

## **Safeguarding Women's Constitutional Rights in the Judicial Reviews of Marriage Law on the Minimum Married Age Limit**

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### **Abstract**

*The Constitutional Court seems inconsistent when examining the same legal issue, i.e., the constitutionality of the minimum married age limit for women, but with different decisions. In the 2014 decision, the Court rejected the petition, while in the 2017 decision, the Court accepted it. This paper analyzes the considerations of constitutional judges in deciding the case to understand whether women's constitutional rights have been protected in both decisions. Using the case and statutory approach, this article concludes that the 2014 decision rejecting the petition to increase the minimum married age limit for women does not fulfill women's constitutional rights. Sixteen years old as the minimum age limit for women and nineteen years for men is discriminatory and deprives girls' rights to health and education. The judges' consideration in the 2017 decision, which granted the petition, was that determining the minimum married age limit is a legal policy. Still, if the policy contradicts the 1945 Constitution, citizens can challenge its constitutionality. The Marriage Law is a past product, so it needs to be adapted to developments and the 1945 Constitution's norms. The difference in the Constitutional Court's decisions on examining the same issue is due to different interpretations and efforts to protect the constitutional rights of citizens.*

**Keywords:** Women's constitutional rights, judicial review, minimum married age limit

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## Introduction

Every Indonesian citizen has constitutional rights guaranteed by the 1945 Constitution. The guarantee is contained in Article 28A-28J, 27, 28, 29(2), 30(1), and 31(1) of the 1945 Constitution.<sup>2</sup> Every citizen has the same constitutional rights without being discriminated against because of differences in ethnicity, religion, belief, and gender. The 1945 Constitution places every citizen in the same position and strongly opposes any forms of discriminatory treatment. However, implementing the constitutional right is sometimes not described in the legislation. It is common to find several articles in an Act that violate and harm the constitutional rights of citizens. Therefore, the People's Consultative Assembly (MPR) mandated establishing a particular institution to guard the Constitution, namely the Constitutional Court, during the constitutional amendment. The Constitutional Court's role is very much needed in guaranteeing and realizing the rule of law and the protection of constitutional rights for every citizen.<sup>3</sup> One of its authorities is to examine the law's constitutionality against the 1945 Constitution, aka judicial review.<sup>4</sup>

Law is a political product produced by the Legislature (DPR) out of political compromise and political domination.<sup>5</sup> Therefore, a law may contain norms that sometimes conflict with the Constitution and harm the constitutional rights of citizens. A case in point is the

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<sup>2</sup> Article 28A-28J of the 1945 Constitution is a human rights bill incorporated in Chapter XA, the result of the second amendment to the 1945 Constitution of the year 2000. Meanwhile, other human rights articles are scattered in several other chapters. All of these articles are provisions regarding the guarantee and protection of the constitutional rights of every citizen. Knut D. Asplund, Suparman Marzuki, and Eko Riyadi (eds.), *Hukum Hak Asasi Manusia* (Yogyakarta: PUSHAM UII, 2008), pp. 252-253.

<sup>3</sup> Nanang Sri Darmadi, "Kedudukan dan Wewenang Mahkamah Konstitusi Dalam Sistem Hukum Ketatanegaraan Indonesia", *Jurnal Hukum* 26, no. 2, (2011), p. 1088.

<sup>4</sup> Pusat Studi Konstitusi FH Andalas. "Perkembangan Pengujian Perundang-Undangan di Mahkamah Konstitusi", *Jurnal Konstitusi* 7, no. 6, (2010), p. 147.

<sup>5</sup> Moh. Mahfud MD, *Politik Hukum di Indonesia*, Edisi Revisi, Cet.2, (Jakarta: Rajawali Press, 2009), p. 5.

provision on the age limit for marriage in Article 7(1) of Law Number 1 of 1974 concerning Marriage (hereinafter UUP 1974).<sup>6</sup> In that provision, the minimum age limit for marriage is distinguished between men, i.e., 19 years, and women, i.e., 16 years. However, this distinction is detrimental to women because 16 is still classified as a child. Therefore, the practices of child marriage in Indonesia harm women and thereby violate women's constitutional rights.<sup>7</sup>

Various problems that arose from child marriages became the reason for several parties to submit a judicial review of the provision in the Constitutional Court in 2014 and 2017. In the 2014 judicial review, the applicants challenged Article 7(1) regarding the phrase "16 years," which they considered contrary to Article 28A, 28B(1-2), 28C(1), 28D(1), 28G(1), 28H(1-2), and 28I(1-2) of the 1945 Constitution. The result was that the Constitutional Court rejected the petitions in their entirety. The Constitutional Court considered that determining the minimum age limit was an open legal policy. In addition, the need to determine the age limit for marriage, especially for women, is relatively adaptable to developments in various aspects such as health, social, and economic aspects. There is no guarantee that when the marriage age limit for women is increased from 16 years to 18 years, it will reduce divorce rates, overcome various health problems, and minimize social problems. The Constitutional Court considers that it can be pursued through a legislative review process to change the age limit.<sup>8</sup>

Given its controversy, this provision was again tested in 2017 using Article 27(1) of the 1945 Constitution concerning equality before the law. In this second trial, the

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<sup>6</sup> Article 7(1) "Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached 16 (sixteen) years."

<sup>7</sup> Badan Pusat Statistik, *Kemajuan Yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia* (Jakarta: Badan Pusat Statistik bekerjasama dengan UNICEF, 2016), p. 11-13.

<sup>8</sup> See Putusan Mahkamah Kontitusi No. 30-74/PUU-XII/2014), p. 234.

Constitutional Court partially granted the applicant's request and stated that Article 7(1) of UUP 1974 contradicts the 1945 Constitution and has no binding legal force. The Constitutional Court believes that although determining the minimum age for marriage is a legal policy for legislators, the policy should not treat citizens differently solely based on gender differences. Men and women are naturally different, but when these differences affect or hinder the fulfillment of the basic constitutional rights of citizens, the distinction is discriminatory. With the difference in the Constitutional Court's decision in examining the provisions of Article 7 paragraph (1) of UUP 1974, the Constitutional Court seems inconsistent when examining the same norm but differing in its decision. The consistency of the Constitutional Court's decision, in this case, is interesting to study, especially in the aspect of fulfilling the constitutional rights of women.

Related to this topic, Ran Hirsch put forward the theory of constitutional theocracy, which means the Constitution and the Constitutional Court have become a bulwark against secularism, pragmatism, and relative moderation, thus emerging as an effective shield against the spread of religious ideas in state life and the increased support for theocratic principles of government.<sup>9</sup> In the context of the constitutionality of the provisions of Indonesian marriage law, which are heavily influenced by the dogma of Islamic law, with the norms of the 1945 Constitution, the Constitutional Court as a secular institution has taken on the role of protecting human rights and individual freedoms through its judicial review process. Alfitri, for example, analyzed three decisions of the constitutional court related to the judicial review of the 1974 UUP and found that the Constitutional Court consistently safeguarded women's rights in the constitutionality of the article on the restriction of polygamy, the article on irreconcilable disputes as a reason

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<sup>9</sup> Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2011), p. 13.

for divorce, and the unconstitutionality of the article on the status of children out of wedlock, a landmark decision of the Court.<sup>10</sup> Several articles have also analyzed Constitutional Court decisions regarding the minimum age for marriage for women.<sup>11</sup> However, these studies do not specifically compare and analyze the two decisions regarding the protection of the human rights of women and children and the consistency of the Constitutional Court as the guardian of the Constitution in dealing with the same legal issues but using different constitutional norms. Meanwhile, various studies have stated that child marriage has a broad social impact, such as sexual violence in marriage.<sup>12</sup> In addition, uncontrolled reproduction causes dangerous pregnancy and childbirth, poverty problems, crime, abortion, HIV AIDS.

In understanding the state's challenges in determining the minimum age for marriage in Indonesia, this article will first discuss the plurality of norms in the minimum age for marriage in Indonesia. Then, he will explain the two Constitutional Court decisions in terms of the legal issues raised, the constitutional norms tested, the seriousness of the parties and the Constitutional Court's legal considerations, and finally, the Constitutional Court's decision on the constitutionality of the provisions regarding the minimum age for marriage in two decisions. The presentation of the two decisions is then followed by a legal

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<sup>10</sup> Alfitri. "Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia." *Asian Journal of Comparative Law* 10, no. 2 (December 2015): 191–212

<sup>11</sup> Norhasanah, "Dispensasi Kawin di Bawah Umur: Analisis Putusan Mahkamah Konstitusi Nomor 74/PUU-XII/2014 Uji Materiil Pasal 7 Ayat 2 Undang-Undang Perkawinan," *El-Maslahah Journal* 8, no. 1 (2018): 3-15; Xavier Nugraha, et.al., "Rekonstruksi Batas Usia Miminal Perkawinan Sebagai Bentuk Perlindungan Hukum terhadap Perempuan: Analisa Putusan MK No. 22/PUU-XV/2017," *Lex Scientia Law Review* 3, no. 1 (2019): 40-54.

<sup>12</sup> See e.g., Mies Grijns and Hoko Horii, "Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns," *Asian Journal of Law and Society* 5 (2018), pp. 453–466; Alfitri, "Protecting Women from Domestic Violence: Islam, Family Law, and the State in Indonesia," *Studia Islamika* 27, no. 2 (2020): 273–307.

analysis that focuses on whether the two decisions have protected the human rights of women and children. Finally, he discussed the consistency of the Constitutional Court in the two decisions.

### **The Plurality of Minimum Age for Marriage Norms in Indonesia**

Marriage law pluralism is something that cannot be avoided in Indonesia's legal system.<sup>13</sup> Religious differences and the diversity of ethnic groups, customs, and cultures that the Indonesian people own are the main reasons for the legal pluralism of marriage to this day. When traced from the long history of marriage law regulations that apply in Indonesia, during the colonial period, the independence period, and the period after the promulgation of UUP 1974, pluralism of marriage law has colored the legal system in Indonesia. Several legal systems apply to the community regarding marriage, namely Islamic law, customary law, Western law (colonial period), and national law (after Indonesia's independence). Apart from the western legal system, the national legal system, Islamic law, and customary law continue to show their existence. They can be in a complementary position as much as they can contradict each other.

UUP 1974 attempts to standardize the rules on marriage by unifying marriage law originating from Islamic legal norms and customary law. In addition, the Marriage Law has historically been influenced by the demands of women, both individually and in groups, as can be seen from several articles whose contents are aimed at elevating the status of women.<sup>14</sup> However, this Marriage Law is not a perfect law that can fulfill all aspects desired by the

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<sup>13</sup> The term legal pluralism was first used by Gurvitch who is a legal sociologist. He says: "Legal pluralism referred to a situation in which people could choose from among more than one co-existing set of rules." See Keebet von Benda-Beckmann dan Bertram Turner, "Legal Pluralism, Social Theory, and The State", *The Journal of Legal Pluralism and Unofficial Law* 50, No. 3, (2018), p. 262.

<sup>14</sup> Khoiruddin Nasution, "Pengaruh Gerakan Wanita Terhadap Wacana Hukum Islam: Studi Hukum Perkawinan Indonesia", *Jurnal Al-Mawarid* 14 (2005), p. 265.

community, primarily when it regulates marriage as the religious aspect, which considers marriage to be a sacred bond and a form of worship. Other aspects of marriage are also closely related to traditions or cultures that have long been developed and practiced by particular communities. Thus, the Marriage Law is very likely to cause pros and cons among people who have religious, ethnic, and cultural differences.

A case in point is the provision regarding the age limit for marriage, especially for women (Article 7(1) of UUP 1974). The provisions on the minimum age limit for marriage are distinguished between men (19 years) and women (16 years). The provision of 16 (sixteen) years for women in the article is considered detrimental to women because that age is still classified as a child and is the cause of many child marriage practices in Indonesia. The provisions on the marriage age limit have pretty strong reasons when viewed from a historical and religious perspective. The marriage law is a unification of the norms of Islamic law and customary law.<sup>15</sup> Both Islamic law and customary law not specifically mention the minimum limit for a person to be allowed or not to get married. Determining whether or not a person is allowed to marry is more about seeing changes in physical characteristics or the discharge of something like a dream for a man or menstruation for a woman.

In Islamic law, it is not explicitly found about the age limit for marriage or the age of maturity for a man or woman to carry out a marriage. Meanwhile, the madhhab eponyms have different opinions regarding the age of maturity (*baligh*). Imam Malik considers *baligh* is marked by the semen released during dreaming or sleeping or by the growth of pubic hair. Meanwhile, Imam Shafi'i and Hanbali see 15 years old as puberty for men and women. Imam Hanafi thinks that puberty for men is marked by dreams and the discharge of semen, while for women by

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<sup>15</sup> Alfitri, "Whose Authority?", p. 195-197.

the presence of menstruation. If these signs are not found, then puberty for men is 18 years, while it is 17 years for women.<sup>16</sup>

Meanwhile, the customary law has no provisions on the minimum age limit for marriage. Generally, the age limit for marriage or maturity refers to changes in body anatomy: menstruation or breasts increasingly prominent in women; changes in the vocal cords, discharge of semen due to dreams, changes in body posture, or the presence of sexual desire in men.<sup>17</sup> Thus, it is clear that customary law also does not have a standard limit regarding the minimum age limit for marriage, so both customary law and Islamic law have similarities in viewing the age limit for marriage, namely by looking at the physical changes.

The Marriage Law is 40 years old and is not in line with current developments. In addition, marriage under the age of 18 is a violation of children's rights guaranteed by the 1945 Constitution and the Child Protection Law. Child marriage is very vulnerable to various health problems, leading to divorce and abandonment of the child being born.<sup>18</sup> Although the Marriage Law is a form of unification of several provisions regarding marriage, Islamic law and customary law will continue to show their existence amid national law because the two legal systems have been rooted and inseparable in Indonesian society. The existence of national law can realize legal certainties in marriage, such as the validity of marriage, marriage registration, divorce, child status, and joint property.<sup>19</sup>

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<sup>16</sup> Achmad Asrori, "Batas Usia Perkawinan Menurut Fukaha dan Penerapannya dalam Undang-Undang Perkawinan di Dunia Islam," *Al-Adalah* 12, no. 4 (2015), p. 809-810.

<sup>17</sup> Yusuf Hanafi, *Kontroversi Perkawinan Anak Dibawah Umur (Child Marriage)) Perspektif Fikih Islam, HAM Internasional dan UU Nasional* (Bandung:CV. Mandar Maju, 2011), p. 23

<sup>18</sup> Mies Grijns and Hoko Horii, "Child Marriage," p. 453-466; Kasjim Salenda, "Abuse of Islamic Law and Child Marriage in South-Sulawesi Indonesia," *Al-Jami'ah: Journal of Islamic Studies* 54, no. 1, (2016): 95-121.

<sup>19</sup> See Mark Cammack, Lawrence A. Young, and Tim Heaton, "Legislating Social Change in an Islamic Society-Indonesia's Marriage Law," *The American Journal of Comparative Law* 44, no. 1 (1996): 45-73; Azyumardi Azra, "The Indonesian



## **The 2014 Constitutional Court Decision on Minimum Marriage Age Limit**

### 1. Issue, Rules, Arguments, and Decision

This judicial review is related to the constitutionality of the age of 16 years as the minimum age limit for marriage stipulated in the Marriage Law. The petitioners in case Number 30/PUU-XII/2014 of this judicial review are individuals and institutions that have concern for the rights of women and children. The provisions being tested in this case are Article 7(1) related to the phrase “age 16 years” and Article 7(2) regarding “deviations from paragraph (1) of this article, both male and female parents may request a dispensation from the court or other official appointed by the court.” The basis for testing used by the applicants to test the provisions of Article 7(1) is several norms contained in the 1945 Constitution, as shown in the following table:

**Table 1. Basic Norms Tested**

<b>UUDNRI 1945</b>	<b>Norms</b>
Art. 1(3)	Indonesia is a “Rechtstaat” (Negara Hukum)
Art. 24(1)	Judicial power is an independent power to administer justice to uphold law and justice.
Art. 28B(1)	Everyone has the right to form a family and continue their offspring through a legal marriage.
Art. 28B(2)	Every child has the right to survive, grow and develop and has the right to protection from violence and discrimination.
Art. 28C(1)	Everyone has the right to develop themselves by fulfilling their basic needs, the right to education, and benefit from science and technology, arts and culture, to improve the quality of their lives and the welfare of humanity.

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Marriage Law of 1974: An Institutionalization of the Shari’a for Social Changes.” in *Shari’a and Politics in Modern Indonesia*, eds. Arskal Salim and Azyumardi Azra, (Singapore: ISEAS–Yusof Ishak Institute, 2003), pp. 76-95.

Art. 28D(1)	Everyone has the right to recognition, guarantees, protection and fair legal certainty, as well as an equal treatment before the law.
Art. 28G(1)	Everyone has the right to personal protection, family, honor, dignity, and property under his control. In addition, he has the right to a sense of security and protection from the threat of fear to do or not do something, which is a human right.
Art. 28H(1)	Everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment, and have the right to obtain health services.
Art. 28H(2)	Everyone has the right to get special facilities and treatment to get the same opportunities and benefits to achieve equality and justice.
Art. 28I(2)	Everyone has the right to be free from discriminatory treatment on any basis and is entitled to protection against discriminatory treatment.

The constitutional reasons used by the applicants are that the minimum age limit of 16 years for women is contrary to the relevant constitutional norms:

**Table 2. Petitioners' Arguments**

<b>Arguments</b>	<b>Contrary to the UUDNRI 1945</b>
<b>The provisions of Article 7(1), as long as the phrase "16 (sixteen) years", has (been):</b>	
created a situation of legal uncertainty	Art. 1(3) and 28D(1)
caused many practices of child marriage, which result in the deprivation of children's rights to grow and develop and obtain an education.	Art. 28B(2) and 28C(1)
resulted in discrimination in the fulfillment of rights between boys and girls	Art. 28B(2) and 28I ayat (2)
contrary to the principle of legal certainty, the principle of free consent in forming a family, the principle of independence of judicial power.	Art. 1(3), 28B(1), 28D(1) and 24(1)

The Petitioner asked the Court to grant his petition in its entirety, stating that the content of Article 7(1) of UUP 1974 along with the phrase “16 years” must be interpreted as conditionally unconstitutional. Contrary to the Constitution, it has no binding legal force as long as it is not interpreted as “18 years”. The Petitioners also asked the Court to change the content of Article 7(1) of UUP 1974 to “marriage is only permitted if the male party has reached the age of 19 years and the woman has reached 18 years.

The applicants submitted 13 expert witnesses consisting of medical experts in reproduction and activists in women’s and children’s rights to strengthen their argument. Julianto Witjaksono, M.D., for example, describes reproductive health in adolescence. According to him, a healthy reproductive age is at the age of 20 to 35 years. In addition, women under the age of 20 have a high risk of disease and death when carrying out their reproductive functions.<sup>20</sup> Yuniyanti Chuzaifah, as the representative of Komnas Perempuan, described the bad marriages of children under the age of 18, such as experienced by house workers, domestic workers, migrants, and sex workers. Child marriage is problematic because it harms fundamental rights such as the right to grow and develop, the right to education, the right to a source of livelihood, social, political rights, and the right to be free from violence. All of the above rights are interrelated.<sup>21</sup>

The Court also listens to government statements and statements from related parties. DPR states that the provisions are constitutional because regulating the age limit for marriage provides legal certainty and justice because Indonesia consists of various kinds of customs that interpret adulthood differently.<sup>22</sup> According to DPR, the determination of the minimum

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<sup>20</sup> See Putusan Mahkamah Konstitusi Nomor 30-74/PUU-XII/2014, pp. 24-26.

<sup>21</sup> See Putusan Mahkamah Konstitusi Nomor 30-74/PUU-XII/2014, pp. 37-44.

<sup>22</sup> See Putusan Mahkamah Konstitusi Nomor 30-74/PUU-XII/2014, pp. 145-210.

age limit in the Marriage Law is a national agreement that is an open legal policy by considering the values developed in the year the Marriage Law was formed. Along with the development that occurs, the child's age is then determined from in the womb until he is 18 years old, as stipulated in various laws. However, when the Marriage Law was enacted, the legislators considered that the ideal age for marriage was 16 years for women and 19 years for men.

The Court then considers the norms governing the age limit; the Court believes that this is an open legal policy for legislators to change based on developments. This reason is in line with several decisions of the Court such as Decision Number 49/PUU-IX/2011 dated 18 October 2011, Decision Number 3739/PUU-VIII/2010 dated 15 October 2010, and Decision Number 15/PUU-V/2007 dated 27 November 2007, which determine the age limit as an open legal policy.

According to the Court, the marriage age determination, especially for women, is adjusted to various aspects: health, social, and economic. Increasing the marriage age limit for women from 16 to 18 years also does not guarantee that the divorce rate will decrease and address social and health problems. However, it does not mean that there is no need to take preventive measures to prevent child marriage. Efforts to increase the age limit for marriage can be taken through the legislative review. The Court did not increase the minimum age limit to hold the legislators from making the best policies for their citizens by adjusting the developments. Hence, Article 7(1) stipulating "16 years" is consistent with the 1945 Constitution. Therefore, the Court decided to reject the petition in its entirety. However, Constitutional Justice Maria Farida Indrati expressed a different opinion by arguing that the phrase "16 years" in Article 7(1) creates legal uncertainty and violates children's rights as guaranteed by the 1945 Constitution.

## 2. Normative-Doctrinal and Socio-Legal Analysis of the 2014 Decision

As mentioned above, the Constitutional Court rejected the application to increase the marriage age limit for women from 16 years to 18 years in Decision No. 30-74/PUU-XII/2014 dated 18 June 2015. The Constitutional Court considers that the determination of the minimum age limit is an open legal policy for legislators and can change at any time following existing developments.<sup>23</sup> The Court also believes that increasing the age of marriage will not reduce the divorce rate, overcome health problems and other social problems due to Article 7(1). However, this does not mean that it is unnecessary to take preventive measures to prevent child marriages that can cause problems, as argued by the petitioners. Different countries maintain different provisions regarding the age of marriage, ranging from 17 years, 19 years, to 20 years.<sup>24</sup> By rejecting the petition in their entirety, the provisions “16 years” in Article 7(1) remain constitutional.

To analyze whether the Constitutional Court's decision has fulfilled women's constitutional rights to marry at an adult age, we will use the following questions to analyze. These questions will be linked to the judge's considerations in this decision to see whether the decision has reflected the fulfillment of women's constitutional rights.

### a) Is 16 years old still a child?

The panel of judges believes that setting the age limit is an open legal policy that is the authority of the legislators. The Court believes that the 1945 Constitution does not regulate the age limit for a person referred to as a child. So that the determination of the age limit for marriage, especially

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<sup>23</sup> See Putusan Mahkamah Konstitusi Nomor 30-74/PUU-XII/2015, p. 230

<sup>24</sup> See Putusan Mahkamah Konstitusi Nomor 30-74/PUU-XII/2015, p. 231

for women, depends on existing developments in terms of health, social and economic aspects.<sup>25</sup>

Provisions regarding the protection of children's rights can be found in various laws and regulations. For example, the Child Protection Act contains the obligation to prevent child marriage by parents. The definition of a child in this law is someone under 18 years old.<sup>26</sup> The Human Rights Law contains provisions for protecting children, including women up to 18 years.<sup>27</sup> Furthermore, the National Education Law contains compulsory education of 12 years for children. Furthermore, the Citizenship Law determines the age of children up to 18 years, while the Health Law contains provisions for child care until 18 years.<sup>28</sup>

Substantially, the marriage law is different from other laws because the marriage law regulates special provisions regarding marriage, including the age limit for marriage. Based on the statutory provisions above, it can be seen that the age 16 provision for women in the marriage law is still classified as a child's age and is contrary to other laws in Indonesia, which on average protect children, including girls until they are 18 years old. Meanwhile, other laws regulate the age limit for a person to be called a child and the protection provisions.

In the concept of protection and fulfillment of children's rights, the provision of 16 years of marriage age limit for women in Article 7(1) of UUP 1974 will conflict with the other laws mentioned above. The age specified for women in Article 7(1) is still in the age category of children who should be protected. Child protection aims to ensure that

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<sup>25</sup> See Putusan Nomor 30-74/PUU-XII/2014, pp. 230-231.

<sup>26</sup> Art. 1(1) Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

<sup>27</sup> Art. 1(5) Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia.

<sup>28</sup> Art. 131(2) Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan.

children's rights can be fulfilled relatively, such as the right to live, grow and develop and are free from violence and discrimination to create quality, moral and prosperous Indonesian children.<sup>29</sup>

If studied further, the age limit of 18 years set out in the various laws and regulations above is undoubtedly intended to protect children's rights. For example, the Education Law and the government's agenda determine 12 years of compulsory education for children. If it is calculated based on Article 34(1) of the Education Law, every citizen is obliged to study at the age of 6 years, then to take primary education from elementary school (SD), junior high school (SMP), to high school (SMA). Hence, one will complete primary and secondary school when she is 18 years old. When a child marries under the age of 18, it will affect the child's education process, wherein various studies state that children who marry at school age tend to end their education. Thus, the child's right to education is not fulfilled. Research conducted by the Central Statistics Agency in collaboration with UNICEF proves that 85% of girls in Indonesia end their education after getting married.<sup>30</sup>

Meanwhile, the law on health stipulates provisions for the protection of children up to 18. Women who marry under the age of 18 are very susceptible to various health problems that can cause death. Research shows those pregnant women and gives birth at the age of 10-15 years are very susceptible to death. Women have to face other problems when giving birth at a child's age: bleeding, miscarriage, infection, or anemia.<sup>31</sup> Fransisca

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<sup>29</sup> See Art. 3 Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

<sup>30</sup> See Badan Pusat Statistik, *Kemajuan Yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia* (Jakarta: Badan Pusat Statistik bekerjasama dengan UNICEF, 2016), p. 12.

<sup>31</sup> Badan Pusat Statistik, *Kemajuan*, p. 12.

Handy, MD., a medical expert witness, stated that there are five health consequences during pregnancy under the age of 18, namely 1) mental health problems; 2) the problem of sexually transmitted diseases; 3) disorders of pregnancy; 4) childbirth problems, and 5) problems with the health of the baby being born.<sup>32</sup>

Thus, 16 years for women in Article 7(1) of UUP 1974 is still deemed children. Furthermore, maintaining the age limit of 16 years for women to marry will subject women to the vulnerability to experiencing various health problems, one of which is the risk of experiencing death during childbirth. Also, women who marry at the age of 16 will have limited access to secondary education. The Court's consideration that determining the age limit is a legal policy for legislators is understandable. Still, it must also be considered that the legal policy has resulted in the deprivation of a person's constitutional rights, especially women. Therefore, this legal policy should have been tested for its constitutionality by the Constitutional Court.<sup>33</sup>

b) Which constitutional rights have been violated?

The 1945 Constitution explicitly regulates the guarantee and protection of human rights in Chapter XA Article 28A-28J. Therefore, the above constitutional basis used by the petitioners to prove that women's constitutional rights, which have been violated by the provisions of Article 7(1) of UUP 1974, are well-founded. If we look closely, the guarantee and protection of children's constitutional rights are in Article 28B paragraph (2) of the 1945 Constitution. This article specifically aimed at protecting children who are indeed vulnerable to

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<sup>32</sup> See Putusan Nomor 30-74/PUU-XII/2014, p. 111.

<sup>33</sup> See *Dissenting Opinion* Maria Farida Idrati J. in Putusan Nomor 30-74/PUU-XII/2014, p. 237.



being victims.<sup>34</sup> It states that every child has the right to survive, grow and develop and is entitled to protection from violence and discrimination. If described, the constitutional rights contained in the article consist of: (1) The right to survival; the most basic human right for everyone protected by the government, family, and parents. (2) The right to grow and develop; the opportunities given to children to grow and develop physically, mentally, and socially.<sup>35</sup> (3) The right to protection from violence and discrimination; in Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, violence is defined as any act against a child that causes physical, psychological, sexual misery or suffering, and/or neglect, including threats, coercion, unlawfully.<sup>36</sup>

Thus, it is clear that Article 28B(2) of the 1945 Constitution is an article that guarantees and protects the constitutional rights of children to live, grow and develop and to avoid violence and discrimination. Neglecting these rights will result in the non-fulfillment of the constitutional rights of children, especially girls, to grow and develop and be free from violence and discrimination.

- c) Are the reasons for the judicial review not strong enough to convince the Court that the provision has violated women's constitutional rights?

The reason for the petitioners to examine the provisions of Article 7(1-2) is that it creates legal uncertainty and contradicts Article 1(3) and Article 28D(1) of the 1945 Constitution. For example, Article

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<sup>34</sup> Saldi Isra, "Peran Mahkamah Konstitusi dalam Penguatan Hak Asasi Manusia di Indonesia", dalam *Jurnal Konstitusi* 11, no. 3 (September 2014), p. 414-418.

<sup>35</sup> See Penjelasan Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

<sup>36</sup> See Art. 1 poin 15a Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

7(1) provides that the age limit for marriage for women is 16 years. Meanwhile, other laws, such as the child protection law, determine that less than 18 (eighteen) years old is a child. Therefore, Article 7(1) has created legal uncertainty because they contain provisions different from other laws. In addition, Article 7(1) leads to many practices of child marriage, which result in the deprivation of children's rights to grow and develop and obtain an education, thus contradicting Article 28B(2) and Article 28C(1) of the 1945 Constitution.

Article 28B(2) is an article specifically intended to protect children's rights. Its content includes the right to grow and develop as a child and be protected from violence and discrimination. All children, including girls, should enjoy this right. However, by determining the age of marriage for women to be 16 years, the rights of women to grow and develop will not be fulfilled. Men are set at 19 years, where that age is no longer a child's age. In addition, the difference in the age of marriage between men and women in Article 7(1) is a form of discrimination against women because Article 28B(1) does not distinguish between men and women. The word "every child" in the article refers to every child, both male and female.

Meanwhile, Article 28C(1) contains rights regarding the fulfillment of basic needs, education, science, and technology. Women who marry at the age of 16 years tend to limit women's access to education. This situation contradicts Article 28C(1), which obliges every citizen to attend primary education, and will hamper the government's program, namely the 12-year compulsory education program. Article 7(1) have resulted in discrimination in the fulfillment of rights between boys and girls, thus contradicting Article 28B(2) and Article 28I(2) of the 1945 Constitution. Article 28B(2) and Article 28I(2) use the wording "every child" and "everyone,"

which means that there is no different treatment for men as well as women.<sup>37</sup>

Based on the constitutional reasons used by the petitioners, it appears that the constitutional basis used by the petitioners is very reasonable to prove that the provisions in Article 7(1) of UUP 1974 are no longer relevant to current developments. The provisions of Article 7(1) have created legal uncertainty and are discriminatory. In addition, if referring to the year the marriage law was formed, it is clear that this law was formed based on the values that occurred at that time, namely 1974. The explanation of Article 7(1) states that the determination of the age limit for marriage is intended to maintain the health of husband and wife. However, women who marry at the age of 16 have experienced various health problems and hindered access to primary education. This provision had also resulted in the deprivation of the right to education and women's health that should have been obtained when they were still children.

The Marriage Law is a product of the past formed before the amendment to the 1945 Constitution. The amendment to the 1945 Constitution has brought about fundamental changes in the protection and guarantee of the human rights of every citizen. The 1945 Constitution strongly opposes any form of discrimination or distinction between men and women, such as the provisions of Article 7(1), which distinguishes the minimum age limit for marriage between men and women. This distinction is contrary to the principle contained in Article 28B(1) that every child has the right to survive, grow and develop and is free from violence and discrimination. Therefore, it is appropriate for the marriage law to adapt to the 1945 Constitution and current developments to

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<sup>37</sup> Jimly Asshiddiqie, "Konstitusi dan Hak Asasi Manusia, (Makalah disampaikan pada *Lecture* Peringatan 10 Tahun KontraS," Jakarta, 26 Maret 2008, p. 14.

protect citizens' constitutional rights, especially women.

- d) How do the President, DPR, and other parties respond to the constitutionality of Article 7(1)?

The Constitutional Court has also heard the President, the House of Representatives, and the parties who have different opinions in assessing the constitutionality of Article 7(1), as illustrated in table 4 below:

**Table 3. Parties' Arguments and Point of Views**

<b>Arguments</b>	<b>Point of Views</b>	<b>Conclusion: Art. 7(1)</b>
<p><b>President:</b></p> <ol style="list-style-type: none"> <li>1. The Marriage Law as a form of codification agreed to unite the diversity that exists in Indonesia;</li> <li>2. The principle of marriage is that the prospective husband/wife has matured in mind/body so that the minimum age of marriage is regulated;</li> <li>3. Regarding the difference in age limit in various laws, it may be different according to the content in the law.</li> </ol>	Historical	Constitutional
<p><b>House of Representative (DPR-RI):</b></p> <ol style="list-style-type: none"> <li>1. Indonesia consists of several different religions and customs so that before the enactment of the Marriage Law, it had different arrangements;</li> <li>2. Article 7(1) is a form of codification;</li> </ol>	Historical and legal pluralism	Constitutional

<p>3. Article 7(1) is a national agreement and constitute an open legal policy;</p> <p>4. The determination of the minimum age limit in Article 7(1-2) is considered sufficient to protect women;</p> <p>5. The age limit difference may vary by law.</p>		Unconstitutional
<p><b>Women Research Institute:</b> WRI believes that Article 7(1) needs to be changed to a marriage that is only permitted if the man has reached 19 years and the woman has reached 18 years.</p>	The impact	Unconstitutional
<p><b>Indonesian Family Planning Association (PKBI):</b></p> <p>1. Child marriage does not protect girls from self-death due to pregnancy at a young age;</p> <p>2. Child marriage causes health problems and increases dropout rates;</p> <p>3. It is vulnerable to divorce and domestic violence.</p>	The impact	Unconstitutional
<p><b>Kalyanamitra:</b> Marriage of children under the age of 16 causes restrictions on children's activities, has an impact on reproductive health and child health problems,</p>	The impact	Unconstitutional
<p>Rahima Association: The same opinion as the applicants.</p>	The impact	Unconstitutional
<p><b>Parisada Hindu Dharma Indonesia:</b> The phrase 16 years old should be changed to 18 years for women.</p>	The impact	Unconstitutional

<p><b>Indonesian Conference:</b> The age of 16 is too early to allow someone to be independent in realizing the responsibilities of a family. Therefore supports a review of the provisions of article 7(1-2).</p>	<p><b>Bishops</b></p>	<p>The Unconstitutional impact</p>
<p><b>The Council of Indonesian Ulama (MUI):</b> 1. The 1945 Constitution contains religious values; 2. The Marriage Law contains Islamic religious values; 3. Article 7(1) follows Islamic religious values; 4. Article 7(1) is conventional and does not conflict with the 1945 Constitution; 5. Article 7(1) still has binding legal force.</p>	<p>Historical and religious</p>	<p>Constitutional</p>
<p><b>Muhammadiyah:</b> 1. The Koran does not specify a concrete age limit for marriage; 2. A person is said to be an adult when he has released semen for men and menstruation for women; 3. The Marriage Law explains a condition for marriage, namely the approval of the two prospective brides.</p>	<p>Religious</p>	<p>Constitutional</p>
<p><b>Nahdlatul Ulama:</b> 1. There are four signs that a person is considered mature, namely a) the Shafi'i school of 15 years, the Hanafi school of 19 or 18 years for men and 18 or 17 for women; b) discharge of semen because of a dream for men; c) menstruation for</p>	<p>Religious</p>	<p>Constitutional</p>

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- women; d) growth of hair around the pubic;
2. The majority of scholars state that marriage contracts before adulthood are allowed but do not allow intercourse with girls who are not yet mature;
  3. Differences of opinion regarding the age of marriage occur among fiqh experts, but it is a blessing and is placed in the appropriate context;
  4. There is no need to change the article for common interest and *dar'ul mafasid muqaddamun alal jalbil mashalih* (rejecting the damage must take precedence over attracting the benefits}.

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<b>Representatives of Indonesian Buddhists:</b>	The Impact	Unconstitutional
<ol style="list-style-type: none"> <li>1. The ideal age for marriage for a woman is 18 years based on the development of science and technology;</li> <li>2. Medically, before the age of 18 years, still need hormones for physical growth;</li> <li>3. This is in line with the 12-year compulsory education program launched by the government;</li> <li>4. Buddhism upholds the equality and dignity of women.</li> </ol>		
<b>High Council of Confucian Religion:</b> Continue to follow the provisions of the law.	N/A	Constitutional

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<b>Communion of Indonesian Churches:</b>	The Impact	Unconstitutional
Marriage for women under 18 is a marriage that does not respect the sacredness of the human body. Therefore, these provisions need to be revised.		
<b>Independent Youth Alliance:</b> <sup>38</sup>	The Impact	Unconstitutional
<ol style="list-style-type: none"> <li>1. Child marriage is still rampant in Indonesia;</li> <li>2. Child marriage can prevent women from accessing education;</li> <li>3. Becoming a mother at a young age is risky for both the mother and the baby because both physically and mentally are not ready.</li> </ol>		

From the statements of the parties above, the President, the House of Representatives, the Indonesian Ulema Council, PP Muhammadiyah, and the Executive Board of the Indonesian Nahdlatul Ulama do not agree with the applicants to increase the provisions of Article 7(1) and consider that the age of 16 years for marriage remains constitutional, with the point of view used as historical-religious-legal pluralism point of views. Meanwhile, those who want changes to the provisions of Article 7(1) are the Women Research Institute, the Indonesian Family Planning Association, Kalyanamitra, the Rahima Association, Parisada Hindu Dharma Indonesia, the Indonesian Bishops' Conference, Representatives of Indonesian Buddhists, the Fellowship of Indonesian Churches and the Indonesian Youth Alliance. The parties consider that Article 7(1) has led to many child marriage practices, causing health problems for girls and limiting access to education that girls

<sup>38</sup> See Putusan Nomor 30-74/PUU-XII/2015, pp. 204-209.



should obtain. The parties who share the same opinion as to the applicants generally use the point of view of the impact on women when they marry under maturity.

The point of view used by several parties who think that the provisions of Article 7(1) do not need to be changed does not mean that the point of view used by these parties is contrary to the principle of protecting the constitutional rights of citizens. However, if a provision in the law is no longer in line with existing developments and results in the deprivation of the constitutional rights of citizens, amending the provision is the best option. Moreover, in the context of the age limit for marriage, it is doubtful that the ideal marriage age limit will be less than 18 years one day.

- e) Has the Court considered the fulfillment of constitutional rights and the impact on women?

From the Court's considerations regarding the review of Article 7(1), it is known that the main reason the Court rejected the petition that the determination of the minimum age limit was an open legal policy. In its considerations, the Court also allowed changing the marriage age limit for women through the legislative review process, which is the authority of the legislators. The Court also mentions that various laws and regulations state that a child's age is from the womb until he is 18 years old as regulated in the Child Protection Law. However, the Marriage Law determined the ideal age for marriage to be 19 years for both men and 16 years for women.

As revealed in the trial, the impact of child marriage also shows that child marriage is very vulnerable and can potentially experience various physical health problems such as reproductive, mental, psychological, and social health. Another problem that may be faced is the problem of meeting

economic needs, which can have an impact on divorce and the neglect of children being born. However, according to the Court, the various problems that occur are not solely caused by the age factor. We think that the Constitutional Court is aware that Article 7(1) harms women. Still, in this case, the Court places itself purely as a positive legislature to allow it to apply for changes to the minimum age limit through legislative review.

### **The 2017 Constitutional Court Decision on Minimum Marriage Age Limit**

#### **1. Issue, Rules, Arguments, and Decision**

In contrast to the Constitutional Court's Decision Number 30-74/PUU-XII/2014, which rejected the petition in its entirety, in Decision Number 22/PUU-XV/2017, the Court granted the petitioners' petition partially. It stated that Article 7(1), containing the phrase "16 years," is contrary to the 1945 Constitution and has no binding force. The Constitutional Court, in its decision, also ordered the legislators to amend the provisions of Article 7(1), especially regarding the age limit for marriage for women within three years.

This case was filed by Endang Wasrinah, Maryanti, and Rasminah; all of them are housewives. They proposed a review of Article 7(1) for the sake of recognizing, protecting, and fulfilling the human rights of children, especially girls, and providing fair legal certainty for both men and women following the mandate of the 1945 Constitution.

The reasons used by the petitioners in examining Article 7(1) are:<sup>39</sup>

- a. It contradicts Article 27(1) of the 1945 Constitution by violating equality before the law. The provision of 16 years for women in article 7(1) is still classified as a child's age as stipulated in the Convention on the Child's Rights, which determines it up to 18

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<sup>39</sup> See Putusan Mahkamah Konstitusi Nomor 22/PUU-XV/2017, p. 14-35.

- years. In addition, the provisions of Article 7(1), which distinguish between men and women, are a form of discrimination and make women, especially girls, increasingly left behind due to the deprivation of their constitutional rights;
- b. It discriminates against girls in obtaining health rights due to differences in legal positions. The explanation of article 7(1) states that the determination of the age limit for marriage is solely to maintain health. But the fact is that currently, the age of 16 is no longer the age that meets the health aspect because marriage at the age of 16 for women is very vulnerable to health problems that can cause death;
  - c. It is a form of discrimination against girls in obtaining the right to education due to differences in legal status;
  - d. It is a form of discrimination against girls at risk of child exploitation due to different legal positions;
  - e. Most countries in the world have equalized the minimum age of marriage for both men and women;
  - f. The Constitutional Court decision Number 30-74/PUU-XII/2014 considers the determination of the age limit as an open legal policy for legislators. The open legal policy could not be tested in The Constitutional Court, except for legal policy products which violate intolerable morality, rationality, and injustice. It also does not conflict with political rights, people's sovereignty, and rationality. Further, it should not exceed the authority of the legislators, nor should it manifestly contrary to the 1945 Constitution. Therefore, if the provisions are open legal policy but contrary to the 1945 Constitution, the Constitutional Court should be able to decide its constitutionality because the problem already concerns the issue of violating constitutional rights, no longer a matter of the authority of the legislators.

Hence, the Constitutional Court gives legal considerations in granting some of the petitioners' claims as follows:

**First**, in the previous decision, namely Decision Number 30-74/PUU-XII/2014, the Constitutional Court stated that the determination of the age limit is a legal policy for legislators and is highly dependent on existing developments. However, it must not ignore the fact that various problems that arise result from the provisions of the minimum age limit in Article 7(1) of UUP 1974. In addition, no guarantee that increasing the minimum marriage limit will lead to a decrease in divorce rates, overcome health problems and other social problems.<sup>40</sup>

The legal policy as mentioned above must not exceed authority, violate morality or rationality, do not cause injustice, and do not conflict with the 1945 Constitution. However, the legal policy can be tested for constitutionality if the legal policy contradicts protection; the Constitution protects human rights. The petitioners believe their constitutional rights guaranteed in Article 27(1) have been violated because of different treatment in the provisions of that article. Different treatment is a form of discrimination based on gender differences. In addition, this is also contrary to Article 28B(2) of the 1945 Constitution regarding the fulfillment and protection of children's human rights.<sup>41</sup>

Furthermore, in the previous decision, the Court thought that this was a legal policy. Therefore, to examine the constitutionality of the legal policy, there must be a strong reason, including if the Court wants to abandon its position. According to the Court, although the determination of the age limit is a legal policy, the Court thinks there should be no difference in treatment between men and women even though they are naturally different. The Court is also of the

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<sup>40</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 47.

<sup>41</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 47.

opinion that if the distinction has hindered citizens' fundamental rights, this constitutes discrimination as outlined in the human rights law.<sup>42</sup> In addition, discriminatory treatment is very contrary to the 1945 Constitution. Therefore, although determining the age limit is a law-making domain (legal policy), there is a strong enough reason to examine the constitutionality of legal policy related to the difference in the minimum age limit for marriage.

The Court is also aware that the determination of the minimum age limit in Article 7(1) is a national agreement formed based on the values when this law was enacted. However, the amendments to the 1945 Constitution have brought about significant changes in human rights protection. Thus, it is necessary to adjust laws formed in the past that are no longer in line with existing developments, including if the law contains such discrimination as the age limit difference for marriage. The Court did not consider this development in the previous decision because the applicants did not postulate that reason.<sup>43</sup> Therefore, even though the age limit difference for marriage is a national agreement, by considering various legal developments and the Indonesian Constitution, this provision is no longer relevant today because it is classified as a discriminatory policy. Hence, it is necessary to reassess its constitutionality because it is considered discriminatory towards protecting and fulfilling children's rights as stipulated in Article 28B(2) of the 1945 Constitution.<sup>44</sup>

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<sup>42</sup> In Art. 1 poin 3 Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia, discrimination is defined as "any restriction, harassment, or exclusion that is directly or indirectly based on human differences based on religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language, political belief, which results in a reduction, deviation, or elimination of the recognition, exercise, or use of human rights and basic freedoms in both individual and a collective life in the political, economic, legal, social, cultural and other aspects of life."

<sup>43</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 49.

<sup>44</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 51.

**Second**, the Court also considers that although the provisions on the age limit for marriage in Article 7(1) are discriminatory based on gender differences, the Court cannot determine the minimum age limit. The Court is only limited to affirming that the minimum age difference policy is discriminatory. Thus, determining the minimum age limit remains the authority of legislators because the minimum age for marriage can change at any time according to developments.<sup>45</sup>

**Third**, the Court also considers that although the legislators have the authority to determine the age limit for marriage, it should be noted that the determination of the age limit does not create legal uncertainty in efforts to protect children's rights. Although there are differences in the age limit of children in various laws and regulations in Indonesia, marriages under 18 years are child marriages.<sup>46</sup> Marriage at the age of a child can harm health because reproductive maturity is certainly not perfect at a child's age. On the other hand, marriage at the age of a child also can cause child exploitation, threats of violence. It impacts children's education so that the mandate of the 1945 Constitution to educate the nation's life will not be achieved.

**Fourth**, the principle of protecting children's rights is explicitly explained in the explanation of the Marriage Law number 4 letter d, namely to carry out a marriage, the prospective husband and wife must mature physically and mentally to realize the purpose of marriage and get good offspring and so that it does not end in divorce.<sup>47</sup>

**Fifth**, with the increasing number of child marriages, changing the policy on the age limit for marriage is necessary to make it easier for countries to realize a new universal development agenda (the 2030 Agenda for Sustainable Development Goals (SDGs)). The

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<sup>45</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, pp. 41-52.

<sup>46</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 52.

<sup>47</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 53.

goal of the SDGs is to eradicate poverty, where the fifth goal of the SDGs is to reduce the number of child marriages.<sup>48</sup>

**Sixth**, the Court considers that various regulations have been issued in various regions in Indonesia, which essentially aim to prevent child marriage, such as Bengkulu Governor Regulation Number 33 of 2018 concerning Prevention of Child Marriage. The efforts made by the regional heads are in line with the government's agenda, such as 12-year compulsory education, family planning, reproductive health education, and others.<sup>49</sup>

**Seventh**, as one of the countries that ratified The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the state should raise the minimum marriage limit, which applies equally to men and women as recommended by CEDAW. Finally, the Court asserted that the use of CEDAW is solely for synchronizing the provisions on the minimum age of marriage with the Child Protection Law, which is in line with the CEDAW ratification law.<sup>50</sup>

**Eighth**, although the petitioners' arguments are legally grounded, the Court does not necessarily declare Article 7(1) of UUP 1974 is contrary to the 1945 Constitution and has no binding force if it is not read "19 years." The Court emphasized that the determination of the minimum age limit remains a legal policy for legislators to consider to not close the space for legislators where the minimum age limit can change in line with legal developments and society. The Court only orders the legislators to immediately make changes to Article 7(1) no later than three years. If the legislators' time limit is determined, Article 7(1) has not changed, the marriage age limit will be harmonized with

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<sup>48</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 55.

<sup>49</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 56.

<sup>50</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 47.

the Child Protection Law to provide legal certainty and avoid discrimination.<sup>51</sup>

From the various considerations of the Court above, the judge in the 2017 Decision thought that there should be no discriminatory treatment between men and women. In principle, both men and women have the same position in law and government, following the norms in Article 7(1) of the 1945 Constitution. From the legal considerations presented by the Court, it is also seen that the Court prioritizes aspects of protecting human rights. However, citizens maintain the same opinion as the previous decision, which considers the minimum age for marriage to be a legal policy and does not limit the legislators to make the best policies for their citizens.

## 2. Constitutional Court Decisions' Consistency

Like these two decisions of the marriage minimum age, several Constitutional Court decisions have the same legal issues but differ in their decisions. They are the Constitutional Court Decision Number 49/PUU-X/2012 and Number 22/PUU-XVII/2019 regarding the Notary Position Regulations. In Decision Number 49/PUU-X/2012 concerning the review of Article 66(1) of Law Number 30 of 2004, the Court canceled the phrase "with the approval of the Regional Supervisory Council" so that the Regional Consultative Assembly (MPD) no longer has the authority to give approval related to the judicial process by investigators, public prosecutors or judges. However, in Decision Number 22/PUU-XVII/2019, regarding the review of Article 66(1) of Law Number 2 of 2014 concerning Changes to the Law on Notary Positions, the Constitutional Court decided differently by stating that Article 66(1) does not conflict with the 1945 Constitution.

Differences are also found in the Constitutional Court Decision Number 003/PUU-IV/2006 and

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<sup>51</sup> See Putusan Mahkamah Konstitusi No. 22/PUU-XIV/2017, p. 58.



Number 25/PUU-XIV/2016 regarding the judicial review of Articles 2(1) and 3 of Law Number 31 of 1999 on the Eradication of Corruption Crimes as amended by Law Number 20 of 2001. In Decision Number 003/PUU-IV/2006, the Constitutional Court stated that the explanation of Article 2(1) is contrary to the 1945 Constitution so that the offense of criminal acts of corruption becomes a formal offense. On the other hand, in Decision Number 25/PUU-XIV/2016, the Constitutional Court stated that the phrase “can” in the provisions of Article 2 and 3 of the Corruption Eradication Law is contrary to the 1945 Constitution and has no binding legal force so that a corruption offense becomes a material offense.

Differences in the Constitutional Court Decisions are also found in Decisions Number 51-52-59/PUU-VI/2008 and Number 14/PUU-VI/2013 concerning the judicial review of the provisions of Article 3(5), 9, 12(1-2), 14(2), and 112 of Law Number 42 of 2008 concerning the General Election of the President and Vice President. In Decision Number 51-52-59/PUU-VI/2008, the Court rejected the petition. Meanwhile, in Decision Number 14/PUU-VI/2013, which tested the same provisions, the Court accepted the applicant's petition. The differences are presented in the table below.

**Table 6. Comparison of the Constitutional Court Decision Number 51-52-59/PUU-VI/2008 and Number 14/PUU-XVI/2013**

<b>IRAC</b>	<b>Decision No. 51-52-59/PUU-VI/2008</b>	<b>Decision No. 14/PUU-XVI/2013</b>

<b>Issues</b>	Article 3(5) <sup>52</sup> and 9 UU Nomor 42 the Year 2008	Article 3(5), 9, 12 (1-2), 14 (2), and 112 UU Nomor 42 the Year 2008
<b>Rules</b>	Article 6A(2), 22E(1), <sup>53</sup> and (2) <sup>54</sup> UUD 1945	Article 1(2), 4(1), 6A(1-2), 22E(1-2), 27(1), 28D(1 and 3), 28H(1), and 33(4) UUD 1945
<b>Petitioners' Arguments</b>	The general implementation of the President and Vice President does not coincide with the election of members of the DPR, DPD, and DPRD, contrary to Article 22E(2) and 6A(2) of the 1945 Constitution.	The new reason put forward is the right of citizens to vote intelligently and efficiently in simultaneous general elections.
<b>Judges' Considerations</b>	Regarding Article 3(5) of Law Number 42 the Year 2008, the Court's opinion is that this is a method or procedure whose implementation refers to the experience commonly practiced (a constitutional convention) so that it becomes the truth that can replace legal provisions because they have been accepted and implemented.	1. Consideration of previous decisions that refer to constitutional conventions is a choice of interpretation related to the context at that time; 2. In terms of original intent and systematic interpretation, the formulators of the 1945

<sup>52</sup> "The election of the President and Vice President is carried out after the election of members of the DPR, DPD and DPRD" (Art. 3(5) Undang-Undang Nomor 4 Tahun 2008 tentang Pemilihan Umum Presiden dan Wakil Presiden).

<sup>53</sup> "General elections are held in a direct, general, free, secret, honest, and fair manner every five years" (Art. 22E(1) Undang-Undang Dasar 1945).

<sup>54</sup> "General elections are held to elect the People's Representative Council, Regional Representative Council, President and Vice President, and Regional People's Representative Council" (Art. 22E(2) Undang-Undang Dasar 1945).

		<p>Constitution wanted the presidential election to coincide with the legislative election;</p> <p>3. Simultaneous selection will be more efficient and save expenses;</p> <p>4. The right of citizens to choose intelligently.</p>
<p><b>Judgment</b></p>	<p>Reject the applicant's application in its entirety.</p>	<p>The petition was granted in part (Article 3(5), 12(1-2), 14(2), and 112 of Law Number 42 the Year 2008 contradicting the 1945 Constitution).</p>

From the decisions above, the differences among the Constitutional Court's decisions on the same legal issues depend on the choice of interpretation or interpretation used by the Constitutional Court judges.<sup>55</sup> In Decision Number 51-52-59/PUU-VI/2008, we argue that the judges have employed a sociological or contextual interpretation, while in case Number 14/PUU-VI/2013, they use an original intent approach with a systematic interpretation, namely the interpretation of the Constitution, which refers to the understanding and the purpose of the Constitution from the opinion of the constituents of the Constitution. Furthermore, in Decision Number 003/PUU-IV/2006,

<sup>55</sup> Suparto, "Perbedaan Tafsir Mahkamah Konstitusi dalam Memutus Perkara Pemilihan Umum Serentak," *Jurnal Yudisial* 10, no. 1 (2017): 1-16.

which rejected the petition, the judges used a textual interpretation, namely by giving meaning to the words contained in the law. Meanwhile, in Decision Number 25/PUU-XIV/2016, which granted the petition, they use a non-original approach with a systematic interpretation, namely linking one law to another as a unit.

Judicial review of Article 7(1) of UUP 1974 shows that the same legal issue may be decided differently by the Court when re-submitted using different constitutional norms. The difference in the decision is due to the different interpretation options used by the Constitutional Court judges in assessing the constitutionality of a norm being tested and the efforts of the Constitutional Court in protecting the constitutional rights of every citizen guaranteed by the 1945 Constitution. In this regard, the Constitutional Court has expressed its legal view:

“... the Constitutional Court as the only juridical interpreter of the constitution should not solely focus on the method of interpretation of “originality” by basing itself only on the “original intent” in the formulation of the articles of the 1945 Constitution. Moreover, if this interpretation causes the constitutional provisions to not work as a system and/or contradicts the main idea underlying the Constitution itself as a whole related to the objectives to be realized. The Constitutional Court must understand the 1945 Constitution in its context all the soul (spirit) contained in it to build a constitutional life that more appropriate to achieve the ideals of the state (staatsidee), namely to realize a democratic rule of law and a democratic state based on law, which is an elaboration of the main ideas contained in the Preamble to the 1945 Constitution.”<sup>56</sup>

Likewise, the Constitutional Court is not inconsistent with the previous decision, but because the interpretation used is different and there are developments in law and society, this results in a different decision.<sup>57</sup>

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<sup>56</sup> See Putusan Mahkamah Konstitusi No. 005/PUU-IV/2006, p. 88.

<sup>57</sup> Cf., Ade Irawan Taufik, “Konsistensi Putusan Mahkamah Konstitusi dalam Pengujian Beberapa Undang-Undang Terkait Kesehatan,” *Jurnal Konstitusi* 16, no. 4 (2019): 763-784.

## **Conclusion**

The provisions of Article 7(1) of UUP 1974, especially for women, are no longer ideal as the basis for the minimum age limit for marriage for women because they are not in line with current developments. Therefore, Decision Number 30-74/PUU-XII//2014, which rejects the application for review of Article 7(1), especially the word “16 years,” can be said not to fulfill women’s constitutional rights. It is a child’s marriage and will cause adverse effects on women’s health, hinder the educational process, and be discriminatory. In addition, from a historical point of view, these provisions were made based on the conditions that occurred at that time so that current developments and taking into account the amendments to the 1945 Constitution should be adjusted accordingly.

Conversely, Decision Number 22/PUU-XV/2017 grants the request to review Article 7(1) for the following reasons. *First*, although the determination of marriage minimum age limit is a legal policy, if the policy contradicts the 1945 Constitution, then the legal policy can be tested for constitutionality. *Second*, the Marriage Law is formed based on the values that developed when the law was formed, while in subsequent developments and taking into account the amendments to the 1945 Constitution, which regulates the protection of human rights, including the prohibition of discrimination, the Marriage Law needs to be adjusted to the 1945 Constitution and current developments. *Third*, the Court maintains that the determination of the minimum age limit for marriage remains the authority of the legislators. Therefore, the Court states that Article 7(1) is contrary to the 1945 Constitution and instructs the legislators to amend the provisions.

## **Conflict of Interest:**

The authors declare that they have no conflict of interest.

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