

# **Child Marriage: An International Perspective**

## **-Australian/Indonesian judicial cooperation-**

### **Introduction**

In 2004 the then Family Court of Australia and the Supreme Court of the Republic of Indonesia recognised the importance of legal and judicial cooperation for the strengthening of bilateral relationships between Courts, which was formalised by the signing of a Memorandum of Understanding on Legal Cooperation in 2008. That Memorandum has been renewed and amended since that time and the cooperation between the Courts continues.

The Federal Circuit and Family Court of Australia (Division 1) and the Federal Circuit and Family Court of Australia (Division 2) are responsible for determination of family law disputes in the Commonwealth of Australia. The Supreme Court of Indonesia and the Religious Courts of Indonesia are responsible for determination of family law disputes throughout Indonesia.

Writing extra-judicially, the Honourable Justice Michael Kirby observed that a “distinctive feature of the present age has been the increase in dialogue between judges and other lawyers across national boundaries.”<sup>1</sup> International judicial dialogue in a peer-to-peer setting has been a component of the cooperation between the Courts of the two countries for more than two decades.

This paper is focused on one aspect of the work undertaken cooperatively between the two courts since 2019, when the Indonesian House of Representatives (Dewan Perwakilan Rakyat, DPR) passed Marriage Law No. 16 of 2019 - which amended the Marriage Law No. 1 of 1974 - effectively setting the minimum age for marriage of both men and women at 19 years of age, which concerns applications to marry underage.

The work undertaken by the judges of both countries, supported by the Australia Indonesia Partnership for Justice, has occurred within a framework whereby each country recognises the fundamental similarities (importance of the rule of law, procedural fairness, timely adjudication of disputes, transparent reasons for decisions) and explores cultural differences which may impact on judicial outcomes.

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<sup>1</sup> The Honourable Justice Michael Kirby AC CMG, “Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges” (2008) 9 *Melbourne Journal of International Law* 171.

In this paper I express opinions based on research and the work undertaken by the courts in both countries, but I do so in a personal capacity and my views should not be considered those of my judicial colleagues in Australia or Indonesia, nor should they be considered views of either Court. The views are expressed respectfully and in the hope that continued dialogue will broaden our collective knowledge and lead to solutions for women and children in both countries.

## **Background**

In Australia the minimum age for marriage is governed by the *Marriage Act 1961* (Cth). Section 11 provides that a person who is eighteen years of age may marry. Section 12 concerns marriage of persons aged 16 or 17 years of age. The section is headed “authorisation of marriage of person under the age of 18 years **in exceptional circumstances**” (emphasis added).

Schedule 1 provides for the consent of persons required to consent to the marriage of a minor.

In Australia the Commonwealth *Criminal Code Act 1995* provides a definition of forced marriage at 270.7A:

- (1) A marriage is a forced marriage if:
  - (a) either party to the marriage (the victim) entered into the marriage without freely and fully consenting:
    - i. because of the use of coercion, threat or deception; or
    - ii. because the victim was incapable of understanding the nature and effect of the marriage ceremony; or
  - (b) when the marriage was entered into, either party to the marriage (the victim) was under 16.
- (2) For the purposes of subsection (1), marriage includes the following:
  - (a) a registered relationship within the meaning of section 2E of the Acts Interpretation Act 1901;
  - (b) a marriage recognised under a law of a foreign country;
  - (c) a relationship registered (however that process is described) under a law of a foreign country, if the relationship is of the same, or a similar, type as any registered relationship within the meaning of section 2E of the Acts Interpretation Act 1901;
  - (d) a marriage (including a relationship or marriage mentioned in paragraph (a), (b) or (c)) that is void, invalid, or not recognised by law, for any reason, including the following:

- i. a party to the marriage has not freely or fully consented to the marriage (for example, because of natural, induced or age-related incapacity);
- ii. a party to the marriage is married (within the meaning of this subsection) to more than one person.

Note: Section 2E of the Acts Interpretation Act 1901 covers relationships registered under a law of a State or Territory that are prescribed by regulations under that Act.

(3) Subparagraph (1)(a)(i) applies whether the coercion, threat or deception is used against the victim or another person.

Section 270.7B, read with the above definition, has the effect of criminalising the marriage of any person under the age of 16. It also deals with questions of consent by deeming that those under 16 are not able to give consent such that the marriage will be regarded as forced.

This is similar in nature to s95 of the *Marriage Act 1961* (Cth) which provides that the marriage of a person under the age of sixteen is an offence. By way of example, the decision in *DPP (Cth) v Shakir* [2017] VCC 1374 was a matter where a term of imprisonment was imposed on conviction of the 34 year old man who had married a 14 year old girl. The cleric who had presided over this marriage was convicted under section 100 of the *Marriage Act* in the Victorian Magistrates Court and was later struck off from the Victorian “ministers of religion” register.<sup>2</sup> This decision to strike of the cleric was upheld on review, with the administrative appeals tribunal declaring him as someone who was “not a fit and proper person to solemnise marriages.”<sup>3</sup>

The family courts in Australia have heard and determined cases involving children who anticipated that their parents intended to force them to marry underage.

*Kandal & Khyatt & Ors* (2010) 43 Fam LR 344, a decision of the then Federal Magistrates Court, involved the use of the injunctive power in s64B of the *Family Law Act*, on application by a seventeen year old child who feared she would be removed from Australia by her mother and stepfather (with the agreement of her father) to be married. The Court made an ex parte order placing her on the airport watch list, the practical effect of was that she would not be permitted to leave Australia.

Similarly in *Madley & Madley* [2011] FMCAfam107 a Federal Magistrate heard an ex parte application by a sixteen year old child to restrain her parents from

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<sup>2</sup> *Omerdic and Registrar of Ministers of Religion Victoria* [2022] AATA 1765.

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

removing her from Australia and placing her on the airport watch list to prevent a foreshadowed marriage overseas.

The Family Court of Australia heard and determined an application which related to a child who had just turned fourteen. In *Department of Human Services v Brouker* (2010) FLC 93-446, the applicant was the child welfare authority of the state of Victoria, who had received a report that a then 13-year-old child had ceased attending school as it was intended that she was to be married. An ex parte injunction was made. The child's mother appeared and did not dispute the account the child had given of her proposed marriage.

In that matter Mushin J made an order that the child not be permitted to leave Australia until she turned 18 and the child welfare authority would retain her passport. His Honour foreshadowed that an application could be made to discharge the injunction after the child turned 16.

Cases in the Australian Courts have seen first-hand what research suggests about the vulnerability of girls to an increased possibility of family violence when married underage: for example, *Essey & Elia* [2013] FCCA 1525.

Australia has adopted a combination of criminal and civil responses to the issue of underage marriage. The civil concentrates on prevention and the criminal on punitive responses to breach of the law.

In Indonesia, the question of capacity to marry is governed by fulfilment of the “substantive requirements” or “non-impediments to marriage.” Relevant to this discussion are the consent of parents or guardians (which applies in all cases), consent of the spouses, consent of an existing wife (where the husband seeks to marry another woman) and the age of the parties.

The Government of Indonesia adopted a National Strategy for the Prevention of Child Marriage as part of the implementation of Sustainable Development Goals. The National Strategy identifies five goals:

- (1) Optimising capacity of children;
- (2) Providing an environment that supports prevention of child marriage;
- (3) Accessibility and Service expansion;
- (4) Strengthening Regulations and Institutions; and
- (5) Strengthening stakeholder coordination.<sup>4</sup>

Given the focus of this paper is on legal and, in particular, judicial responses to child marriage, the focus is on strategy goal (4), with a recognition of the

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<sup>4</sup> Kementerian PPN/Bappenas and Kementerian Pemberdayaan Perempuan Dan Perlindungan Anak, ‘National Strategy on the Prevention of Child Marriage’ (Policy Paper, 2020).

importance of coordination between the legislature, the courts, government and non-government agencies.

In Indonesia, amendments to *Law No. 1 of 1974 on Marriage* in 2019 (consistent with the Indonesian government strategy) were designed to introduce a minimum marriage age of 19 for both men and women. Persons 21 and over may marry without parental consent.

In *Law No. 16 of 2019* which amended *Law No. 1 of 1974*, the risks of underage marriage - and hence rationale for the amendment - were identified in recital(b):

That child marriage has detrimental effects on the growth and development of children and will lead to the violation of children's basic rights, such as the right to protection from violence and discrimination, civil rights, health rights, educational rights, and social rights.

This amendment took place against a background of a decision of the Constitutional Court brought by three female applicants who had been married as children – which focused on the distinction between the minimum age for marriage of boys and girls.

Neither the constitutional decision nor the subsequent amendment to *Law No.1 of 1974* set an absolute minimum age for marriage of girls or boys. Data about the age of marriage consistently identifies that for girls, only 3 out of 10 had a prospective husband who was a contemporary in terms of age.<sup>5</sup>

Research has concluded that notwithstanding the clear language of the provisions which relate to dispensation cases, judges grant the application to dispense with the minimum age requirement in 95 per cent of cases which come before them. This statistic must acknowledge that the data about cases which are brought to court represents approximately 15 per cent of cases involving marriage over girls under the age of 19.<sup>6</sup> It follows that while this paper is concerned with the approach of the courts to those applications which come before the courts, the discussion has to appreciate that the vast

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<sup>5</sup> AIPJ2 (Australia Indonesia Partnership for Justice 2) (2019) 'Marriage Dispensation Case Analysis in Indonesia/Analisa Putusan Dispensasi Kawin di Indonesia' <<https://aipj.or.id/pages/publication/decision-analysis-of-marriagedispensation-cases-in-indonesia>> and <<https://aipj.or.id/pages/publication/analisis-putusan-dispensasi-kawin-di-indonesia>>.

<sup>6</sup> AIPJ2 (Australia Indonesia Partnership for Justice 2) (November 2023) 'Supporting the Implementation of the National Strategy for the Prevention of Child Marriage: 2022 Key Data on Marriage Registrations, Child Marriage Prevalence and Marriage Dispensation Cases filed in Indonesian Courts' (Policy Paper, November 2023).

majority of marriages of underage people in Indonesia occur in villages and towns without any judicial scrutiny.

The Indonesian criminal law, *Law No 12 of 2022 regarding Sexual Violence Crimes* at Articles 4 and 10 are addressed to forced marriage and specifically child marriage.

## **Consideration**

In this section I explore the impediments to strict compliance with Indonesian laws designed to end child marriage<sup>7</sup> and judicial tools available to assist in decision making designed to promote legislative aims. I do so within a framework which recognises that child marriage has a disproportionate impact on girls, since both UNICEF and Statistics Indonesia have found that underage marriage disproportionately impacts girls in Indonesia as opposed boys.<sup>8</sup> That has ongoing impacts for those women and the children born into those families, which is a gendered issue, but one with implications for the society as a whole. The research is clear that marriage before majority is associated with lifelong harmful consequences which are disproportionately visited on women but have consequences for all members of the societies in which they frequently occur.

The discussion also requires acknowledgment of the complexity of the issue of consent in discussions involving underage marriage. The literature concerning “forced marriage” broadly accepts a definition of forced marriage as “a marriage in which one and/or both parties have not personally expressed their full and free consent to the union.”<sup>9</sup> The question of what is “full and free consent” is influenced by culture, tradition and social expectations.<sup>10</sup>

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<sup>7</sup> Arthur van Collier has identified difficulties associated with use of the expression “child marriage” in so far as the language purports to bestow the legitimacy of “marriage” on a practice which is illegitimate, he offers the expression “paedogamy”. See: Arthur van Collier, ‘Child Marriage – Acceptance by Association’ (2017) 31(3) *International Journal of Law, Policy and the Family* 363-376.

<sup>8</sup> Cate Sumner, ‘Ending Child Marriage in Indonesia: The Role of the Courts’ (Policy Paper No. 19, Centre for Indonesia Law, Islam and Society, Melbourne Law School, University of Melbourne, 2020), 5.

<sup>9</sup> United Nations Human Rights Office of the High Commissioner, ‘Child and forced marriage, including humanitarian settings’, *Issues in Focus* (Web Page) <<https://www.ohchr.org/en/women/child-and-forced-marriage-including-humanitarian-settings>>.

<sup>10</sup> Merida Charla and Kyla Raby, *Modern Slavery in Australia* (Lexi’s Nexis, Australia, 2024) 216.

Arguably for all judges in all countries, decision making which touches on family relations involves a process of navigating customs, culture, religious and legal obligation – with one factor or another playing a larger or smaller role as the facts and circumstances of each family differ.

In Indonesia, where one or both of the intended spouses are under the age of nineteen, they may marry according to law if a court of competent jurisdiction grants an exemption – referred to as an application for dispensation. It effectively dispenses with the requirement that both parties be nineteen years or older.

In 2019 the Supreme Court of Indonesia issued PERMA Number 5 (a practice direction)<sup>11</sup> as guidelines for applications concerning marriage dispensation. Those guidelines:

- Direct judicial officers to ensure that in hearing such applications they ensure the implementation of a justice system that protects children's rights;
- Note that judges shall increase parental responsibility in the context of preventing child marriage;
- Direct that judges shall identify whether or not there is coercion behind the application for marriage dispensation; and
- Provide that judges shall standardise the process of adjudicating applications for marriage dispensation in the court.

These guidelines emphasise the best interests and protection of children, the importance of consent, and the significance of a system which is designed to implement a law which recognises the harms which may accompany underage marriage.

### *Impediments*

Research has identified multiple and multi-faceted impediments to the aims embodied in the legislation. These include:

- Consultation with judicial colleagues has raised the issue of the significance to individual decision making of judicial officers making unpopular decisions or decisions which are perceived to be unpopular within the society or community in which they are made as well as decisions that the judicial officers believe will not be implemented or supported by the parties.
- Research has identified a distinction between the application of the law relating to dispensation in rural areas when compared to its application

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<sup>11</sup> Peraturan Database, 'Peraturan Mahkamah Agung Nomor 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin' available at: <https://peraturan.bpk.go.id/Details/206071/perma-no-5-tahun-2019>.

in urban areas. In rural areas more applications for dispensation are granted. Researchers have identified different rates of approval of applications for dispensation across different regions.<sup>12</sup>

Continuing domestic dialogue amongst Indonesian judges from different regions and with different experience will likely promote supportive pathways and sharing of information and experience.

Other impediments and potential solutions are discussed below.

### **Lack of a contradictor**

An application for dispensation to marry underage in Indonesia is a *permohonan* – effectively a petition by one party to the court (as opposed to a *gugatan* – which a defended application). The moving party will usually be the parents of the underage child. That said, because of the obligation of the court to ensure that the resulting order is appropriate under the revised Marriage Law and PERMA No 5 of 2019, the application for dispensation must be considered and the Court may, in the exercise of its discretion, decline the application notwithstanding the absence of a formal contradictor.

### **Solutions**

Absent wholesale legislative change, the courts have a number of different ways of ensuring that any contrary evidence is before it. Given that the legislation and PERMA 5 of 2019 emphasise best interests and child protection issues, those concepts function to maintain a “best interests of the child” focus such that the judicial officer performs the function of contradictor.

Indonesia is a state party to the *United Nations Convention on the Rights of the Child*, by virtue of *Presidential Decree No 36 of 1990*.

Underage marriage is explicitly a child protection issue. Indonesia’s *Child Protection Law of 2002* and subsequent amendment in 2014 state at Article 26:<sup>13</sup>

(1) Parents shall be responsible and accountable for:

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<sup>12</sup> Very Julianto et al, ‘Judges’ perspectives on changes in the legal minimum age at marriage in Indonesia’ (2024) 31(1) *Journal of Family Studies* 94-117, 2.

<sup>13</sup> Discussed in Sumner (n 8) at p.7.

- a. Caring for, maintaining, educating and protecting children;
- b. Ensuring the growth and development of the child in accordance with their capabilities, talents and interests; and
- c. Preventing underage marriages.

In addition, Law No 12 of 2022 regarding Sexual Violence provides that a person who is found guilty of forcing or permitting a child marriage will be punished by up to 9 years gaol and/or a 200 Million IDR fine.

The judiciary through its decisions (particularly if largely uniform) may also have a role to play in establishing social norms. Judges are obliged to apply all laws even those which are unpopular or those with which the judge may personally disagree – the impact of consistent decision making which acknowledges the exceptional nature of dispensation sets a standard for society which may impact not only those who come before the courts but those who do not.

### **Exploration of consent within a “best interests”/child protection framework**

The lines between consensual arranged marriages and coerced marriages are not always clear and bright. Researchers have described the limitations of a coercion/consent dichotomy and posited a better framework as being one where coercion and consent are understood as sitting at opposite ends of a continuum, between which “lie degrees of social expectation, control, persuasion, pressure, threat and force.”<sup>14</sup>

The situation is more stark when the marriage is one involving a child. Some international bodies note that the very fact of the minority of the proposed spouse makes consent irrelevant since a child lacks capacity to consent. In both Australia and Indonesia there is a legal recognition of the fact that some persons under the age of eighteen may lawfully provide consent in certain circumstances.

This is compounded by culturally appropriate deference to the views and wishes of parents.

It must also be acknowledged that some judges experience a tension between what they perceive as conflicting aims: desire on the one hand to prevent

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<sup>14</sup> Sundari Anita and Aisha Gill, ‘Coercion, Consent and the Forced Marriage Debate in the UK’ (2009) 17(2) *Feminist Legal Studies* 165-184,172.

social exclusion or religious harm, while at the same time endeavouring to protect children's rights and welfare.<sup>15</sup>

One of the ways in which the Court could be provided with evidence upon which it might exercise the power to refuse applications for dispensation of the minimum age for marriage is by being provided with reports about the views of the proposed minor spouse.

In October 2022 the Chief Justice of Indonesia travelled to Australia with officials from the Ministry of National Planning and Development (BAPPENAS) and the Ministry of Women's Empowerment and Child Protection. Together with other Indonesian Supreme Court judges and staff, those delegates participated in a conference with judges of the Federal Circuit and Family Court of Australia Divisions 1 and 2 hosted by the University of Technology Sydney. The purpose of the meeting was to explore models for the representation of children in proceedings relating to child marriage.

The legal aid commissions of the states and territories of Australia fund a model which provides legal representatives to children in some family law proceedings. One of the functions of the independent children's lawyer ("ICL") in those proceedings is to gather evidence and present a case as to which outcome or arrangement would best meet the needs of the child/ren on an objective basis.

That model was explored as providing potential opportunities for the representation of children in cases relating to child marriage.

In the absence of immediate sources of funding in different regions of geographically disparate Indonesia, different functions of an ICL have been explored – in particular the function of obtaining evidence about the views of the child in a report form.

While Article 13 of PERMA No 5 of 2019 directs judges to obtain the views of the child whose marriage is being considered, research which analysed 1000 decisions found that it was not clear in the reasons for judgment whether the views of children had in fact been taken into account.<sup>16</sup> According to case analysis undertaken by the Australia Indonesia Partnership for Justice, in fifty-five per cent of those cases the child was present at Court. In the other 45 per cent the child was not present, and the reasons did not reveal how, if at all, the child's views had been considered.

With training, social workers or paralegals in Indonesia are likely to be able to canvas with young people their understanding of the advantages and

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<sup>15</sup> Julianto (n 12), 12.

<sup>16</sup> Sumner, C and Lister, L in collaboration with Indonesian partners, 'Decision Analysis of Marriage Dispensation Cases in Indonesia' (2019); discussed in AIPJ2, (n 5).

disadvantages (to them) of the proposed marriage. These interviews reproduced as reports or oral evidence would inform a judge about the nature of the consent which is being given by the young person. This would be invaluable evidence.

The Idramayu Religious Court has a collaborative project with DP3AKB of Indramayu District which has co-located counsellors at the Religious Court. The function of the counselling has been reported to have been to advise the prospective spouse to postpone marriage until they reach 19.<sup>17</sup> It is clear from studies that of all the applications for dispensation filed, the vast majority are approved, a small number are rejected and others appear to be withdrawn. It is not clear whether counselling has a role in those which are withdrawn, but a program which explicitly addresses known risks and provides information may function to decrease the number of applications.

It is useful to examine the way in which some Religious Courts in Indonesia have interpreted Article 15(d) of the *PERMA No. 5 of 2019* which provides that when considering an application for dispensation the court is to “request recommendations from psychologists or doctors/midwives, professional social workers, social welfare staff, Integrated Service Centres for the Protection of Women and Children (P2TP2A) and the Indonesian/Regional Child Protection Commission (KPAI/KPAD).”<sup>18</sup> The word “recommendation” has sometimes been interpreted as requiring one of the agencies to approve the application and hence the court may be given a “letter of recommendation” which says that the application is recommended. That letter does not address many of the very matters those agencies are best able to comment on – such as health and medical considerations, consent of the proposed spouse, level of maturity and understanding, level of education. In a legal sense the recommendation has little value as a mere ipse dixit (unproven statement). The real value of such a report would be if it contained a conclusion supported by the evidence upon which that conclusion had been reached.

The extent to which courts require the letter of recommendation differs throughout Indonesia, and even those courts who have regard to the letters of recommendation do not necessarily mention the content in their reasons for judgment.<sup>19</sup> These letters are a valuable opportunity for the Court to receive evidence which focuses on the key consideration, namely, child protection issue within a “best interests” framework.

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<sup>17</sup> Danielle Johanna Panungkelani Samsuori, ‘Analysis of the Implementation of Supreme Court Regulation (Perma) No. 5 of 2019 on Guidelines for Adjudicating Marriage Dispensation Applications’, (Policy Working Paper, International NGO Forum on Indonesian Development, 2024), 15.

<sup>18</sup> *Ibid*, 21.

<sup>19</sup> *Ibid*.

The expectation that the issue of consent can be effectively dealt with by the judge in open court in the presence of the child's parents and potential in-laws ignores significant power dynamics and cultural issues.

Researchers who have written about different outcomes in similar fact situations in two cases heard and determined by the Bukittinggi Religious Court identified that in the decision where dispensation was refused the judge expressed concerns that the child's desire to marry did not seem to match the parents' views about readiness.<sup>20</sup>

A child protection checklist which identifies the child protection issues in each case which comes before the Court is a useful tool for the judicial decision maker in coming to a decision. It should identify the risk explicitly and comment on it specifically in the context of the individual case rather than merely recommending the application be granted or refused.

Article 7 of the Revised Marriage Law raises as a requirement that the dispensation is designed to address urgent circumstances.<sup>21</sup> There is lack of clarity amongst legal scholars and commentators about the meaning to be given to the expression urgent in this context. An applicant may consider the situation "very urgent" but it is for the judge hearing the case and reading or listening to the evidence to determine (through a best interests lens) whether the situation is objectively urgent. Similarly, even if a situation appears to meet the test of urgency (for example, child is pregnant or parents fear child may engage in sexual relationship) it remains open to a judicial officer to determine that the dispensation application should nonetheless be refused because it is contrary to the interests of the child or children involved.

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<sup>20</sup> Ashabul Fadhli and Ashabul Kahfi (2023) "The Judge's Considerations in Refusing an Application for Dispensation in Respect of Very Urgent Reasons" *iEl-Hekam: Jurnal Studi Keislaman*, 8(1), 200.

<sup>21</sup> *Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan at Pasal 7:*

- (1) Perkawinan hanya diizinkan apabila pria dan wanita sudah mencapai umur 19 (sembilan belas) tahun.
- (2) Dalam hal terjadi penyimpangan terhadap ketentuan umur sebagaimana dimaksud pada ayat (1), orang tua pihak pria dan/atau orang tua pihak wanita dapat meminta dispensasi kepada Pengadilan dengan alasan sangat mendesak disertai bukti-bukti pendukung yang cukup."

## Role of International Legal Instruments

Throughout the twentieth century, international human rights instruments have focused on issues such as the consent of spouses and the establishment of minimum ages to marry.<sup>22</sup>

The judiciary need to be seen to be acting in line with primary prevention methods. Primary prevention begins in communities, school and homes. As Chantal and Raby have noted: “[p]rimary prevention initiatives aim to prevent forced marriages before the process begins, by addressing the root causes and vulnerabilities that lead to such marriages and enhance the capacity and resilience of communities at risk.”<sup>23</sup>

As Cate Sumner has correctly noted, Indonesia, as a state party to the Convention on the Rights of the Child, 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.”<sup>24</sup>

It is one thing to provide a child with the opportunity to be heard but making sure that the child’s engagement with the system is meaningful and able to properly record the nuanced views and circumstances of that child requires scaffolding.

Making it a requirement that the children to whom the proceedings relate are present at court is a straightforward way of increasing the possibility that his or her informed views will be taken into account. Paralegals or social workers could be present to support children’s participation. Judges could take the opportunity in the formal setting of the courthouse to explain the law and the intention of the legislature in enacting such a law.

The Indonesian government is also a party to the 1979 *UN Convention on the Elimination of all forms of Discrimination Against Women* (‘CEDAW’), by way of *Law No. 7 of 1984* which ratified the Convention. Article 16 of CEDAW prohibits child marriage: “betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.” As discussed above, child marriage primarily impacts the rights of girls and women and has long (sometimes lifelong) consequences. It is uncontroversial that the greatest impact of child

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<sup>22</sup> *Universal Declaration of Human Rights 1948*, Article 16; *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1964*, Article 2; *International Covenant on Civil and Political Rights 1966*, Article 22(3).

<sup>23</sup> Chantal and Raby (n 6) 239.

<sup>24</sup> Sumner (n 8) 10.

marriage is borne by women and their children. It limits educational and career opportunities and exposes women to medical risks. In the next generation, it creates similar intergenerational disadvantage and greater risk of poverty and stunted development. Proper appreciation of the significant impact on women and women's rights should inform judicial decision making.

In the Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices the Committees recommended that the States parties to the Conventions adopt or amend legislation with a view to effectively addressing and eliminating harmful practices. In doing so, they should ensure:

- (a) That a minimum legal age of marriage for girls and boys, with or without parental consent, is established at 18 years; CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 13
- (b) That a legal requirement of marriage registration is established and effective implementation is provided through awareness-raising, education and the existence of adequate infrastructure to make registration accessible to all persons within their jurisdiction;
- (c) That a national system of compulsory, accessible and free birth registration is established in order to effectively prevent harmful practices, including child marriage.<sup>25</sup>

Indonesia is also a party to the International Covenant on Economic, Social and Cultural Rights, ratified by way of *Law No. 11 of 2005*. The instrument requires acknowledgment of the consequences of child marriage for the rights of the persons involved.

The UN 2030 Agenda for Sustainable Development provides a framework which the government of Indonesia has acknowledged as providing guidelines designed to aid not just individuals but the citizenry as a whole; and the amendments to the law relating to marriage constituted a national legal response. What is required further is a focus on implementation of what the law has provided in a consistent manner designed to meet the development goal.

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<sup>25</sup> Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices*, CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (8 May 2019), available at <<https://docs.un.org/en/CEDAW/C/GC/31/REV.1>>.

## **Role of judgment templates, checklist and judicial guidelines**

Many jurisdictions endorse judicial bench books which assist judicial officers with common checklists and guidelines drawn from the legislation and case law.<sup>26</sup> The bench books are not designed to impede judicial independence or to fetter discretion but rather to help busy judges, in high-volume courts, navigate with consistency, application which raise similar facts.

In meeting with judges of the Religious Courts of Indonesia in 2024 in Jakarta and Bandung, judges of the Federal Circuit and Family Country of Australia discussed the following factors which impact decision making in this area:

- The act of discretionary judicial decision making is always personal;
- The outcome is dictated by the application of the law to the facts;
- Different facts may call for different outcomes;
- Certainty and predictability are aided by consistent approaches;
- Litigants and lawyers come to understand how judges or benches may approach an issue;
- Those expectations can then be used to inform community dialogue;
- The more closely the judge ties her or his decision to the criteria the more compelling the resulting reasoning.

The work of considering applications to dispense with the minimum of age of marriage appear well-suited to adoption of such a resource. It would set out the factors which the legislation obliges the judicial officer to consider as prompts for that consideration.

Theoretically, there are factors which a judgment template could contain which relate to the identified risks of underage marriage. Those can be drawn directly from the recitals to the revised Marriage Law as well as the 2020 Indonesian National Strategy on the Prevention of Child Marriage, which identify risk and do so explicitly. The risks may be to the child in the present, such as potential medical harm (including higher mortality rates in childbirth) or an end to education. The risks may also look into the future. Research highlights risks to women's mental health,<sup>27</sup> and greater exposure to family violence.<sup>28</sup>

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<sup>26</sup> See for example: [National Domestic and Family Violence Bench Book - Australasian Institute of Judicial Administration - Australasian Institute of Judicial Administration](#).

<sup>27</sup> Danusha Jayawardana, 'Child marriages in Indonesia increase women's depression, research shows', *The Conversation* (Online article, 16 May 2023) <<https://theconversation.com/child-marriages-in-indonesia-increase-womens-depression-research-shows-198777>>.

<sup>28</sup> Julianto (n 12), 14-15.

An example of the type of working template which may be employed is set out here:

Risk #1: risk to health.

I am required by law to consider risk #1. In this case I had a report from a medical practitioner.

OR

The applicants did not file any evidence about this risk.

OR

I am entitled to have regard to the statement of agreed or accepted facts which identifies risk #1

The applicants are required to satisfy the court that the application should be granted.

The applicants are required to satisfy the court that the circumstances are exceptional.

The applicants have not discharged the evidentiary burden.

OR the applicants have not persuaded the court on the basis of evidence that the identified risk can or has been mitigated.

[each of the risks would be discussed]

### ***Conclusion***

As discussed, there is an absence of evidence which satisfies the court that the accepted risks are not present in this case. I find that they are.

Having considered each of these risks and the material filed by the applicants I could not be satisfied that this is a case which meets the stringent definition of being “exceptional”. Accordingly, I decline the application.

### **Role of continuing judicial education**

The Supreme Court – in particular the religious chamber – provides guidance to the 412 first level Religious Courts and 29 High Religious Courts which operate across 29 provinces.

Judicial education begins with strong leadership from those in the apex court. It is important that judicial decision makers focus firmly on the appropriate outcome over procedural matters such as efficiency.

Research indicates judicial reluctance to refuse applications for dispensation for understandable reasons, such as a concern that if the court does not grant the application, the parties will marry nonetheless but will not have the benefit of a legally recognised union.

While understandable, each case needs to turn on its own facts and be granted or allowed if the evidence establishes the appropriateness of the outcome.

Judicial education begins with an acknowledgment that judges are one part of a system which the Indonesian government relies upon to implement its strategy of elimination of child marriage. Given their role and standing, it is to be expected that judges are leaders in this system – following and implementing the law without fear or favour.

Researchers have suggested that classifying marriage dispensations cases as “simple matters needs reconsideration due to their complexity and implications.”<sup>29</sup>

Research suggests that two key areas of judicial education may assist in producing outcomes more in line with the legislative aims:

- (1) Wide dissemination of PERMA 5 of 2019 and guidance as to its application;
- (2) A focus on the child protection and best interests foci of the legislation and on the evidence needed to support refusal.

Judicial education which sets specific goals is seen to be most effective.<sup>30</sup> Identifying leaders within the courts of provinces as key providers of ongoing judicial education is a useful approach. Hearing from peers and engaging in learning in a participatory model is more likely to effect change.<sup>31</sup>

## **Role of service provision in court setting**

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<sup>29</sup> Samsoeri (n 17), 20.

<sup>30</sup> John Clifford Wallace, ‘Judicial Education and Training in Asia and the Pacific’, (2000) 21(4) *Michigan Journal of International Law* 849-875, 854.

<sup>31</sup> *Ibid*, 860.

Many people have identified that the interaction between the families of those seeking dispensation and the courts provides an opportunity for intervention in the form of provision of information (health, education etc) and services – designed to assist families to navigate the reasons why the legislation is designed to prevent child marriage.<sup>32</sup>

Where families have had an application for dispensation refused, it would be useful if there were scope for referrals to agencies who may assist the family.

Some studies have noted a high rate of female pregnancy at the time of application. It is important that those who approach the court have the opportunity to access a broad range of social supports available to them. While this is not the key undertaking of courts, it provides a good opportunity for courts to facilitate the provision of information and referrals.

If an application is refused, it would be a valuable opportunity for the provision of wraparound services to that family. This requires cooperation between the courts and civil society organisations (both government and non-government).

The existence of co-located services may also assist in the provision of evidence to the court as discussed above.

### **Role of public education**

The Religious Courts of Indonesia are closed except to the parties and their lawyers. While it may well be understood that families may be reluctant to have third parties present open hearings would function to provide information. Electronic hearing (as opposed to attendance in person at the court) where any interested party may listen to the hearing, or mobile (travelling) court hearings, offer the potential for the key issues and risks the court is considering to be conveyed to a greater number of people.

The Ministry of Religious Affairs has a key role to play in public education. The Ministry registers the marriages of Muslim citizens. The availability of data from registration is important for decision makers, and the Ministry itself has been identified as a “key partner” in the public messaging about consent and the value of completing education.<sup>33</sup>

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<sup>32</sup> Julianto (n 12), 16.

<sup>33</sup> Sumner (n 8), 17.

Concerns about teenage relationships and pregnancy outside marriage remain important reasons which drive child marriage. Schools have a role to play alongside families in educating children about the methods available for avoiding pregnancy in adolescence.

Educational outreach needs to target children and their parents. Public health researchers have identified the relationship between marriage in Indonesian traditional culture being a “family responsibility” as opposed to a question of individual desire.<sup>34</sup> It is necessary that all education be targeted to both groups. Research in other jurisdictions has concluded that level of knowledge about the impacts of child marriage has an impact on the number of child marriages.<sup>35</sup> It follows that both adults and children should have access to clear information about the identified risks at all stages – when a marriage is contemplated, when the application is filed with the court, when it is considered by the court and if it is rejected by the court.

## **Conclusion**

As has been discussed, the approach to reduction in the number of child marriages requires a whole of community approach. This paper has focused specifically on the role of the judiciary and courts as part of the solution. By way of domestic judicial education about risk factors and the impact of assessment of risk in a process which is focused on the best interests of the child consistency of outcome is enhanced. As the number of applications for dispensation approved declines – this fact in itself sets norms and informs the public about the disadvantages to children of early marriage.

The Hon Justice Suzanne Christie

Federal Circuit & Family Court of Australia (Division 1)

Chambers

June 2025

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<sup>34</sup> Agung Dwi Laksono, Ratna Dwi Wulandari and Ratu Matahari, ‘Does Education Level Matter in Women’s Risk of Early Marriage?: Case Study in Rural Area in Indonesia’, (2021) 21(1) *Medico-legal Update January-March 2021*, 24-28.

<sup>35</sup> Ibid, citing Fariba Heidari and Saeed Dastgiri, ‘The Prevalence and Predicting Factors of Female Child Marriage in North-West of Iran: A Case-Control Multi-Center Study’ (2020) 31(3) *Gazi Medical Journal* 387-392.

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## BIBLIOGRAPHY

### **A Articles/Books/Reports**

AIPJ2 (Australia Indonesia Partnership for Justice 2) (2019) 'Marriage Dispensation Case Analysis in Indonesia/Analisa Putusan Dispensasi Kawin di Indonesia' <<https://aipj.or.id/pages/publication/decision-analysis-of-marriagedispensation-cases-in-indonesia>> and <https://aipj.or.id/pages/publication/analisis-putusan-dispensasi-kawin-di-indonesia>

AIPJ2 (Australia Indonesia Partnership for Justice 2) (2023) 'Supporting the Implementation of the National Strategy for the Prevention of Child Marriage: 2022 Key Data on Marriage Registrations, Child Marriage Prevalence and Marriage Dispensation Cases filed in Indonesian Courts' (Policy Paper, November 2023)

Agung Dwi Laksono, Ratna Dwi Wulandari and Ratu Matahari, et al, 'Does Education Level Matter in Women's Risk of Early Marriage?: Case Study in Rural Area in Indonesia', (2021) 21(1) *Medico-legal Update* January-March 2021, 24-28

Arthur van Coller, 'Child Marriage – Acceptance by Association' (2017) 31(3) *International Journal of Law, Policy and the Family* 363-376

Ashabul Fadhli and Ashabul Kahfi (2023) "The Judge's Considerations in Refusing an Application for Dispensation in Respect of Very Urgent Reasons" *iEl-Hekam: Jurnal Stui Keislaman*, 8(1)

Cate Sumner, 'Ending Child Marriage in Indonesia: The Role of the Courts' (Policy Paper No. 19, Centre for Indonesia Law, Islam and Society, Melbourne Law School, University of Melbourne, 2020)

Danielle Johanna Panungkelani Samsoeri, 'Analysis of the Implementation of Supreme Court Regulation (perma) No. 5 of 2019 on Guidelines for Adjudicating Marriage Dispensation Applications', (Policy Working Paper, International NGO Forum on Indonesian Development, 2024)

Fariba Heidari and Saeed Dastgiri, 'The Prevalence and Predicting Factors of Female Child Marriage in North-West of Iran: A Case-Control Multi-Center Study' (2020) 31(3) *Gazi Medical Journal* 387-392

John Clifford Wallace, 'Judicial Education and Training in Asia and the Pacific', (2000) 21(4) *Michigan Journal of International Law* 849-875

Merida Charla and Kyla Raby, *Modern Slavery in Australia* (Lexi's Nexis, Australia, 2024)

Sundari Anita and Aisha Gill, “Coercion, Consent and the Forced Marriage Debate in the UK” (2009) 17(2) *Feminist Legal Studies* 165-184

Sumner C and Lister L, *Supporting the Implementation of the National Strategy on Ending Child Marriage: 2022 Key Data on Marriage Registrations, Child Marriage in Indonesian Courts* (November 2023 Update), Australia Indonesia Partnership for Justice 2

The Honourable Justice Michael Kirby AC CMG, “Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges” (2008) 9 *Melbourne Journal of International Law* 171

Very Julianto et al, ‘Judges’ perspectives on changes in the legal minimum age at marriage in Indonesia’ (2024) 31(1) *Journal of Family Studies* 94-117

### **B Cases**

*Department of Human Services v Brouker* (2010) FLC 93-446

*DPP (Cth) v Shakir* [2017] VCC 1374

*Essey & Elia* [2013] FCCA 1525

*Kandal & Khyatt & Ors* (2010) 43 Fam LR 344

*Madley & Madley* [2011] FMCAfam107

*Omerdic and Registrar of Ministers of Religion Victoria* [2022] AATA 1765.

### **C Legislation**

Law of the Republic of Indonesia No. 23 of 2002 on Child Protection

*Criminal Code Act 1995* (Cth)

Law of the Republic of Indonesia No. 7 of 1984 on the Elimination of All Forms of Discrimination Against Women

Law of the Republic of Indonesia No. 11 of 2005 on Ratification of International Covenant on Economic, Social and Cultural Rights

Law of the Republic of Indonesia No. 12 of 2022 regarding Sexual Violence Crimes

*Marriage Act 1961* (Cth)

Marriage Law No. 1 of 1974

Marriage Law No. 16 of 2019

Peraturan Mahkamah Agung Nomor 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin

#### **D Treaties**

*Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, opened for signature 7 November 1962, 521 UNTS, 231 (entered into force 9 December 1964)

*International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

*International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

UN General Assembly, Resolution 217A (III), *Universal Declaration of Human Rights*, A/RES/217(III) (December 10, 1948)

*UN Convention on the Elimination of all forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)

#### **E Other**

Australasian Institute of Judicial Administration, 'National Domestic and Family Violence Bench Book' (Online Resource, University of Melbourne, 2024) available at <<https://aija.org.au/publications/national-domestic-and-family-violence-bench-book>>

Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices*, CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (8 May 2019), available at <<https://docs.un.org/en/CEDAW/C/GC/31/REV.1>>

Danusha Jayawardana, 'Child marriages in Indonesia increase women's depression, research shows', *The Conversation* (Online article, 16 May 2023) <<https://theconversation.com/child-marriages-in-indonesia-increase-womens-depression-research-shows-198777>>

Federal Circuit And Family Court of Australia '12 Years of Innovation in Women's Access to the Family Courts of Indonesia' (Web Page) available at: <https://www.fcfoa.gov.au/international/reports/12-years-womens-access-fcoi>

Kementerian PPN/Bappenas and Kementerian Pemberdayaan Perempuan Dan Perlindungan Anak, 'National Strategy on the Prevention of Child Marriage' (Policy Paper, 2020)

United Nations' 2030 Agenda for Sustainable Development, available at <<https://sdgs.un.org/2030agenda>>

United Nations Human Rights Office of the High Commissioner, 'Child and forced marriage, including humanitarian settings', *Issues in Focus* (Web Page) <https://www.ohchr.org/en/women/child-and-forced-marriage-including-humanitarian-settings>