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Submission Draft

The Feasibilty of Criminalizing Child Marriage In Indonesia: Learning From India And The Philippines

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Abstract	*Criminalization is a choice for India, the Philippines and Indonesia to address the high rates of child marriage. Obviously, this effort raises pros and cons so that the feasibility of criminalization is questioned. This normative study is geared to explore the prohibition of child marriage in these three countries, and examining the feasibility of criminalizing child marriage in Indonesia based on the Schonsheck filtering method. By using statutory, conceptual, and comparative approaches, the results show that the differences in prohibitions in the three countries encompass the juridical concept of child marriage, the qualification of offenses, the formulation of prohibiting norms. Referring to Schonsheck's filtering, the criminalization of child marriage in Indonesia is still inappropriate. Eventhough the presumption filtering stage is fulfilled, the other two stages, namely the principle and pragmatic filtering, are insufficiently fulfilled*

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I. INTRODUCTION

Child marriage is a violation of children's rights that still occurs in many Asian countries such as the Philippines, India and Indonesia. In Indonesia, the practice of child marriage occurs almost evenly in 22 provinces. Every year, it is estimated that there are around 340,000 girls from both rural and urban areas with various economic levels who are married under the age of 18. The National Bureau of Statistics also shows that there are around 1,220,900 women aged 20-24 who were married before the age of 18 in 2018. This child marriage emergency continued until 2022, marked by the high number of requests for marriage dispensation in Indonesia in 2021 and 2022, which reached 65 thousand and 55 thousand requests.[1] This condition has positioned Indonesia as the 7th country out of 10 countries with the highest child marriage rate in the world[2] and the 2nd highest country with the highest number of child brides in ASEAN.[3]

The One of the strategies taken by the Indonesian Government to prevent child marriage is performing legal reform, which includes (a) the enactment of a minimum age provision for women and men to marry at the age of 19 as stipulated in Article 7 paragraph (1) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Act of 2019), (b) the legitimization of child marriage dispensation applications to the Religious Courts on the grounds of extreme urgency under Article 7 paragraph (2) of the Marriage Act of 2019, and (c) the criminalization of child marriage as an expansion of the criminal act of coercion of marriage as stipulated in Article 4 paragraph (1) letter e, in conjunction with Article 10 paragraph (1) and (2) letter a, Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (hereinafter referred to as the Sexual Violence Act of 2022).

The Philippines and India are two countries in Asia which have also chosen criminalization to overcome child marriage. The criminalization of child marriage

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[1] Ministry of Women's Empowerment and Child Protection Press Release (2023), online: <https://www.kemenpppa.go.id/index.php/page/read/29/4357/kemen-pppa-perkawinan-anak-di-indonesia-sudah-mengkhawatirkan>.

[2] Puskapa UI, "Child Marriage Prevention Acceleration that Cannot Be Delayed" (2020), online: <https://www.unicef.org/indonesia/media/2851/file/child-marriage-report-2020.pdf> at 7.

[3] Factsheet on Child Marriage Prevention, Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia Indonesia (2016).

in the Philippines was marked by the signing of the *'Implementing Rules and Regulation (IRR) of Republic Act No. 11596'* in December 2021. Under this provision, child marriage is declared illegal and a criminal offense. This legislative effort is the realization of the Philippine government's commitment to strengthen legal action to address the increasing rate of child marriage. In the Phillipines, one of six girls is married before the age of 18, and the country is currently the 12th country with the highest child marriage rate in the world.[4] India is not much different. It can even be seen as the initiator of the ban on child marriage. India has been implementing the legislative effort since 1929 through the Child Marriage Restraint Act of 1929 (known as the *Sharda Act*). It was later updated with the Prohibition of Child Marriage Act of 2006 which qualified child marriage as a criminal offense.[5] This criminalization effort was triggered by the alarming state of child marriage in India. More than half of women marry before the age of eighteen, 16% of the men are under the age of 18, and 28% of the men under the age of 20 are married.[6] As a long-standing issue rooted in tradition, culture and religion, child marriage in India is difficult to overcome. Hence, criminal law is seen as an extraordinary means.[7]

Unlike the criminalization of acts that are *an sich* despicable, the criminalization of child marriage is complex and debatable. The criminalization of child marriage invites crucial questions, including whether or not child marriage has an evil nature so that it should be seen as a crime. Is criminal law, which tends to be coercive and imperative, the right way to deal with child marriage? There are differing views in communities in relation to whether child marriage should be regarded as an evil act that needs to be prohibited by criminal law. For some communities, marriage is morally a good thing as long as it is carried out in accordance with religious provisions and traditions that are believed to be true. Similarly, the age requirement for marriage in religions is not determined by age, rather by the condition of one's puberty. Moreover, there is legal dualism related to the age limit of children in Law Number 35 of 2014 concerning Child

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4 End Violence Against Children, "Philippines abolishes child marriage" (2022), online: *End Violence* <https://www.end-violence.org/articles/philippines-abolishes-child-marriage>.

5 Handbook on The Prohibition of Child Marriage Act (2006), online: <https://www.childlineindia.org/pdf/Child-Marriage-handbook.pdf> at 3.

6 *Ibid.*

7 *Ibid.*

Protection (hereinafter referred to as the Child Protection Act of 2014) with the Marriage Act of 2019.

The pros and cons of criminalizing child marriage also emerge in the Philippines and India. In the Philippines, the community of Bangsamoro Autonomous region expressed an objection and asked for the withdrawal of the provision prohibiting child marriage. Anwar Embalawa, a muslim leader in Maguindanao Province, argued that in Islam, there is no fixed age for marriage. When a girl reaches the age of puberty, then she is allowed to marry.[8] Romeo Sema added that the issue of marriage is a matter of culture and it is very difficult to change.[9] In India, resistance to the criminalization of child marriage also occurred in the state of Assam in Northeast India. Hundreds of women protested after police arrested more than 2400 people for performing, facilitating or officiating child marriages.[10] The mass arrests raise questions regarding the feasibility of criminalizing child marriage. Criminalization, which is expected to support child protection, brings more adverse effects on wives, children, and family integrity. Excessive reliance on criminal law demonstrates the government's inability to address social problems.

The facts show that criminalization is not a simple effort, but a complex one.[11] The complexity of criminalization is related to different values and norms prevailing in society, as well as the various choices of social controls.[12] Not all human actions which have the potential to be harmful can be criminalized. Criminalization must be carried out rationally, rigidly, and wisely to avoid the negative impacts. However, criminal law must be regarded as the ultimate effort (*ultima ratio principle*), because in addition to being a prime guarantor, criminal law can become a prime threatener if its use is not limited, arbitrary, and non-discriminatory.[13] The two issues addressed in this article encompass: (1) the comparation of the prohibition norms of child marriage in the Philippines, India, and Indonesia, and (2) the feasibility of criminalizing child marriage in Indonesia.

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8 Jeoffrey Maitem, "Philippine Muslim Leaders Urge Repeal of New Law Criminalizing Child Marriage" (2022), online: *Benar News* <https://www.benarnews.org/english/news/philippine/child-marriage-01072022135850.html>.

9 *Ibid.*

10 Assam: Indian women protest against child marriage mass arrests (2023), online: <https://www.bbc.com/news/world-asia-india-64495567>.

11 Victor Tadros, "Criminalization: In and Out" (2020) 14:3 Criminal Law, Philosophy 365–380 at 367.

12 Salman Luthan, "Ad Criteria Of Criminalization" (2009) 16:1 Jurnal Hukum IUS QUIA IUSTUM 1-15 at 3.

13 Herbert L Packer, *The limits of The Criminal Sanction* (California-USA: Stanford University Press, 1968) at 87.

This article aims to evaluate the criminalization of child marriage in Indonesia by examining the laws and practices of countries such as the Philippines and India, which can be used to reinforce national regulations forbidding child marriage in Indonesia.

II. METHODOLOGY

The research on the prohibition of child marriage in Indonesia, India, and the Philippines is undertaken because there was no prior research on this issue published. Hence, it is pivotal to conduct preliminary research to explore as well as to examine the feasibility of criminalizing child marriage in those three countries to gain re-evaluation and to push the reformulation of child marriage prohibition in Indonesia, learning from the best experience of India and the Philippines. This research is a normative legal study that employs three models of approaches, namely statutory, conceptual (theoretically based), and comparative approaches. The secondary data were obtained from literature reviews, results of previous studies, and related regulations in Indonesia, India, and the Philippines, which were then analyzed evaluatively and qualitatively. The Philippines and India were chosen as objects of comparison because the two countries are also criminalizing child marriage as an effort to overcome the high number of child marriages. In addition, the two countries have intersections between two legal systems, namely civil law and religious law.

III. PROHIBITION OF CHILD MARRIAGE IN INDONESIA, PHILIPPINES AND INDIA

A. Juridical Concept of Child Marriage

Internationally, UNICEF defines child marriage as *a marriage of a girl or boy before the age of 18 and refers to both formal marriages and informal unions in which children under the age of 18 live with a partner as if married.*[14] From this definition, marriage not only includes formal marriages, but also extends to informal unions of women and men living together. Meanwhile, a child is conceptualized as someone under the

[14] Unicef, "Child marriage" (2023), online: <https://www.unicef.org/rosa/what-we-do/child-protection/child-marriage>.

age of 18. In the context of child marriage, one or both partners, both female and male, are under the age of 18.

Normatively, Indonesia, the Philippines and India use the same references in defining child marriage based on age limit at which individuals can marry. However, the three countries have different formulations. In Indonesia, the concept of child marriage is not explicitly formulated in any regulation, whether in the Marriage Act of 1974, the Child Protection Act of 2014, or the Sexual Violence Act of 2022. The concept is obtained through *a contrario* interpretation of Article 7 paragraph (1) of the Marriage Act of 2019, which regulates the minimum age requirement for women and men to be allowed to marry, namely at the age of 19 years. Furthermore, Article 2 paragraphs (1) and (2) of the Child Marriage Act of 1974 recognizes two types of legal marriage, namely: (a) informal marriages that are only carried out according to the laws of each religion and belief, and (b) formal marriages, which are carried out religiously and officially registered by state law. From these regulations, it can be concluded that child marriage includes both formal and informal marriages of women and men, one or both of whom are under 19 years of age.

The difference between the age at which individuals can marry in the Marriage Act of 2019 and the age limit for children in Article 1 of the Child Protection Act of 2014 indicates that the two rules are contradictory. It can also be said that there has been a legal dualism regarding the age of children in the concept of marriage in Indonesia. Referring to the Child Protection Act of 2014, *a contrario* a person is said to be an adult if he or she has reached the age of 18 years and over. So, it can be interpreted that if someone marries when he or she is exactly or exceeds 18 years of age, he or she is actually an adult and the marriage is not categorized as a child marriage. Meanwhile, in the Marriage Act of 2019, the age of adulthood at which an individual may marry is 19 years and over. If the person is still under 19 years of age, the marriage can be categorized as a child marriage.

Different from Indonesia. The Philippines and India have explicitly regulated the concept of child marriage in specific laws. In section 3 paragraph (b) of Republic Act No. 11596 (also known as An Act Prohibiting the Practice of Child Marriage and Imposing Penalties for Violations Thereof), the Philippines defines child marriage as "any marriage entered into where one or both parties are children"

as defined in paragraph (a), and solemnized in civil or church proceedings or in any recognized traditional, cultural, or customary manner. It shall include any informal union or cohabitation outside of wedlock between an adult and a child or between children. The children referred to in the regulation include two categories: a) those under the age of 18, and b) those who are 18 years old and above, but have physical and mental limitations that prevent them from taking care of themselves or protecting themselves from abuse, neglect or cruelty. The concept of children in the Philippines is more identical to the international conception of UNICEF, but the concept of children is slightly expanded to include those who are physically and mentally challenged despite being 18 years of age or older.

Meanwhile, India has a simple concept related to child marriage. According to section 2 paragraph (b) of the Prohibition of Child Marriage Act, 2006, it refers to a marriage to which either of the contracting parties is a child. In paragraph (a), it is clarified that the child referred to in the law is a man under 21 years of age, and a woman under 18 years of age. This limitation was later amended in 2021 by raising the minimum age for women to 21 years old. Thus, the juridical concept of a child in child marriage in India is both female and male under the age of 21.

The similarities and differences in the juridical concepts of child marriage in Indonesia, the Philippines and India can be seen in the following table:

TABLE 1. Juridical Concepts of Child Marriage in Indonesia, the Philippines and India

Similarity			
Child marriage in all three countries in conceptualized based on age restrictions			
Differences			
Object	Indonesia	The Philippines	India
Regulation	Implict	Explicit	Explicit

Formulation Type	Moderate	Extensive	Simple
Scope of Marriage	formal and informal, legal based on the laws of religion and belief	formal, infomal according to religion or culture and tradition, and informal union/cohibitation outside of wedlock	Scope ot mentioned
Limitation of Children Subject to Marriage	One or both are under 19 years of age	One or both are under 18 years of age, and physically or mentally challenged	One or both are under 21 years of age

Sources: Authors, 2025

B. Prohibition Norms and Criminal Sanctions on Child Marriage

Indonesia, the Philippines and India have different formulations of prohibitive norms as well as criminal sanctions. In the Sexual Violence Act of 2022, child marriage is defined as a form of sexual violence, with a norm called the offense of forced marriage.[15] The offense regulated in Article 10 paragraph (1) of this law is actually not a specific offense of child marriage, but a general offense of marriage, with the main actions: 'forcing', or 'placing someone under his power', or 'abusing power to perform or allow' the marriage of a child with the perpetrator or another person. This means that the target of the acts prohibited in the article is people in a general sense, not specifically children.

However, Article 10 paragraph (2) expands the range of acts referred to in Article 10 paragraph (1) to several other specific acts, including child marriage (letter a), forced marriage in the name of cultural practices (letter b), and forced marriage

[15] Article 4 paragraph (1) e, *juncto* 10 paragraph (2) a and b, Sexual Violence Act of 2022.

of victims with perpetrators of sexual violence (letter c). For the acts mentioned in letters b and c, the victims can include both children and adults.

Criminal sanctions imposed on child marriage in Indonesia include main criminal sanctions in the form of imprisonment for a maximum of 9 years and or a maximum fine of 200 million, which can be increased by 1/3 as stipulated in Article 15 letters a and g[16], to a maximum of 12 years imprisonment and/or a fine of around 267 million rupiah. In addition to the main punishment, the perpetrator is also subject to additional punishment in the form of revocation of child custody or revocation of guardianship, announcement of the perpetrator's identity, and/or confiscation of profits and/or assets obtained from the criminal act.[17] In addition, as mentioned in Article 16 paragraph (1), for perpetrators of child marriage whose punishment is more than 4 years in prison, restitution may also be imposed.

In the Philippines, the prohibition of child marriage is categorised as a 'public crime'[18], which is regulated in section 4 of Republic Act No. 11596 entitled 'Unlawful Act'. The norm of prohibition of child marriage is specifically divided into 3 offenses, namely: a) facilitation of child marriage, punishable by *prision major* in its medium period and a minimum fine of 40,000 Pesos. Aggravated penalties are applied to parents, elders, adoptive parents, stepparents, or guardians in the form of *prision major*[19], a fine of 50,000 Pesos, and loss of parental authority. This offense also covers those who produce, print, issue any form of document required for the validity of a marriage, such as a marriage certificate that has been falsified for its age. Specifically for these acts, the perpetrators are subject to the strict liability model. b) Solemnization of Child Marriage, which includes performing or officiating child marriage. The penalty for this offense is prision major in its maximum period and a fine of not less than 50,000 Pesos. c) Cohabitation of an Adult with a Child outside Wedlock, which is punishable by prision major in its maximum period and a fine of not less than 50,000 Pesos.

16 If committed within the family (letter a), and committed against a child (letter g).
17 Article 16 paragraph (2), Sexual Violence Act of 2022.
18 Section 5 of Republic Act No. 11596 (Philippines).
19 Prision major is a specific term of imprisonment in the Philippines, which ranges from 6 years, 1 day to 12 years. The types of Prision Major consist of minimum, medium, and maximum Prision Major

If the perpetrator of the three offenses is a public officer, the officer may be dismissed from the service and perpetually disqualified from holding office. The Philippines also recognizes the legal consequences of an absolute annulment of marriage, in which the child who is the victim of this marriage will be restored to his or her status before the marriage.

While in India, the Prohibition of Child Marriage Act of 2006 recognizes three main offenses of child marriage, namely the act of a man marrying a child[20], the solemnization of child marriage, ranging from organizing, directing, or assisting child marriage[21], promoting and granting permission for the solemnization of child marriage, including failure to prevent child marriage, attending and participating in child marriage.[22] The penalties for all three offenses are the same, rigorous imprisonment for a minimum of 1 year, extendable to 2 years, and a fine of up to 1 lakh rupees. This law prohibits the imposition of imprisonment on female offenders. In addition, similar to the Philippines, India also recognizes the annulment of child marriage under certain conditions.

From the illustration above, some of the differences in the regulation of the prohibition of child marriage in the three countries are presented in the following table:

TABLE 2. Child Marriage Prohibition in Indonesia, the Philippines and India

Object	Indonesia	The Philippines	India
Qualification	Sexual Violence Offences	Public Crimes	Prohibition of Child Marriage
Subject	Everyone	Any person, parent or guardian, and public officer	Every person, every man, every person responsible for the child, including members of

[20] Section 9 of Prohibition of Child Marriage, 2006.
[21] Section 10 of Prohibition of Child Marriage, 2006.
[22] Section 11 of Prohibition of Child Marriage, 2006.

			relevant associations or organizations
Form of Action	Forced Marriage	Facilitation, Solemnization of child marriage and cohabitation with a child	Marrying a child, Solemnizing child marriage, Promoting or Permitting Solemnization of Child Marriage
Criminal Liability Model	Does not recognize strict liability	Strict Liability for the offense of facilitating child marriage	Does not recognize strict liability
Sentencing System	Combined System	Cumulative System	Alternative System and Cumulative System
Pattern of Punishment	Special Maximum	Special Maximum	Minimums and maximums are specific to imprisonment, maximums are specific to fines
Type of Punishment	Imprisonment for a certain period of time and/or a certain amount of fine	*Prision Major* in is medium to maximum. And a fine with specific amount	Jail and Fines

Other Sanctions	Additional punishment and Restitution	None	None
Criminal Aggravation	Recognize criminal aggravation by 1/3	Recognizing criminal aggravation	Extended prison term of up to two years
Juridical consequences on marital status	None	Marriage annulment	Marriage annulment

Sources: Authors, 2025

Based on the rules prohibiting child marriage in the Philippines and India, several points can be considered for improving and strengthening the rules prohibiting child marriage in Indonesia, namely: a) setting the qualifications of the prohibition of child marriage specifically in the relevant laws; b) formulating the concept of child marriage in line with the juridical limitations of 'child'; c) formulating the concept of child that is not only based on age, but also on consideration of the condition of physical and mental disability of a person; d) clarity in the formulation of norms prohibiting child marriage; f) prohibition of the imposition of penalties on women and children; g) formulating minimum and maximum sanctions on punishment; and h) expansion of the subject of the offense on officials or public officers.

IV. THE FEASIBILITY OF CRIMINALIZING CHILD MARRIAGE ACCORDING TO THE SCHONSHECK FILTERING METHOD

In criminal legislative efforts, criminalization is one of pivotal issues in designing the substance of criminal law. Criminalization, according to Nina Persak, is an act of an entitled public entity to define human behaviour that constitutes a public

wrong and to prohibit it.[23] In other words, criminalization is the process of determining which human actions can be qualified as criminal acts in criminal regulations, because criminal law contains norms of prohibition along with the penalties. The general classification of criminal acts consists of crimes (*misdrijven*) or known as *mala in se delict* or *recht delict*, which are actions that, although not regulated in the law, are considered to be against the law by the community (*onrecht*), and offenses (*overtredingen*) or also known as *mala prohibitum delict* or *wetdelict*, which are actions whose unlawful nature is only known when regulated in law.[24]

Crime can be found in almost all societies. Crime is an eternal and normal phenomenon in society. As Frank Tannebaum stated, "crime is eternal as society".[25] The impermanence does not lie in crime as a social problem, but rather in the qualification of an act as a crime that develops along with the relative despicability of an act that depends on changing values in society. An act that is currently considered reprehensible may be considered normal in the future, and vice versa. Therefore, it is appropriate that criminalization efforts are complex efforts that should be carried out precisely, rigidly and wisely.[26]

Measuring the feasibility of criminalization is important as criminal law is a cruel law so that its design and application must be limited in accordance with the principle of *parsimony*. Not all social problems must be addressed by criminal law. It needs a process of sorting and choosing strictly, precisely, measurably referring to clear criteria. Otherwise, humans will be faced with the problem of overcriminalization and paralysis of the function of criminal law as a means of social defence. Instead of being an effective solution to protect the community, it becomes a threat to the protection of the community itself. Husak reminded that excessive criminalization can damage the legal order.[27] According to Roeslan Saleh, the necessity of criminal law in solving problems does not lie in the

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23 Nina Persak, *Criminalising Harmful Conduct* (USA: Springer, 2007) at 179.

24 Frans Maramis, *General and Written Criminal Law in Indonesia* (Jakarta: Raja Grafindo Persada, 2012) at 74-75.

25 Teguh Sulistia and Aria Zurnetti, *Criminal Law New Horizons Post Reform* (Jakarta: Raja Grafindo Persada, 2011) at 65.

26 Tamar Pitch, *Limited Responsibilities: Social Movements and Criminal Justice,* translated by John Lea, (London: Routledge Publisher, 2005) at 71.

27 Douglas Husak, *Overcriminalization* (New York: Oxford University Press, 2008) at 13.

objectives to be achieved, but in how far to achieve these objectives requires coercion.[28]

There are at least two procedures to justify the feasibility of criminalization. The first is a decision-procedure of balancing, which is the procedure of measuring the balance of reasons to criminalize an act with reasons not to criminalize it.[29] This procedure is countered by Schonsheck because it is difficult to obtain objective balance accuracy, considering that weighing arguments is not the same as weighing objects whose strength is clear. [30] The second is the filtering procedure initiated by Schoenscheck. This procedure is considered better because assessing the feasibility of criminalization refers to the fulfilment of three stages of filtering.[31] The three stages are principle filtering, presumption filtering, and pragmatism filtering.

The criminalization of child marriage results in debates and even rejection from the community, especially community members who still adhere to religious values, traditions, and culture. An interesting question that could potentially be raised is whether child marriage is a crime that needs to be addressed by criminal law. Addressing crime means discussing the evil or despicable nature of an act. The reprehensibility of child marriage is still debatable due to the diverse views on the nature of marriage and the absence of consensus on the minimum age of marriage. This article examines the feasibility of criminalizing child marriage by using the Schoenscheck filtering method:

1. **Principle Filtering**

Principle Filtering is filtering using a set of relevant criminalization principles. There are many versions of criminalization principles. Duff introduced the principle of 'public wrong' and the 'polity's civil order'. Both are interrelated, where criminalization is carried out because the act meets the criteria of public wrong, and the act is said to be so if the act violates the principle of 'polity's civil order'.[32] Countries with continental legal systems generally use the principles of unlawfulness, wrongfulness, and social dangerousness,[33] and legal

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28 Zurnetti, *supra* note 25.
29 Jonathan Schonsheck, *On Criminalization* (Dordrecht: Kluwer Academic Publishers, 1994) at 7.
30 *Ibid,* at 33.
31 *Ibid,* at 64.
32 Patrick Tomlin, "Duffing Up the Criminal Law?" (2020) 14:3 Criminal Law, Philosophy 319–333 at 321.
33 Persak, *supra* note 77 – 103.

good[34] as the basis of criminalization. In Luthan's version, the three principles of criminalization are the principle of legality, subsidiarity, and the principle of equity.[35] Schonsheck relies on the principle of state authority, which he defines as 'things fit to be done by a government under filtering'. From the 10 types of principles of state authority, there are four basic principles that are widely used in Aglo-American countries, namely the harm principle, offence principle, legal paternalism, and legal moralism.

Referring to Duff's criminalization criteria, a 'public wrong' is fulfilled if it violates the 'polity's civil order', while the civil order here is established by the government, which unfortunately relies heavily on the government's success in adopting certain important values in society.[36] If the government fails to identify and adopt the values of society, then it fails to establish the public wrong of an act. That is why, in Duff's approach, according to Chao, criminalization derives from public wrong, and therefore crime is whatever the majority of people consider to be wrong or reprehensible. Starting from this thought, it is very difficult to determine the 'public wrong' in child marriage, considering that the public perception of child marriage is still divided, especially in multicultural societies such as Indonesia. For some people, child marriage that is carried out in accordance with religious rules, beliefs, and traditions is a good act, especially if it is done with a purpose that they feel is good, such as avoiding children committing adultery or being trapped in promiscuity.

Referring to the principle of legality in Luthan's criminalization criteria, the criminalization of child marriage seems to have fulfilled the principle of legality, where the prohibition actually provides legal certainty as well as criminal law limits related to which actions in child marriage should be prohibited and punished. In addition, the prohibition is expected to provide a balance of protection for children and also the life of society in the future. However, when exploring further the criminalization of child marriage, the normative facts show that Article 10 paragraph (1) of the Sexual Violence Act of 2022 does not specifically regulate the crime of child marriage, but the crime of forced marriage in general, which is extended to other acts mentioned in Article 10 paragraph (2), including child marriage.

The categorization of child marriage as a criminal offense of forced marriage in the Sexual Violence Act of 2022 has multiple interpretations: a) The norm prohibiting child marriage in Article 10 must contain elements of coercion,

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[34] *Ibid,* at 104.

[35] Luthan, supra note 5.

[36] Hend Hanafy, "Public Wrongs and Power Relations in Non-Democratic & Illiberal Polities" (2024) 18:3 Criminal Law and Philosophy :709-726.

placing a child under the power of other persons, or abuse of power to perform or allow child marriage, b) whether or not any norm prohibiting child marriage contains elements as in Article 10 paragraph (1). The potentially multi-interpretative norm will clearly have implications for differences in interpretation, errors, or abuse of law enforcement officials in enforcing the norm at the practical level.

Another ambiguity is related to Article 15 paragraph 1 letter a and g, which regulate the aggravation of coercion of marriage committed by the family and against children. This arrangement is certainly confusing and contradicts Article 10 paragraph (2) in conjunction with paragraph (1). How is it possible that child marriage as stipulated in Article 10 paragraph (2), which in fact is mostly carried out by families and carried out against children, is given a different weight of sanctions? Does the child marriage referred to in Article 10 paragraph (2) have a different context from marriage with aggravated sanctions regulated in Article 15 paragraph 1 letter a and g? The vagueness of the regulation on the prohibition of child marriage actually does not fulfil the *ultima ratio principle, precision principle, clearness principle,* and *principle of differentiation*.[37] The non-fulfilment of these principles can lead to overcriminalization and the inevitable overburdening of the authorities.

The principles on which Schoenschek's filtering relies in examining the criminalization of child marriage include the harm principle, offense principle, and legal moralism principle, which are discussed below:

a. The Harm Principle

This principle, which was proposed by Stuart Mill, has been widely used by the legislature in justifying criminalization efforts. It is a morally charged concept based on the existence (risk) of harm/loss from an act which is the basis for justifying criminalization.[38] An act should be criminalized if it harms or contains a risk of harm to others. Husak suggests 2 categories of harm, namely trivial harm and non-trivial harm. In line with the *de minimis* principle, only acts that contain non-trivial harm should be criminalized.[39] Meanwhile, Duff and Marshall identify two spectrums in the harm principle, including the harm prevention principle (the principle of the risk of harm that should be prevented), and the harm conduct principle (the right to see that the act is indeed harmful).[40]

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37 TJ Gunawan, *Concept of Punishment Based on Economic Loss Value* (Yogyakarta: Genta Press, 2015) at 109.

38 Andrew Ashworth & Jeremy Horder, Principles of Criminal Law, 6th ed (New York: Oxford Universit Press, 2009) at 28.

39 Husak, *supra* note 65-71.

40 RA Duff & SE Marshall, "Abstract Endangerment: Two Harm Principles and Two Routes To Criminalisation" (2015) 3:2 Bergen Journal of Criminal Law and Criminal Justice 131–161 at 133-139.

Based on the thoughts, the danger of child marriage stems from the (risk of) negative impacts that arise or are experienced by children both before and after child marriage. These negative excesses have reached the two spectrums mentioned by Duff and Marshall, harm prevention and harm conduct principle. Many studies have shown the negative impacts of child marriage, such as Djamilah and Kartikawati (2014),[41] Iustitiani and Ajisukmo (2018),[42] Fan and Koski (2022), [43] and Lebni, et al. (2023). [44] The results of Djamilah and Kartikawati's (2014) study show that the negative impacts of child marriage affect the safety and welfare of children, including (a) school drop-outs, (b) family instability because children are essentially unstable and lack experience in managing household life, (c) domestic violence, (d) low health quality and can result in death), and (e) inequality of child status which results in discriminatory behavior and mental abuse.[45]

b. The Offense Principle

Justification of criminalization of an act is not only based on the presence or absence of harm (risk). According to Simester, not all actions contain elements (risk) of harm/ loss. Sometimes, the existence of these elements is not clear. Therefore, another legitimizing basis is needed for justifying criminalization, namely the offense principle. Under this principle, an act should be criminalized if it has offended or violated the rights of others. Simester added that criminalization is justified if the act is offensive, either degrading human dignity (insulting character), or violating the privacy (rights) of others (having an exhibitionism character).[46]

Child marriage, especially those carried out by coercion, intimidation, or abuse of power, is an act that violates the fundamental rights of children, which are regulated in the Convention on Rights of the Child, including the rights regulated in Articles 2, 3, 6, 12, 19, 24, 28 and 29, 34, 35, and 36.[47] The rights of children referred to in some of the articles above can be seen in the following table:

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41 Djamilah and Reni Kartikawati, "The Impact of Child Marriage in Indonesia" (2014) 3:2 Journal of Youth Studies 1–6.

42 Nilla S D Iutitiani & Clara RP Ajisukmo, "Supporting Factors and Consequenses of Child Marriage" (2018) 33:2 Ani ma Indonesian Psychological Journal 100–111.

43 Suiqiong Fan & Alissa Koski, "The Health Consequences of Child Marriage: A Systematic Review of The Evidence" (2022) 22 BMC Public Health Journal 1-17.

44 Javad Yoosefi Lebni, et al, "Exploring the Consequences of Early Marriage: A Conventional Content Analysis" (2023) 60 INQUIRY: The Journal of Health Care Organization, Provision, and Financing 1–14.

45 Kartikawati, *supra* note 4.

46 AP Simester, *Rethinking The Offense Principle, Legal Theory* (USA: Cambridge University Press, 2002) at 269.

47 Rangita De Silva De Alwis, *Child Marriage and The Law* (New York: UNICEF, 2007) at 12-13.

TABLE 3. Children's Rights in Child Marriage

Child Rights	Articles
Freedom from Dicrimination	Article 2
The right to have treated based on the best interest of the child	Article 3
Maximum Support for survival and development	Article 6
The right to express his/her views freely	Article 12
The right to protection from all kinds of violence	Article 19
The right to health	Article 24
The right to education	Article 28 and 29

Sources: Authors, 2025

c. Legal Moralism Principle

Devlin argues that immorality is a sufficient basis to criminalize an act. For legal moralism, the presence or absence of harm or loss is not always a consideration in criminalization. The legitimacy of criminalization can be based on morality, the sense of right or wrong, good or bad that humans use in valuing an act. There are two contexts of legal moralism, a narrow and broad context. In a narrow sense, an act should be criminalized if the nature of the act is immoral while in a broad sense, an act should be criminalized if the act is or has the potential to cause "free floating-evils".[48]

With respect to the principle of legal moralism in the narrow sense, it is difficult to say that child marriage is immoral. Although the law itself is full of moral values, morality is not a single and permanent thing. In scientific discourse, there are at least four types of moral teachings, namely moral universe, moral dogmatism, moral relativism, and moral pluralism. In terms of moral pluralism, people's moral choices are based on the diverse values that prevail in the society in which they live. In short, the meaning of moral or immoral will depend on the religious values, traditions, culture, and historical background held by the community.

In Indonesia, the perspectives on the morality of child marriage vary. It is not easy to homogenize the views of a multicultural society regarding child

[48] Schonsheck, *supra* note 66.

marriage as an immoral act. For communities that still adhere to religious values, traditions and culture such as in Madura, marriage is sacred and has a good purpose. As long as marrying off the child does not violate the boundaries set by religion, marriage is seen by some people as a good and moral thing. Conversely, in a broad legal moral context, child marriage can be said to have the potential to be immoral or contain free floating evils, so it should be criminalized. The immoral potential of child marriage can be identified if there are coercion, pressure, intimidation, abuse of power, or other improper actions such as fraud or age falsification. Differences in tradition, culture, and religious interpretations have resulted in debates about conflicting norms of sexual morality, gender, and marriageability. According to Pakasi, this makes all efforts to prevent child marriage fail, not achieving the expected results.[49]

d. Presumption Filtering

This second filtering stage aims to explore and examine the possibility of other social control efforts that are assumed to be more successful in overcoming social problems, rather than the use of coercive methods such as the application of criminal law. At this stage, it needs to be considered that ideally the use of criminal law should be directed as the last resort or *ultimum remedium*, not the primary resort or *primum remedium*. In consideration of Resolution No. 3 at the 6th UN congress in 1980, it was stated that crime prevention depends on the human, and crime prevention strategies should be based on efforts to raise the human spirit, and reinforce confidence in his ability to do good.[50]

In other words, criminal law is actually not the most effective tool in overcoming social problems in society. Although various views propose that criminal law has a general deterrent effect, according to Robin, the effect is very small and even difficult to evaluate. In fact, according to Schuldz, the rise and fall of crime are not caused by changes in law, but by major cultural changes in society.[51] Therefore, Taft and England strongly argue that customs, religious beliefs, group support and condemnation are more efficient means of regulating human behaviour than criminal sanctions.[52] Intensifying and utilizing non-penal means are considered effective in overcoming crime or social problems, among others, by working on public health or a health social environment, both with a religious approach and a national cultural identity approach , eliminating the causes of crime[53], empowering each individual as an agent of social control,

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[49] Diana Teresa Pakasi, "Child Marriage in Indonesia: Practices, Politics, and Struggles, public" (2019) 24:1 sociology journal at 5.

[50] Barda Nawawi Arief, *Anthology of Criminal Law Policy*, 3rd ed (Jakarta: Kencana media Prenada Group, 2010) at 47.

[51] H.D. Hart (ed), cited by Barda Nawawi Arief, *Ibid.* at 51.

[52] Donald R, Taft and Ralph W. England, cited by Barda Nawawi Arief, *Ibid.* at 51.

[53] Cherif Bassiouni, cited by Barda Nawawi Arief, *Ibid.* at 52.

optimizing the use of mass media, reinforcing social values [54], revival and development of informal or traditional systems, and increasing the role of education and religious counselling.

In the context of child marriage, Indonesia's strategies since 2020 have reflected non penal measures, among others through programs from the key strategies for preventing child marriage, including: 1) optimization of child capacity; 2) enabling environment for child marriage prevention; 3) accessibility and expansion of services; 4) institutional strengthening; 5) strengthening stakeholder coordination. However, the implementation of the strategies, according to the government, is still not optimal. This is shown by the small percentage of reduction in child marriage cases which is still far from the expected target, 3.5 percent in the last 10 years from the target of 8.74 percent in 2024.

There are two non-penal measures proposed by Joar Svanemyr, et.al to prevent child marriage, which are the provision of higher education for children, especially girls, and cooperation with all stakeholders to influence and change people's views on cultural norms that perpetuate early marriage. In line with Svanemyr, Faizan Mustafa argues that the educational path for both children and parents is better in overcoming child marriage than solving it using criminal law. Even if it is forced to be criminalized, the use of a restorative justice approach is better than a retributive justice approach. This is in line with the thoughts of Romli Atmasasmita in his retirement speech, who said that it is time for repressive law to be abandoned, and shift to responsive law and restorative law which are more in line with the character of Indonesian society based on the values of Pancasila.[55] Thus, the goal of legal expediency is better achieved without harming justice and social welfare of society in a broad sense.

2. Pragmatic Filtering

This third filtering stage focuses on mapping the actual consequences that could potentially occur from criminalization efforts. Herbert L. Packer argues that legislators must assess the benefits and harms of criminalization. [56] If criminalizing an act causes the situation to become worse or chaotic, or the law becomes paralyzed, then criminalization of the act is not necessary, or not worth doing. The criteria known as cost and benefit have also been proposed by Sudarto [57] and C. Bassiouni [58] as criteria that must be considered before criminalizing. Related to this pragmatic filtering, C. Bassiouni also believes that

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54 R. Hood and R. Sparks, cited by Barda Nawawi Arief, *loc.Cit.,* at 51.

55 Romli Atmasasmita, Retirement Speech Character and Direction of Legal Politics in National Development (Bandung: Padjajaran University, 2014) at 15.

56 Schonsheck, *supra* note 7.

57 Sudarto, *Law and Criminal Law* (Bandung: Alumni Publisher, 1977) at 44-48.

58 Cherif Bassiouni, cited by Barda Nawawi Arief,, *supra* note 82.

the social influence of criminalization must also be taken into consideration. This social influence can be positive or negative, and of course the positive influence should be far greater than the negative.

An analysis of the impact of criminalization must be carried out because the criminalization of an act is not always able to solve existing problems or achieve the expected legal objectives. In the utilitarian understanding, crimes are not punished unless they have benefits for the criminal and society. Jerem Bentham argued that punishment is only acceptable if it can provide hope for the prevention of greater crimes.[59]

The criminalization of child marriage will undeniably have a significant social impact, in addition to requiring significant social costs, both the costs of criminal behaviour and the costs of protection and/or prevention (including victimization costs). [60] Cases that occurred in India have shown that the criminalization of child marriage had a domino effect on society. As a result of this criminalization, more than 2400 people were arrested and detained for performing, facilitating and officiating child marriages. This massive enforcement of the law against child marriage has triggered more complicated problems. This fact is certainly worrying and shows that the criminal law is over-operationalized as a machine that attacks its own society.

The domino effects that might potentially occur due to law enforcement of child marriage crimes in India include, among others, the increasing costs of law enforcement, the stigma of evil or criminals or convicts that will be attached to the perpetrators, the mental pressure faced by children because they see their families in prison, the overload of law enforcement officials' tasks, and the overcapacity of prisons. It is hard to imagine how chaotic it would be if more than 2400 people were detained and criminally prosecuted for committing the crime of child marriage. Will the goal of prohibiting child marriage be achieved under such conditions? Not to mention the wives and children who will bear financial losses and family vulnerability because their husbands or fathers cannot support and care for them while in prison.

The actual consequences that occurred in India have not occurred in Indonesia. However, they might also happen. What has happened in India should be a lesson for Indonesia so that Indonesia does not experience the same thing by preparing all forms of anticipation. So far, the actual consequence that has occurred in Indonesia is the surge in child marriage due to the provisions of marriage dispensation applications. The vagueness of the rules in Article 10 paragraph (1) *juncto* paragraph (2) *juncto* Article 15 letters a and g of the Sexual

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59 Gunawan, *supra* note 75.

60 Charles M Gray, *The Costs of Crime* (London: Sage Publication, 1979) at 22.

Violence Act of 2022, legal dualism related to age limits in the Child Protection Act of 2014 and the Marriage Act of 2019, and the provision of marriage dispensation as legitimization of deviations from the age limit for marriage, encourage child marriage in a different model. This means that child marriage still occurs but to avoid punishment it is carried out in a softer way (without coercion), utilizing marriage dispensation applications, and manipulating the age of the child.

V. CONCLUSION

The conclusion which can be drawn from the above study is that the difference in the prohibition of child marriage in Indonesia, the Philippines, and India lies in the juridical concept of child marriage, the qualification of offenses, the formulation of prohibiting norms, and criminal sanctions. Indonesia does not specifically regulate the prohibition of child marriage, only expanding the range of offenses of forced marriage. The Philippines and India, on the other hand, more specifically regulate the prohibition norms, with three forms of actions including facilitation, solemnization, and cohabitation. The juridical concept of child marriage in the three countries uses an age reference, but the age limit for marriage is regulated differently. Referring to Schoenscheck's filtering method, the criminalization of child marriage in Indonesia is not enough feasible because it only meet the presumption filtering which is reflected from a series of non-penal measures applied by Indonesia in addressing child marriage. Meanwhile, the principle filtering stage is partially fulfilled notably harm and offence principle, taking into account the fulfilment of legal moralism and legality principle is still questionable due to the diverse views on morality of child marriage in multicultural society, and the vague and contradictive norms of child marriage prohibition. Lastly, the pragmatic filtering is insufficiently fulfilled considering some concequences of criminalizing child marriage may potentially occurred in relation to the vague and contradictive norms of child marriage which may trigger multi-interpretation and abuse in application of the norms. Eventually it may result in the continued existence of child marriage in soft ways to avoid penalties, and the high cost of crime, both the cost of victimization and cost of prevention.

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REFERENCES

Child Marriage Act of 1974.
Child Marriage Act of 2019.
Prohibition of Child Marriage, 2006 (India).
Republic Act No. 11596 (Philippines).
Sexual Violence Act of 2022.
The Convention of Child Right of 1989.
Alwis, Rangita De Silva De, *Child Marriage and The Law* (New York: UNICEF, 2007).
Arief, Barda Nawawi, *Anthology of Criminal Law Policy*, 3rd ed (Jakarta: Kencana media Prenada Group, 2010).
Atmasasmita, Romli, *Retirement Speech Character and Direction of Legal Politics in National Development* (Bandung: Padjajaran University, 2014).
Gray, Charles M, *The Costs of Crime* (London: Sage Publication, 1979).
Horder, Andrew Ashworth & Jeremy, *Principles of Criminal Law*, 6th ed (New York: Oxford Universit Press, 2009).
Husak, Douglas, *Overcriminalization* (New York: Oxford University Press, 2008).
Maramis, Frans, *General and Written Criminal Law in Indonesia* (Jakarta: Raja Grafindo Persada, 2012).

Packer, Herbert L, *The limits of The Criminal Sanction* (California-USA: Stanford University Press, 1968).

Persak, Nina, *Criminalising Harmful Conduct* (USA: Springer, 2007).

Pitch, Tamar, *Limited Responsibilities: Social Movements and Criminal Justice,* translated by John Lea (London: Routledge Publisher, 2005).

Schonsheck, Jonathan, *On Criminalization* (Dordrecht: Kluwer Academic Publishers, 1994).

Simester, AP, *Rethinking The Offense Principle, Legal Theory* (USA: Cambridge University Press, 2002).

Sudarto, *Law and Criminal Law* (Bandung: Alumni Publisher, 1977).

TJ. Gunawan, *Concept of Punishment Based on Economic Loss Value* (Yogyakarta: Genta Press, 2015).

Zurnetti, Teguh Sulistia and Aria, *Criminal Law New Horizons Post Reform* (Jakarta: Raja Grafindo Persada, 2011).

Ajisukmo, Nilla S D Iutitiani & Clara RP, "Supporting Factors and Consequenses of Child Marriage" (2018) 33:2 Ani ma Indonesian Psychological Journal 100–111.

Factsheet on Child Marriage Prevention, Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia Indonesia (2016).

Hanafy, Hend, "Public Wrongs and Power Relations in Non-Democratic & Illiberal Polities" (2024) 18:3 Criminal Law and Philosophy :709-726.

Kartikawati, Djamilah and Reni, "The Impact of Child Marriage in Indonesia" (2014) 3:2 Journal of Youth Studies 1–6.

Koski, Suiqiong Fan & Alissa, "The Health Consequences of Child Marriage: A Systematic Review of The Evidence" (2022) 22 BMC Public Health Journal 1–17.

Lebni, Javad Yoosefi, *et. al,* "Exploring the Consequences of Early Marriage: A Conventional Content Analysis" (2023) 60 INQUIRY: The Journal of Health Care Organization, Provision, and Financing 1–14.

Luthan, Salman, "Ad Criteria Of Criminalization" (2009) 16:1 Jurnal Hukum IUS QUIA IUSTUM 3.

Marshall, RA Duff & SE, "Abstract Endangerment: Two Harm Principles and Two Routes To Criminalisation" (2015) 3:2 Bergen Journal of Criminal Law and Criminal Justice 131–161.

Pakasi, Diana Teresa, "Child Marriage in Indonesia: Practices, Politics, and Struggles, public" (2019) 24:1 sociology journal 5.

Tadros, Victor, "Criminalization: In and Out" (2020) 14:3 Criminal Law, Philosophy 365–380.

Tomlin, Patrick, "Duffing Up the Criminal Law?" (2020) 14:3 Criminal Law, Philosophy 319–333.

"Assam: Indian women protest against child marriage mass arrests" (2023), online: <https://www.bbc.com/news/world-asia-india-64495567>.

End Violence Against Children, "Philippines abolishes child marriage" (2022), online: *End Violence* <https://www.end-violence.org/articles/philippines-abolishes-child-marriage>.

Maitem, Jeoffrey, "Philippine Muslim Leaders Urge Repeal of New Law Criminalizing Child Marriage" (2022), online: *Benar News* <https://www.benarnews.org/english/news/philippine/child-marriage-01072022135850.html>.

Puskapa UI, Child Marriage Prevention Acceleration that Cannot Be Delayed, online: <https://www.unicef.org/indonesia/media/2851/file/child-marriage-report-2020.pdf>.

Unicef, "Child marriage" (2023), online: <https://www.unicef.org/rosa/what-we-do/child-protection/child-marriage>.

Handbook on The Prohibition of Child Marriage Act (2006), online: <https://www.childlineindia.org/pdf/Child-Marriage-handbook.pdf>.

Ministry of Women's Empowerment and Child Protection Press Release (2023), online: <https://www.kemenpppa.go.id/index.php/page/read/29/4357/kemen-pppa-perkawinan-anak-di-indonesia-sudah-mengkhawatirkan>.