POLICY PAPER 19

Ending Child Marriage in Indonesia: The Role of the Courts

Cate Sumner

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ENDING CHILD MARRIAGE IN INDONESIA: THE ROLE OF THE COURTS

CATE SUMNER

ABSTRACT

UNICEF and Statistics Indonesia (BPS) estimate that one in nine girls in Indonesia (11 per cent) marry before they have reached 18 years of age, placing Indonesia in the top ten countries in the world for numbers of child brides. This compares with just one in a hundred boys in Indonesia who marry before 18. In September 2019, the Indonesian legislature agreed to revise the 1974 Marriage Law to raise the age at which parents may provide their consent to marry their daughters, from 16 to 19 years, making it the same age for both boys and girls. This legislative amendment implements a decision of the Constitutional Court of Indonesia of December 2018 in a case brought by three women applicants who had been married as girls. However, the amendment to the 45-year old Marriage Law does not alter the fact that there is still no absolute minimum age of marriage set by legislation in Indonesia, because parents are still able to apply to the Indonesian courts for dispensation to marry sons or daughters under the age of 19 years. The paper reviews research findings recently published by the Australia Indonesia Partnership for Justice based on an analysis of over 1,000 marriage dispensation cases and half a million divorce cases in Indonesia. UNICEF estimates that two million Indonesian girls under the age of 19 are married each year in Indonesia. Instead of being the point at which a judge simply grants or denies dispensation for a girl or boy to marry, the 14,000 marriage dispensation cases that currently come to the courts could instead be the point at which a range of integrated counselling, legal, education, scholarship and reproductive health services are mobilised to ensure that girls and boys in Indonesia benefit from 12 years of education and defer having children until they are over 18.. This paper proposes a number of recommendations that would improve the ability of judges to accurately assess the views of boys and girls when considering marriage dispensation cases in Indonesia.

CATE SUMNER

For 25 years, Cate Sumner has worked in the Middle East, Asia and the Pacific, focusing on access to justice, human rights and judicial reform. Her career spans working with the international law firm Baker & McKenzie in Cairo, the United Nations (UN-RWA) as both a Refugee Affairs Officer in the Gaza Strip and as Legal Officer in Jerusalem, the Department of Foreign Affairs and Trade in Canberra, and the International Development Law Organisation (IDLO) in their offices in Manila and Sydney.

In 2005, Cate established Law & Development Partners to work on access to justice, legal identity and judicial reform programmes across Asia and the Pacific. Its focus is on improving access to justice for women, people with a disability, and vulnerable children. A particular focus has been on how these groups are able to access the formal justice system and civil registration systems.

Cate has worked as an adviser on access to justice programmes in Indonesia since 2005 and in the Pacific since 2011 with UN Women, and bilateral development programmes supported by the Governments of Australia, Denmark, New Zealand, Sweden and the United States. Cate has also contributed analytical and policy papers to a range of international organisations and policy think-tanks including the Centre for Global Development, UN Women, the World Bank Justice for the Poor Series, and the Lowy Institute for International Policy.

In September 2019, Cate was awarded a Churchill Trust Fellowship to research how impact investing can support legal services for women and children.

ENDING CHILD MARRIAGE IN INDONESIA: THE ROLE OF THE COURTS¹

CATE SUMNER

[H]ealth and education are the key components of what economists call human capital ...the best way for a country to unlock productivity and innovation, cut poverty, create opportunities, and generate prosperity.

Investments in human capital today help people increase their incomes tomorrow. But without human capital—that is, for those who are unhealthy and uneducated—it is virtually impossible to escape poverty. (Bill and Melinda Gates Foundation, 2019: 8)

INTRODUCTION

UNICEF and Statistics Indonesia (Badan Pusat Statistik, BPS) estimate that one in nine girls in Indonesia (11 per cent) marry before they have reached 18 (BPS and UNICEF, 2017), placing Indonesia in the top ten countries for numbers of child brides.² This compares with one in 100 boys in Indonesia who marry before they are 18.³ In September 2019, the Indonesian national legislature (Dewan Perwakilan Rakyat or DPR) agreed to revise the 1974 Marriage Law to raise the age at which parents may provide their consent to marry their daughters from 16 to 19 years, making it the same age for both boys and girls. This Law took effect in October 2019.⁴ The amendment implements a decision of the Constitutional Court of Indonesia made in December 2018⁵ in a case brought by three women applicants who had been married as girls.

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- 1 The methodology, statistics and key findings for the marriage dispensation decision analysis were jointly produced by Leisha Lister and Cate Sumner in their capacity as Senior Advisers to the Indonesia Australia Partnership for Justice (IAPJ). The author acknowledges the contribution of the AIPJ2 decision analysis activity research team, which included Theodora Shah Putri, AIPJ Activity Manager for Transparency, Accountability and Anti-Corruption; Wahyu Widiana, AIPJ Senior Adviser; Haemiwan Fathony and Triatmoko of HaROL <www.harol.id>; and more than a dozen university and CSO partners, including MaPPI UI, UCY, LPA Gowa, LPA Sulawesi Selatan, ICJ Makassar, UIN Bandung, FPMP Sulawesi Selatan, Pusat Hukum dan Hak Asasa Manusia UII, Pusat Kajian Perlindungan Anak UI, LBH Makassar, and UIN Banten.
 - 2 See Girls not Brides website: <<https://www.girlsnotbrides.org/where-does-it-happen/atlas/#/>>.
 - 3 Communication with UNICEF Indonesia Office, 22 October 2019.
 - 4 Law No 16 of 2019 on Changes to Law No 1 of 1974 on Marriage.
 - 5 Constitutional Court of Indonesia Decision No 22/PUU-XV/2017.

However, this amendment to the 45-year old Marriage Law does not alter the fact that there is no absolute minimum age of marriage set by legislation in Indonesia, because parents are still able to apply to the Indonesian courts for dispensation to marry sons or daughters under 19. While a positive step, if all parents abide by the amended Law it will have the effect of dramatically increasing the number of marriage dispensation cases brought to court by an estimated two million.⁶ In 2018, approximately 14,000 dispensation cases were brought to the court of a total 190,000 girls estimated to have married under 16 years of age.⁷

Research findings recently published by the Australia Indonesia Partnership for Justice (AIPJ2, 2019a) (<https://aipj.or.id/>), based on an analysis of over 1000 marriage dispensation cases in Indonesia, estimate that only 3 per cent of marriages involving underage girls in Indonesia come before a court in marriage dispensation cases, as Indonesian law requires. Therefore, 97 per cent of marriages involving underage girls are taking place without court approval. In the fraction of cases that do come before the courts, judges grant the marriage dispensation sought in 99 per cent of them.

The amendment of the Marriage Law will not change this pattern of non-registered, underage marriage in Indonesia unless the government of Indonesia, in partnership with the courts and grass-roots civil society organisations, works to change attitudes, improve support services and information for girls and boys, as well as increase knowledge in the community of the legal requirements for bringing a marriage dispensation case to court. Changing outcomes for girls and boys in the light of the Constitutional Court decision and the legislative amendment will also require a range of training resources to be made available to judges and court staff on how to determine the best interests of the child when marriage dispensation cases do come to court.

The 2018 Constitutional Court decision highlights the key role of the Indonesian courts in ending child marriage. The arguments raised by the Constitutional Court will be important for Indonesian judges to consider when hearing marriage dispensation cases in future, as well as for policy makers in Indonesia aiming to reach the Sustainable Development Goal Target 5.3 by 2030 and 'eliminate all harmful practices such as child, early and forced marriage'. The National Planning Agency (BAPPENAS) has released its National Strategy on Ending Child Marriage, and the Medium Term Development Plan for 2020-2024 (RPJMN) and has set a target of 8.7 per cent as the percentage of women aged 20-24 years married before the age of 18 years – this would be a reduction of 2.5 per cent from current levels (BAPPENAS, 2019).

This paper reviews these developments and proposes a number of specific

6 UNICEF communication on 14 October 2019 on the percentage of Indonesian girls marrying under the age of 19 years, estimate based on SUSENAS 2018.

7 See: Mahkamah Agung, 2019; and also the May 2019 UNICEF communication on the percentage of Indonesian girls marrying under the age of 19 years, estimate based on SUSENAS, 2018.

recommendations that would improve the ability of judges to more accurately assess the views of boys and girls when considering marriage dispensation cases in Indonesia.

MARRIAGE AGE AND THE CONSTITUTIONAL COURT OF INDONESIA

While the age that a man and woman in Indonesia may marry without parental consent is set at 21, art 7(1) of Law No 1 of 1974 on Marriage previously provided (as mentioned) that a parent may give consent to marry a daughter aged 16 years and above and a son aged 19 years and above. It is this provision that the Constitutional Court found to be discriminatory and that the DPR has recently amended.

The Child Protection Law of 2002, art 26⁸ states out that:

Parents are responsible for the nurture, care, education and protection of their children and ... preventing their marriage while still a child (under the age of 18 years).

Law No 16 of 2019 amending the 1974 Marriage Law states that:

Considering that:

- a) that the state guarantees the right of citizens to form a family and continue their descendants through a legal marriage, [and] guarantees the rights of children to survive, grow and develop and be entitled to protection from violence and discrimination as mandated in the 1945 Constitution of the Republic of Indonesia;
- b) that child marriage has a negative impact on a child's growth and development and will result in not fulfilling the basic rights of the child such as the right to protection from violence and discrimination, the child's civil rights, the right to health, the right to education, and the social rights of the child

Article 7:

- 1) Marriage is only permitted if men and women have reached the age of 19 (nineteen) years.
- 2) In the event of a deviation from the age requirement as referred to in paragraph (1), the parents of the male party and/or female party may request dispensation from the **Court on the grounds that it is very urgent accompanied by sufficient supporting evidence.**
- 3) When granting dispensation as referred to in paragraph (2) the Court **must listen to the opinions of the prospective bride and groom who**

8 Law No 35 of 2014 on Changes to Law No 23 of 2002 on the Protection of Children.

are going to be married. (emphasis added)

As also mentioned, this amendment to art 7 of the Marriage Law still allows parents to apply to the Indonesian courts for dispensation to marry their sons or daughters under 19 with no minimum age set, albeit with the new requirement that the case involve 'very urgent reasons accompanied with sufficient supporting evidence'. Indonesian civil society organisations had called for legislators to also include a minimum marriage age in the recent legislative amendment but they were not successful (Nuraini, 2018; Arubone, 2019).

The experiences of the three women applicants in the Constitutional Court case are well-known to Indonesian civil society organisations working on policies to end child marriage, and they bear repeating briefly here, because they offer insights into the lived experiences of child brides in Indonesia, and why continued reform of the law in this area is so important.

Ibu Endang from Indramayu was married at 14 to a 37-year-old man. The family's economic situation was cited as the main reason for the marriage. The Court heard that, as a consequence of the marriage, Ibu Endang dropped out of school in the second year of junior high school. After her marriage, she continued to live a life marked by poverty due to not completing her education. As a result of being married as a child, Ibu Endang also suffered from health complications.

Ibu Maryanti from Central Bengkulu was married at 14 to a 33-year-old man. The family's economic situation was cited as the main reason for the marriage and the fact that her family owed a debt to the prospective husband. As a result of being married as a child, Ibu Maryanti did not complete her basic education and suffered several miscarriages.

Ibu Rasminah from Indramayu was married at 13 to a 25-year-old man. The family's economic situation was given as the main reason for the marriage. Ibu Rasminah did not complete the examinations at the end of primary education due to the family's economic situation. She had her first child at 14 and has married four times, twice while still a child. The court heard that all Ibu Rasminah's marriages were entered into for economic reasons. In a recent interview, Ibu Rasminah recounted how she felt at the time of her first marriage at the age of 13:

'My dreams were just to go to school and play, but I couldn't. I was married and had to care for a child', she said. 'You can't even imagine how that felt for me. I still remember my mother said to me that I was no longer in primary school now and I should just get married, so someone can make sure I'm fed and bring rice to the table. The first time I met [my former husband] was at a neighbour's wedding, they pointed and told me to go with him.' (Wibawa, 2019)

The Constitutional Court heard arguments that allowing parents the right to approve the marriage of girls below the minimum age violated the Indonesian Constitution, as it led to different treatment of girls, and discrimination against them, particularly as regards

rights to health, education and livelihood opportunities. It also increased the risk that they would experience violence and forms of child exploitation. It held that:

The existence of inequality in law and discrimination in the provisions of marriage age for men and women in Article 7 paragraph (1) of the Marriage Law, has resulted in a constitutional loss, both real and potential, to the Petitioners and women in general, because they do not achieve fulfillment of their rights as children due to their marriage under the age of 18 years. The rights of these children are fundamental and guaranteed by the 1945 Constitution which includes, health rights, education rights, the right to grow, the right to play, and other rights.⁹

The judges of the Constitutional Court of Indonesia were also presented with a range of global and Indonesian data that are also relevant for the judges of the Religious Courts and General Courts who hear marriage dispensation cases. This included reference to:

- the significantly increased risk of maternal mortality for girls giving birth under 18 compared with women aged 18 and over;
- the significantly increased risk of child mortality for girls giving birth under the age of 18 compared with women aged 18 and over;
- the higher incidence of pregnancy and labour-related health issues for girls giving birth under the age of 18;
- The incidence of psychological issues, including depression, associated with child marriage and pregnancy;¹⁰
- the fact that girls who married under 18 significantly less likely to complete 12 years of education compared with women who married at 18 and over;¹¹ and
- the increased risk of child exploitation and violence.

As the court heard:

One of the fundamental problems that occur when children are married by parents to prospective older husbands on economic grounds is that the child is basically not able to give consent to legal actions taken including marriage. Girls

9 Constitutional Court of Indonesia Decision No 22/PUU-XV/2017, para 73.

10 Constitutional Court of Indonesia Decision No 22/PUU-XV/2017, On health consequences, paras 74-84.

11 Constitutional Court of Indonesia Decision No 22/PUU-XV/2017, On education consequences paras 85-91.

do not have rights to their bodies, because children must obey their parents or family to be married to men they don't know. That 'exploitation' of children that occurs does not stop when determining whether to marry or not, but also affects the power relations at the time of marriage that may lead to domestic violence. Girls who marry older men are vulnerable to domestic violence.¹²

As mentioned, the court ruled on 13 December 2018 that art 7(1) of the Marriage Law was inconsistent with the non-discrimination principles in the Constitution. It gave Indonesia's legislators a maximum period of three years to amend the Marriage Law. The resulting amendment was signed into law by President Joko Widodo (Jokowi) on 14 October 2019.

The role of the courts in ending child marriage in Indonesia is two-fold. The first is to enforce the basic rights the Constitutional Court referred to that guarantee equality of treatment and opportunity for girls and boys, women and men. The second role relates to the current provision in Indonesian Law that allows parents to bring cases to the courts to receive dispensation to marry their children under the age stipulated in the Marriage Law.

MARRIAGE DISPENSATION CASES IN INDONESIA TODAY

In 2018, 13,880 marriage dispensation cases were decided in the Religious Courts for Muslim citizens, a 20-fold increase over the last 14 years from the 631 cases decided in the Religious Courts in 2005.¹³ By contrast, in 2018, just 201 marriage dispensation cases were decided in the General Courts for non-Muslim citizens, reflecting Indonesia's relatively small non-Muslim population, around 10 to 15 per cent of total. In other words, the vast bulk of marriage dispensation cases Indonesia are heard in the Religious Courts, and their numbers continue to grow dramatically.

While marriage dispensation cases are brought by the parent or guardian,¹⁴ the person most affected by the outcome of the case is, of course, the girl or boy for whom the court's dispensation is sought. The Convention on the Rights of the Child and Indonesia's Child Protection Law provide that children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.¹⁵ As a State Party to the Convention on the Rights of the Child, Indonesia has committed to ensuring that a child has the opportunity to be heard in any judicial and administrative proceeding affecting him or her, either directly or through a representative.

12 Constitutional Court of Indonesia Decision No 22/PUU-XV/2017, para 98.

13 See Mahkamah Agung, 2019 and 2005 case data provided by Badan Peradilan Agama.

14 Law No 16 of 2019, 6 art 7(2).

15 Convention on the Rights of the Child, art 12; and Law No. 23 of 2002 on Child Protection, arts 2, 10 and 24.

From 2018 to 2019, the Australia Indonesia Partnership for Justice 2 (AIPJ2) collaborated with an Indonesian company specialising in machine-read technology (HaRoI <www.harol.id>) and more than a dozen university and civil society partners to undertake an analysis of over 1000 Indonesian marriage dispensation cases. AIPJ2 advisers and CSO partners developed a survey of approximately thirty questions to analyse marriage dispensation cases, and over 160 cases were read and analysed by CSO partner researchers. HaRoI then used machine-read technology to analyse 873 Religious Court and 40 General Court marriage dispensation cases with the same questions used by the University and CSO researchers.¹⁶

From this combination of machine-read and person-read decisions nine key points emerge that will be important for the government of Indonesia to consider as it implements the National Strategy on Preventing Child Marriage:

PREVALENCE

More than 95 per cent of marriages of girls in Indonesia occur without a judge granting marriage dispensation as required under Indonesian law. The AIPJ2 decision analysis research found that 35 per cent of the marriage dispensation cases studied were brought by parents on behalf of their daughters, and 65 per cent on behalf of their sons.¹⁷ In 2018, the Religious Courts received 13,880 marriage dispensation cases. UNICEF estimates that there were 190,533 Indonesian girls aged 20-24 years who married under 16 in 2018.¹⁸

These data suggest that approximately 5,000 of marriage dispensation cases in 2018 (35 per cent of 14,000 cases) were brought to the courts by parents on behalf of girls, a figure that represents only 3 per cent of the girls under 16 that it is estimated were married in 2018.

OUTCOME

In 99 per cent of cases brought to the Religious Courts, the judge granted the request for dispensation to marry the child under the legal age of marriage.

16 The full methodology and findings for the AIPJ2 research can be found at: <<https://aipj.or.id/pages/publication/decision-analysis-of-marriage-dispensation-cases-in-indonesia>>.

17 The discrepancy in the percentage of cases brought on behalf of sons and daughters seen in the decision analysis is due to the age difference stipulated in the Marriage Law prior to its amendment. More cases were brought by parents on behalf of boys as they were then obliged to apply for marriage dispensation while the boy was under 19 years compared with girls under 16 years. It will be interesting to observe if the same number of cases are brought to the courts on behalf of boys and girls following the Marriage Law amendment.

18 Communication from UNICEF Indonesia Office on 8 May 2019 on modelling from SUSENAS, 2018.

Views of the Child

The child is the party most affected by the court decision. However, only 55 per cent of decisions clearly indicate that the child on whose behalf the marriage dispensation case was brought was present at the court hearing. Forty-five per cent of decisions do not clearly indicate whether the child was present in court or whether his or her views were considered by the judge at the hearing.

One in Four Women in Divorce Cases were Married as Girls

In over 500,000 Indonesian divorce cases analysed using machine-read technology (AIPJ2, 2019b), 24 per cent of wives were married as girls, compared with 2 per cent of husbands married as boys. UNICEF estimates that 11 per cent of girls in Indonesia are married under 18 (BPS and UNICEF, 2020). Yet 24 per cent of women in divorce cases were married as girls, indicating a high rate of divorce for women married under 18.

Disability

Only one decision in a 1000 referred to a child living with a disability, yet the 2015 Intercensal Population Survey (SUPAS) found that 9 per cent of Indonesia's population lives with disabilities, while WHO estimates that around 15 per cent of the world's women, men and children live with disabilities.

Age of Child in Marriage Dispensation Cases

The average age of a girl in a marriage dispensation case was 14.5, while the average age of a boy in a marriage dispensation case was 16.5.

Age Disparity in Marriage Dispensation Cases

For eight out of ten boys, their prospective wife was a contemporary aged 16-19. However only three out of ten girls had a prospective husband who was a contemporary aged 16-19.

Reason for Marriage Dispensation Case

In seven out ten marriage dispensation cases, the girl was not pregnant. Reasons outlined by judges for giving permission for these marriages are:

- the child is at risk of infringing religious values or social norms.
- the girl and boy are in love.

Legal Representation

There is no reference to the 14,000 girls and boys whose parents applied to the court for dispensation to marry them being given access to independent legal representation.

WHOSE CASE IS IT?

There is a technical issue about the characterisation of marriage dispensation cases by the Indonesian courts that has a number of important ramifications for girls and boys and, in particular, whether their views will be heard and considered separately from those of their parents.

Under Indonesian civil procedure law there is a distinction between two types of civil cases: a *permohonan* and a *gugatan*. The fundamental distinction between these two types of cases is that a *permohonan* is regarded as a petition to the court by only one party in which the fundamental aspects of the matter are not in contention, while a *gugatan* involves at least two parties - an applicant and a respondent - and the issues brought before the judge are in dispute. An example of the former is a marriage legalisation case where a husband and wife petition the court to formally acknowledge the date upon which their religious marriage took place for the purpose of formally registering their marriage.¹⁹ The married couple appear as one party and the issue being put before the court is not in dispute. By way of contrast, a divorce case has two parties bringing a contentious matter before a judge for determination.

A marriage dispensation case is currently characterised as a *permohonan*, although it has certain aspects that actually make it a hybrid between the two civil case types. In Indonesia, the party that brings the marriage dispensation case is the parent or guardian of the child for whom marriage is sought. However, it is the responsibility of the judge to determine whether the marriage of the child is in their best interests as a separate matter from the arguments put to the court by the parents or applicants in the *permohonan*. In this sense, a marriage dispensation case is clearly a case in which a judge has to consider more than one point of view.

In Indonesia both types of civil cases, *permohonan* and *gugatan*, are usually heard before a panel of three judges, unless the law stipulates otherwise.²⁰ However, there is a difference between the General and Religious Court systems when it comes to marriage dispensation cases. The Religious Courts recognise the more complex nature of these cases and they are heard before a panel of three judges. However, in the General Courts they are most commonly heard by one judge.

Finding a way for the panel of judges to hear directly from the girl or boy whose parents are seeking the court's permission to marry them is critical if judges are to be able to determine what is in the best interests of the child. The AIPJ2 research shows that in 99 per cent of the marriage dispensation cases analysed the judges approved the request of the parents to marry their children, and in half of the cases it was not clear whether

19 Marriage Law, art 2. As explained below in more detail, for a marriage to be recognised by the Indonesian state, it must first take place according to religious ritual, and must then be formally registered with the relevant government office.

20 Article 11(1 and 2), Law No 48 of 2009 on Judicial Power.

the judges had considered the views of the child at all, or whether the child had the requisite maturity for the proposed marriage to be in his or her long-term best interests.

In November 2019, the Supreme Court of Indonesia finalised a Practice Direction on Adjudicating Marriage Dispensation Cases.²¹ Interestingly, art 1(11) provides that all marriage dispensation cases will be heard by only one judge in both the General Courts and Religious Courts, despite the complexity of these cases. However, the Practice Direction does state that the judge must obtain the views of the girl or boy on whose behalf the case has been brought, as well as consider other health and education information, when determining whether granting dispensation to marry is in the child's best interests. Importantly, the judge must refer to these views in the decision, and failure to do so will render it null and void.²²

Specifically, the judge must hear whether the child wishes the marriage to proceed and is psychologically prepared for marriage. The judge must also consider whether there is psychological, physical, sexual or economic coercion of children and/or their families in relation to the marriage.²³ The judge can: hear the views of the child without the presence of their parents; authorise a support person to assist the child in court; and seek medical, psychological and social work reports from professionals to assist the judge in coming to a decision.²⁴

The judge must also provide advice to the parents and prospective husband and wife to ensure that they understand the risks of marriage including those related to: the possible cessation of education for the children; the impact on the girl of having children before the age of 18; economic, social and psychological impacts of marriage on children; and the potential for disputes and domestic violence. Again, a failure by the judge to provide this advice will render the marriage dispensation decision null and void.²⁵

The Practice Direction also states if the applicant bringing a marriage dispensation case on behalf of their child faces financial disadvantage she or he may apply to the

21 Supreme Court Regulation (*Peraturan*) No 5 of 2019 on Guidance to Ruling on Marriage Dispensation Petitions (*Pedoman Mengadili Permohonan Dispensasi Kawin*; and Jamaluddin, 2019.

22 Supreme Court Regulation No 5 of 2019 on Guidance to Ruling on Marriage Dispensation Petitions arts 13.

23 Supreme Court Regulation No 5 of 2019 on Guidance to Ruling on Marriage Dispensation Petitions art 14.

24 Supreme Court Regulation No 5 of 2019 on Guidance to Ruling on Marriage Dispensation Petitions art 15.

25 Supreme Court Regulation No 5 of 2019 on Guidance to Ruling on Marriage Dispensation Petitions art 12.

court for a waiver of the court fee.²⁶

It will be important to monitor whether the amendment to the Marriage Law, combined with the requirements of the new Supreme Court Practice Direction, leads to a change in the way marriage dispensation cases are handled in court.

KEY COLLABORATION PARTNER – MINISTRY OF RELIGIOUS AFFAIRS

In Indonesia, a marriage must be valid according to the religion of the couple and must also be registered with the state.²⁷ If a couple do not register their marriage within a certain set period they may bring an application to the court seeking a retrospective marriage legalisation. In Indonesia, the Religious Courts are the family law courts for Muslim citizens. They play an important role in legalising marriages that are valid under Islamic Law but have not been registered with the Office of Religious Affairs (Kantor Urusan Agama, KUA) and in respect of which a marriage certificate has therefore not been issued.

A marriage certificate is an important document for women, as it clearly evidences the date of the relationship. It is also important for children of the marriage, as it allows them to obtain a birth certificate with both their father and the mother's name on it.²⁸ In 2018, almost 60,000 couples brought marriage legalisation cases to the Religious Courts, compared with 13,000 cases a decade ago, demonstrating the rising importance of birth certificates and other legal identity documents for access to education, employment and a wide range of social services.²⁹

For the last 20 years, the number of Muslim marriages registered with the Ministry of

26 Supreme Court Regulation No 5 of 2019 on Guidance to Ruling on Marriage Dispensation Petitions art 9.

27 Marriage Law, art 2.

28 In 2016, the Minister for Home Affairs issued a regulation stating that a man and woman with a valid religious marriage could sign a Statutory Declaration stating that they were the child's parents and that their family card evidenced the religious marriage (Minister for Home Affairs. Regulation (Peraturan Menteri Dalam Negeri) No 9 of 2016 on Accelerating and Increasing the Coverage of Birth Certificates (Percepatan Peningkatan Cakupan Kepemilikan Akta Kelahiran). However, many couples with a religious marriage whose family card does not evidence the fact that they are married under religious law will not be able to obtain a birth certificate for their children with both the father and mother's name on it. The absence of the father's name on the certificate can have significant and damaging social and legal consequences in Indonesia. For a more detailed outline of legal identity documentation including marriage certificates and birth certificates and the complex interaction between Indonesian laws and regulations and the practices of the Office of Religious Affairs and civil registry office refer to Sumner (2016) and (2015) and Sumner and Kusumaningrum (2014).

29 Supreme Court Annual Reports 2018 and 2009 data obtained from Badan Peradilan Agama, For the importance of birth and marriage certificates see Sumner (2010); Sumner and Lindsey (2010); and Hanmer and Elephante (2016).

Religious Affairs has stayed constant at approximately 2 million marriages a year.³⁰ However, during this time, the population in Indonesia has increased by 27 per cent from 209M in 1999 to 265M in 2018. This means there is an ever-widening gap of men and women in Indonesia who do not register their marriage.

As mentioned, in 2018 UNICEF estimated that 19 per cent of women aged 20 to 24 were married before they turned 19.³¹ The 2019 amendment to the Marriage Law means that for these marriages to be registered, parents of the girls will now need to obtain the permission of the courts. The findings from the AIPJ2 research suggest that only 3 per cent of parents will bring marriage dispensation cases to the courts to marry their daughters. The implication of this is that from 2020 onwards, approximately two million girls each year in Indonesia will have unregistered marriages. This is equal to the total number of registered marriages in Indonesia each year.

In late 2018, the Ministry of Religious Affairs launched a new version of its marriage certificate database (SimKAH) that links to the Ministry of Home Affairs' SIAK database. At KUA offices across Indonesia, officials will enter a Unique Identity Number (NIK) for each marriage partner and the SimKAH personal data fields will auto-populate from the Home Affairs SIAK database. If one or more marriage partner is under the age permitted by the Indonesian Marriage Law, a marriage certificate will not be printable until the judgment number of a marriage dispensation decision is entered. In 2019, the Ministry of Religious Affairs will, for the first time, have real-time, sex-disaggregated data on boys and girls who are being married in Indonesia and seek a marriage certificate.

One of the drivers of child marriage in Indonesia is the failure of parties officiating at the religious marriage to explain that the marriage must be registered at the Office of Religious Affairs to be valid in the eyes of the state. In Bangladesh, the Access to Information (a2I) initiative has developed an SMS solution that empowers local religious leaders, including qazi (registered with the government to legalise the marriage), to query the central civil registration database (Birth Registration Information System - BRIS) to check a child's eligibility for marriage. If the bride or the bridegroom's age is below the legal age for marriage in Bangladesh, then the qazi will not register the marriage but declare it illegal. In addition to qazi, there are a further 85,000 informal marriage solemnisers and celebrants³² all over the country who also perform marriages from a religious point of view. These informal marriage solemnisers and celebrants can also access this SMS solution for age verification. Data from the system can also be used to understand the prevalence of child marriage cases in specific geographies that

30 Ministry of Religion, Rekapitulasi Data Peristiwa Nikah dan Rujuk Seluruh Indonesia 1999-2018.

31 UNICEF Indonesia Office communication October 2019 based on UNICEF's modelling from SUSENAS 2018 data and the Intercensal Population Survey (SUPAS) population estimate.

32 Plan International's Bangladesh Office advised that the Governance Innovation Unit under the Prime Minister's office holds this list of solemnisers and celebrants.

supports targeted interventions to further prevent child marriage from occurring. After a successful pilot of the solution, it is now being expanded across 59 districts of the country in partnership with Plan International Bangladesh, reaching out to a wide range of people who perform marriages in both formal and informal spheres.³³

Another factor contributing to both unregistered marriage and child marriage is poverty. A 2015 survey that updated the government of Indonesia's Unified Database of the poorest 40 per cent of households³⁴ showed that 4 out of 10 married women and men living in the poorest 40 per cent of Indonesian households were unable to produce a marriage certificate. For the rate of unregistered marriages in Indonesia to decline it will be important for the Ministry of Religious Affairs to remove the barriers of awareness, cost, distance and complexity that couples in the poorest 40 per cent of households face to registering their marriages at the time of the religious marriage. It will also be critical for the Ministry of Religious Affairs to engage with religious leaders who conduct marriage ceremonies and find a mechanism to check whether the bride and groom are 19 years or older, like the SMS system trialled in Bangladesh.

At the same time, it will be important for the Indonesian courts to remove knowledge, distance and financial barriers for parents to bring marriage dispensation cases to the Indonesian courts. Consideration should be given to waiving the fee in all marriage dispensation cases. The court fee for a marriage dispensation case can vary depending upon the cost of summoning parties but will cost the parents bringing the marriage dispensation case approximately Rp 200,000. This court fee is half the monthly per capita income of a person living on or below the Indonesian poverty line of Rp 410,670 (BPS, 2019a). The Supreme Court of Indonesia has already recognised that the poorest 40 per cent of households included in the Integrated Database of The National Team for the Acceleration of Poverty Reduction are eligible for a waiver of the court fee.³⁵ Indonesian research shows that girls from household with the lowest quintile of expenditure are four times more likely to be married before the age of 18 years (BAPPENAS, 2019).

The Ministry of Religious Affairs is a key partner in raising awareness in Indonesia that: the interests of the child and Indonesia are best served by children completing 12 years of school; that young people should enter marriage freely as adults; and that girls should be given the opportunity to not become pregnant until they are over 18. A mass information campaign needs to be developed by the government of Indonesia, and the

33 Information on the Bangladesh, the Access to Information (a2I) initiative provided to the author by Plan International Headquarters on 31 October 2019 and Plan International Bangladesh on 13 November 2019.

34 Pemutakhiran Basis Data Terpadu (PBTD) 2015 data provided to the author by TNP2K, July 2019.

35 Supreme Court Practice Regulation No 1 of 2014 on the Provision of Legal Services in Court for People Facing Financial Hardship updating Supreme Court Circular Letter (Surat Edaran) No. 10 of 2010 on Guidelines for the Provision of Legal Aid.

Ministry of Religious Affairs in particular, to communicate the reasons why marriages should be registered with the KUA for Muslim citizens and the civil registry for non-Muslim citizens.

KEY POLICY ISSUES EMERGING

Given Indonesian legislators have now acted to increase the age at which parents can legally provide their consent for their daughters to marry, the government of Indonesia faces a number of critical policy issues:

THE COMPLIANCE ISSUE

Indonesian legislators have amended the Marriage Law and yet currently hundreds of thousands of parents across Indonesia continue to marry their daughters without court approval (AIPJ2, 2019). Raising the age bar from 16 to 19 years for girls will not improve compliance with Indonesian law in cities and villages unless concerted action is taken on a number of other fronts.

THE CAPACITY ISSUE

If all Indonesian parents followed the new amendment to the Marriage Law there would be an additional two million cases coming to Indonesian courts involving requests for girls to marry below the age of 19 (based on a UNICEF estimate that in 2018, 19 per cent of women aged 20-24 were married before they turned 19).³⁶ This would be a 140-fold increase in the number of marriage dispensation cases currently heard by Indonesian courts, dwarfing the current total caseload of 550,000 cases received a year in the Religious Courts. This would create an urgent need for an increase in the number of judges and court staff to handle the increase in marriage dispensation cases. If the courts are unable to deal with these cases in a timely fashion, many parents will simply ignore them, and marry their underage children illegally.

THE VOICE OF THE CHILD ISSUE

In half the cases analysed, the decision does not indicate that the girl or boy on whose behalf the marriage dispensation case was brought had an opportunity to present his or her views on the proposed marriage to the judge. The views of the boy or girl are critical as there will be a proportion of marriage dispensation cases in which adolescents are exploring relationships and may believe that marriage is the only socially acceptable way that they can pursue a teenage relationship. There are some marriage dispensation cases being decided in Indonesia where the judges do not grant a marriage dispensation even where the girl has become pregnant, as they found that marriage would not be in the best long-term interests of the child and would compound the existing problems of

36 Communication with UNICEF Indonesia Office, 14 October 2019.

adolescent pregnancy.³⁷

THE OUTCOME ISSUE

In the fraction of cases that do currently reach the courts, judges almost always grant the marriage dispensation request. In future it will be critical for Indonesian judges to demonstrate in their decisions that they have acted in the best interests of the child taking into account the significant educational, health and livelihood impacts on girls/young women who marry under 19 years.

Instead of being the moment when a judge simply grants or denies dispensation for a girl or boy to marry, the 14,000 marriage dispensation cases that currently come to the courts could instead be the point at which a range of integrated counselling, legal, education, scholarship and reproductive health services are mobilised to ensure that girls and boys in Indonesia benefit from 12 years of education and defer having children until they are over the age of eighteen.

NEXT STEPS

Child marriage is a complex issue in any country and requires intervention at many levels over a significant period of time to make an impact on the social norms that contribute to the underage marriage of girls. The following five strategies would go some way to addressing these compliance, capacity and outcome issues in child marriage cases.

ADDRESSING THE COMPLIANCE ISSUE

Changing the hearts and minds of children, their parents, religious leaders and a myriad of social work, health, education and other officials in a range of government agencies about the appropriate age at which girls and boys should marry will require a major social campaign targeting the different groups in ways that will make sense for them. The current cycle of non-registered child marriages and pregnancy in child brides, followed by divorce in many cases, is not a path that will lead to a thriving, educated and healthy cohort of teenagers or healthy families. Creating space for teenage relationships outside marriage and providing appropriate information on healthy relationships and reproductive health to children and adolescents will be challenging but critical.

- 1. Implement a national campaign that advocates a minimum age of marriage of 18 or above, consistent with the Indonesian Child Protection Law, and that normalises and accepts adolescent relationships outside marriage.**
 - Ministry of Religious Affairs, BAPPENAS and CSOs collaborate on an

³⁷ As examples: Wates Religious Court, Decision No 63/Pdt.P/2018/PA.Wt, 30 August 2018; Wates Religious Court, Decision No 52/Pdt.P/2018/PA.Wt, 27 July 2018 (Tomi Widodo bin Sukmawi); Wates Religious Court, Decision No 21/Pdt.P/2018/PA.Wt, 19 March 2018.

amendment to the Marriage Law that sets a minimum age of marriage at 18 years below which it is not possible for judges to grant a marriage dispensation.

- Ministry of Religious Affairs and Ministry of Education and Culture collaborate on a healthy relationships and reproductive health curriculum for school children attending primary and secondary schools to increase girls' and boys' knowledge of relationships inside and outside of marriage and how to avoid adolescent pregnancy.
- Ministry of Women Empowerment and Child Protection collaborate with Ministry of Education and Culture and Ministry of Religious Affairs on clear policies to support girls who marry and/or are pregnant to remain at school and complete 12 years of education. Currently, these girls are encouraged to leave or change schools and undertake equivalency education programmes. A clear statement that 12 years of education is a basic right of children all over Indonesia, regardless of personal circumstances such as pregnancy or marriage, is an important message to send to girls and boys and their families. Support could include scholarships and mentoring to encourage girls to complete 12 years of school. In Indonesia, girls who marry under 18 are at least four times less likely to complete secondary education or equivalent (BPS and UNICEF, 2020).
- The government of Indonesia undertake a national campaign to create space for teenage relationships outside marriage as part of its National Strategy on Ending Child Marriage. This could include empowering young people in the campaign to convey their aspirations on modern marriage, healthy relationships and family planning.
- A Guidance Note be issued by the Indonesian President, Minister of Health or other relevant Indonesian agency that echoes the World Health Organisation guidelines recommending reducing marriage under 18. Estimates suggest a 10 per cent reduction in child marriage could contribute to a 70 per cent reduction in a country's maternal mortality rate (WHO, 2018 and WHO, 2011).
- Ministry of Religious Affairs consider piloting an SMS solution that enables local religious leaders to query the central civil registration database to check the prospective bride and groom's eligibility for marriage and transmit notice of a religious marriage to the KUA by electronic means.
- Ministry of Religious Affairs conduct a national campaign directed at parents, religious leaders and children, providing information that the interests of the child and Indonesia are best served by children completing 12 years of school and girls delaying marriage and pregnancy until they are over 18. At the same time, a mass information campaign needs to be brought by the government of Indonesia communicating the reasons why marriages should

be registered with the KUA or civil registry.

2. Remove knowledge, distance and financial barriers for parents to bring marriage dispensation cases to the Indonesian courts.

- Indonesian courts and the Ministry of Religious Affairs consider providing funding to implement mobile services so marriage dispensation cases for families living in remote areas can be heard cheaply and conveniently on circuit.

ADDRESSING CAPACITY AND OUTCOMES ISSUES, INCLUDING THE VOICE OF THE CHILD

The amendment to the Marriage Law has the potential to increase the total caseload of the Religious Courts from the 555,000 cases filed in 2018 to 2.5 million cases if all parents in Indonesia were to immediately follow the proposed amendment to the Marriage Law. While the compliance issues and barriers to cases being brought to the courts mentioned above will have to be addressed first, the Indonesian courts, BAPPENAS and the Ministry of Finance will need to consider how to absorb this increase in demand for courts services in a manner that makes the courts accessible to all socio-demographic groups and provides outcomes for girls and boys that promote their long-term educational, health and welfare needs.

3. Government of Indonesia agencies allocate sufficient budget resources and develop guidelines to ensure that girls and boys at risk of child marriage receive the advice, support and referral services they need, including to participate on an informed basis in a marriage dispensation case brought to the Indonesian courts. This would include:

- funding a free children's helpline providing counselling and referrals to legal, health, and other services through a phone or chatbot service.
- providing funding for, and facilitating access for, girls and boys in marriage dispensation cases, to an independent children's lawyer who would provide legal advice and representation in marriage dispensation cases, and present the views of the child for whom the marriage dispensation is sought in court independently of the parents.
- providing funding for and facilitating reports from a social worker or psychologist that outlines: the personal circumstances of the child and their family for whom the marriage dispensation case is sought; whether they are still at school; their views on the proposed marriage and whether they feel forced to marry the proposed marriage partner; and the effect on the child of granting the application.
- supporting paralegal services that link girls and their families in villages across Indonesia with the services mentioned above.

- targeting scholarships and mentoring services to support the government of Indonesia policy of 12 years of education for girls, including those at risk of child marriage or who have married.

4. Supreme Court of Indonesia to provide guidance and training resources to judges on how to consider the girl or boy's best interests when deciding marriage dispensation cases, including:

- before, during and after the court case, girls and boys who are the subjects of marriage dispensation cases should receive advice on how to access independent legal advisory services, counselling, and appropriate services from local government services
- regardless of whether the marriage dispensation is granted or not, the child should receive support services to encourage the child and their family to undertake 12 years of education and receive appropriate reproductive health information to reduce the risk of adolescent pregnancies.
- judges should receive reports from a social worker or psychologist that outlines: the personal circumstances of the child for whom the marriage dispensation case is sought, and their family; whether they are still at school; their views on the proposed marriage and whether they feel forced to marry the proposed marriage partner; and the effect on the child of granting the application.
- protocols to outline how judges can interview girls and boys in an appropriate manner or otherwise hear their views.

5. Ministry of Finance, BAPPENAS and the Supreme Court consider the budget required for marriage dispensation cases to be decided in a manner that supports the best interests of the child, including:

- increasing the number of judges and court staff in proportion to the increased number of marriage dispensation cases being brought to the Religious Courts as a result of amendment of the Marriage Law in 2019.
- consideration be given to waiving the fee in all marriage dispensation cases because Indonesian research shows that girls from households with the lowest levels of expenditure are three times more likely to be married under 18 (BPS and UNICEF, 2020). As an interim measure, the national allocation in the Supreme Court budget to cover costs of the waiver of court fees in marriage dispensation cases would need to increase significantly. The current allocation of court fee waivers in the annual budget received by the Religious Courts from the Supreme Court is calculated by district and estimated a year in advance. However, it is not possible for the Religious Courts to foresee how many marriage dispensation cases will come to each district a year in advance. It is recommended that the Supreme Court consider a pool of

funds for court fee waivers that is managed at a national rather than district level, and a mechanism for courts to access this as needed.

- providing funding for social work reports in all marriage dispensation cases.
- providing funding for independent children's lawyers in all marriage dispensation cases.
- taking into account the fact that, given the decentralisation of budget resources in Indonesia, it is important that these budget items are agreed to at national, provincial and district levels of government.

It will be important to track whether the decision of the Constitutional Court of Indonesia discussed earlier and the consequent amendment to the Marriage Law has an impact on the percentage of girls and boys in Indonesia marrying under 18. Statistics Indonesia (Badan Pusat Statistik, BPS) should consider including questions in the Indonesian census that will take place in 2020 about the age of first marriage for all women and men, and whether that marriage was registered. These questions were first introduced in the census survey (Pemutakhiran Basis Data Terpadu, PBDT 2015) for Indonesia's poorest 40 per cent of households in 2015.

CONCLUSION

In his inauguration speech on 20 October 2019, President Jokowi set out his vision for Indonesia in 2045, one century after Independence:

Ladies and gentlemen, and all the people of Indonesia, there is strong potential that we will escape the middle-income trap. Right now we are at the peak of the demographic bonus, where our productive-aged population far outnumbers those of the non-productive age. This is a big challenge and also a great opportunity. This could be a big problem if we cannot provide jobs, but it will be a big opportunity if we are able to develop superior human resources, supported by an advantageous political and economic ecosystem. (Tehusijarana, 2019)

If the lives of the three women who brought their child marriage case to the Constitutional Court of Indonesia are not to be endlessly repeated, it will take considerably more than a legislative amendment to stem the tide of two million girls being married each year in Indonesia under the age of 19. The five strategies outlined above would go some way to addressing the complex compliance, capacity and outcome issues that have arisen as a result of the Constitutional Court decision and the amendment of the Marriage Law.

The 10,000 judges of the Religious and General Courts will also play an important role in determining whether the view of the Indonesian legislators that child marriage has a negative impact on the child's growth and development and prevents fulfilment of their basic rights will be upheld in Indonesia's courts in the decades to come. Jokowi's vision of Indonesia in 2045 rests on the next generation of girls not marrying as adolescents

but instead receiving ‘the right to protection from violence and discrimination, the child’s civil rights, the right to health, the right to education, and the social rights of the child’.³⁸

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Under the leadership of the Hon. Prof. Dr M. Hatta Ali a Supreme Court Practice Direction on Women before the Law (PERMA 3/2017) was adopted in 2017 aimed at providing Indonesian judges with guidance on the principles to consider when hearing and deciding cases involving women and girls. The implementation of this Practice Direction is supervised by the Supreme Court Working Group on Women and Children, headed by the Hon. Justice Prof Dr Takdir Rahmadi, SH, LL.M. The commitment and dedication of the judges and court staff that comprise the Supreme Court Working Group on Women and Children will be particularly valuable as the Indonesian courts grapple with the ramifications of the amendment to the Marriage Law.

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