

## Marriage Dispensation From the Perspective of Women's Protection (Case Study of Determination Number 206/PDT.P/2023/PA.BADG)

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Received: 5 July 2023  
Revised: 18 July 2023  
Accepted: 28 July 2023

### Abstract

A marriage dispensation is a request for court permission to allow individuals to marry when they don't meet the legal age requirements. This study aims to analyze Determination Number 206/Pdt.P/2023/PA.Badg, focusing on the judge's rationale in granting marriage dispensation cases. The study reveals that the judge's decision is primarily based on the applicants being underage. However, the legal basis employed appears discriminatory and neglects women's protection, as it relies on Law No.1 of 1974, Perma No. 5 of 2019, and the Compilation of Islamic Law. Notably, the judge does not consider the principles outlined in Law No.7 of 1984, pertaining to the Convention on the Elimination of All Forms of Discrimination Against Women. Employing a juridical-normative approach and relying on secondary data sources, this research sheds light on the complexities of marriage dispensation cases and their legal implications.

**Keywords:** Marriage Dispensation, Women's Protection, Decision Analysis

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**How to Cite:** Patmanasari, R., Salma, N., Ahmad, F., & Kania, D. (2023). Marriage Dispensation From the Perspective of Women's Protection. *International Journal of Education, Information Technology, and Others*, 6(3), 487-496. <https://doi.org/10.5281/zenodo.10152171>

## INTRODUCTION

In the last thirty-six years, improvements have been recorded in all facets of life along with ongoing efforts to achieve the emancipation of women and their movements. These efforts aim to end discrimination stemming from gender differences and exclusion of rights (Gufran & Kurdi, 2013).

Women are considered the "second sex," which is reflected in their recent marginalization. This difference in status between the two sexes causes one sex to have a lower status than the other. In order to reach a higher level of civilization, women are considered to have to have an attitude that controls nature (Mosse, 1993).

The production and expansion of inequality in the relationship between men and women has resulted from efforts to "domesticate" women. Indonesia has made a legal commitment to abide by the principles and values of human rights, both at the national and international levels, as a democratic country and member of the United Nations (UN).

Various notions of freedom, including negative and positive freedom, form the conceptual basis for the concept of democracy. The phrase "freedom from" is used to convey the idea of negative freedom, which suggests that the government should play a minimum role in ensuring the security of its citizens and safeguarding their civil and political freedoms. Meanwhile, "freedom to" is how the idea of positive freedom is expressed.



According to this perspective, having the freedom to use and develop human rights, one of which is by protecting women's rights, one of which is in marriage and family, women have the same rights as men, the right to choose a partner freely, including considering carefully and thoroughly before deciding whether to become a partner or not, whether with him can achieve the goal of marriage sakinah mawaddah warahmah, as stipulated in QS. Ar-rum: 21

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً  
وَرَحْمَةً ۗ إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يُتَفَكَّرُونَ

"And among the signs of His greatness is that He created for you mates of your own kind, so that you may be attracted to them and feel secure in them, and that He may create in you love and affection. Indeed, in such there are signs (of Allah's greatness) for those who think."

After that, it can only be decided whether each candidate is suitable or not. then proceed to the marriage stage. This compatibility in Islam is known as kafa'ah (kufu). Therefore, a person planning a marriage must carefully evaluate their prospective partner, especially the age of their prospective partner. In order to later maintain a well-functioning marriage, as well as to maintain the health of the husband and wife, as well as to maintain the health of the children of the couple. There is a widespread belief among the general public that a person who has a family through a legal marriage has a better outlook on life from the point of view of the state and religion. The marriage regulations in Indonesia stipulate that a person entering into a marriage must fulfill several requirements, both administrative and substantive. These various marriage requirements are regulated so that the parties involved in the marriage can obtain legal certainty and so that the purpose of marriage can be realized.

To be considered legally mature, both in thought and action, and to be able to perform legal acts and take responsibility for their actions, a person is usually required to reach the prescribed age for marriage. Although they may not yet have full independence, individuals in this situation are recognized as legal subjects under international human rights law. The age limit for marriage has long been a contentious issue in society.

The Quran and hadith do not explicitly mention a minimum age requirement for marriage. In Islam, the general prerequisites for marriage are being of sound mind and reaching the age of puberty, which are two widely accepted standards.

The view of some professionals, such as Marc Hendry Frank, is that marriage should be entered into by the prospective groom if he is between 25 and 30 years old, and for the woman if she is between 20 and 25 years old, with health considerations. On the other hand, Yusuf Musa argues that maturity begins at the age of 21, as modern society requires maturity before marriage, given the lack of life experience and learning period.

In civil law, the age of majority is often set at 21 years of age, given that marriage is a legal event and a fundamental human right that must be protected. Legal protection for underage marriage, especially in the context of protecting women, is also important (Benu, 2012).

As stated in Law Number 1 of 1974 jo Law Number 16 of 2019 which regulates the age of marriage in Indonesia: Both a man and a woman must be 19 years old to be legally married under Article 7 Paragraph (1).

Article 7 paragraph 2 expressly legalizes marriage dispensation for children who have not reached the age of marriage; Article 7 paragraph (2); Article 47 paragraph (1); which states that children under 18 years of age or have been married, are subject to parental authority; and Article 50 paragraph (1); which states that children under 18 years of age who have never entered into marriage are not subject to parental authority, but are under the authority of a guardian.

Basically, the law contains the supremacy of important ideals, especially justice, in the law enforcement process. Legal substance (including written and unwritten legal rules, as well as court decisions), legal structure (including law enforcement institutions, including law enforcers), and legal culture (including opinions, habits, ways of thinking, and ways of acting, both from law enforcers and citizens), according to Lawrence M. Friedmen, are factors that determine the law enforcement process (Khoidin, 2008).

Meanwhile, I support research on women's legal rights in the implementation of marriage in relation to marriage dispensation in court decisions in Feminist Legal Theory. Marriage dispensation in religious court decisions.

## **RESEARCH METHOD**

This research is a qualitative study with a descriptive juridical-normative approach. The research data sources mainly come from secondary documents, including religious court judges' decisions, laws and regulations, books, journals, articles, and other sources relevant to the object of research. The data collection technique used is a literature study, by identifying and collecting various main and supporting literature sources related to the focus of the research problem. This approach allows researchers to analyze legal issues relating to marriage dispensation and evaluate the legal arguments used in court decisions. As such, this research aims to provide a deeper understanding of marriage dispensation cases and related legal aspects (Soekanto, 2010). With qualitative data analysis techniques, processed and discussed using the deductive method (Lexy 2006).

## **RESULTS AND DISCUSSION**

### **Dispensation for Marriage**

Exceptions for Married Minors, the Court will offer prospective couples who have not reached the legal minimum age for marriage a dispensation to marry.

Marriage Law No. 1 of 1974 jo Law No. 16 of 2019 regulates the age limit for marriage for both men and women is 19 years old. This republican law can be used to request dispensation to the court or another official chosen by both parents of the male and female parties.

One of the decisions regarding marriage dispensation that was granted was a decision by the Judge of the Bandung Religious Court with the consideration of carrying out the marriage both according to the provisions of Islamic law and applicable legislation has been fulfilled except for the age requirement for children who have not reached the age of marriage; the judge uses the basis of Qaidah

Fiqhiyah in determining the dispensation of marriage age which means, avoiding damage / mafsadah must take precedence over maintaining goodness / masalah.

In practice, especially in religious courts, each judge's opinion is in accordance with the fiqh book he or she refers to. This is due to the absence of standardized rules in the Religious Courts (PA). Judges' decisions are often different even in the same case, so it can be said that the subjectivity of judges is very high. From the point of view of legal theory, this means that religious court products are contrary to the principle of legal certainty.

### **1. Legal Protection for Women in the Decision of the Judge of the Bandung Religious Court**

Legal protection contained in the Determination of the Bandung Religious Court Judge, Article 7 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and all other applicable laws and regulations relating to this case; Article 5 of Perma Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications; Articles 144 and 145 HIR and Articles 169, 171 and 172 HIR; Kaidah fiqhiyah and all other legal provisions relating to this case.

The judge's consideration in the decision did not refer to the Protection of Women in the 1945 Constitution of the Republic of Indonesia. The 1945 Constitution of the Republic of Indonesia (UUD RI 1945) which has been amended with provisions that take into account the principles of non-discrimination and gender equality. Law No.7 of 1984 on the Convention Concerning the Elimination of All Forms of Discrimination Against Women; The Government of the Republic of Indonesia's support for the objectives of the Convention Concerning the Elimination of All Forms of Discrimination Against Women (Women's Convention), as stated in the Government's statement in the House of Representatives, Jakarta, on February 27, 1984. Law Number 23 Year 1992 on Health; The regulation of protection of women's health rights in the framework of national and international human rights in Indonesia is the protection of women in reproductive health rights. Health is a state of well-being of the body, soul and states that parents are obliged and responsible for preventing marriage at the age of children. With reference to Article 6 Paragraph (2). Article 6 Paragraph (2). Law No.1 of 1974 concerning Marriage, states that to enter into a marriage a person who has not reached 21 years of age must obtain permission from both parents (Sumiyati, 2007). From several opinions and referring to the Child Protection Law, with the Law Thus underage marriage and the conditions for a person to be allowed to marry contained in Law No.1 of 1974 concerning Marriage Article 7 Paragraphs (1 and 2) are not relevant to UUPA and Article 6 Paragraph (2) of the Marriage Law itself is an inconsistency with the Marriage Law currently in force. Thus, it is necessary to amend this article so that there is synchronization with article by article in the UUP and harmonization with the UUPA and laws that were born later after the Marriage Law ".

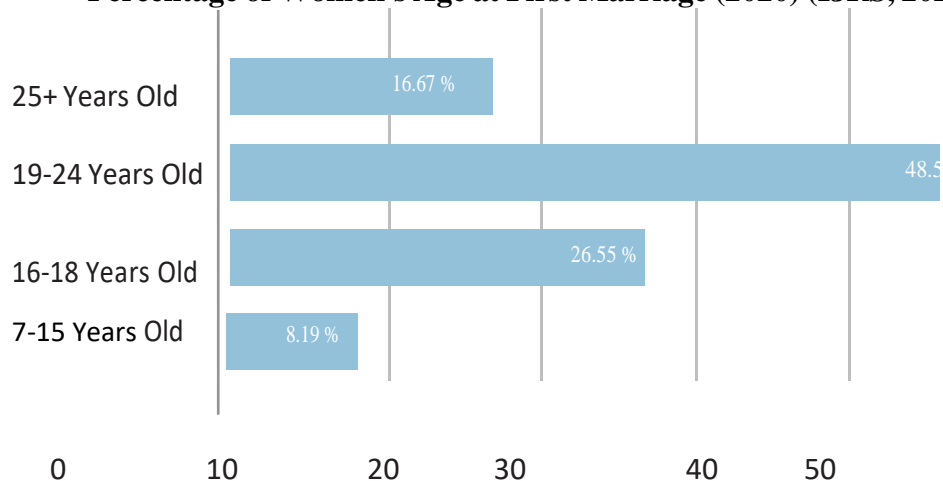
### **2. Marriage Age Limits and Law No. 16 of 2019**

The age of marriage is the age or age at which a person is considered physically and mentally ready for marriage. The age limit for marriage is referred to as the minimum age limit or the minimum age at which prospective couples are allowed to marry. This age limit is in accordance with the principles contained in

the marriage law, namely that prospective spouses must be mature both physically and mentally in order to achieve the goals of marriage without ending in divorce and getting good offspring. The enactment of Law Number 16 of 2019 concerning Marriage, according to the author, has contributed to preventing underage marriage in accordance with the provisions of the law. However, this law also regulates the permissibility of underage marriage very strictly, which must go through a hearing mechanism in court first in order to obtain a marriage dispensation permit. This law also plays a positive role in achieving the goals of marriage and the wisdom of the parties (Infid n.d).

According to Law No.16 of 2019 article 7 paragraph (1) marriage is only permitted if the man and woman have reached the age of 19 years. Thus, underage marriage is a marriage between a man and a woman who have not reached the minimum age limit set by law and the bride and groom are not mentally mature. The 2020 National Socio-Economic Survey (Susenas) showed that 48.59% or the majority of Indonesian women entered into marriage for the first time at the age of 19-24 years.

**Percentage of Women's Age at First Marriage (2020) (IJRS, 2022)**



The remaining 26.55% of girls were married at the age of 16-18 years, and 8.19% of girls were even married at a fairly early age, namely 7-15 years (Komnas Perempuan, 2020). There are various factors behind child marriage (BPS, 2020), and the high number of marriage dispensation applications at the Bandung Religious Court, namely:

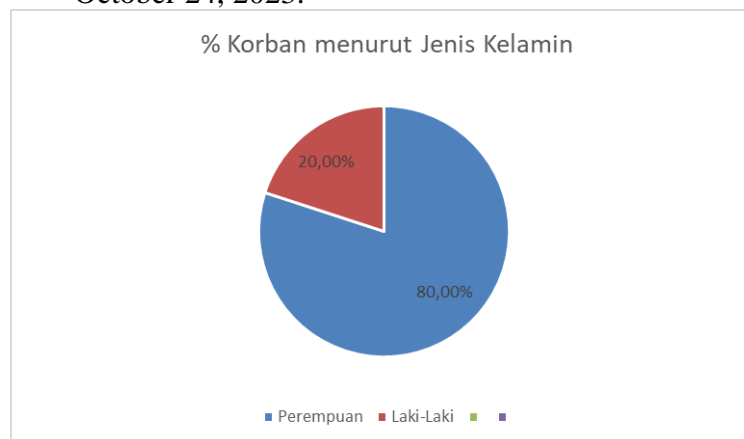
In underage marriage there are several influencing factors including the following:

The factor of pregnancy outside of marriage, the reason the couple is not old enough to get married is because the partner is pregnant before marriage due to promiscuity. Economic factors, marriage before legal age due to economic difficulties and it is hoped that early marriage can reduce the burden on parents. The promiscuity factor Parents are afraid of promiscuity which is certainly contrary to the rules set by Allah SWT regarding public morals. This factor dominates premarital pregnancy. The factor of parental concern, parents are worried about their child's relationship with a partner who is too close, afraid that their child will provoke unwanted things by doing things that are prohibited by religion.

### 3. The Impact of Underage Marriage According to Law No. 16 of 2019

Some of the impacts of underage marriage are as follows:

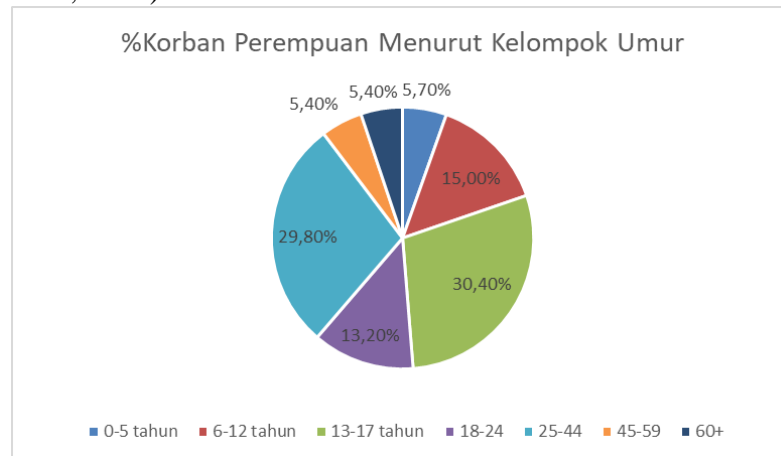
- a. Biological Impact, Biologically reproductive organs are still in the maturation stage so they are not ready to have sexual intercourse with the opposite sex, especially if you become pregnant and then give birth. If forced, it will cause serious injuries, tears, infections, damage to reproductive organs, and even endanger the child's life.
- b. Psychological Impact, Psychologically, children who are not ready and do not understand gender clearly will cause long-term psychological damage that is difficult to heal on their souls. The child will be gloomy and full of regret because his life has ended in a marriage in which he himself does not clearly understand his life decisions. Social Impact, This social phenomenon cannot be separated from the socio-cultural factors of society that place women in a low position and are considered only sexual complements for men. This condition is very contrary to the teachings of religion, especially Islam, which highly upholds women. This situation will preserve the patriarchal culture or commonly called gender which will give birth to violence against women (UNCEF n.d). Both physical and psychological unpreparedness can affect the occurrence of domestic violence. Based on data from the Ministry of Women's and Children's Empowerment, there were 19,171 female victims out of a total of 21,653 cases of violence, data inputted from January 1, 2023 to October 24, 2023.



(Picture 1)

Every year, more and more cases of domestic violence (KDRT) are reported to Komnas Perempuan, and violence against wives tops the list. In 2023, Komnas Perempuan received 19,171 reports of violent crimes against women. Domestic violence affects many different social groups in addition to the general public. Women are more likely to be victims, up to 80.00%, Violence against women, more specifically is often categorized as gender-based violence. This is because violence against women is often the result of gender inequality, with unequal power relations between men and women. This can be reflected in domestic violence, which is more often committed by people who have more power over

weaker victims. Gender-based violence is also seen in cases of rape, which are more often committed by men against women than vice versa. This gender-based violence places special emphasis on the root causes of violence perpetrated against women, namely that between the perpetrator and the victim there is a gender relationship where in their position and role the perpetrator controls and the victim is the one who is controlled through the act of violence. This is what is meant by historical inequality in the 1993 Declaration on the Elimination of Violence against Women (Kania, 2015).



(Picture 2)

Of the total 21,653 victims of violence, it is known that the largest percentage of victims of violence against women reached 80.00% or around 19,171 female victims, while the highest percentage of victims of violence against men reached 20.00% or around 4,448 male victims.

1. Female victims by age group (Figure 2)
2. The age group 0-5 years old had a percentage of 5.70%.
3. Vulnerable age 6-12 years old has a percentage of 15.00%
4. Vulnerable age 13-17 years old has a percentage of 30.40%
5. Vulnerable age 18-24 years old has a percentage of 13.20%
6. Vulnerable age 25-44 years old has a percentage of 29.80%
7. The age range of 45-59 years has a percentage of 5.40%
8. Vulnerable age 60+ years there is a percentage of 5.40 %

Based on the analysis of the data above, the age of 13-17 is the highest age vulnerability of the percentage of violence against women, which is 13-17 is classified as adolescence, an underage age that is both physically and psychologically not ready to build a household, even according to BKKBM the ideal age of marriage for women is at least 21 years old. While the ideal age of marriage for men is at least 25 years. This is for several considerations including mental, health, and continuity of marriage, and to minimize domestic violence.

However, it cannot be denied that not all early marriages and the granting of marriage dispensation are bad for a family, because many people who marry young are able to maintain and maintain the integrity of the family in accordance with the purpose of marriage. marriage itself is to form a family. eternal based on God Almighty.

In the case of Determination Number 206/Pdt.P/2023/PA.Badg regarding a marriage dispensation case. It was decided in a hurry so that the consideration of granting marriage dispensation was also not deeply considered, both physical and psychological factors (Nurbayanti, 2020).

Women in conflict with the law have the same rights as men, including the right to be treated equally before the law. In accordance with Perma Number 3 of 2017, judges must consider the concepts of gender equality and non-discrimination in assessing/examining cases. And in the case of Determination Number 206/Pdt.P/2023/PA.Badg, the Panel of Judges did not pay attention to the values listed in Law No.7 of 1984 concerning the Convention on the Elimination of All Forms of Discrimination Against Women.

Elimination of All Forms of Discrimination Against Women, No. XVII/MPR/1998 on Human Rights, Law No. 39 of 1999 on Human Rights, Law No. 23 of 2002 on Child Protection, Law No. 4 of 1979 on Child Welfare, Law No. 23 of 1992 on Health, Law No. 23 of 1992 on Human Rights, and Law No. 23 of 2002 on Child Protection.

Therefore, the author concludes that the legal basis taken into consideration by the judge is still discriminatory and has not considered the protection of women.

## **CONCLUSION**

Dispensation of Marriage in the case of Determination Number 206/Pdt.P/2023/PA.Badg Decision Granting Dispensation of Marriage in the decision of the case, the Panel of Judges only refers to Law Number 1 of 1974 concerning Marriage, Perma Number 5 of 2019 concerning Application for marriage dispensation. and Compilation of Islamic Law. The Panel of Judges did not pay attention to the values listed in Law No.7 of 1984 concerning the Convention on the Elimination of All Forms of Discrimination Against Women. Law No. 23 of 1992 concerning Health; The regulation of protection of women's health rights in the framework of national and international human rights in Indonesia is the protection of women in reproductive health rights. Elimination of All Forms of Discrimination Against Women, TAP No. XVII/MPR/1998 on Human Rights, Law No. 39 of 1999 on Human Rights, Law No. 23 of 2002 on Child Protection, Law No. 4 of 1979 on Child Welfare, Law No. 23 of 1992 on Health, Law No. 23 of 1992 on Human Rights, and Law No. 23 of 2002 on Child Protection.

Article 6 Paragraph (2). Law No.1 of 1974 concerning Marriage, states that to enter into a marriage a person who has not reached 21 years of age must obtain permission from both parents. From several opinions and referring to the Child Protection Law, with the Law Thus underage marriage and the conditions for a person to be allowed to marry contained in Law No.1 of 1974 concerning Marriage Article 7 Paragraphs (1 and 2) are not relevant to UUPA and Article 6 Paragraph (2) of the Marriage Law itself is an inconsistency with the Marriage Law currently in force. Thus, it is necessary to amend this article so that there is synchronization with article by article in the UUP and harmonization with the UUPA and laws born later after the Marriage Law ".

Based on the description above, the author concludes that the legal basis used by the judge is still discriminatory and has not considered the protection of women.

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