 2018 and 2019 might be due to factors other than the increase in the minimum age of marriage, which is a peculiar proposition considering the circumstances

[27]Habibi, "Dialektika Pembuktian Alasan Mendesak Dalam Dispensasi Nikah Dan Korelasinya Terhadap Kepentingan Terbaik Bagi Anak."

[28]Lubis, "Dispensasi Kawin Jelang Dua Tahun Pasca Perubahan Undang-Undang Perkawinan," 6; Bahri, "Dispensasi Kawin Jelang Dua Tahun Pasca Perubahan Undang-Undang Perkawinan."

REFERENCES

Al-Dasuqi, Muḥammad ibn Aḥmad. Ḥāshiyah Al-Dasūqi Al-Sharḥ Al-Kabīr. vol. 4. Beirut: Dar Al-Fikr, 2016.

Aristoni dan Junaidi Abdullah. "4 Dekade Hukum Perkawinan Di Indonesia: Menelisik Problematika Hukum Dalam Perkawinan Di Era Modernisasi." *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 7, no. 1 (2016): 74-97.

Asrori, Ahmad. "Batas Usia Perkawinan Menurut Fukaha Dan Penerapannya Dalam Undang-Undang Perkawinan Di Dunia Muslim." *Al-'Adalah* 12, no. 2 (2015): 807-826.

Bahri, Syamsul. "Dispensasi Kawin Jelang Dua Tahun Pasca Perubahan Undang-Undang Perkawinan." Pengadilan Agama Tual. Accessed 30 August 2022. https://pa-tual.go.id/berita/berita-terkini/541-dispensasi-kawin-jelang-dua-tahun-pasca-perubahan-undang-undang-perkawinan-oleh-syamsul-bahri-s-h-i.

Boyle, Alan and Christine Chinkin. *The Making of International Law*. New York: Oxford University Press, 2007.

Freeman, Michael. "The Problem of Secularism in Human Rights Theory," *Human Rights Quarterly* 26, no. 2 (2004): 375-400.

Ghufron, Muhammad. "Makna Kedewasaan Dalam Perkawinan." *Jurnal Al-Hukama* 6 (2016): 319-336.

Habibi, Ahmad Rizza. "Dialektika Pembuktian Alasan Mendesak Dalam Dispensasi Nikah Dan Korelasinya Terhadap Kepentingan Terbaik Bagi Anak." Pengadilan Agama Purworejo. Accessed 30 August 2022. https://www.pa-purworejo.go.id/publikasi/artikel-peradilan/485-dialektika-pembuktian-alasan-mendesak-dalam-dispensasi-nikah-dan-korelasinya-terhadap-kepentingan-terbaik-bagi-anak.

Ilhami, Haniah. "Relevansi Putusan Mahkamah Konstitusi Nomor 22/PUU-XV/2017 Dalam Upaya Mencegah Perkawinan Usia Anak." *Jurnal Konstitusi* 17, no. 2 (2020): 284-308.

Indonesia, Constitutional Court Decision No. 30-74/PUU/XII/2014.

Indonesia, Constitutional Court Decision No. 22/PUU/XV/2017.

Indonesia, Law No. 12 of 2005 on the Ratification of ICCPR.

Indonesia, Law No. 11 of 2005 on the Ratification of the ICESCR.

Indonesia, Law No. 7 of 1984 on the Ratification of CEDAW.

Indonesia, Presidential Decree No. 36 of 1990 on the Ratification of CRC.

Lubis, Lisman. "Dispensasi Kawin Jelang Dua Tahun Pasca Perubahan Undang-Undang Perkawinan." *Jurnal Ilmiah Penelitian Law Journal* 2, no. 1 (2021): 1–9.

Muhammadin, Fajri Matahati et al. "Lashing in Qanun Aceh and the Convention Against Torture." *Malaysian Journal of Syariah and Law* 7, no. 1 (2019): 11-24.

Rahmawati, Sri. "Batas Usia Minimal Pernikahan (Studi Komparatif Hukum Islam Dan Hukum Positif)." *Syakhsia: Jurnal Hukum Perdata Islam* 21, no. 1 (2020): 85-110.

Ramlah. "Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama Di Indonesia." *Al-Risalah: Jurnal Ilmu Syariah dan Hukum* 12, no. 1 (2012): 383-402.

Sudantra, I Ketut and I Gusti Ngurah Dharma Laksana. "Di Balik Prevalensi Perkawinan Usia Anak Yang Menggelisahkan: Hukum Negara Versus Hukum Adat." *Jurnal IUS Kajian Hukum Dan Keadilan* 7, no. 1 (2019): 56-72.

"Reservations to CEDAW." United Nations Entity for Gender Equality and the Empowerment of Women. Accessed 26 October 2017. http://www.un.org/womenwatch/daw/cedaw/reservations.htm.