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Legal Dilemma between Law on Protection Child and Marriage Law in Addressing Early Marriage

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Abstract: *This study aims to analyze marriage regulations with child protection, namely Law Number 16 of 2019 on Marriage and Law Number 35 of 2014 on Child Protection. These two regulations will be analyzed to protect children who marry underage. The study method used is normative juridical. As a novelty, the study tries to compare marriage arrangements with child protection arrangements. The purpose and perspective of underage marriage between the two regulations are different. The research results show that marriage law has a different spirit than child protection law. This is shown in the marriage law, which states that children are still allowed to marry for urgent reasons by applying for a dispensation to the court. However, child protection law explicitly does not allow this. Therefore, there is a need for more detailed regulation regarding the category of "urgent reasons" regulated in the marriage law.*

Keywords: *Marriage; Children; Protection.*

Abstrak: Tujuan dalam penelitian ini adalah menganalisa peraturan perkawinan dengan perlindungan anak yaitu Undang-Undang Nomor 16 Tahun 2019 Tentang Perkawinan dengan Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak. Kedua peraturan tersebut akan dianalisa dalam upaya memberikan perlindungan pada anak yang melaksanakan perkawinan di bawah umur. Metode penelitian yang digunakan adalah yuridis normatif. Kebaharuan dalam penelitian ini adalah bahwa dalam penelitian ini mencoba membandingkan antara pengaturan dalam perkawinan dengan pengaturan dalam perlindungan anak. Tujuan dan cara pandang perkawinan dibawah umur di antara kedua peraturan tersebut memiliki perbedaan. Hasil penelitian menunjukkan bahwa hukum perkawinan tidak memiliki semangat yang sama dengan hukum perlindungan anak. Hal ini ditunjukkan dalam hukum perkawinan masih diperbolehkan anak melakukan perkawinan dengan alasan mendesak dengan cara mengajukan dispensasi ke pengadilan. namun dalam

hukum perlindungan anak secara tegas tidak memperbolehkan. oleh sebab itu, perlu pengaturan lebih rinci mengenai kategori "alasan mendesak" yang diatur dalam hukum perkawinan tersebut.

Kata Kunci: Perkawinan; Anak; Perlindungan.

INTRODUCTION

Indonesia is a country that holds the importance of law in the government process. The concept of the rule of law adopted by Indonesia is derived from the values of Pancasila. This concept of a rule of law is believed to be able to provide happiness for society. In the concept of a legal state, the state not only has the duty of being a night watchman, but is also obliged to be actively involved in various areas of community life in order to achieve state goals.¹ Providing public welfare is one of Indonesia's goals which has been mandated in the constitution.²

The goals of the Indonesian state are stated very clearly in the state constitution, as a legal state which aims to realize general welfare. In this case Indonesia as a state, it plays a role in organizing marriages that can realize the goal of marriage, namely achieving a happy and prosperous family based on the belief in the Almighty God. Marriage is one of the rights that every person must have because it is regulated in Article 10 of Law Number 39 of 1999 on the Protection of Human Rights. The marriage that is built indeed has a noble goal, namely achieving a happy family. Based on current legal provisions, marriage must be carried out according to religion and law. Religiously valid according to the religion one adheres to and believes in. Then sociologically, marriage can be interpreted as a culture and part of human life.³

The urgency of this study is that the practice of underage marriage still occurs very often in Indonesia, both in rural and urban communities. First, based on data from *BPS*, the percentage of child marriages in Indonesia reached 15.66% in 2018, while the percentage of child marriages in Indonesia in 2017 was 14.18%. Secondly, based on data from the case tracking information system (SIPP) of the Batam Religious Court, 21 requests for marriage dispensation have been submitted since January 2020. Third, *Sungguminasa* Religious Court, a city in South Sulawesi, recorded 43 requests for marriage dispensation since January 2020. This is urgent because, normatively, the marriage law allows underage marriages to be carried out by applying for a dispensation in court. While, the regulations regarding child protection explicitly state that parents/guardians are obliged to prevent marriages among children. It is a concern because the positive law governing marriage conflicts with other statutory regulations. Therefore, it is very natural that when implemented in society, the practice of underage marriage is still widespread because positive law is not yet clear in dealing with the practice of underage marriage.

Many previous studies related to underage marriage have been carried out. An example is a study by Hasan Bastomi entitled "Early Marriage and its Impact (Review of the

¹ S.F. Marbun, "Negara Hukum Dan Kekuasaan Kehakiman," *Jurnal Hukum Ius Quia Iustum* 6, no. 9 (1997): 9.

² Oman Sukmana, "Konsep Dan Desain Negara Kesejahteraan (Welfare State)," *Sospol: Jurnal Sosial Politik* 2, no. 1 (2016): 104.

³ Lindha Pradhipti Oktarina, Mahendra Wijaya, and Argyo Demartoto, "Pemaknaan Perkawinan (Studi Kasus Pada Perempuan Lajang Yang Bekerjadi Kecamatan Bulukerto Kabupaten Wonogiri)," *Jurnal Analisa Sosiologi* 4, no. 1 (2015): 75.

Age Limit for Marriage According to Islam and Indonesian Marriage Law)." Most previous studies only discussed marriage from marriage laws without looking at the provisions in laws regarding child protection. Therefore, the current study will specifically discuss the two laws, namely the marriage law and child protection.⁴

Marriage is regulated in Law Number 16 of 2019 on Marriage. In carrying out a marriage, age requirements must be met as regulated in Article 7, namely that men and women who marry must reach a minimum age of 19 years. Then, the regulation also stipulates that if these requirements still need to be met, parents/guardians can apply for dispensation to the court for urgent reasons. However, the regulation does not explain the indicators for urgent reasons. Then this is, of course, contrary to the mandate in Article 26 of the Law on Child Protection that parents/guardians are the subjects who should prevent child marriages from occurring. Based on this background, this study aims to analyze the regulations in marriage law and child protection law in Law Number 16 of 2019 on Amendments to Law Number 1 of 1974 on Marriage.

METHOD

The type of the current study is normative juridical. It can be interpreted simply as a study that asks whether the law is profound and jurisdiction-specific. [1] The type of data used is secondary data consisting of primary legal materials, namely Law Number 16 of 2019 on Marriage and Law Number 35 of 2014 on Child Protection. Then, in answering the problem formulation in this research, a theoretical basis was used, namely the theory of development law by Mochtar Kusumaatmadja.

DISCUSSION

The Regulations in The Marriage Law and Child Protection Law in Responding to The Phenomenon of Child Marriage

The right to marry has been mandated in the constitution, namely in Article 28 B. Then, explicitly, marriage issues are regulated by the law on marriage. The problem is that, in substance, the marriage law "seems" to provide opportunities for people to freely carry out child marriages by submitting a dispensation to the court. Child marriage is a big concern and homework for the Indonesian state because the impact of child marriage is very harmful, namely, children lose their right to education, children lose their health rights due to reproduction in girls who are not ready to become mothers, and the loss of several rights that a child should have.

The practice of child marriage is widespread in Indonesia. This is proven by data from the Religious Court which records that requests for marriage dispensation increased rapidly from January to June 2020. 97% of dispensation requests were also granted by the court.⁵ The practice of child marriage that occurs in Indonesia is motivated by various

⁴ Hasan Bastomi, "Pernikahan Dini Dan Dampaknya (Tinjauan Batas Umur Perkawinan menurut Hukum Islam Dan Hukum Perkawinan Indonesia)," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 7, no. 2 (2016): 355.

⁵ Dwi Hadya Jayani, "Wabah Pernikahan Dini Di Tengah Pandemi Dan Dampak Buruknya," 2021, <https://katadata.co.id/muhammadridhoi/analisisdata/5ff7cb5cdf279/wabah-pernikahan-dini-di-tengah-pandemi->

factors. One of them is cultural and customary factors. For example, what happened in Madura. In Madura, people consider marriage at a young age (nikah ngodheh) a tradition that must be maintained and preserved because it is a legacy passed down from generation to generation.

Then, based on data from the Religious Court (PA) in Probolinggo Regency, it was noted that the number of marriages under the age of 15 in 2008 increased by 500% compared to 2007. In September 2008, there were 10 marriages under that age. of 15. the bride is under 15 years old.⁶

Apart from Madura, this also happened in Indramayu. Child marriages in Indramayu Regency, West Java, always occur. This phenomenon occurs because of the level of poverty experienced by the community. The impacts resulting from the practice of underage marriage are many, such as vulnerability to divorce, domestic violence, and even the health of mothers and babies born. Then, the application for marriage dispensation in Indramayu is the third largest application in West Java after Tasikmalaya and Garut Regencies. Granting marriage dispensation is indeed a dilemma. On the one hand, children are not yet at a suitable age for marriage, but parents bring their children to get married. Then the impact resulting from underage marriage also has many negative impacts on the couples who marry.⁷

Child marriage has the potential to take away human rights, especially women, namely the right to continue their education because most married women will drop out of school and are already busy with household activities; women are also more vulnerable to becoming victims of domestic violence.⁸ Apart from that, the readiness of women under 19 years of age is not yet biologically good enough to conceive and even give birth to a baby. It can also trigger maternal death during childbirth and infant death and even the potential to give birth to malnourished babies. Also, young mothers' minimal knowledge of caring for babies is also a dilemma.⁹

The facts regarding the practice of child marriage cannot be ruled out. The majority of child marriage practices occur in rural areas rather than urban areas. The majority of ages at marriage are under 18 years or 15 years.¹⁰ The Law on Marriage has changed from 1974 to 2019. One of the changes is to set the age limit for marriage, namely 19 years for men and

dan-dampak-buruknya.

⁶ Yudho Bawono et al., "Budaya Dan Pernikahan Dini Di Indonesia," *Jurnal Dinamika Sosial Budaya* 24, no. 1 (2022): 83.

⁷ Abdullah Fikri Ashri, "Kasus Perkawinan Anak Bak Beranak Pinak Di Indramayu," Nusantra, 2023, https://www.kompas.id/baca/nusantra/2023/01/31/kasus-perkawinan-anak-yang-beranak-pinak-di-indramayu?utm_source=newsletter&utm_medium=newsletter_sendclean&utm_content=register&utm_campaign=kontenterkini.

⁸ Shafa Yuandina Sekarayu and Nunung Nurwati, "Dampak Pernikahan Usia Dini Terhadap Kesehatan Reproduksi," *Jurnal Penelitian Dan Pengabdian Kepada Masyarakat (JPPM)* 2, no. 1 (2021): 40.

⁹ Belinda Maswikwa et al., "Minimum Marriage Age Laws and the Prevalence of Child Marriage and Adolescent Birth: Evidence from Sub-Saharan Africa," *International Perspectives on Sexual and Reproductive Health* 41, no. 2 (2015): 58–68.

¹⁰ Marsha Habib, "Pencegahan Perkawinan Anak: Percepatan Yang Tidak Bisa Ditunda" (Jakarta, 2020).

women. It is in line with the constitutional mandate that men and women must be treated equally.¹¹

The changes to the provisions on the age limit for marriage and the application for marriage dispensation as regulated in Law Number 16 of 2019 have reaped many pros and cons. However, the actual aim of changing the law is to save the civil rights of children and women because the phenomenon of underage marriage cannot be stopped in Indonesia, so space is given to legalize underage marriage by submitting a dispensation to the court. However, this provision seems to be misused by society. It also gives the impression that the government approves of underage marriages.¹²

There are several reasons for changing the marriage law, as follows;¹³

1. Indonesia realizes that the practice of child marriage cannot be eliminated. If the practice of child marriage does not receive legal attention, many marriages will be carried out legally and illegally. The presence of the new marriage law seems to provide an opportunity to carry out child marriages, even though the initial intention of changing the marriage law was to protect the civil rights of women and children whose marriages are not legally valid. The hope is that even though they are married under age, the marriage can be carried out legally by applying for a dispensation in court.
2. Low educational background. It is evident from data from the Central Statistics Agency that women who marry below the marriageable age limit have education up to grade 7. In contrast, those who marry within the marriageable age limit have a minimum educational background of junior high school. It proves that women who marry below the age limit determined by law have a low educational background because it is challenging for a woman to complete her education once she is married.

If studied based on the theory of how the law works, it becomes clear that law has an extensive scope and is complex because it has many different faces and versions. The law can appear from its normative side, which tends to be rigid because it wants legal certainty. Apart from that, the law can appear from a philosophical perspective because the law wants the embodiment/concretization of societal values. In the sociological dimension, law desires that the law used as a means (by the state) to regulate relations in society is genuinely compelling. It means that the law is accepted, obeyed, and used by the community as a guide, a basis for resolving problems between them so that the law is functional. At an initial level, it can be understood that law is a rule, a norm, or a positive law (legislative system, law as rules) with a juridical-normative approach, which is the law's main (dominant) face.

¹¹ Pemerintah Pusat Indonesia, "Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan Pasal 7 Ayat 1,"

¹² Rabiatul Adawiyah, "Analisis Batas Usia Perkawinan Pada UU No. 16 Tahun 2019 Atas Perubahan UU No. 1 Tahun 1974 Tentang Perkawinan (Studi Terhadap Pandangan Ilmuan Kota Padang Tentang Perubahan Batas Usia Perkawinan)," *Hukum Islam* 21, no. 2 (2021): 261.

¹³ Hamda Sulfinadia, "Tingkat Kesadaran Hukum Dari Pelanggar Hukum Terhadap Peraturan Perundang-Undangan Tentang Perkawinan Dalam Masyarakat Minangkabau, Pascasarjana IAIN Imam Bonjol Padang" (2016).

However, if it is related to the theory of how the law works, then the law must be seen from a sociological perspective, namely looking at the law in action law in society, whose dimensions are sociological-empirical.¹⁴

If analysis uses the working theory of law, law enforcement can be analyzed since the legal regulations began forming. If we look back at the purpose of changing the marriage law, we see that the change in the marriage law has a good purpose. The marriage dispensation regulated in the Marriage Law is not intended to perpetuate the practice of child marriage. However, only to help child marriages that occur so that the marriage can be legally valid. It is because the government realizes that the practice of child marriage is challenging to avoid. So, in this case, it seems that the government is providing space for child marriage to be carried out, but for urgent reasons. It is done to save the civil rights of women and children.

It needs to be emphasized that the aim of changing the marriage law is to protect the best interests of children because if child marriages are not legally accommodated, there will be many marriages that are not valid in the eyes of the law. It also has an impact on the civil rights of a child born from a relationship that is not legally valid. It is the basis or reason for changing the marriage law to provide a marriage dispensation for prospective brides and grooms who still need to meet the marriageable age requirements.

It certainly seems to contradict the mandate in the law regarding child protection. Children should be subjects whose rights must be guaranteed. Article 26 also emphasizes that parents/guardians should prevent marriage between children.

The Marriage Law has made girls experience discrimination in obtaining their rights as children. Some of the discrimination experienced is as follows:

1. Girls are vulnerable to health discrimination. It is due to a woman's biological unpreparedness to conceive and undergo the process of giving birth to a child. There are many cases of death of mothers during childbirth and even deaths of babies at birth. Apart from physical health threats, pregnancy and the process of giving birth also have the potential to threaten the mental health of an immature woman.¹⁵
2. Children, especially girls, lose the opportunity to pursue education. Once a girl becomes a wife and mother, she will lose the opportunity to continue her education. Every child has the right to education as regulated in the constitution, the law on human rights, and the law on child protection.¹⁶

If linked to Mochtar's Legal Theory of Development, the law should be a means of societal renewal. In theory, the law in question is a written law that should continuously

¹⁴ Abdul Jalil, "Penegakan Hukum Di Pengadilan Dan Dimensi Spiritualitasnya (Aspek Yang Sering Terlupakan)," *Administrative Law and Governance Journal* 4, no. 2 (2021): 316.

¹⁵ UNFPA, "Marrying Too Young," 2012, <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>.

¹⁶ Ahmed Sadaf et al., "Psychological Impact Evaluation of Early Marriages," *International Journal of Endorsing Health Science Research* 1, no. 2 (2013): 86.

accelerate development. Development law theory provides a view of the dominant role of legislation in Indonesia, which is one of the objective conditions in Development Law theory. The aim of legal order shows that the law functions as a means of maintaining order in society. This kind of function is conservative, meaning it maintains and maintains what has been achieved. This function is needed in a developing society. As a written law, the law provides order for society and must also play a role in reform. Written laws must be able to change people's behavior.¹⁷

These written legal rules should not only provide order for society but must reach the level of bringing about change in society. However, these two written laws conflict with each other and have different spirits in curbing or even preventing child marriages.

CONCLUSION

Children are subjects that must be protected because they cannot yet protect themselves. One of the phenomena that occurs in children is child marriage. Marriage is indeed everyone's "right." However, suppose the marriage occurs to a child. In that case, the marriage will have various negative impacts and violations of children's rights, such as the right to education and health and not to be discriminated against, especially when married. The phenomenon of child marriage often occurs in Indonesia, both in cities and villages, for reasons of custom and culture. The law stipulates that child marriage is permitted by applying for a dispensation to the court. It is regulated precisely to save the civil rights of children and married women. However, the marriage law is normatively misused to conflict with Law Number 35 of 2014 on Child Protection. Therefore, it is necessary to regulate in more detail in Article 7 of the Marriage Law regarding the indicators of "urgent reasons" used as the basis for applying for a marriage dispensation in court. Then, the judge in court must also be more selective in granting marriage dispensation applications submitted by parents/guardians.

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¹⁷ M Zulfa Aulia, "Hukum Pembangunan Dari Mochtar Kusuma-Atmadja: Mengarahkan Pembangunan Atau Mengabdikan Pada Pembangunan?," *Undang: Jurnal Hukum* 1, no. 2 (2018): 371.

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