

## CRIMINALIZATION OF MAN WHO MARRIED CHILDREN IN CHILD MARRIAGE IN INDONESIA

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### ABSTRACT

*It is universally recognized children's rights in the declaration of children's rights in Indonesia, the attention to the fulfillment of children's rights with regard to the protection of children in various areas of law become one of the priority development of the law. It can be seen from the publication of various laws, including the Law of the Republic of Indonesia No. 1 of 1974 on Marriage and the Law of the Republic of Indonesia No. 23 of 2002 on Child Protection. Marriage Act until now has never been a change, while the Child Protection Act has two (2) times do change. Which attracted the attention of both the legislation is, the regulations that the application may be liable to result in a man who marries a child in a child marriage in Indonesia. It is caused by the stipulation for the age limit may enter into marriage in the Marriage Law may be exceeded use permit request dispensation on the grounds that the woman who is to marry had been expecting it. While one chapter of the Child Protection Act, can be used as a basis to prosecute men who marry women, for committing to persuade a child to do or let do obscene acts. The application of the policy implications for the various issues, among others: Men who marry women lose their jobs, cannot provide a living so inwardly and outwardly to his wife and children born and the stigma of evil. The implications of violating human rights, especially the rights of children. The conceptual thinking on the need to continue the reconstruction of the Child Protection Act, which reconstructs provisions prohibiting acts persuade a child to do or let do obscene acts, used as complaint offence if such actions result in pregnancy followed by marriage.*

Key Word: Criminalization, Married with Children

### A. Preliminary

Children's rights are universally recognized in the Declaration on the Rights of the Child (Declaration on the Rights of the Child), on 20 November 1959 (document A/4354). Through a long journey, the principles in this Declaration have been implemented by the countries that have ratified.

United Nations General Assembly adopted the convention and open for signature on 20 November 1989 (the 30th anniversary of the Declaration on the Rights of the Child). [5] This Convention applies on 2 September 1990, after a number of countries that ratified it reached the requirement. The Convention generally defines a child as any human beings under the age of 18 years, except if it has been determined by the law of the country concerned.<sup>1</sup>

Broadly speaking, this Declaration contains 10 principles on the rights of children, which are: Principle 2: The right of children to receive special protection and should have the opportunity and facilities guaranteed by law and by other means so that the physical, mental, moral, spiritual and social, they can develop healthy and reasonable in the circumstances of freedom and dignity. Principle 9: children must be protected from all forms of neglect, cruelty, and oppression.

Recognition of children's rights are universal, in Indonesia was marked by the publication of the Decree of the President of the Republic of Indonesia Number 36 of 1990 on the Ratification of the Convention On The Rights Of The Child, so that the policy formulation and application policy of child protection in various fields, be one of the priorities of development law in Indonesia. Therefore, both policy formulation and application of child protection policy must not violate the rights of children. However, what is expected does not always correspond to reality.

It can be seen from the publication of various laws, including the Law of the Republic of Indonesia No. 1 of 1974 on Marriage and the Law of the Republic of Indonesia No. 23 of 2002 on Child Protection. Marriage Act since its publication until now has never been a change, while the Child Protection Act has two (2) times do change.

Sociologically, the husband and wife is the smallest form of society which is referred to as a family, that legally married couples institutionalized in the "marriage", which is governed by the Law of the Republic of Indonesia No. 1 of 1974 on Marriage. This law commonly known as the Marriage Act, abbreviated UUP. While the definition of "family", legally defined in the Law of the Republic of Indonesia No. 23 of 2002 on Child Protection was changed by the Law of the Republic of Indonesia No. 35 of 2014 on Amendments to the Law of the Republic of Indonesia No. 23 of 2002 on Protection of Children and the second amendment by the Law of the Republic of Indonesia No. 17 Year 2016 concerning the Stipulation of Government Regulation No. 1 Year 2016 regarding the Second Amendment Act No. 23 of 2002 on Child Protection, the following: The family is the smallest unit in society consisting of husband and wife, or husband and

<sup>1</sup> [https://id.wikipedia.org/wiki/Konvensi\\_Hak-Hak\\_Anak](https://id.wikipedia.org/wiki/Konvensi_Hak-Hak_Anak), diunduh Rabu 11 Oktober 2017 pukul 18.35

wife and child or father and child, or mother and child, or a family of flesh in a straight line up or down until third degree. (Article 1 paragraph 3).

While the Law of the Republic of Indonesia Number 52 Year 2009 on Population Development and Family Development, defined that meant the family is the smallest unit of society consisting of a husband and wife, or husband, wife and child, or father and child, or mother and child (Article 1, item 6).

Definition of marriage defined in Article 1 of the Marriage Act as "the inner and outer bond between a man and a woman as husband and wife with the aim of forming a family (household) were happy and abiding by the deity of the Almighty". This understanding contains the value of the purpose of marriage, which is to achieve a happy family and eternal, so that this legislation requires a lot of things that must be met and prepared by a man or a woman who would bind himself in marriage, which includes physical and mental preparation.

Physical and mental preparation for married couples is necessary, because in order to prevent the various possibilities that are not expected to occur. This is caused by the presence of a bond between two people who differ from each other; both different types, different social background, economic, education, perspective, attitude, or different properties, and so on.

Physical preparation is defined as physical maturity, while the mental preparation is the maturity or maturity being and wisdom in dealing with problems. Therefore, determining the Marriage Act also limits the minimum age of a man and a woman who is allowed to enter into marriage. However, reality shows that in a society still occur marriage age children who have not reached the limit prescribed by the Marriage Act, commonly known as marriage early age or underage marriage or child marriage.

It was primarily due to provisions within the Law of the Republic of Indonesia No. 1 of 1974 on Marriage which provided the opportunity to do a marriage to men and women whose age has not reached the age limit as stipulated in Article 7 paragraph (1) of the Marriage Act. The opportunity is the provision to enter into marriage with a dispensation from the court or other officials appointed by the parents of the man and the woman (Article 7 (2) Marriage Act). But in the Marriage Act as well as in his explanation, no mention of the reasons that can serve as the basis for dispensation can be given. It follows that everyone can easily obtain a dispensation. Similarly, on the grounds that used to apply for dispensation. Many things can be used as a reason to apply for dispensation, including one of the reasons that can be used to apply for dispensation, is because his daughter was pregnant. The reason it is often used as a basis to apply for dispensation to enter into marriage.

At the present time, after the issuance of Law of the Republic of Indonesia No. 23 of 2002 on Child Protection was amended by the Law of the Republic of Indonesia No. 35 of 2014 on Amendments to the Law of the Republic of Indonesia No. 23 of 2002 on Protection of Children and the second amendment by the Law of the Republic of Indonesia No. 17 Year 2016 concerning the Stipulation of Government Regulation No. 1 Year 2016 regarding the Second Amendment Act No. 23 of 2002 on Child Protection, which is commonly known as the Child Protection Act (BAL). Publication of legislation needs to be watched by the people who will enter into marriage using dispensation permit on the grounds that the woman was pregnant. Because of these problems can be disastrous for the man to marry her, because he may be liable under the provisions of Article 82 of the BAL.

With the criminal man to marry her, cause a problem or a new problem, because marriage cannot realize the establishment of a happy family and eternal. The criminal man to marry her, then as a husband he lost his job due to undergo criminal prosecution, and therefore cannot provide a living inwardly and outwardly to his wife and child. With this situation, if the marriage can realize happiness and unseen are eternal? If they (husband and wife) are not within the scope of the household, how is the social life of each. What is the condition of children born spicology, knowing his father was a prisoner

The background is used as an excuse by the author to discuss the work of scientific thought with the title "Criminalization of men who married children in child marriages in Indonesia".

## **B. Problems**

From this background, the authors formulate the problem as follows:

1. Basic rules are used to criminalize men who marry children in child marriages in Indonesia?
2. What is the implication of punishment on men who marry children in child marriages in Indonesia?

## **C. Discussion**

### **1. Basic laws used to criminalize men who marry children in child marriages in Indonesia**

#### **1.1. The provisions limit marriage age in Indonesia**

On January 2, 1974 was issued Law No. 1 of 1974 on Marriage. Article 1 Marriage laws formulate the notion of marriage, contained also the purpose of marriage.

Marriage is inner and outer bond between a man and a woman as husband and wife with the aim of forming a family or household happy and abiding by the divine Almighty.

The notion that marriage is inner and outer bond between a man and a woman as husband and wife, embodied the meaning that the basis of a marriage is their genuine love between them. While the purpose of marriage, which is a family or household happy and eternal. This objective indicates philosophical values contained in this law, then these values are implemented into chapters which are governed by the law.

One of the values for the achievement of a family or household happy and eternal, is the maturity value of life for both the prospective husband and wife, which can be measured with a minimum age limit future husband and future wife, who dikontrolir limit to in Article 7 of the Marriage Law.

Article 7, which consists of two paragraphs, regulates the minimum age of marriage for prospective husband and wife candidates, but it looks inconsistent. Is said to be inconsistent, for in subsection (1) define the minimum age limit to be able to mate, but in paragraph (2) it determines that the minimum threshold be exceeded.

Article 7 paragraph (1) Marriage Act states that marriage is only permitted if the man has reached the age of 19 years (nineteen) and the woman has reached the age of 16 (sixteen) years. However, in Article 7 (2) Marriage Act states that if the men and women have not yet reached the age limit as mentioned in Article 7 (1), to enter into marriage is necessary dispensation from the court or other official designated by both parents of the man or the woman. In Article 7 paragraph (1) is determined for certain minimum age limit to be able to mate for both candidates, but in Article 7 (2) provide the opportunity to deviate from the provisions of Article 7 paragraph (1). Therein lies the inconsistency.

In addition to the provisions of the minimum age limit to be able to enter into marriage, the Marriage Act regulates also the age limit of the prospective husband and wife candidates must get permission from both parents as a condition of marriage. This provision is stipulated in Article 6 paragraph (2), the formulation is as follows: To establish a marriage that has not reached the age of 21 (twenty-one) years must get consent of both parents. This provision is a condition of marriage, and not exceeding the child's age are allowed to mate as provided in Article 7. This provision is not relevant in the discussion, but it is necessary to note, that not one of perception to the minimum limit of age a man and a woman allowed to enter into marriage.

If the provisions age limit for marriage in the Marriage Law, it can be said that the constitutional government entitles about a man to enter into marriage without a minimum age limit. It is known from the provisions of the minimum age limit in Article 7 (1), but still could be exceeded as the provisions of Article 7 (2).

### **1.2. Definition of Marriage Children in Indonesia**

In the Marriage Law does not regulate and does not give a definition of child marriages, and not to give an understanding of the child. However, Article 7 (2) Marriage Act of opportunities to enter into marriage with age under the provisions of Article 7 paragraph (1), namely marriage with dispensation from the court or other official designated by the parents of the man nor the parties woman.

Marriage with a dispensation was often called "the marriage of minors" or "early childhood marriage" or "child marriage", which according to the provisions of the Marriage Act, marriage is not forbidden to do.

The term marriage of minors, early childhood marriages, or child marriages, presented itself in the community. In sociology, the term is used to describe the marriage with the permission of the dispensation, which is legally recognized legality. While in this paper used the term "Child Marriage", and do not use the term "marriage Children under Age" and "Early Marriage". The use of the term "child marriage" is considered to be more appropriate in this discussion, because it refers to the notion of children specified in the Child Protection Act, that is, those who have not turned 18 (eighteen) years.

### **1.3. Article 82 of the Law of the Republic of Indonesia No. 23 of 2002 on Protection of Children and amendments**

Constitutionally, the Child Protection Act was published to ensure the welfare of every citizen, including the protection of the rights of children is a human right. And that every child is able to assume responsibility, then he needs to get the widest possible opportunity to grow and develop optimally. Therefore, the Child Protection Law threaten criminal sanctions against anyone who violates the rights of children, who are determined to within a few chapters. One of them is the provision of Article 82 of the Child Protection Act.

Article 82 before adjustment:

Any person who knowingly commit violence or threats of violence, force, deceit, a series of lies, or persuade a child to do or let do obscene acts, shall be punished with imprisonment for a period of 15 (fifteen) years and 3 (three) years and a maximum fine Rp 300.000.000,00 (three hundred million rupiah) and least Rp 60.000.000,00 (sixty million rupiahs).

Article 82 Changes by Law No. 35 of 2014 on Amendments to the Law of the Republic of Indonesia No. 23 of 2002 on Child Protection Conditions prohibited acts specified in Article 82 before it was changed and Article 82 changes in conjunction with Article 76E and Article 82 of the second change, basically the same set. namely

threaten criminal sanctions against those who commit violence or threats of violence, force, deceit, do a series of lies or persuade the Son to do or let do obscene acts. The difference lies in the assertion that explains that such actions are "prohibited".

The difference lies on the perpetrators and sanctions. Article 82 before it was changed, the culprit is everyone. The sanction is imprisonment for a period of 15 (fifteen) years and 3 (three) years accumulated to a maximum fine of Rp 300.000.000,00 (three hundred million rupiah) and least Rp 60.000.000,00 (sixty million rupiahs).

In the Article 82 changes, the offender and criminal sanctions is set to 2 (two) verse. Paragraph (1) threatened criminal sanctions against anyone who commits prohibited acts as defined in Section 76E, with the sanction of imprisonment for a minimum five (5) years and a maximum of 15 (fifteen) years and a fine of Rp 5.000.000.000,00 (five billion rupiah).

While paragraph (2) is a lex specialist, which threaten criminal sanctions against certain persons (Parents, Guardians, Caregiver Child, educators, or staff) who commit a prohibited act Article 76E. And the criminal threat of 1/3 (one third).

Article 82 before it was changed to formulate the act which is punishable by criminal sanctions along with the threat of criminal sanction, be one in the article, without explicitly explaining that the action is prohibited. Whereas Article 82 changes, the act which is punishable by criminal sanctions, formulated into other articles, namely Article 76E, which strictly speaking prohibited to do.

The threat of criminal sanctions associated with strafmaat or the severity of punishment under Article 82 change change. Similarly strafmodus or form of the imposition of criminal and strafsor /type the sentence unchanged.

Article 82 before the revamped determine strafsor or type of criminal is imprisonment and criminal fines. Both imprisonment and criminal fines, both of which are the principal criminal. Strafmoud or the imposition of criminal form is cumulative, ie wearing imprisonment and criminal fines. Both imprisonment and criminal fines determined maximum and minimum. Whereas Article 82alterchange strafmaat or the severity of the crime, that to imprisonment for a minimum especially into 5 (five) years in prison. whereas the maximum penalty is only determined without any minimum, but raised to a maximum of 5,000,000,000., - (five billion rupiah).

Article 82 of the second change there are changes in both the perpetrators and criminal sanctions (strafmaat, strafmodus, and strafsor). Article 82 of the second amendment determine the sanctions that may be imposed not only criminal sanctions alone, but set also sanctioned action. Article 82 The second change consists of 8 (eight) paragraph and adds one more article, namely Article 82A.

In addition to this, Article 82 of the second amendment regulates recidive and criminal weighting against the perpetrators.

*Recidive* or repetition of criminal acts occur in the case of a person who committed a crime and had been sentenced by a Court decision that remain (*inkracht van gewijsde*), then committed a crime again.<sup>2</sup>

*Recidive* is reason to strengthen criminal prosecution.<sup>3</sup>

The second change in Article 82, paragraph 3 (three), regulates the criminal weighting that may be imposed against the perpetrators have ever been convicted of a criminal offense as defined in Section 76E. So there recidive against the same criminal offense.

In the second amendment to the Article 82 paragraph (6), arranged on sanctions in the form of action, namely the rehabilitation and installation of electronic detection devices. The imposition of such measures was decided together with the principal criminal by loading period of implementation of the action. Extra sanctioned this action contains a useful purpose in the public interest. And in its regulation, the imposition of such measures is the addition to the form of criminal sanctions. Therefore, a person may be two (2) principal punishment (imprisonment and fines) and measures as well as additional criminal.

Criminal law in its efforts to achieve its aims not merely convict, but there are times when using actions. In addition to the criminal action. The act is a sanction as well, but there are no properties revenge of him. It is intended solely to special prevention. Purpose of action is to maintain the security of society against those who more or less is considered a threat, and it feared would commit criminal acts. Nevertheless, the action in general

<sup>2</sup> Barda Nawawi Arief, *Sari Kuliah Hukum Pidana II*, Badan Penyediaan Bahan Kuliah Fakultas Hukum Universitas Diponegoro, Semarang, 1993, hlm.66.

<sup>3</sup> *Ibid.*

was also felt heavily by those who are subject to the action. Often also felt the same as the criminal, and therefore also closely associated with vengeance.<sup>4</sup>

Basically, the use of sanctions in the form of "action" is used as a substitute in the form of criminal sanctions. So do not add to criminal sanctions. However, under Article 82 of the second amendment Child Protection Act, use of sanctions "action" may be imposed against the perpetrator along with two (2) subject to criminal sanctions.

#### 1.4. Criminalization of men who married children in child marriages in Indonesia

Child Marriage From the definition as described above, it can be said that "child marriage" is an act which is not prohibited and may be conducted pursuant to Article 7 (2) of the Marriage Law. However, if the reason for dispensation permit request is for pregnant women, hence the reason it can be used as evidence for the criminal acts of Article 82 of the Child Protection Act. women who have been pregnant and married, is the result of actions to persuade the Son to do or let do obscene acts committed before the marriage took place. Criminal acts committed before the marriage took place is a criminal act / criminal incident / crime, and such actions meet the elements of Article 82 of the Child Protection Act.

The offenses occurred before the marriage took place not remove because it has been held marriage. Marriage held for pregnant women is not a justification and not an excuse or reason eraser prosecution.

In the theory of criminal law usually reasons abolish criminal differentiated into:

- (1) Justify; that is the reason that abolishing legal action against the properties, so that what was done by the accused and be fair and correct actions,
- (2) Excuses; that is the reason that abolishing guilt of the accused. Acts committed by the defendant still is against the law. So it remains a criminal act, but he was not convicted, because there are no errors.
- (3) Reason eraser prosecution: not here because there is a justification or an excuse, so there is no thought about the nature of its action and the person doing the act, but the government considers that, based on utility or usefulness to society, should not be held prosecution. To be considered here is the public interest. If the case is not prosecuted, of course, has done can not be prosecuted a criminal.<sup>5</sup>

So the act of persuading the Son to perform obscene acts or persuade a child so that the child is allowed to do obscene acts, remains prohibited and may be liable under Article 82 of Law on Child Protection. There are several forms of prohibited acts under Article 82 of the Child Protection Act,

Acts that are prohibited under Article 82 in conjunction with Article 76E Child Protection Act are: violence or threat of violence, force, deceit, do a series of lies or persuade the Son to do or let do obscene acts. Of these provisions are forms of prohibited acts, namely:

Conduct of violence or threat of violence, Compel, Conducting a ruse, Conducting a series of lies, or Persuade.

While the victim is the Son, and to do such acts, the victim did or letting performed obscene acts. Of five (5) forms of prohibited acts, to be convicted offender does not have to all forms have been made by the culprit.

Performers only do one form of prohibited act under Article 82 of the Child Protection Law, criminal elements have been fulfilled, if the victim did or letting performed obscene acts. So, the actors act only "persuade" alone can be used as a legal basis to penalize the offender, if casualties or victims do let do obscene acts.

Therefore, not only because the perpetrators of acts persuade then the victim made obscene acts. But it can also be convicted offender because he was persuaded, then let the victim do obscene acts. It is necessary to note, that Article 82 of the Child Protection Law is not a complaint-based offense, offense but ordinary / common offense. What this means is, to be able to prosecute offenders do not need any complaint from the victim or entitled to sue.

From the above it can be seen that in Indonesia, to men who marry a use permit exemption on the grounds that his daughter had been pregnant may be liable. The basic rules are Article 82 of the Law of the Republic of Indonesia No. 23 of 2002 on Child Protection was changed by the Law of the Republic of Indonesia No. 35 of 2014 and the second amendment by the Law of the Republic of Indonesia Number 17 Year 2016.

Therefore, people need to be careful in using the excuse that the woman had become pregnant as a basis for the application for permission to enter into marriage dispensations. The use of this reason for requesting the permission of dispensation, may result punishment for man / husband who married her.

<sup>4</sup> Roeslan Saleh, *Telsel Pidana Indonesia*, Penerbit Aksara Baru, Jakarta, 1987, hlm. 47

<sup>5</sup> Moeljatno, *Azas-Azas Hukum Pidana*, Bina Aksara, Jakarta, 1983, hlm.137.

Therefore, the enforcement of Article 82 of the Child Protection Law against child marriages, only used to criminalize men as the husband of a married woman, if the marriage is done using licenses dispensation because the woman had been pregnant. And not for the women who married for already pregnant.

## 2. Implications of punishment on men who marry children in child marriages in Indonesia

In society, the problem of child marriage is often performed by a variety of reasons which are used as the basis for an application for permission dispensation, including the reasons for women was pregnant.

However, since the publication of the Child Protection Act, there are prisoners who were undergoing criminal prosecution for using licenses dispensation to mate with the female base was pregnant. The fact is a lot happening, and the implications are alarming.

The analysis of the implications arising from the enforcement of Article 82 of the Child Protection Law against child marriages by dispensation permit use of reason pregnant women, carried out on the consequences that may arise from punishment husband.

When viewed from *strafsort* / kind of criminal, *strafmaat* / *strafmaat* / severity of criminal and *strafmodus* / shape of the imposition of the sentence, the sentencing is considered very heavy. This is caused because the judge must impose imprisonment of at least five (5) years and a criminal fine that could reach five (5) billion cumulatively. This has implications for criminal punishment against the loss of jobs. The loss of jobs has implications also on unpaid criminal fines cannot, it should be replaced with imprisonment. Therefore, it will add to the length of punishment.

The length of punishment also has implications for the divorce caused by the marriage, the husband can not provide a living inner and outer. This may have implications on the psychology of children born. The number of implications that may occur, it needs further thought. Child marriage on the grounds that pregnant women have used as the basis of an application for permission dispensation, generally occurs as both consensual. And not because there is violence or threats of violence. Pregnancy due date exceeded the limit. Therefore, if it is made men who marry must undergo criminal prosecution, need to do more thinking.

Due to the criminalization issue generated a lot of negative implications, there should be a review of the provisions of Article 82 of the Child Protection Act. In this case the application of Article 82 of the Child Protection Act, need to be exempted settings to permit child marriage with a dispensation because the woman had been pregnant. The exceptions are: a complaint to the application of Article 82 that the culprit is the husband of the woman who married already pregnant.

## D. Conclusion

Constitutionally, both of the Marriage Law and the Law on Child Protection, has the constitutional legality. However, the application of Article 82 of the Child Protection Law on Child marriage, can result in punishment for men who marry a woman for dispensation permit to use the excuse that the woman was pregnant. The criminal prosecution raises a lot of negative implications, so it needs to be reexamined.

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