



## Legal protection of minors who marry without an application for dispensation of marriage

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### ABSTRACT

*This study aims to determine the form of Legal Protection for Minors Who Marry Without a Marriage Dispensation Application in Latoma District, Konawe Regency. This study uses a cumulative research method using an empirical juridical approach. The primary sources in this study are married minors, judges of religious courts and communities. In data collection, field observation, interviews and documentation methods are used. The results show that for underage marriages that take place without a marriage dispensation, it will result in the absence of a guarantee of legal protection from a competent institution that can provide a guarantee that the marriage that occurs is not a violation of the rights of children and in contrast to a minor marriage that receives a determination of marriage dispensation, the role of the court is significant in providing a guarantee of protection for children. Marriage dispensation is necessary in terms of fulfilling the order of Law Number 16 of 2019 concerning Marriage, that deviations from the age of marriage in the Marriage Law can be requested for dispensation to the Religious Court or other officials appointed by both parents from the male and female sides.*

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## 1. Introduction

The definition of child according to the Indonesian Dictionary which can be concluded is, the second offspring means from a man and a woman who gives birth to offspring, the offspring biologically comes from a male egg cell which then reproduces in the womb of a woman, in the form of a womb and then the woman in time will give birth to her offspring (Kartika, 2022).

The child is a trust and a gift from God Almighty, in whom the dignity of a human being is inherent. Children are the buds of potential sources and the younger generation of successors to the struggle for the ideals of the nation in the future, therefore they must be guarded and protected from bad actions or as victims of someone's bad actions (Alam, S., & Fauzan, 2008).

Children are seen as valuable assets for a nation and state in the future that must be preserved and protected considering that children are the weakest humans who are very dependent on adults, so special protection is needed. Protection for children in Indonesia has specifically

been accommodated in the provisions of Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 and henceforth the two laws are referred to as the Child Protection Law., 2021) (Safira, et al., 2021).

Based on the Child Protection Law, efforts to protect children need to be implemented from the foetus in the womb until the child is 18 years old. Protection of children requires the role of the state, parents, family and society, both through child protection institutions, religious institutions, non-governmental organisations, community organisations, social organisations, the business world, mass media, and even judicial institutions (Candra, 2017a).

Based on Article 1 point (1) of Law Number 23 of 2002 as amended by Law Number. 35 of 2014 concerning Child Protection, the definition of a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. So that children who have not been born and are still in the mother's womb, according to the provisions of this Law, have received legal protection (Muqaffi, A., Rusdiyah, R., & Rahmi, 2021).

Furthermore, in relation to children contained in the provisions of the Child Protection Law, Law Number 1 of 1974 concerning marriage also regulates the age limit for marriage between men and women, where the age of marriage for a man is at least 19 years old and a woman is at least 16 years old, if you look at the existing regulations between the Child Protection Law and the Marriage Law there is a gap in the minimum age limit for marriage for women (Rohana & Nasution, 2023).

The Child Protection Law sees that the age of 16 years is still categorised as a minor, then Marriage Law Number 1 of 1974 was revised with Law Number 16 of 2019. In the provisions of Article 7 paragraph (1) of Law Number 1 of 1974 that, marriage is only permitted if the male party reaches the age of 19 (nineteen) years and the female party has reached the age of 16 (sixteen) years, this provision allows marriage at the age of the child in women because in Article 1 point 1 of the Law on the Amendment to Law Number 23 of 2002 concerning Child Protection is defined that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb (Nurcholis, 2022).

The renewal of Marriage Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage has changed the minimum age of marriage from 16 (sixteen) years old for women to 19 (nineteen) years old for both women and men. This change of provision aims to prevent early marriage, which is considered to have adverse effects on health, as well as the potential to trigger sexual violence and human rights violations. However, this provision is not absolute, because the Law still provides an opportunity or opens the way for minors to apply for marriage dispensation through the Religious Court (Halilah, 2022).

An application for marriage dispensation is essentially a deviation from the minimum age for marriage, which is 19 years for both men and women. The paradigm of handling marriage dispensation cases in the Religious Courts changed with the issuance of Law Number 16 of 2019 and PERMA Number 5 of 2019. These regulations prioritise the best interests of the child in order to protect children's rights by limiting the grounds for applying for marriage dispensation (Jasmaniar & Muhdar, 2021).

Law No. 16/2019 regulates the application for marriage dispensation for urgent reasons accompanied by sufficient evidence. However, the inclusion of the marriage dispensation clause gives the impression of a loss of legal assertiveness by the government towards eradicating the practice of underage marriage. The judiciary is the only institution that can grant permission for deviations from the provisions for entering into marriage. However, in fact, in the community of Latoma District, Konawe Regency, Southeast Sulawesi, underage marriages still occur and are carried out without an application for marriage dispensation from the Judicial Institution, both the Religious Court and the General Court. In underage marriages that take place without the determination of marriage dispensation from the Court (Suryanti & Rudy, 2021).

The objective condition of underage marriage in the Latoma community of Konawe Regency is that most of them are still carried out by the Latoma community of Konawe Regency, indicating that there are many cases of married couples who are married underage, it's just that this treatment is carried out secretly without being known or permitted by the KUA orPN but also sometimes falsifying the data of the couple who will marry, known as (*curi umur*).

There are 45 cases that occurred in the Latoma community of Konawe District. (BPS Konawe, 2024) Some cases cannot be processed by the KUA because they are considered to violate procedures and violate the Marriage Law. However, this was not detected by the KUA because when there is a file that enters the KUA Office and it is detected that the age is not sufficient or not in accordance with Law Number 1 of 1974 concerning marriage, the KUA does not process it but gives advice to the court to apply for marriage dispensation. But until now there has never been a community that came to the KUA office with the marriage dispensation file in question.

In the absence of parties or in this case the participation of the state through competent institutions, namely judicial institutions that can guarantee the protection of rights for children. This is because in general, the function of child protection in marriage dispensation is to protect children to achieve their rights, and protect children from mistreatment and acts of arbitrariness of parents or guardians to marry off their children in the event that a marriage is held without a marriage dispensation, there is no clear legal guarantee that the marriage took place at the will of the underage children and there is no certainty regarding the readiness of the child either mentally or physically to build a household (Sukadi et al., 2024). The practice of underage marriage in Indonesia is caused by various things. Starting from the influence of customs, community habits, religion, economic factors, low education, to teenage relationships that cause unwanted pregnancies.

Underage marriage in Latoma District in the period since Marriage Law Number 1 of 1974 was revised by Law Number 16 of 2019 until 2024 still occurs and has not received special attention from the government, community leaders, religious leaders and local governments. That underage marriages that take place without marriage dispensation will result in no guarantee of legal protection from competent institutions that can guarantee that the continuation of the marriage that occurs does not violate the rights of children. Unlike the case with underage marriages that obtain a marriage dispensation determination, the role of the court is very significant in providing guarantees of protection for children, this is because judges in receiving, examining and deciding cases of marriage dispensation cases are required to provide careful legal considerations and cannot be separated from sociological, historical and philosophical considerations (Marwiyah et al., 2023).

## **2. Research Methods**

This research uses a cumulative research method using an empirical juridical approach. Primary sources in this research are married minors, religious court judges and the community. In collecting data, field observation, interview and documentation methods are used. The legal materials used were obtained from the Konawe Regency Population Control, Family Planning, Women's Empowerment and Child Protection Office (DPPKBP3A). This research is also based on the analysis of legal norms in laws and regulations as well as legal opinions of experts in various related literatures and law books.(Amiruddin, 2013) Furthermore, this research is descriptive in nature, namely by explaining, describing and describing the problems and problem solving (Soekamto, 2010).

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### 3. Result and Discussion

#### 3.1. Legal Protection of Minors Who Marry Without an Application for Dispensation of Marriage in Latom District, Konawe Regency.

In the case of a marriage that deviates from the minimum age of marriage without a determination of marriage dispensation from the Court institution but administratively the state has been registered, basically it is a form of administrative violation committed by the marriage registration officer because when referring to the provisions of Articles 20 and 21 of Law No. 1 of 1974 it is quite clearly stated that a marriage registration officer is not allowed to solemnise or assist in solemnising a marriage if he knows, among others, that there is a violation of the minimum age limit for marriage (Basyir, 1997). The concrete form of legal protection that can be sought in the event that there is an underage marriage without marriage dispensation but has been registered by the marriage registration agency, the marriage can be submitted for marriage cancellation, because in terms of administration related to marriage registration, the marriage does not meet the requirements specified in the applicable laws and regulations as specified in Article 7 paragraph 2 of Law No. 16 of 2019 jo Article 6 paragraph 2 letter e of Government Regulation No. 9 of 1974.

According to Law No. 1 of 1974, in principle, a marriage can be annulled if the parties do not meet the conditions for entering into a marriage.

The cancellation of marriage is regulated in the provisions of Article 22 to Article 28 of Law No 1 Year 1974. Marriage annulment cannot be done in the event that a marriage has reached more than 6 (six) months considering that as it is evident in Article 27 paragraph 3 of Law No. 1 of 1974 that if more than a period of 6 months to file a petition for annulment the parties do not file a lawsuit for annulment, the right to file a lawsuit is lost. The procedure for cancelling a marriage in the case of Muslim parties can be requested to the Religious Court in the jurisdiction where the husband or wife lives or where the marriage was held (Saebeni, 2008). The marriage will be cancelled starting after the Court's decision which has permanent legal force and applies from the time of the marriage, this is regulated in Article 28 paragraph 1 and paragraph 2 of Law No. 1 of 1974, for the cancellation of marriage does not apply retroactively to children born from the marriage.

Based on the above, it can be underlined that the marriage of minors must be carried out by legal process through a court decision. If the law has a function as a guardian of order and social engineering, then the marriage dispensation that must be carried out through a court decision is an advance towards the orderly practice of marriage of minors living in the community, so that the event of underage marriage has legal certainty for the protection of children's rights before the marriage occurs and when viewed from the administrative aspect or marriage registration, the marriage will be protected because it has been recognised in the eyes of the law (Salami, 2018).

Finally, after 45 years, Law No. 1 of 1974 concerning Marriage received a breath of fresh air by increasing the minimum age of marriage for women to 19 years or equivalent to men and the changes were officially outlined in Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974, with the hope that changes to the Marriage Law could reduce the number of underage marriages. However, the inclusion of the marriage dispensation clause gives the impression of the loss of legal assertiveness of the government towards eradicating the practice of underage marriage (Makkajareng et al., 2024).

The judiciary is the only institution that can grant permission for deviations from the provisions for marrying, but in fact in society 95% of child marriages in Indonesia occur without an application for marriage dispensation. The method used in this research is normative juridical. This article will analyse the legal protection for children who marry without marriage dispensation from the court as well as the implementation of the judge's consideration in granting marriage dispensation (Bukido, 2018).

The results show that underage marriages that take place without marriage dispensation will result in the absence of legal protection guarantees from competent institutions that can guarantee that the continuation of the marriage that occurs does not violate the rights of children and is different from underage marriages that obtain a marriage dispensation determination, the role of the court is significant in providing guarantees of protection for children, this is because judges in accepting, examining and deciding cases of marriage dispensation cases are required to provide mature legal considerations that are inseparable from sociological, historical and philosophical considerations.

### **3.2. The Role of the Government in Providing Legal Protection for Minors Who Marry Without an Application for Dispensation of Marriage in Latoma District, Konawe Regency.**

The Office of Religious Affairs is the smallest agency of the Ministry of Religious Affairs (kemenag) at the sub-district level. The KUA is tasked with helping to carry out some of the duties of the District Ministry of Religious Affairs Office in the field of Islamic Religious Affairs in the sub-district area. The registration of Islamic marriages is an important task. For this reason, the institution is also obliged to register marriages in accordance with Indonesian law. It even makes important efforts so that the provisions of Islamic marriage law are carried out correctly. This includes the registration of early marriage.

The government's juridical and sociological efforts to prevent the marriage of minors who marry without a marriage dispensation application (Judiasih, 2019).

### **3.3. Juridical Effort**

Furthermore, in Legislation No. 16 of 2019 concerning marriage, if a prospective husband has not reached the age of 19 (nineteen) years and the prospective wife has not reached the age of 19 (nineteen) years, he must obtain dispensation from the Religious Court. The age allowed for marriage in Indonesia is 19 (nineteen) years for men and 19 (nineteen) years for women.

However, that is not enough, at the level of implementation there are still conditions that must be met by prospective brides (catin), namely if the prospective husband and prospective wife are not yet 21 (twenty-one) years old, there must be permission from the parents or marriage guardian, this is in accordance with the Minister of Religion Regulation No.11 of 2007 concerning Marriage Registration Chapter IV article 7 'If a prospective bride has not reached the age of 21 (twenty-one) years, she must obtain written permission from both parents' (Hazairin, 1963).

This permission is mandatory, because at that age it is considered that the parents/guardians still need guidance and supervision. In the model N5 format the parents/guardians must put their signatures and clear names, so that the permission is used as a basis by the PPN/penghulu that the bride and groom have obtained their parents' permission/restuu. Another case is if the bride and groom are more than 21 (twenty-one) years old, then the catin can carry out the marriage without the permission of the parents/guardians (Candra, 2017).

Prevention of marriage is different from cancellation of marriage. Prevention of marriage is carried out before the marriage continues due to the non-fulfilment of the pillar conditions of marriage.

Based on the various definitions of marriage dispensation put forward by experts in State Administrative Law, it can be seen that what is meant by marriage dispensation is an application to be submitted to the Religious Court or a state administrative official with the aim that the Marriage Law does not apply for certain reasons. Marriage dispensation is found in Article 7 paragraph (2) of the Marriage Law which states that in the event of a deviation from paragraph (1) of this Article, a request for dispensation may be made to the Religious Court or an official appointed by both parents of the male and female parties. In the historical record, the

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formation of the Marriage Law has existed since the Marriage Bill submitted by the government in 1973 (Nursariani Simatupang, 2018).

Article 7 paragraphs (2) and (3) explain exactly the requirements or reasons when applying for dispensation of underage marriage at the Religious Court. In order to avoid certain limitations for parents who wish to apply for marriage dispensation for their underage children, they only know that there is a law that regulates the issue. This law determines the principles or principles regarding marriage and everything related to marriage that is adjusted to the development and demands of the times.

However, for the bride-to-be this will be a problem because her parents are the nasab guardians as well as the people who will marry her. Therefore, parental permission and blessing is certainly a very important thing because it will be related to one of the pillars of marriage, namely the existence of a marriage guardian (Sekar, 2023).

Marriage dispensation is needed in terms of fulfilling the orders of Law Number 16 of 2019 concerning Marriage. Yusuf Hanafi said that deviations from the age of marriage in the Marriage Law can be requested for dispensation to the Religious Court or other officials appointed by both parents of the male and female parties. Marriage dispensation is granted by the Religious Court, in connection with Article 7 paragraph (1) of the Marriage Law determining the age limit for marriage, so for men and women who have not met the age requirements must obtain marriage dispensation from the Religious Court.

This dispensation provision has also been adopted or stipulated in Article 15 paragraph (2) KHI, which basically states that the Court in the area where the person who is going to enter into marriage resides at the request of the person can give permission after first hearing these people. But the permission in question does not necessarily have to be obtained from the parents, the presence or absence of parents who want to marry, or other relatives' guardians. The Religious Court may grant marriage dispensation, to fulfil the provision in Islamic law that there is no age limit for marriage in Islamic law. If with careful consideration and to prevent things that religion does not want, then the marriage dispensation must be granted by the Religious Court (Hadikusuma, 2017).

Based on the results of interviews with Mr Rifa'I, it was found that with regard to marriage dispensation, if there is a marriage of a minor as stipulated in the Marriage Law, the judge at the Religious Court gives permission for the marriage of a minor by giving marriage dispensation even though Islamic law does not allow underage marriage but with the size of baligh. The dispensation is only granted if it is requested by the parents or the female party.

Marriage dispensation applies to girls and boys who are not yet 19 (nineteen) years of age by way of a request submitted by their parents to the Religious Court. The effort made by the Religious Court is to summon the parents together with the prospective bride and groom to obtain information on the physical and psychological aspects of the prospective bride and groom, whether they are capable or not. The judgement of the Religious Court is essentially that both candidates and parents must be based on the sacred intention to obtain happiness in marriage (FOKUSMEDIA, 2005).

The judge at the Religious Court bases his consideration of granting marriage dispensation for those who apply for marriage dispensation based on consideration of the 5 (five) laws in Islamic Fiqh, namely wajib, sunnah, haram, makruh, and mubah by arguing on the provisions of the Qur'an and Hadith and other sources to determine whether it is obligatory to carry out marriage or sunnah or haram or makruh or marriage is mubah.

### **3.4. Sociological Effort**

- a) Islamic counselling, the KUA officials of Kubung sub-district are not in charge of all administration. Both in the field of religious counselling and sociological including Islamic marriage is also an important function of some of its officials. The front guard is in the

responsibility of the Islamic Religious Counselor. Based on the Decree of the Minister of Religion (KMA) Number 79 of 1985 that: 'Religious instructors have a role as community mentors, as role models and as connectors of government duties.'

In full, Islamic religious instructors have a very dominant function in carrying out their activities, namely: a) Informative and educative functions, as a preacher who is obliged to preach, convey information and educate the community as well as possible according to the teachings of Islam; b) Consultative function, which is to be involved in the problems faced by the community, both personally, family and as members of the general public; c) Advocative function, moral and social responsibility to carry out defence activities for the people or society from various threats, disturbances, obstacles and challenges that harm *aqidah*, wait for worship and damage morals.

- b) Strengthening cooperation with other agencies and community leaders, the Marriage Preservation Advisory Board (BP4) is another part of the KUA. BP4's effort to reduce the rate of early marriage is to socialise the impact of underage marriage to teenagers in its working area. BP4 administrators try to provide an understanding for the teenage generation regarding marriage, so that they can make the right decision if they want to get married. The average age of underage marriage for women is 19 (nineteen) years and for men is 19 (nineteen) years.

In addition to marriage counselling like this, we usually hold *isbat nikah* or the provision of marriage books to people who do not have them by being remarried. In its implementation, this event usually also collaborates with BKKBN, Puskesmas, Polsek and UPT as partners because it involves students.

However, the KUA still urges the perpetrators of underage marriages to apply for *isbat nikah* to the *Syar'iyah* Court after the age of the underage couple has entered the age of marriage in accordance with the marriage law in order to obtain a marriage book. The challenges faced in socialising the age limit for marriage in the community are parental factors, traditional factors, mass media, promiscuity, elopement, a very shallow religious understanding of the *hadith* literature regarding the permissibility of marriage is *baligh* and the marriage of the Prophet Muhammad with *Aisyah*.

#### **4. Conclusion**

In practice, there are two forms of implementation of underage marriage without marriage dispensation that are often carried out in the community, including first, underage marriages that are carried out under the hand and second, underage marriages that are recorded by the marriage registration institution illegally and in the case of underage marriages that are held without marriage dispensation, it can be seen that there is no legal guarantee from the competent institution, namely the judiciary, which can guarantee the rights of children in the long term, especially in terms of health, education and economy. Unlike the case with underage marriages that obtain a marriage dispensation determination, the role of the court through the determination of marriage dispensation from the judge is very significant in providing legal protection for children, this is because judges in accepting, examining and deciding cases of marriage dispensation cases are required to provide mature legal considerations that are inseparable from sociological, historical and philosophical considerations and the granting of marriage dispensation determinations by judges must be in accordance with the legal norms set out in Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation so that with this, the protection of these children will also be guaranteed. In addition, it is necessary to make changes to the regulations that strictly regulate the granting of marriage dispensation.

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