

Child Forced Marriage in the Perspective of Indonesia's Criminal Law

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Abstract: Based on World Health Organization's report in 2002, it is stated that child marriage is considered as a form of sexual abuse, since marrying at a young age means that the child should encounter sexual intercourse when he/she is actually not ready thus engage it with fear. This situation of child marriage has been going on in Indonesia since years ago and there are so many reasons rooting for its substance. Even in 2018, Indonesia has been ranked as one of the top ten country with the highest rate of child marriage globally, which based on The Office of the United Nations High Commissioner for Human Rights, child marriage is considered the same as child forced marriage since the child her/himself could not express full, free and informed consent. Therefore, this research used normative-juridical method that aims to understand how the criminal law in indonesia regulates child force marriage.

Keywords: Child Forced Marriage, Criminal Law, Indonesia

Introduction

A child supposes to enjoy their adolescence with their peer, being taken cared by his/her parent, having a proper education, or as mentioned in United Nation's Declaration of The Rights of The Child 1959:children, without any exception, have the rights to protection, shelter, access to educational system and healthcare, so the child could grow and develop physically, mentally, spiritually, and socially in conditions of freedom and dignity. When referring to Indonesia's law, these rights are not far from different as mentioned in the consideration of why Indonesia's Child Protection Law 2002 (Law Number 23 of 2002 which revised to Law Number 35 of 2014) was made. According to the law, a child is defined as a person who has not reach the age of 18, including the unborn baby, and child protection itself means any activities to guarantee and protect children and their rights so they can live, grow, develop, and participate optimally, including getting protect from abuse and discrimination. As the future generation, children should be protected and guarantee the child's well-being, and any other rights that a child has, including the opportunity to evolve.

One of the problems that arised and has been concerning for many years in Indonesia regarding a child's chance to grow and develop is child marriage. Even in 2018, Indonesia has been ranked as the country with second highest rate on child marriage in ASEAN, and seventh highest rate globally [1]. Based on the 2020's report of The Center on Child Protection and Wellbeing, University of Indonesia (Pusaka UI), teaming with Indonesia's Bureau of Statistics (BPS), United Nations Children's Fund (Unicef), and The Ministry of National Development Planning (Bappenas), the reasons why this phenomenon seems to happened unceasingly are; the low education level which education might be an approach to prevent early marriage, poverty, residing in rural area, several traditions that perpetuate child marriage, religion including beliefs that approve the thoughts that it is better for them having sex before marriage which leads to unwanted pregnancy, and post-disaster situation [2]. At some point, few studies have shown that there's also a possibility of the child, who married at such a young age, was being pushed to do it out of the child's wish [3] [4] [5] which are more likely happened to female youngsters. This case is also known as child forced marriage.

According to United Nations Children's Fund, child marriage is defined as a marriage of a girl or boy before the age of 18 and refers to both formal marriages and informal unions in which children under the age of 18 live with a partner as if marriage [6]. The Office of the United Nations High Commissioner for Human Rights (OHCHR) stated that a child marriage is considered as a form of force marriage, since one and/or both parties have not expressed full, free and informed consent [7]. Marriage is often used as a justifying condition of sexual violence towards oneself, especially women, since the status is thought to give a sense of ownership towards the partner. In 2002, World Health Organization (WHO) has categorized forced marriage or cohabitation, including the marriage of children as one of sexual violences, since the children involved was not able to give their consent, and generally, they know little to nothing about sex. Therefore, a child is not only strained to form a marital relation, but also being forced to face sexual intercourse out of fear [8].

In terms of facing this phenomenon, Indonesia had formulated The Erasure of Sexual Abuse Law, which stated that forcing a child to marry, whether it is being done by the parents, relatives, or other responsible party, is a crime hence followed by criminal sanctions such as imprisonment and fine. Unfortunately, this act formulation was taken out of National Legislation Program (Prolegnas) by the The People's Representative Council (DPR) because the making of it was regarded as "*too complicated*" [9]. There are pros and cons in

whether the state should interfere the private life of its folk or not. Especially, in Indonesia, where marrying on such a young age is considered normal in a specific area.

Research Method

This research was conducted by using normative-juridical method which is a systematic collection, organization, and interpretation of textual information, gathered and observed, using statutory and conceptual approach. The author uses regulations that correlate to answer the problems within this research and scientific papers/reports to have a deeper insight on the topics delivered. All of the data that had been collected, observed, and systematically arranged until it meets the purpose of the research.

Results and Discussion

Indonesia has already set a minimum age for any person who wants to marry. As a country that has diversity including on the religion and beliefs, it has a distinguished marriage law for those who are moslems, which is Marriage Law 1974. Marriage is defined as a binding between male and female to make a family as husband and wife based on the belief in the one and only God. Article 7 (1) Marriage Law 1974 (Law Number 1 of 1974 which was revised to Law Number 16 of 2019) has mentioned that the minimum age for a female to get married is 16 years old, whereas the age for a male is 19 years old. But in the latest revision, the minimum age has changed to 19 years old female or above, as marriage act is revised. The change is rooted by one of the Constitutional Verdict in 2017 (Putusan Mahkamah Konstitusi No. 22/PUU-XV/2017), which mentioned that the difference of the minimum age is considered as a discrimination. This change has been praised by so many institutions, since keeping the difference could be taken as letting youngsters, especially young female to face a few disadvantages briskly. From the perspective of health, children who marry on a young age might face health consequences, such as; the risk of sexually transmitted infection and cervical cancer; risk during the pregnancy which might danger the mother or the baby since the body of the mother, who is still a child, is not ready yet to uphold it; and the children who have to face child marriage might become depressed since they have to prove their fertility and lose their opportunity to develop themselves with a proper education and living environment [10].

It is prohibited by the law for an adult to have sex with an underage person and, as mentioned above, Indonesia has implemented minimum age of anyone who wants to get married. But acknowledging the facts, there are so many cases where it seems that a marital relation between an adult with an underage or between youngsters are considered as common. Social pressure and family hardship thought-out to be the form of protection to shield the child marriage. In 2015, End Child Prostitution and Trafficking (ECPAT) and Plan International had delivered a report titled "*Unrecognised Sexual Abuse and Exploitation of Children in Child, Early, and Forced Marriage*". Child marriage becomes as a medium to various forms of sexual violence such as trafficking, prostitution and other type of act that results for the child becomes sexually victimized and are against the child's right. There are possibilities where adults who were involved in the child marriage gained benefit from it. The report has delivered a comparison on how child prostitution and child trafficking are stigmatised, condemned, and seen as an abusive practice, whereas the child marriage is socially accepted, promoted, and the parents or society might encourage their children for it [14].

Taking a look on recent criminal law, if referring to Criminal Code (KUHP), there is no specific regulations that stated if forcing someone to marry, including a child, as a crime [12]. Article 287 of Criminal Code has prohibited fornicating with female who is below 15 years old with maximum imprisonment of 9 years. If it happens in a marital relationship; Article 288 of Criminal Code has prohibited the act and penalized the person whom the child is marriage with, resulting in imprisonment as sanction from maximum of 4 years to maximum of 12 years. The act of forcing someone to marry is considered as one of the prohibited act based on Article 355 Criminal Code (1), as it stated that any person who against the law, by force or threat, strained a person to do or not to do something, might get penalize by imprisonment for maximum 1 year. But even though this article might be used for someone who conduct such act, it is more likely for public prosecutors to sue the other party who is binded with the child in the marital relation instead. E.g. in Supreme Court Verdict Number 690 of 2010 (Putusan Mahkamah Agung Nomor. 690K/Pid.Sus/2010) [13]

Article 506 Criminal Code where the law has prohibited anyone to make benefits out of any fornication might be a way to sanctioned a person who forced a child to marry [12], but it only stated that if the person whom made benefits from was a woman without any other classification such as the age of the victim whatsoever. Article 297 of Criminal Code is also prohibited to traffic women and male-underage, which then modified in Human Trafficking Law 2007 (Law Number 21 of 2007) which defines sexual exploitations as any form of utilizing the body of other person as a part of human trafficking and does not contrained by fornication nor prostitution. Also, considering the forced child marriage as a form of domestic violence since the person who forced the child are usually his/her parent or their relatives, Article 5 (e) of Domestic Violence Law 2004

(Law Number 23 of 2004) has also stated that sexual abuse is prohibited to do, as Article 8 has defined, that sexual abuse includes of forcing sexual intercourse in purpose of getting commercial benefits. But of course, these regulations cannot be interpreted directly as a way to criminalize child forced marriage since the law itself do not explicitly address the issue.

In strengthening the laws and policies to prevent child marriage, it is recommended that the implementation of the change should be enforced, accompanied by proper implementation in Child Protection Law (Law Number 23 of 2002 which revised to Law Number 35 of 2014). It also should be underlined that increasing the minimum age of marriage also risk in hide child marriage, hence could increase unregistered marriage [2]. Referring to Indonesia's *ius consitutum*, currently, there is no specific regulation that forbid child marriage, therefore, there is no sanction either if any person does this kind of act.

Article 17 of The Erasure of Sexual Abuse Law has defined forced marriage as a form of sexual abuse by using threat, violence, dishonesty, or other psychological pressure so the subject, who is being forced, agree to have a marriage, which based on the explanation of Article 17, including the registered and non registered marriage. In Article 118, it is stated that any person who has done child forced marriage might get punished by imprisonment and distinct correctional. The imprisonment differs from: 4 -13 years; 5 – 14 years if it incites the child so the child could not continue his/her education; 6 – 15 years if the child suffers psychologically. Article 119 of The Erasure of Sexual Abuse Law also stated the sanctions for marriage registrar who knows the forced marriage with 2 – 5 years of imprisonment and distict correctional. On the academical draft of The Erasure of Sexual Abuse Law, it is stated that there are five point of sentencing forced marriage as a crime, which are; (a) If it is being done in purpose of getting material benefits, prestige, or having a certain jobs or position; (b) If it is being done because it is considere to hide the disgrace of the family; (c) If it is being done by marriage registrar who knows or should knows that the person who is going to marry is under forced to do it but does not do anything to prevent it, (d) If a person orders another person to do forced marriage, even though the other person does not agree; (e) If a person persuades or helps another person to held a marriage, whereas the other person knows about the disagreement of one and/or both the parties [11].

Here is where The Erasure of Sexual Abuse Law comes ahead. Not only it exceeds the limitation of wheter the law could be use or not based on the person registered religion, but it also brings a few new notions that has not been contained in the presently conducted criminal law. These kind or rules made it possible for the state to meddle and help the minors as they are the victims of child forced marriage. One of the distinctive features on implementing criminal law is the procedure to enforce the law since the state has major part in the process. Started by delegating its personnel from investigating to prove wether the abiding law has been broken or not, the trial, and the execution. Old perspective brought criminal law as a retributive means to pay the wrongdoings of a person towards another person who is victimized. But looking further to the development of the criminal law, it is known that there are a few other purposes of it. As for the state's intervention in forced child marriage, the reason is a means to prevent this ongoing situation (deterrence) because the state has forbided the act of forcing child marriage since the child usually has no power to avoid this kind of situtation. He or she might have no power to defend his or her right to not become espoused. Too bad, The Erasure of Sexual Abuse Law has to be taken down before it even could be brought forth, despising these few new premises that might help to depose the rates of child marriage in Indonesia.

Child forced marriage has become a cover for the violations of the children's basic human rights. There might be a long-debates of wheter anyone who conduct such act or has parts in it should be criminalize or not. But it is actually not just aprofoundidea. Few countries have implemented this kind of law. In example, Norway in Article 222 (2) of its Penal Code of 2003 has stated explicitly that anyone who by force, improper pressure, or any other unlawful conduct, or by threats of such conduct forces someone to enter into marriage is guilty of causing forced marriage that might result in imprisonment of maximum 6 years, since it considered as a felony against personal liberty. Scotland on the other hand, has made a specific law for the issue, which is contained in Forced Marriage Act of 2011. [15] Australia has also banned child forced marriage since Section 270 of its Criminal Code, which result in imprisonment of maximum of 25 years. [16] Even though it is indeed complicated, the effort to regulate it should be considered as a way for the state to protect its people without any exception. But certainly, this protective measure should not be dependent only on the criminal justice system itself, but also in the effort of changing the perspective of society on this issue.

Conclusion

The Office of the United Nations High Commissioner for Human Rights (OHCHR) stated that a child marriage is considered as a form of force marriage, since one and/or both parties have not expressed full, free and informed consent, and World Health Organization (WHO) has stated that child forced marriage is a form of sexual abuse. Indonesia, unfortunately, has a high rate of child marriage, which in 2018, was ranked as the state with 2ndhighest rate of child marriage in ASEAN country, and ranked as the 8th highest rate globally. This

problem appears and has been going on for many different reasons, such as the educational level, poverty, living area, tradition, and religion. From the explanation on the previous part, it can be concluded that *iustus constitutum* in Indonesia, such as Criminal Code, Child Protection Law, and Domestic Violence Law, does not have specific criminal law that might penalize a person who force a child to marry. Even though it is possible to punish such act with Article 335 (1) of Criminal Code, it is more likely for the person who is married with the child instead that is being brought to the trial. While there was The Erasure of Sexual Abuse Law in the making, which might become a better means to protect the child from forced marriage and helps to diminish the rate of child marriage, The People's Representative Council of Republic of Indonesia had taken it down because it is "too complicated" and taking it out of the National Legislation Program. Therefore, present criminal law has not provided the protection needed for the children, since forced marriage usually comes in a condition where the parents, relatives, or the obligation to fulfill certain tradition, and the state could not interfere.

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