



Children Rights and The Age Limit: The Ruling of The Indonesian Constitutional Court

Bagus Hermanto,¹ I Gede Yusa²

¹Fakultas Hukum Universitas Udayana, E-mail: bagushermanto9840@gmail.com

² Fakultas Hukum Universitas Udayana, E-mail: gd_yusa@unud.ac.id

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Corresponding Author:
Penulis Pertama, E-mail:
bagushermanto9840@gmail.com

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Abstract

Indonesian laws determine different age limit for the children. The Law of Republic of Indonesia Number 1 Year 1974 concerning Marriage holds the age limit for the children until 16 years old for the women and 19 years old for the men. Meanwhile, the Law of Republic of Indonesia Number 23 Year 2002 concerning Child Protection determines the age limitation 18 years old applied both for women and men, in accordance with the Convention of the Rights of Children, as ratified through Presidential Decree Number 36 Year 1990. Some violations of the human rights of children in Indonesia were more or less related to the unclear limitation of the age of children. A few years ago, this situation was brought into legal concern as a constitutional review was lodged before the Constitutional Court of the Republic of Indonesia. The main purpose of this paper is to analyze the legal consideration contained in this Judgment. This paper is set as normative legal research that uses the statutory approach and case approach. It can be assessed that, the Constitutional Court, in its decision, tends to consistently follow jurisprudence which considers that the minimum age limit is an open legal policy which at times can be changed by creating/amending Law through the legislative review process. Once should be noted that not all Justices had a similar view on the judgment as one Justice expressed a dissenting opinion.

1. Introduction

The Decision of the Constitutional Court of the Republic of Indonesia Number 30-74 / PUU-XII / 2014 pronounced on June 18, 2015, has remained social and legal matters regarding the legality of child marriages. The verdict is actually not related to review any legislation that specifically regulates the rights of the child, but the ruling was on the case of reviewing Law No. 1 of 1974 on Marriage, hereinafter referred to as the Indonesian Marriage Act, against the Constitution of the Republic of Indonesia, hereinafter referred to as Indonesian Constitution.

The main legal issue is the provision in Article 7 paragraph (1) of the Indonesian Marriage Act in respect of the phrase "16 (sixteen) years". The provision reads "Marriage is only allowed if the man has reached the age of 19 (nineteen) years and the

woman has reached the age of sixteen (16) years." Petitioners argued that the phrase becomes the basis and justification of the legal basis of child marriages.¹

Petitioners filed some test bases as stipulated in the Indonesian Constitution, namely Article 28A; Article 28B paragraph (1) and (2); Article 28C paragraph (1); Article 28D (1); Article 28G (1); Article 28H paragraph (1) and (2); and Article 28 paragraph (1) and (2).²Based on the assessment of facts and law, the Constitutional Court declared in its verdict to reject the entire petitions.³ The Court concludes that the subject of the petition has no legal grounds.⁴ Despite the majority of the judges supported the ruling, there is one judge who gave a dissenting opinion that Judge Maria Farida Indrati, meaning that the judgment in concern is in fact not taken unanimously.

This certainly raises questions about the role of the Constitutional Court which has been seen as the protector of human rights because as the rights of the children, especially girls, are not given proper attention. This leads the writer to raise this issue from the perspective of the human rights of the children.

This paper is primarily aimed to analyze the legal reasoning given by the judges of the Constitutional Court of the Republic of Indonesia concerning the age limit of children in relation to the issue of child marriage as stated in the Decision No. 30-74 / PUU-XII / 2014. As background understanding to support the analysis of these objectives, it would need to be discussed in advance of the Indonesian Laws concerning children's rights and the competence of the Constitutional Court to deal with the case of a judicial review.

2. Method

This writing performs a normative legal research that uses statutory and case approaches. It primarily looks at how norms contained in an Act, as a product of legislation, is judicially reviewed before Indonesian Constitutional Court. Most sources are taken from Indonesian national law, court decision, and treaties. Besides this paper also reads relevant books and journals articles.

3. Result and Discussion

Children are regarded as one of the vulnerable groups that need to be protected.⁵ As part of the community, they are still powerless in many ways and are still dependent on adults.⁶ Facts about the children's age as well as psychological and mental maturity factors leads to the marginalization of children in the policy-making process.⁷

¹See for further explanation :The Decision of the Constitutional Court of the Republic of Indonesia Number 30-74 / PUU-XII / 2014, hereinafter referred to as Indonesian Constitutional Court Case Law, para.2.1-16.

²*Ibid.*, para.2.1-8.

³*Ibid.*, para 5.

⁴*Ibid.*, para 4.3.

⁵ Ramteke, P. S. (2017). Knitting the Future Story of Indian Women: Preventing Violence, Fostering Development, and Accelerating Empowerment." *Udayana Journal of Law and Culture*, 1(2), 98-120. doi:10.24843/UJLC.2017.v01.i02.p02., p. 111.

⁶ Clifford, A.B. & Arief, B.A. (2018). Implementasi Ide Restorative Justice ke dalam Ketentuan Peraturan Perundang-Undangan Anak di Indonesia. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 7(2), 204-222. doi: <https://doi.org/10.24843/JMHU.2018.v07.i02.p06>. p. 205.

⁷ Aryani, N. M. (2016) Perlindungan Hukum terhadap Anak Sebagai Korban Kekerasan Seksual di Provinsi Bali. *Kertha Patrika*, 38(1), 18-30.

In Indonesia, the rights of the child have been legally protected by official law and regulations. Facts show that some peoples or groups of peoples raise issues that these laws could not be properly implemented due to the current development. That is why, Court is expected to play a crucial role to interpret the norms stipulated in the laws on children in a proper context and direction. The following discussion will describe Indonesian law on children and the capacity of Indonesian Constitutional Court to assess constitutional provision with regards to the issue of children, in a specific theme, that is age limit and marriage.

3.1. Indonesian Law concerning Children's Rights in relation with Children Age Limit and Mariage

The constitutional guarantee for the rights of children is stipulated in the Indonesian Constitution (after the amendment), in particular in Chapter X A on Human Rights. Article 28B paragraph (2) of the Indonesian Constitution states that every child has the right to live, grow, and develop as well as the right to protection from violence and discrimination.

At the level of legislation, the Law of the Republic of Indonesia Number 39 of 1999 on Human Rights, hereinafter referred to as the Indonesian Human Rights Act, promulgates a number of provisions regarding children as stated in Part Ten, started from Article 52 until Article 66. There are two provisions in this law pertaining to the issues addressed in this paper. First, Article 1 point 5 defines a child as every human being below the age of 18 [eighteen] years old and unmarried, including unborn child if it is in his interest. Secondly, Article 50 states that a woman who has grown up and/or has been married is entitled the right to take legal actions unless otherwise provided by her religious law.

The issue of child protection is specifically regulated in the Law No. 23 of 2002 regarding Child Protection as amended by Law Number 35 Year 2014. Article 1 (1) of this law determines that a child is a person under 18 (eighteen) years, including children who are still in the womb. Relating to marriage, Article 26 (1) (c) of the law states that parents are obliged to and responsible, among others, to prevent marriage at the age of children.

Indonesia has ratified two international treaties that provide protection of children's rights. First, the Convention on the Rights of the Child, hereinafter CRC, which was ratified by Presidential Decree No. 36 of 1990 and the International Covenant on Civil and Political Rights, hereinafter ICCPR, which was ratified by Act No. 12 of 2005. Article 1 CRC reads as follows: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier." This provision determines that a child means every human being in under the age of eighteen years unless under the law applicable to the child, the adult has been achieved before.⁸

ICCPR regulates both the issue of marriage and the rights of children. Article 23 (2) states that "The right of men and women of marriageable age to marry and to found a

doi: <https://doi.org/10.24843/KP.2016.v38.i01.p02>. p. 11.

⁸ As a comparison to other existing treaty, see Article **Article 8(2)** (b) (xxvi) The Rome Statute of the International Criminal Court that determines Conscripting or enlisting children under the age of fifteen years to involve in armed conflict as a war crime that can be penalized before the International Criminal Court

family shall be recognized". Further, paragraph (3) states that "No marriage shall be entered into without the free and full consent of the intending spouses ". Paragraph (4) of this provision was also set up as follows, States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage. Regarding the children rights, Article 24 of the ICCPR only states that every child has the right to protection of his/her status without any discrimination.

It should be understood that in its implementation, the rights of children that are constitutionally protected cannot be appropriately fulfilled by the State. Even, the mismatch between "*das sein*" with "*das sollen*" is more visible in the context of juridical regulation on human rights, especially in the case of children. The government should promote, respect, protect and fulfill the constitutional rights of children as enshrined in Article 28 (4) of the Indonesian Constitution. In fact, the constitutional rights of children were not properly implemented.

3.2. The Competence of the Constitutional Court over the case of Judicial Review

As outlined by Asshiddiqie,⁹ the term judicial review actually has grown during Ancient Greece and before the 19th century. There is a Dutch term "*toetsingsrecht*" that often paired with judicial review, but these two terms actually have differences, especially in terms of the actions of judges for *Toetsingsrecht* is limited to the judge's assessment of a legal instrument which its revocation is returned to the agency in form, while the implementation of the judicial review in Continental European countries already include actions of judges to declare the rule inadmissible. While judicial review generally covers the meaning of 'legislative review', 'constitutional review', and 'legal review', in the context of the judicial review before the Indonesian Constitutional Court, it may be referred to as the constitutional review as the constitution is used to be the basis of the review.

Historically, the emerge of judicial review was very much resulted from the decision of the Supreme Court of the United States (The Federal Supreme Court) in the case of *Marbury vs. Madison* in 1803 when the court annulled the provisions of Judiciary Act of 1789 because it was considered contrary to the Constitution of the United States. Although there were no provisions, either in the Constitution of the United States or in the specific law, that authorize the Federal Supreme Court to deal with judicial review, the Justices headed by John Marshall argued that the matter becomes a constitutional obligation of the Justices who have been bound by an oath to uphold and maintain constitution. Thus, the Supreme Court was seen to have an obligation to maintain the supremacy of the constitution as the highest law of the land, including the rules in violation of the constitution, and it is not only a constitutional obligation of the court but also other state agencies.¹⁰

According to Beard,¹¹ judicial review is part of checks and balances system as an essential element of the constitution that was built on the doctrine that the branches of

⁹ Asshiddiqie, J. (2005) *Model-Model Pengujian Konstitusional di Berbagai Negara*. Jakarta: Konpress, p. 6-16.

¹⁰Konstitusi, M (2010). *Hukum Acara Mahkamah Konstitusi*. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, p. 1-3.

¹¹Levy, L.W., (ed.) (2005) *Judicial Review: Sejarah Kelahiran, Wewenang, dan Fungsinya dalam Negara Demokrasi*, Judul Asli: *Judicial Review and the Supreme Court*, Penerjemah: Eni Purwaningsih. Jakarta: Nuansa, p. 3.

government should not fully control the power. Asshiddiqie¹² reveals that by the end of the 19th century, George Jellinek introduced the idea of the need to add an authority to conduct a judicial review at the Supreme Court of Austria. At that time, the Austrian Supreme Court already has the authority to hear disputes between citizens and the government related to the protection of political rights although district courts also have the authority to decide any constitutional objections raised by citizens for the actions of the state (constitutional complaint).

The idea of creating a separate judiciary outside the Supreme Court for dealing with any judicial review was first proposed by Hans Kelsen. The idea was then adopted in the Constitution of Austria in 1920 through the establishment of *Verfassungsgerichtshof* or what is known as the Constitutional Court.¹³ Apart from a number of sources mentioned that the first Constitutional Court established in the world was in Czechoslovakia, but the proposal of Hans Kelsen in the Constitution of Austria in 1920 is, undeniably, a landmark history of the establishment of the Constitutional Court, seen from the constitutional law perspectives.¹⁴

There are at least five (5) functions inherent in the existence of the Constitutional Court and implemented through its authority, namely as the guardian of the constitution, the final interpreter of the constitution, the protector of human rights, the protector of the citizen's constitutional rights, and the guardians of democracy.¹⁵

When associated with judicial power, constitutional functions possessed by the Constitutional Court is the judicial function to enforce law and justice, which is to uphold the supremacy of the constitution. Therefore, the degree of the justice and law upheld in the Constitutional Court proceedings is the constitution itself that is understood not just as a set of basic norms, but also the principles and moral of the constitution, among others, the rule of law and democracy, protection of human rights, as well as the protection of constitutional rights of citizens.¹⁶

In Indonesia, the authority of the Constitutional Court to conduct a judicial review provided for in Article 24 C (1) of the Indonesian Constitution and Article (1) (a) Law of the Republic of Indonesia Number 24 Year 2003 regarding the Constitutional Court. In essence, the Constitutional Court has the authority to hear at the first and last any review of the laws against the Constitution, and its decision is final.

3.3. The Case Law

¹²Jimly Asshiddiqie, *op.cit.*, p. 24.

¹³Asshiddiqie, J. & Fakhry. M. (2002) *Mahkamah Konstitusi :Kompilasi Ketentuan UUD, UU dan Peraturan di 78 Negara*. Jakarta: Pusat Studi Hukum Tata Negara FHUI dan Asosiasi Pengajar HTN dan HAN Indonesia, p. 15-25.

¹⁴Hamzah, M. G. (2016) *Mahkamah Konstitusi dan Sistem Ketatanegaraan Indonesia, serta Association of Asian Constitutional Courts (AACC), Paper, Presented at Kintamani Room, Sanur Paradise Plaza Hotel, Denpasar, 23 Juli 2016*, p. 5-7. See also the issue of individual complaint before Austrian Constitutional Court as a Kelsenian Model in Bezemek, C. (2011) *A Kelsenian Model of Constitutional Adjudication: The Austrian Constitutional Court*. SSRN, 1-17. <http://dx.doi.org/10.2139/ssrn.1937575>, p.15-16.

¹⁵Desiana, A. (2014) *Analisis Kewenangan Mahkamah Konstitusi dalam Mengeluarkan Putusan yang Bersifat Ultra Petita Berdasarkan Undang-Undang Nomor 24 Tahun 2003*. *Majalah Hukum Forum Akademika*, 25 (1), 45-57. <https://online-journal.unja.ac.id/index.php/ForAk/article/view/2163>, p.50.

¹⁶Fadjar, A.M. (2016) *Hukum Konstitusi dan Mahkamah Konstitusi*. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, h. 119.

In the case before the Indonesian Constitutional Court No.30-74/PUU-XII/2014, Petitioners filed three petitions. *Firstly*, the Constitutional Court should state that the substance of Article 7 (1) of Law No. 1 of 1974 on Marriage throughout the phrase "16 (sixteen) years" should be interpreted as conditionally unconstitutional so that these provisions throughout the phrase "16 (sixteen) years" is contrary to the Indonesia constitution as long as not interpreted "18 (eighteen) years". *Secondly*, the Constitutional Court to declare that the abovementioned provision does not have binding legal force. *Thirdly*, the Constitutional Court to change the substance of the abovementioned becomes: "Marriage is only allowed if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 18 (eighteen) years".

As has been previously described in the background, the Constitutional Court in its verdict rejected entirely the petitions because it concluded that the subject of the petition has no legal grounds. The legal considerations contained in this verdict are interesting to be observed. *First*, there is the consideration that some religions as well as various cultural backgrounds in Indonesia, have a different standard in the matter of the marriage age. *Second*, consideration refers to a number of the jurisprudence of the Constitutional Court,¹⁷ which had considered that the minimum age limit is an open legal policy which at times can be changed by creating Act in accordance with the demands of existing development. *Third*, considerations that need to determine the limits of the marriage age, especially for women, is relatively adapt it to the various aspects of both the health aspect and the socio-economic aspects since nobody can be sure that increasing limit marriage age for women of 16 (sixteen) year to 18 (eighteen) years will further reduce the divorce rate, tackling health problems, as well as minimizing other social problems. *Fourth*, considerations that the changes in marriage age limit for women can be done by a legislative review process that may be done by legislators to determine the ideal minimum age for women to marry. *Fifth*, the Court was reluctant to set a minimum age limit specified as the minimum age limit is constitutional because it can limit the efforts to change policy by the state to determine what is best for its citizens in accordance with the development of the civilization of any age or generation, which in this case related to the policy to determine the minimum age of marriage.¹⁸

Maria Farida was the only judge who expressed different views for considering that the phrase "the age of sixteen (16) years" in Article 7 (1) Indonesian Marriage Act has caused legal uncertainty and violate the rights of children as set out in Article (3), Article 28B (2), and Article 28C paragraph (1) of the Indonesian Constitution. In addition, she also concluded three things. *First*, child marriage will endanger the survival and development of the child and placed the child in a fragile situation of violence and discrimination. *Second*, marriage requires the readiness of physical, psychological, social, economic, intellectual, cultural, and spiritual. *Third*, child marriage cannot qualify under Article 6, namely the free will of the bride because they are minors. Interestingly such dissenting opinion expressed the consideration of Judge Maria Farida that the issue of marriage age needs legal changes immediately, namely through the Court's decision as a legal form of law as a tool of social engineering, which in this case will have an impact on the changes in the form of adjustments in the

¹⁷See as the comparison with :Decision No. 49/PUU-IX/2011 dated October 18, 2011, Decision No. 37-39/PUU-VIII/ 2010 dated October 15, 2010, and Decision No. 15/ PUU-V/2007 dated 27 November 2007.

¹⁸Indonesian Constitutional Court Case Law, *op.cit.*, para 3.13.2.

implementation of the Indonesian Marriage Act which will also have an impact on efforts to change the culture and tradition of child marriage.¹⁹

In 2017, the same concern was addressed to the Indonesian Constitutional Court for the second judicial review in the application no. 22/PUU-XV/2017. It seems the progress is relatively slow.²⁰ Prameswari and Agustin suggested that if the upcoming decision by Constitutional Court would remain the same, they suggested the Indonesia People's Representative Council (DPR) and President to modify its national legislation, particularly Indonesian Marriage Law and Compilation of Islamic Law (KHI) by virtue of diminishing any discrimination on the ground of sex and raise the minimum legal age for marriage for girls at age as that for boys.²¹

4. Conclusion

In this case, the Constitutional Court Decision tends to consistently follow jurisprudence which considers that the minimum age limit is an open legal policy which at times can be changed by creating/amending Act through the legislative review process. It can also be noted that the Constitutional Court was reluctant to set a minimum age limit specified as the minimum age limit is constitutional because it can limit the efforts to change policy by the State to determine what is best for its citizens in accordance with the development of the civilization of any age or generation, which in this case associated with the policy determine the minimum age of marriage. Dissenting Opinion by Judge Maria Farida reflects the desire to make changes to the law relating to the issue of marriage age by decision of the Court as a legal form through the means of law as a tool of social engineering. This method is seen to have an impact on the change in the form of adjustments in the implementation of the Marriage Law that will also have an impact on the efforts to change the culture and traditions of child marriage. It may be suggested to the legislators that own authority to create laws, both from the government and parliament, should begin the process of legislative review in order to change the minimum age limit. In addition, academicians should conduct a comprehensive study related to the opinions and perceptions of child marriage so that the resulting study can be used as a reference of the legislative review process.

¹⁹*Ibid.*, Decision of the Constitutional Court of Indonesia, para 6.3.

²⁰ Pos Kota, Perkara Mangkrak Enam Bulan, Pemohon Uji Pernikahan Dini Datangi MK, 19 Desember 2017, <http://poskotanews.com/2017/12/19/perkara-mangkrak-enam-bulan-pemohon-uji-pernikahan-dini-datangi-mk/>

²¹ Prameswari ZWAW & Agustin A, (2018) Indonesian Marriage Law Reform: The Way to Strengthen the Protection of Children's Rights Against Child Marriage. *Journal of Southeast Asian Human Rights*, 2 (1) p. 286-301 doi:10.19184/jseahr.v2i1. p.299.

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