

Indonesian Marriage Law Reform: The Way to Strengthen the Protection of Children's Rights Against Child Marriage

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Abstract

The Act Number 1 Year 1974 on Marriage stipulates the minimum ages requirement to enter into a marriage, which are 19 years for men and 16 years for women. It is expected that at that ages, each party has a mature soul and physic to enter into a marriage life. However, it is possible for those who have not reached the age to enter into marriage if there is a dispensation granted by the courts or other official designated by the parents of each party in the marriage. In 2012, a judicial review was filed to the Constitutional Court against the provisions of the minimum age limit in the Act Number 1 Year 1974 on Marriage to raise the limit of minimum age for women from 16 to 18 years. However, the Constitutional Court considered the provisions is constitutional. Then in 2017, the same provision of Marriage Law is submitted for the second time by different applicant to be reviewed again by the Constitutional Court. On the other hand, Indonesia has participated in the formulation of a variety of international human rights instruments which have an impact on children, and is a party to a number of them, including the CRC and the CEDAW. This paper elaborates the stipulation on minimum age requirement to enter into marriage and the conformity of Indonesian Marriage Act to the principles and provisions on the international human rights instruments.

Keywords: *Child Marriage, Children's Rights, Indonesian Marriage Law, Minimum Ages*

I. INTRODUCTION

Normally, marriage is regarded as one of the precious moments in adults life. However, in many part of the world, there are marriages which lead to some serious problems since they involve children as the brides.¹ Child (or early) marriage, defined as a formal marriage or informal union before age 18, is a reality for both boys and girls.² Even

¹ UNICEF, "UNICEF_Indonesia_Child_Marriage_Factsheet_.pdf", (2014), online: <https://www.unicef.org/indonesia/UNICEF_Indonesia_Child_Marriage_Factsheet_.pdf>.

² Joar Svanemyr et al, "Preventing child marriages: first international day of the girl child 'my life, my right, end child marriage'" (2012) 9 *Reprod Health* 31.

though boys are also potential subjects in child marriage, girls are disproportionately the most affected by the marriage.³ Based on the statistic in 2014, worldwide, more than 700 million women alive were married before their 18th birthday. More than one in three (about 250 million) entered union before age 15.⁴ Child brides will not only lose their childhood, they are often socially isolated as well with limited opportunities for education, employment and health facilities.⁵

Child marriage indicates that there is gender inequality in society. It is reflecting social norms that maintain discrimination against girls. Additionally, girls are often married to considerably older men. Child marriage among girls is most common in South Asia and sub-Saharan Africa, and the 10 countries with the highest rates are found in these two regions.⁶ According to UNICEF, Niger has the highest overall prevalence of child marriage in the world. However, Bangladesh has the highest rate of marriage involving girls under age 15. Almost half (42 per cent) of all child brides worldwide is in South Asia. Furthermore, India accounts for one third of the global total.⁷

Indonesia is not the country with the highest amount of child or early marriage, but still a country with serious problems of it. The problems linked with the child marriage also exist in Indonesia. Child marriage prevalence in Indonesia remains high. Around one in four girls are married before 18. Child marriage prevalence has plateaued from 2008 to 2015.⁸ The Central Statistics Agency's (Badan Pusat Statistik/ BPS) latest report showing a slight decrease in the number of child marriage cases. BPS released a report that said the number of child marriages in Indonesia stood at 23 percent in 2015, slightly down from 24.5 percent in 2010. The surveys, conducted in 2015 and in 2010, involved 300,000 households from all provinces across Indonesia as samples. They were selected from around 62.5 million households, in which the respondents were housewives aged between 20 and 24 years and were married before the age of 18.

Marriage law in Indonesia was issued as an effort of Indonesian Government to carry out unification on marriage law that applies to all Indonesian citizens. The Law Number 1 Year 1974 on Marriage (hereinafter referred to as Indonesian Marriage Act) was issued by Indonesian Government to replace the old marriage law stipulated in *Burgerlijk Wetboek* (hereinafter referred to as BW) inherited from the Dutch colonial. Before Indonesian Government created the Indonesian Marriage Act, there was pluralism in Indonesian marriage law since various laws applied to various classification of residents in Indonesia. First, *adat* law and Islamic law applied to indigenous people of Indonesia.⁹ Second, *Huwelijks Ordonantie Christen Indonesia* applied to Christian

³ Deborah A Grahame, *UNICEF* (World Almanac, 2004).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ OHCHR, "The Global Partnership to End Marriage.pdf", (2017), online: <<https://www.ohchr.org/Documents/Issues/Children/HumanitarianSituations/GirlsNotBrides.pdf>>.

⁷ *Ibid.*

⁸ "Child marriage remains a serious problem in Indonesia", online: <<https://www.aa.com.tr/en/asia-pacific/child-marriage-remains-a-serious-problem-in-indonesia/972756>>.

⁹ Sudarsono, *Hukum perkawinan nasional* (Rineka Cipta, 1991).

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people of Indonesia.¹⁰ Third, book I of the *BW* with a slight change applied to foreign east Chinese and their descendants.¹¹ Forth, for other foreign east people in Indonesia, their customary law applied.¹² Fifth, from Dutch law applied in Indonesia. Since this old Dutch law on marriage was considered no longer appropriate to the culture and backgrounds of Indonesian people, then the Indonesian Marriage Act was set, influenced by culture and religions in Indonesia.¹³ Book I of the *BW* applied to Europeans in Indonesia and their descendants.¹⁴

Therefore, the Indonesian Marriage Act is an effort of Indonesian Government to create a unification of marriage law. Based on Article 66 of the Indonesian Marriage Act, all various laws applied before the Indonesian Marriage Act are no longer applicable if this is related to aspects that are already stipulated in the Indonesian Marriage Act. However, this stipulation means if there is a legal vacuum on certain aspect that is not stipulated in the Indonesian Marriage Act, the prior laws shall be referred. This makes the unification of Indonesian Marriage Act is unique. Yet, we should be careful to apply the old marriage laws in order not to be the contrary to the principles of the Indonesian Marriage Act.

Based on Article 1 of the Indonesian Marriage Act, marriage is defined as both physical and mental bond between a man and a woman as husband and wife with the purpose to form a happy, eternal and prosperous family based on belief in the Almighty God. Compared to Article 26 Book I of the *BW*, *BW* did not stipulate definition of marriage and only considered marriage as civil relations. The provision of Article 1 of the Indonesian Marriage Act creates a change in the meaning of marriage. A marriage is no longer simply seen as a civil relation, but it is also based on belief in the Almighty God.

Several requirements both formal and substantive are stipulated in the Article 6 to 12 of the Indonesian Marriage Act. A marriage shall be conducted when determined requirements are met based on the Law. As one of the requirements, Article 7 stipulates the minimum age to enter marriage. At the minimum, a man shall be 19 years old, while a woman shall be 16 years old. This stipulation is intended to make the marriage achieve the true goal. Basically, it is expected at that age, each party has a mature soul and physic. However, it is possible for those who have not reached the minimum age to enter marriage, if there is a dispensation granted by the courts or other official designated by the parents of each party in the marriage. This means that even when the age of a man or a woman is less than 19 years old or 16 years old, they can conduct a marriage based on Indonesian Marriage Act.

As many other countries in the world, Indonesia is facing problems of child marriage. Indonesia is one of the countries with the highest absolute numbers of child marriage. In this regard, in 2012, there was an effort to raise the limit of minimum age to enter into marriage by filing a judicial review against the provisions of the minimum

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

age limit in the Indonesian Marriage Act. The appeal was filed to Indonesian Constitutional Court in order to raise the limit of minimum age for women from 16 years to be 18 years. However, the Indonesian Constitutional Court considered that the provisions in the Article 7 of the Indonesian Marriage Act on the minimum age in the Indonesian Marriage Act is constitutional. In 2017, the same provision of Marriage Law is submitted for the second time by different applicant to be reviewed again by the Constitutional Court.

This paper attempts to analyze two main issues. Firstly, it will scrutinize the *ratio legis* of the stipulation on minimum age requirement to enter into marriage in the Law No. 1 Year 1974 on Marriage. Secondly, it will discuss the conformity of Indonesian marriage law to the principles and provisions on the international human rights instrument, including the legal measures shall be taken to strengthen the legal protection for children against child marriage. At the international level, Indonesia has participated in the formulation of a variety of international human rights instruments which have an impact on children and is a party to a number of them. However, to make a deeper legal study, the second issue in this research will only investigate Indonesian marriage law in the light of the 1948 Universal Declaration of Human Rights (herein referred to as “the UDHR”), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (herein referred to as “the CEDAW”) and, most significantly, the 1989 Convention on the Rights of the Child (herein referred to as “the CRC”).

This study employs the Doctrinal Research Methodology since this research involves the study of law ‘in the book’ and is concerned with the formulation of legal ‘doctrines’ through the analysis of legal rules. Furthermore, it analyses the legal frameworks and human rights dimension of child marriage.

II. THE STIPULATION ON MINIMUM AGE REQUIREMENT TO ENTER INTO MARRIAGE IN INDONESIA

The requirements of a valid marriage stipulated in the Indonesian Marriage Act are both on formal and substantive requirements. The substantive requirements are regarding the personal of the prospective bride and groom. Then, the formal requirements are related to the procedure that must be done to conduct a marriage. Article 2 (1) of the Indonesian Marriage Act states that a marriage shall be conducted based on each party’s religious law. Then Article 2 (2) mentions that each marriage shall be registered in the institution of marriage registrar.

In principle, there are six basic principles embodied in the Indonesian Marriage Act¹⁵. The principles are the aim of marriage, the validity of marriage, the monogamy principle, the minimum age to enter marriage, the principle to complicate divorce, and equal rights and obligations of husband and wife. Those basic principles colouring the provisions in the Indonesian Marriage Act are influenced by values in culture and religions in Indonesia.

¹⁵ Moch Isnaeni, *Hukum perkawinan Indonesia* (Refika Aditama, 2016).

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The substantive requirements to get married can be found in Article 6 to 11 of the Marriage Law. Firstly, there must be consent of the parties in a marriage. This aims to prevent forced marriage. Then, the next requirement is regarding the minimum age to get married stipulated in Article 7. After that, Article 8 which states that there must be prohibition of marriage due to blood relations. Then, in Article 9, it is stipulated that a married person shall not allowed to remarry with anyone else, unless there is a permission from the court. While, Article 11 stipulates substantive requirement to get married regarding waiting period of marriage for women whose marriage are dissolved both due to death and divorce.

There are several articles in the Indonesian Marriage Act that contain provisions on age of the parties. The first provision can be seen in the Article 6 (2), that regulates the requirement to get permission from the parents for them who are still less than 21 years old to conduct a marriage. Then, the second provision can be found in the Article 7 (1), that states the minimum ages to be allowed to conduct a marriage which are 19 years old for men and 16 years old for women. After that, the third stipulation can be found in Article 47 (1) *jo.* 50 (1) that mentions that every child under 18 years old shall be under his/her parents' or guardian's authority. These provisions regarding ages are interesting to be analyzed since there are different criteria on each.

As one of the basic principle in the Indonesian Marriage Act, the Article 7 (1) stipulates the minimum ages to enter into a marriage. As mentioned above, a man must be 19 years old and a woman must be 16 years old. Basically, the stipulation on minimum ages is made in order to prevent child marriage, therefore the marriage will reach the aim of marriage as stipulated in the Article 1 that is to form a happy and eternal household based on belief in God Almighty. At that ages, the parties are considered mature physically and mentally, and ready to live out their marriage. This comes from the Islamic law that considers a person as an adult when he or she is *baligh*. *Baligh* is a term in Islamic law when there are particular signs of puberty in a man and a woman. However, this minimum age of marriage seems to be a justification for marriage of young age, especially for women that usually still study in school in their 16s.

In practice, there may be risks arising in the household of them who conducted under age marriages. The risks are regarding health, such as maternal mortality and family disharmony caused by unstable emotion and immature mind of the parties in the marriage. Due to problems arose, then the risk of divorce is also very high. Nonetheless, child marriage in Indonesia have been common, especially in some areas due to the influence of local customs. Marriage is done by an arranged marriage by the parents without the child's understanding about the meaning of the marriage. The situation that also often happens is even worse when the children's education should be stopped because of their household life.

The minimum ages to enter marriage are different with the minimum age regarding capacity to conduct legal act that is reflected in the Article 47 (1) *jo.* 50 (1) which is 18 years old. The parents or guardian shall represent the child aged less than 18 years to conduct legal acts both in or outside the court. These articles then become one of the legal basis to determine the legal capacity of a person.

Even though marriage is a legal act, it has special characteristics that make it different with other legal acts in general. Marriage does not simply require capacity to perform business obligation, but also involve physical and mental factors to conduct a marriage. Thus, the stipulation on minimum age to enter into marriage is distinguished from the minimum age to conduct other legal acts. On the other hand, the Indonesian Marriage Act also stipulates that each party aged less than 21 years old must get permission from their parents to conduct a marriage. This means that although a woman is already aged 18 years old that is considered eligible to get married and no longer under the authority of her parents or guardian, she must get permission from her parents to get married. Moreover, a man who is already 18 years old and has a capacity to conduct legal act in general, he is still not eligible to enter marriage because the minimum age to marry for a man is 19 years old.

Actually, the Marriage Law regulates the minimum age of marriage in order to eliminate the occurrence of early marriage. When it is compared to the previous provisions on marriage in the BW, there is only a slight difference on the minimum age stipulation that is 15 years for women and 18 years for men as regulated in Article 29 BW that was made more than a century ago. This age limit of marriage in the BW is often compared to the age limit of capacity to perform legal acts regulated in Article 330 BW which is 21 years. These legal acts are in particular doing business relation. In this act, it takes a person's ability to calculate profit and loss in business. In contrast to marriage that is also a legal act, but not only requires the ability to calculate profit and loss, but also involves emotions, and feelings. So that, at the specified minimum age to marry, women and men are competent to perform marital law acts. However, if the prospective bride and groom want to make a nuptial agreement, then as stipulated in Article 151 BW, considering the age that has not met the age limit of capacity, there is the assistance scheme in making the nuptial agreement by the party authorized to give permission to mate. There is no such stipulation in the Indonesian Marriage Act to deal with the situation.

Looking back at the current prevailing provisions under the marriage law, the marriage age and adult age limit have changed. So, on one hand, a woman who has met the minimum age of marriage of 16 years, is still considered incompetent according to Article 47 *jo.* 50 because she has not reached 18 years yet. As for men, the minimum age limit is 19 years, which means he has exceeded the age limit of adults. This age difference is particularly vulnerable to problems due to the lack of a clear ratio of the minimum age limit.¹⁶ The issue of marriage is also very casuistic. The law regulates that minimum age limit is intended to reduce the occurrence of child marriage, but also in current practices and developments, some argue that the minimum age should be increased, at least equal to the age limit of adults that is age limit to be considered to have legal capacity, that is 18 years. In practice, the problem of the age limit of marriage is not only this. Due to administrative problems, especially in remote areas, the prospective bride and groom might not have birth certificates to determine whether he or she has met the age limit requirement

¹⁶ Ibid.

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The requirement of age limit to get married can also be found in Compilation of Islamic Law (*Kompilasi Hukum Islam*) which is promulgated in 1991 as Presidential Instruction Number 1 Year 1991 on Dissemination of Indonesian Compilation of Islamic Law, that is aimed at upholding the consistency and uniformity in the implementation of the law by providing judges with a reference to handle cases in Islamic matters within the jurisdiction of Islamic courts.¹⁷ Article 15 (1) of the compilation states that to achieve the benefit (*kemaslahatan*) of the marriage, the requirement of minimum age to get married shall refer to Article 7 of the Marriage Law. This means that the age limit requirement in the compilation is the same that are 19 years old for men and 16 years old for women.

As mentioned before, that the stipulation of this age limit is to prevent underage marriage that is intended to ensure that the marriage can last and achieve its objectives. A marriage is also a legal relationship which creates rights and obligations of the husband and wife, and also to the children born in the marriage. Moreover, in Indonesian law, marriage is also based on belief in Almighty God, as stipulated in the Article 1 that states: "Marriage is the emotional and physical bond between a man and a woman as a husband and a wife that aims to form a happy and eternal family (household) based on belief in "God Almighty"; therefore, the religious values influence the provisions in the Law, including the substantive requirements of marriage in the Marriage Law. In Islamic law, actually, there is no stipulation on minimum age to conduct marriage, besides being based on the puberty age. However, the Compilation of Islamic Law accommodates the provisions that refer to the Marriage Law.

Furthermore, a dispensation to get married might be given when a party is still less than 19 or 16 years old. The dispensation is granted by the court or other official designated by the parents. The dispensation can be given when there are certain conditions regarding the parties, for example when the woman has been already pregnant out of wedlock. For benefit of the family and to provide legal protection for the woman and the child, then the court may give the dispensation to conduct marriage. The prospective bride and groom or their parents must file the request for dispensation to the court. The dispensation shall be given by court order after the court considers sufficient reason given by the parents or guardian. Basically, this stipulation on dispensation to marry can trigger the underage marriage practices.

In order to give such dispensation as the deviation of the age limit, the judges should give priority to the aim of the provision of age limit requirement. In the elucidation of the Article 7 (2) of Marriage Law, it is stipulated that the purpose of the age limit is to maintain the health of husband, wife and the descendants. Therefore, the dispensation should be given if it does not break this goal. However, the formulation of the provision on dispensation does not reflect this goal and may even be contrary to the goal itself because there are no strict conditions specified in the provision. This may lead to the deviation in the practices of dispensation to marry since this depends on the interpretation of the judged in each case. This could be more complicated when there is consent from the young bride to marry, that indicates that the first requirement of marriage is met.

¹⁷ Isnaeni, *supra* note 15.

In regard to this, in 2014 a judicial review on the Article 7 (1) of the Indonesian Marriage Act was filed to Indonesian Constitutional Court. The minimum age for women that is 16 years to enter marriage is considered too early based on several data about the number of a girl who got married before 18 even 15 years old.¹⁸ This data is related to the number of divorce that reached 50% and also the figure of maternal mortality rate that increased.¹⁹ However, the Constitutional Court considered that there is no guarantee when the marriage is conducted by older ages will last longer. In addition, the constitutional Court also look into the Islamic law that does not specifically mention certain ages as the requirement to marry, besides the requirement of *baligh*.

III. THE CONFORMITY OF INDONESIAN MARRIAGE ACT TO THE INTERNATIONAL HUMAN RIGHTS LAW INSTRUMENTS

Child or early Marriage is a reality faced by many parts of the world. Many children, most of them are girls, are encouraged by the parents to get married while they are before the age of 18. Commonly, the marriage is intended to benefit them both financially and socially, while also relieving financial burdens on the family.²⁰ After all, whether it happens to a girl or a boy, early marriage is a violation of human rights.

In fact, number of international human rights law instruments has discussed child marriage, for instance the UDHR, the CRC, the CEDAW, the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic Social and Cultural Rights (ICESCR), the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices, the International Labour Organisation's Convention 182 on the Elimination of the Worst Forms of Child Labour, and the WHO Constitution, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In general, the human rights perspective advocates to set up child marriage as a crime against women and the girl child. Additionally, girls and women are often facing unequal treatment before the law. That is why apart from specific law instrument which deal with child's rights, this study also approaches law instrument relating to prohibitions against discrimination on the ground of sex and age.

The UDHR addresses the marriage issue in Article 16, as follows:

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered only with the free and full consent of the intending spouses.

¹⁸ "MK tolak naikan batas usia minimal untuk menikah", online: *BBC News Indones* <http://www.bbc.com/indonesia/berita_indonesia/2015/06/150618_indonesia_mk_nikah>.

¹⁹ *Ibid*.

²⁰ "Early Marriage: A Harmful Traditional Practice", online: *UNICEF* <https://www.unicef.org/publications/index_26024.html>.

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(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The UDHR promotes the human dignity and equality between men and women. It affirms sex as being among the impermissible grounds of differentiation and provides an equal protection clause. Additionally, Article 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law. Despite the fact that the UDHR does not in and of itself have legal effect on all states, it is morally persuasive and is considered part of customary international law. Provisions for equality of the sexes in the enjoyment of rights are provided for in all the major human rights covenants of the United Nations. The UDHR also recognizes the right to free and full consent to a marriage.²¹ The consent cannot be 'free and full' when at least one partner is very immature. For both girls and boys, child marriage has profound many impacts, such as physical, intellectual, psychological and emotional impacts, cutting off educational opportunity and chances of personal growth.²²

In 1962, the UN created the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (herein referred to as "the Marriage Convention") to promote consensual marriage between adults. The Preamble confirms that the Marriage Convention recalls article 16 (1) of the UDHR that men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. In addition, it affirms that State Parties should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded. Article 2 of the Marriage Convention requests States Parties to take legislative action to specify a minimum age for marriage. The same provisions further provide that no marriage shall be legally entered by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses. Finally, Article 3 with an eye on implementation of the goals of the Marriage Convention, mandates that all marriages be registered in an appropriate official register by the competent authority.²³ It would seem that this ought to eliminate child marriage, unfortunately the convention does not prescribe a minimum age for marriage. Additionally, Indonesia has not ratified the document.

The other human rights law instruments which address child marriage that will be explored in this section are the CEDAW and the CRC. Indonesia ratified the CEDAW through Law Number 7 Year 1984. The CEDAW addresses marriage in Article 16. Article 16(1) requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations

²¹ United Nations, "Child Marriage and the Law: Legislative Reform Initiative Paper Series", online: *UN Rule Law* <<https://www.un.org/ruleoflaw/blog/document/child-marriage-and-the-law-legislative-reform-initiative-paper-series/>>.

²² UNICEF Office of Research- Innocenti, "Early Marriage: Child Spouses", online: *UNICEF-IRC* <<https://www.unicef-irc.org/publications/291-early-marriage-child-spouses.html>>.

²³ Grahame, *supra* note 3.

and in particular to ensure on a basis of equality of men and women the same right to enter into marriage and the same right freely to choose a spouse and to enter into marriage only with their free and full consent. The CEDAW also provides in Article 16(2) that the betrothal and marriage of a child shall have no legal effect and that all necessary action, including legislation, must be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. Despite the fact the CEDAW leave the authority to determine a minimum age for marriage to the state parties, through Article 2 it stipulates that the states are bound to eliminate discrimination against women in all spheres of life, including the private sphere—especially in the family. This includes not only eliminating practices that are intended to constrain women’s human rights but also those unintended consequences of facially neutral laws. In pursuing these goals, states may under Article 4 of the CEDAW even introduce temporary affirmative action measures until equality between men and women is achieved.²⁴

Indonesia ratified the CRC through Presidential Decree of The Republic of Indonesia Number 36 Year 1990 on 5 September 1990. Article 1 of the CRC stipulates that for the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. Based on the article, the CRC leaves the starting point of childhood open. Besides that, the article also states that for the purposes of the Convention, childhood ends at the 18th birthday unless, in a particular State, majority is achieved earlier.²⁵ According to Article 4, setting minimum ages is part of States Parties’ obligations. The state parties require to “undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized” therein.

The CRC and its Optional Protocols discuss the age of the child in relation to issues ranging from the right to be heard, to provisions dealing with employment, criminal responsibility, compulsory education, and recruitment into armed forces among others. As stated before that the CEDAW also refers to State Parties’ obligation to set a minimum age for marriage. However, these instruments do not always decide definitely how the age should actually be determined. They leave States Parties to reach decision on the proper age.²⁶

However, the Committee has encouraged States to reexamine the age of majority if set below 18, and in particular to raise protective ages. The example can be seen from the recommendation given to the Second Periodic Report of Saudi Arabia in 2006. The Committee expressed concern “... that a judge has the discretionary power to decide that a child has reached majority at an earlier age”. The Committee recommended “... that the State Party take the necessary legislative and other measures to unequivocally

²⁴ *Ibid.*

²⁵ “Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition”, online: *UNICEF* <https://www.unicef.org/publications/index_43110.html>.

²⁶ *Ibid.*

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set the age of majority at 18 with no exception for specific cases, including within the juvenile justice system...".²⁷

Additionally, both the CRC Committee and the CEDAW Committee have widely examined the issue in their General Comments or Recommendations and Concluding Observations. Significantly, the first General Comment/Recommendations jointly issued by the two Committees in November 2014 on harmful practices contains extensive considerations in relation to child marriage. Regarding the minimum age for marriage, the Committees recommend:

A minimum legal age of marriage for girls and boys is established, with or without parental consent, at 18 years. When exceptions to marriage at an earlier age are allowed in exceptional circumstances, the absolute minimum age is not below 16 years, grounds for obtaining permission are legitimate and strictly defined by law and marriage is permitted only by a court of law upon full, free and informed consent of the child or both children who appear in person before the court.²⁸

Indonesian law has diverse minimum ages defined under various laws related to the protection of child's rights. In addition, Indonesia through some of its legislations put the end of the childhood at the marital status of the child. For example, Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights defines a child as every human being below the age of 18 years who has never been married, including the unborn child if there is a matter relating to the unborn child. Besides that, Article 1 point 2 of Law of the Republic of Indonesia Number 4 Year 1979 on Child Welfare defines a child as someone who has not reached 21 years old and never been married.

As well as many other countries, Indonesia also facing the problems linked to the practice of child or early marriage. In some parts of West Java as well as Madura, the marriage of girls at an early age (12 or 13 years old) is still a cultural tradition and common practice. Usually when they marry at an early age, girls leave school. Early marriage may lead to early divorce which resulted in economic hardship. Without an education, a girl divorced will lack the skills needed to find a job. Moreover, they are often not prepared emotionally, economically or socially to live on their own. These factors make them vulnerable to trafficking as many divorced young girls leave their home villages in search of work to support themselves and their families.²⁹ Thus, child marriage or early marriage of girls undermines a number of rights guaranteed by the CRC, they are:

- The right to education (Article 28).

²⁷ "OHCHR | Committee on the Rights of the Child", online:

<<https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>>.

²⁸ "Joint General Recommendation/General Comment No. 31 of the CEDAW and No. 18 of the CRC on Harmful Practices | Better Care Network", online: <<https://bettercarenetwork.org/library/social-welfare-systems/child-care-and-protection-policies/joint-general-recommendationgeneral-comment-no-31-of-the-cedaw-and-no-18-of-the-crc-on-harmful>>.

²⁹ "Indonesian Law on Anti-trafficking", online: *AP Migr*

<<http://apmigration.ilo.org/resources/indonesian-law-on-anti-trafficking>>.

- The right to be protected from all forms of physical or mental violence, injury or abuse, including sexual abuse (Article 19) and from all forms of sexual exploitation (Article 34).
- The right to the enjoyment of the highest attainable standard of health (Article 24).
- The right to educational and vocational information and guidance (Article 28).
- The right to seek, receive and impart information and ideas (Article 13).
- The right to rest and leisure, and to participate freely in cultural life (Article 31).
- The right to not be separated from their parents against their will (Article 9).
- The right to protection against all forms of exploitation affecting any aspect of the child's welfare (Article 36).³⁰

Unfortunately, Indonesia Marriage Law has contributed to the situation. Indonesian Marriage Act stipulates that the consent from both parents needed if one wants to marry below 21 years. It sets the minimum age for marriage at 16 years for a girl and 19 years for a boy. However, the Act also gives the possibility to disregard the minimum ages. In other words, a girl below 16 years or a boy below 19 years can marry. In this case, the consent of the Court or authorized officer is needed. Even though Law on Child Protection obliges the parents to prevent the early marriage,³¹ it does not provide the minimum age for marriage explicitly. Bearing in mind, if a 16 years old girl gets married, she will lose her child protection status based on Law Number 39/1999 and Law Number 4/1979.³²

In fact, the Committee was concerned with the minimum legal ages set by Marriage Law in its consideration of 2nd (second) periodic report submitted by Indonesia under Article 44 of the CRC. It was concerned that the legal age of marriage of girls and boys was still discriminatory. Besides that, a very large proportion of children, especially girls, were married by the age of 15, and that they were thereby legally considered to be adults, meaning that the CRC no longer applies to them. Further, the Committee recommended Indonesia to ensure that no discrimination based on sex remains, and that the age of marriage for girls is the same age as that for boys.

In the 3rd (third) and 4th (fourth) periodic report submitted by Indonesia under Article 44 of the CRC, the Government shared the concern of the Committee with regard to some practices of underage marriage in the country and has made efforts to address it. To prevent underage marriages the Government conducted a campaign on the risks of underage marriages in terms of the physical, mental and economical aspects. This effort is yet to show optimal results, because underage marriages are still prevalent in certain regions.³³

In 2014, the minimum age requirement for marriage provision in Marriage Law was submitted to the Constitutional Court to be reviewed. Unfortunately, the Constitutional Court decision Number 30-74/PUU-XII/2014 stated that the provision was constitutional

³⁰ Grahame, *supra* note 3.

³¹ "Indonesia - Law No. 35 of 2014 Amending Law on Child Protection (No. 23/2002).", online: <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=98588>.

³² "Law No. 1 of 1974 on Marriage", (13 January 2015), online: *Equal Now* <<https://www.equalitynow.org/content/law-no-1-1974-marriage>>.

³³ note 27.

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dan rejected the petition to raise the minimum age for marriage for girl from 16 to 18. The judges argued that the minimum age requirement for marriage was an open legal policy that could be changed at any time by the legislator in accordance with the needs of the existing development. It was entirely the authority of the legislator whose choice was not prohibited and as long as it was not against the 1945 Constitution. In the case *a quo*, the 1945 Constitution did not clearly regulate the age limit of a person referred to as a child. Additionally, there were no guarantee that by increasing the minimum age for marriage for girls from 16 to 18 would further reduce divorce rates, address health concerns, or minimize other social problems. In 2017, the same provision of Marriage Law is submitted for the second time by different applicant to be reviewed again by the Constitutional Court.

In Constitutional Court Decision Number 30-74/PUU-XII/2014, the Constitutional judges did not give the consideration that by setting different minimum age requirement between boys and girls, the Marriage Law was discriminatory. Whereas the applicant had argued that the Act *a quo* against the 1945 Constitution provisions and one of them was Article 28B (2). Article 28B(2) stipulates that every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination. Furthermore, non-discrimination is one general principle of the CRC, as identified by the Committee, is that all children should be able to enjoy their rights without discrimination³⁴ This general principle is one of the important tools in implementing the CRC and its Optional Protocols.

Whether the marriage happens to a girl or a boy, child marriage violates their human rights since it eliminates their freedom to choose when and whom to marry. The fulfilment of the rights of girls is an obligation and a moral imperative which is reflected in international law. There is a comprehensive international legal framework establishing the obligations of States regarding the human rights of the girl child. In addition to the CRC, which provides a comprehensive set of rights to be enjoyed "without discrimination of any kind", including discrimination on the ground of sex, all fundamental human rights treaties include provisions confirming the principle of non-discrimination and equality between men and women, boys and girls.³⁵

Under the CRC, one of the obligations of the governments is to ensure the progressive implementation of children's protection, provision, and participation rights. Thus, governments have the responsibility to help parents and caregivers in looking after the needs and best interests of children. Governments have to scrutinize the risk factors for child marriage. As well as identifying the risk factors, it is essential to identify positive factors that can protect children against it. Families that live under difficult conditions may require the help and support of governments. They may need supportive policies and programs in dealing with the problem of poverty or lack of childcare or inadequate health care or family breakdown. When governments are negligent in providing for this support, and as a result child are put at risk, the governments fail. After all, the risk factors are not only found in negative parenting, family conflict, and child maltreatment in the home. They are also found in the failure

³⁴ Asbjorn Eide, *Economic Social and Cultural Rights* (Springer Netherlands, 2001).

³⁵ *Ibid.*

of governments to secure the rights of children and provide for strong child and family policies. In other words, child-unfriendly policies are a risk factor for the raising of violent children.³⁶

IV. CONCLUSION

Number of the international human rights law instruments could be applied to prohibit child marriage. However, they do not specifically and explicitly identify child marriage in those provisions. Additionally, they leave implementation and enforcement to each individual state. As a result, many countries, including Indonesia do not construe general provisions to apply to the issue, as well as have denied that the provisions actually prohibit the practice of child marriage. By setting “16” as the minimum age requirement for girl to get married, the Indonesian Marriage Act not only discriminatory on the ground of sex. By allowing early marriage, particularly to girls, the Act also put girls at much higher risks since they can not access their rights covered by the CRC, as well as domestic laws.

In the second judicial review for provision regarding minimum age requirement for marriage in the Indonesian Marriage Act, the Constitutional Court should consider that by setting different minimum age requirement for marriage between boys and girls, Indonesian Marriage Act is discriminatory and against the 1945 Constitution. If in the next decision, Constitutional Court still argue that the provision is constitutional, the People’s Representative Council (DPR) and the Government have to consider that Indonesia has to amend its national legislations, particularly Law Number 1/1974 and Compilation of Islamic Law (KHI) in order to diminish the discrimination on the ground of sex and raise the minimum legal age for marriage for girls at age as that for boys (i.e. 19 years old). Furthermore, the Government also has to identify the importance of prevention and notably on the importance of adopting a holistic approach to address the root causes, such as poverty and under development, contributing to the vulnerability of children to the child or early marriage.

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³⁶ Thomas Waldock, “Children, Families and Violence: Challenges for Children’s Rights, Katherine Covell and R. Brian Howe, London, Jessica Kingsley Publishers, 2009, pp. 288, ISBN 978 1 84310 698 2 (hb), £39.99” (2010) 40:1 *Br J Soc Work* 343.

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