

Juridical Analysis of Child Marriage Tolerance on Living Habits in Society Against Marriage Law

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Abstract. *The diversity of the legal system in Indonesia triggers differences of views on the age limit of marriage between customary provisions and regulations in the law. The practice of people who still tolerate underage marriage is contrary to Law No. 16 of 2019, which expressly sets the age limit for marriage. This study aims to examine the position of customary law that still tolerates early marriage in the perspective of marriage law, and explore the possible limitations that can be applied by positive law to bridge the gap. This study uses normative legal research methods by examining various laws and regulations and related legal concepts. Data was obtained through literature studies sourced from laws and various articles relevant to the research topic. The results of the study show that customary law recognizes and provides space for the practice of child marriage, while the law provides that such tolerance can only be granted through the mechanism of marriage dispensation based on strong grounds. This difference of views requires dialogue and deliberation between traditional leaders and the government in order to achieve the harmonization of marriage law in Indonesia.*

Keywords: Customs; Juridical; Marriage; Tolerance.

1. Introduction

Marriage is a legal way to distribute biological needs protected by law. This is stated in the 1945 Constitution Article 288 paragraph (1) which certifies the right for anyone to carry out a legal marriage in an effort to form a family and continue to be married (Ilham et al., 2024). The implementation of marriage cannot be carried out at will because marriage contains legal values that involve couples who want to carry it out. Marriage has clear rules in the law and needs to be obeyed by all Indonesian people (Meliza et al., 2024).

Marriage regulations often face material problems, especially in the Constitutional Court Decision Number 22/PUU-XV/2017. The decision refers to the age limit for marriage perpetrators as stated in Law No. 16 of 2019. This gives rise to negative opinions that reveal that the limits given are a form of discrimination against women's rights, including the right to determine when they need a life partner (Putra & Fitriyah,

2024).

The age limit for marriage is not meant to deny women's rights. These limits are made to accommodate more crucial women's rights. One of these crucial rights is the right to continue education (Wulandari et al., 2024). Indirectly, this marriage age restriction is an advice to parents who want to marry their minor children, that education is very important to develop the resources owned by their children which will ultimately provide them with welfare. This is quite reasonable, considering that Law No. 16 of 2019 with a minimum age limit of 19 years is basically not an age limit for education, but at that age access to education at a higher level is still needed. However, this gives an implicit meaning that refers to the importance of parents to consider children's education as the government's main goal is to educate the nation's life through education.

Child marriage also has other negative impacts apart from the unfulfilled right to education. These impacts are in the form of limited association, the possibility of depression, vulnerability to divorce, affecting reproductive health, and domestic violence (KDRT) (Siska et al., 2022). This condition is very concerning, especially the cases of underage marriage that occur in Indonesia are quite concerning. According to UNICEF data, Indonesia ranks eighth globally and second in ASEAN in terms of underage marriage since 2022 (Ridhowati et al., 2024).

The high number of cases of underage marriage that occurs in Indonesia is inseparable from the habits that have been ingrained in society that is thick with customs. Some cases show that some customs embraced by certain rural communities encourage their daughters to get married quickly even though they are still minors for fear that their children will be old virgins (Dewi et al., 2024). Although marriage is clearly contrary to the Positive Law that applies in Indonesia, the postulates of customary and religious law, especially Islam, which do not question it, cause them to think about continuing to carry it out.

Underage marriage is clearly contrary to Law No. 16 of 2019 which limits the minimum age of marriage to 19 years, as well as Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection which views marrying minors as depriving children of their rights (Bahroni et al., 2019). *It's just that the problem is the pluralism of laws that apply in Indonesia. Legal pluralism by Sally Engle Merry is a situation in which two or more legal systems coexist in the same social field* (Ratuanak, 2023). This refers to the meaning of legal pluralism as the phenomenon of two or more legal systems recognized in the context of a homogeneous social environment.

Customary law that does not question underage marriage is something that needs to be discussed because although on the one hand it is contrary to positive law, on the other hand its existence is recognized because it is in Article 5 of the Law. No. 48 of 2009 recommends to judges that when carrying out their judicial duties, they should always explore, understand and follow the legal values and sense of justice that live in society, especially like a society that is still consistent with the implementation of its customs (Suherman, 2019).

Customary law basically does not recognize the term age limit for the legalization of a marriage or marriage (Choirunnisa et al., 2022). For example, Balinese customary law does not question the age limit in carrying out the marriage process because for the Balinese people there is absolutely no uniform criterion for the maturity of a person (Sudantra & Laksana, 2019). Another example that happened to the Tolaki Tribe in the Konawe Regency area, Southeast Sulawesi Province is one of the tribes that still hold fast to customs. The Tolaki tribe has never questioned the issue of marriage age at all because the most important thing is the blessing of both parties who want to get married and compliance with the customary provisions that must be followed. This fact can be seen from one of the cases of underage marriage as a result of customary violations as stated in Konawe Regency Regional Regulation Number 1 of 2018 Article 15 related to the implementation of customary *Mombokomendia*. Even though the man and woman who undergo this type of marriage are still minors, but by the agreement of their families and the applicable customary provisions, both can be married in a customary view. This when viewed from a positive law, it should be through a marriage dispensation application which can be granted or rejected. Although there is a gap between customary law on the tolerance of underage marriage and the Marriage Law, it is necessary to study more deeply to determine the position of customary law that provides such tolerance according to the marriage law and the possible limitations that can still be considered by positive law over the gap considering that in Article 18 B paragraph (2) of the 1945 Constitution as a result of the amendment which the article recognizes the existence of the customary law community (Burhanudin, 2021).

2. Research Methods

The scientific study was carried out using a normative legal approach through legislation and conceptual (Soekanto, 2007). The data studied was obtained through literature studies sourced from the Marriage Law, the 1945 Constitution, journals on marriage tolerance of indigenous peoples, Law No. 39 of 1999 concerning Human Rights, and laws and articles related to this research issue. The data that has been obtained are analyzed qualitatively with the aim of understanding the phenomena related to the research holistically, through the process of description in the form of words and language patterns, in a special context that is natural (Gunawan, 2022).

3. Results and Discussion

3.1. Tolerance of Underage Marriage from a Customary Perspective

Customary law basically tolerates marriage issues held by couples who are underage according to the Marriage Law. Customary law does not provide a main indicator that can be used as a benchmark for a person's adult age. This has consequences in the absence of a legal basis that can be used as a benchmark for the implementation of marriage. Of all the criteria for maturity that experts have expressed, it will not apply equally to everyone in this world. Some cases may show signs of maturity will be apparent at the age of 19 but in other cases it occurs under the age of 19. This means that there is no standard benchmark that can be used to limit everyone's maturity (Ghufron, 2016).

The absence of a standard limit on a person's maturity makes customary law still provide opportunities for couples who want to carry out marriage. Adulthood in a customary perspective is not based on a certain age quantity. In the process, the family,

in this case the parents of both parties (husband and wife) who have married underage have the responsibility to provide assistance in supporting their lives (Choirunnisa et al., 2022). The support of the families of underage marriage perpetrators is also considered in the perspective of customary law. Customary law views the marriage bond that occurs between a married couple not only as a civil bond but also related to customs and kinship (Yustianugraha, 2022).

Underage marriage is allowed from a customary point of view as long as it is not included in the category of prohibitions according to customs and religion that has become part of the provisions of the applicable customary law. Underage marriage is not part of the prohibition of customary law (Hilman, 1992). Although various regions in Indonesia have cultural differences, in general they do not question underage marriage (Ningrat, 2018).

Customary law generally provides tolerance for underage marriage that is adjusted to the background of the marriage that occurs. This will be different for each region in Indonesia. Some regions provide this tolerance on the basis of arranged marriage (Akhiruddin, 2016) or because of pregnancy out of wedlock (Helvira et al., 2020). But in other areas it can be caused by embarrassment if the daughter becomes an old virgin (Najib, 2019). When viewed from the various reasons that make customary law provide tolerance, in fact customary law does not provide space for everyone who will marry a minor.

Finally, it can be understood that customary law does not view the age of marriage quantitatively as an absolute requirement for those who want to carry out marriage. The main conditions that are used as the basis for its implementation are the biological readiness concerned, the beliefs adhered to and the family agreement. Thus, normatively, customary law in general does not prohibit or provide the widest tolerance for underage marriage.

3.2. Tolerance of Underage Marriage Perspectives on Marriage Law

Tolerance of underage marriage from the perspective of the Law can be seen in the case of marriage dispensation. According to Supreme Court Regulation (MA) Number 5 of 2019, marriage dispensation refers to the granting of a marriage license by the court to married couples who are under 19 years old. Such tolerance can be given if there is an urgent reason accompanied by strong evidence as the basis for its acceptance. Marriage Law No. 1 of 1974 concerning Marriage as amended by Law No. 16 of 2019 in Article 7 paragraph (2) states that a marriage dispensation can be given if there is a very urgent reason accompanied by sufficient supporting evidence.

In the explanation of Article 7 Paragraph (2) provides an explanation of the urgent reason, namely the situation has no other choice and is very forced to get married. This provision provides guidelines for the tolerance of underage marriage only given with urgent reasons so that the marriage must be carried out even though the couple is still a minor. The rule does not provide a firm limit on urgent reasons so that it requires precision and caution for judges in formulating matters related to whether urgent reasons have been fulfilled or not. Likewise, the judge in granting the dispensation application is accompanied by sufficient evidence. The provision of tolerance for underage mating must go through a process that is not easy. The judge must give advice first to the parties before giving a determination, namely advice related to marital risks, such as the possibility of stopping children's education, reproductive health, economic, social and psychological impacts of children and the potential for

domestic violence (KDRT). The judge must also listen to the child's testimony in examining the marriage dispensation case as in article 7 paragraph (3) of the Marriage Law, then in Article 15 letters a and b of the Supreme Court Regulation (MA) Number 5 of 2019. In this case, the judge needs to identify the extent to which the child knows the proposed marriage plan, psychological condition, health and readiness of the child and identify whether there is coercion against the child/family in submitting the marriage dispensation application. In addition, the judge also explored whether marriage is the best thing for the child with all the risks that he must experience and whether there is a very urgent reason that the child must be given permission to marry (given marriage tolerance). The urgent reason according to the judge's consideration in interpreting article 7 paragraph 2 of Law No. 16 of 2019 amendments to Law No. 1 of 1974 concerning marriage which allows the judge to provide marriage tolerance through the acceptance of marriage dispensation applications, can be in the form of pregnancy conditions so that legal discretion is needed by prioritizing the interests and safety of the child in the applicant's womb (Tanjung, 2021).

If the applicant's child is really pregnant after committing adultery, then based on Presidential Instruction No. 1 of 1991 concerning the dissemination of the Compilation of Islamic Law (KHI), Chapter VIII of Pregnant Marriage is the same as the issue of marrying a pregnant woman. Article 53 of the Chapter contains three (3) paragraphs (Hariyono & Anwarudin, 2022), that is:

1. A woman who is pregnant out of wedlock, can marry the man who impregnates;
2. Marriage with a pregnant woman mentioned in paragraph (1) can be carried out without waiting for the birth of her child;
3. By having a marriage when the woman is pregnant, there is no need for remarriage after the child is born;

The provision of tolerance for underage marriage through the application of a kawain dispensation is not immediately accepted only with the words "pregnant out of wedlock". Although it is true that there is an admission of the applicant that the person concerned has, but when referring to Article 7 paragraph (1), the parents of the man and/or the parents of the woman can request a dispensation to the Court on very urgent grounds accompanied by sufficient supporting evidence. One of them is that the applicant must submit more than 1 (one) witness because if only 1 (one) witness is submitted, the witness cannot be trusted (*unus testis nullus testis*).

The provision of tolerance in the view of the Marriage Law is based on the best interests of the child. Pregnancy out of wedlock is an urgent condition that can threaten the safety of babies conceived by underage women who are pregnant out of wedlock, as a result of the possibility of excessive stress when having to bear the burden of taking care of a child without the child's biological father. In addition, psychological shocks can also accompany the life of minors who become pregnant out of wedlock when they are not given mating tolerance. Even if this application is accepted, it will still give rise to a negative stigma in the community, because the child who has received the dispensation has already been known to the community. For the community, it is not a question of whether the person concerned has been married after adultery or not, but rather the fact that the person concerned has committed adultery and this is an act of violating the norm. However, by providing tolerance for marriage out of wedlock in these cases, it will be related to the frequency level of the negative sticima. Because if the child is born without a father, the frequency of

negative stigma will be felt by the child. This is not contrary to the content of the Convention on the Rights of the Child Part I Article 3 which reads "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Bahter, 2020). This means that the interests of the safety of the baby and the life of the child who are pregnant out of wedlock as well as the possibility of psychological pressure in the society that they will feel must be prioritized so that the law should tolerate underage marriage.

Tolerance for underage marriage is not granted to applicants who cannot provide evidence of a very urgent or emergency condition. Only very urgent reasons accompanied by strong evidence can the application be considered for acceptance. Underage marriage through dispensation without sufficient supporting evidence as referred to in paragraph (1) of Law No. 16 of 2019 turns out to be more dominant, causing negative impacts in the form of; loss of the right to education, limited association, depression, vulnerable to divorce, affecting health, and domestic violence (domestic violence) (Siska, Dewi, & Syamsiah, 2022). Therefore, in the process of considering the acceptance or rejection of marriage tolerance through the submission of an application for a marriage dispensation, it is always based on the best interests of the child, In providing certainty regarding the best interests of the child, the first thing to do is to look at the magnitude of the negative impact caused if the marriage dispensation application is accepted. The possible negative impacts are seen from: (1) The possibility of stopping education for children; (2) The sustainability of children in taking compulsory education for 12 years; (3) The child's reproductive organs are not ready; (4) Economic, social and psychological impacts on children; and (5) Potential for disputes and domestic violence. If the negative impact caused turns out to be greater, it is also necessary to consider the acceptance of the application submitted.

Thus, marriage tolerance in the view of the Marriage Law can only be granted through the acceptance of marriage dispensation applications. The acceptance of the dispensation can only occur due to an emergency or very urgent condition that can threaten the safety of the child's life and psychology if it is not granted. Tolerance of underage marriage cannot be granted without emergency conditions because it can hinder the fulfillment of children's basic rights.

3.3. Marriage Law Perspective on Tolerance of Underage Marriage by Society

The space of tolerance provided by customary law for underage marriage has a recognized legal basis. Article 18B paragraph (2) and Article 28I paragraph (3). Article 18 B paragraph (2) states that the State recognizes and respects the units of customary law communities and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the law. Article 28 I paragraph (3) states that the cultural identity and rights of traditional communities are respected in line with the development of the times and civilization (Retno Kus Setyowati, 2023). Thus, the state recognizes and respects the existence of customary law communities.

The granting of tolerance for underage marriage by indigenous peoples can still be accepted by the Law through the process of applying for marriage dispensation when faced with urgent conditions as explained in article 7 paragraph 2 of Law No. 16 of 2019. Apart from urgent conditions, the marriage tolerance given by indigenous peoples is contrary to the view of the Marriage Law. Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power does state that the provision to pay attention to

the values that live in society is intended so that the judge's decision is in accordance with the law and the sense of justice of the community. However, in deciding the case, the judge must also refer to the applicable law so that policy synchronization is very necessary in underpinning the judge's decisions, in this case the Determination of the Marriage Dispensation Application.

The application for tolerance of underage marriage through the marriage dispensation process essentially shows that the community still believes in the Law. The granting of marriage rejection through dispensation is not a loophole to block the mandate of Law No. 16 of 2019, but rather strengthens the purpose of the law. Because if the law is not excluded for urgent reasons such as pregnancy out of wedlock, it is feared that the State's obligation to protect its citizens from negative things that can harm them will not be fulfilled and create more space for other problems to come to the surface. Then, when it is said that the decline in the number of dispensation applications is considered an indicator of the rise of illegal marriage, then it is based on the principle of truth rejected, because scientific evidence is needed to answer it. This will result in long-term consequences because the decrease in the number of dispensation applicants could mean that the entire community has understood and implemented the mandate of Law No. 16 of 2019, or the community does not understand and do not implement the mandate of the Law.

Understanding of Law No. 16 of 2019 does not mean that there is less or no understanding of indigenous peoples who do not question the age limit for marriage. It's just that the law has given indigenous peoples the right to regulate their marriage laws. The existence of this recognition has given birth to legal pluralism which has an impact on different views on the age of marriage according to customary law and positive law in Indonesia. The main foundation of pluralism cannot be separated from the reading of Article 18B paragraph (2) of the Constitution of the Republic of Indonesia in 1945 which states that "The State recognizes and respects the units of customary law communities and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as stipulated in the law". Through the evidence stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, it can be understood that the tolerance of minors by indigenous peoples without any restrictions that are consistent with positive law is not recognized by the state. This is due to the fact that the substance of the norms contained in it is completely inconsistent with the applicable laws and regulations in Indonesia (Sudantra & Laksana, 2019).

Broadly speaking, customary law that provides marriage tolerance does not get recognition according to the Marriage Law because it legalizes in general the tolerance of underage marriage without any age limit in accordance with the Marriage Law in force in Indonesia. Marriage tolerance based on customary law views can provide a great opportunity to cause a high rate of underage marriage. For this reason, legal synchronization is needed as a way out. This synchronization will only be possible if customary law norms adapt to state legal norms, not state laws that adapt to customary norms. This can be done through deliberations between the government and traditional leaders throughout Indonesia.

The synchronization of customary law and positive law has a great opportunity to be realized. This condition can be seen from the process of accepting religious law or certain beliefs by customs, where customary law can adapt to religious law. This can

also happen to customary law against positive law in Indonesia. Therefore, it is very necessary to synchronize customary law and positive law through the process of revising customary law norms regarding the minimum age limit of marriage which must be adjusted to the provisions of the minimum limit of the age of marriage specified in the applicable marriage law in Indonesia.

4. Conclusion

Customary law provides tolerance for underage marriage to every couple who wants to marry with terms and conditions that have been regulated according to the customs in each region and its essence is recognized by law. Age restrictions are not the main requirement in the implementation of marriage by indigenous peoples, making the practice of underage marriage according to customary law can continue in every region in Indonesia. According to the positive legal view through the Marriage Law in Indonesia, tolerance for underage marriage will only be granted through the process of submitting an application for marriage dispensation. The acceptance itself is based on very urgent or emergency conditions by paying attention to the fulfillment of basic rights of children. Apart from very urgent conditions, the tolerance of underage marriage is not justified by the Marriage Law in Indonesia. This condition makes there is no synchronization between customary law and positive law in Indonesia in terms of the age limit of marriage which has an impact on the chances of legality of underage marriage which continues to occur in the midst of Indonesian society. Therefore, a deliberation process is needed between all traditional leaders in Indonesia and the government in the context of synchronizing marriage law with the condition that customary law must adapt to the positive law that applies in Indonesia.

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