

## **Underage Widows and Widowers before the Law: Problem, Contestation and Legal Certainty in Marriage Dispensation**

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**Abstract:** Increasing the minimum age for marriage has increased the community's efforts to obtain a marriage dispensation permit in court. Generally, this application is made by children who are not old enough and not yet married, but the facts on the ground state that there are widows and widowers under age who also apply for a marriage dispensation for the second time, this raises a new problem, namely legal uncertainty for the applicant. This study will explore the problems of an underage widow and widower in registering his second marriage and the contestation of authority in the marriage of underage widows and widowers. The study was conducted by looking at and analyzing several cases of application for dispensation for the marriage of underage widows and widowers in several Religious Courts (juridical normative) and mapping related documents (library research). Three important points are noted. First, when a widow and widower under the age of 19 applies for marriage registration at the Office of Religious Affairs but is refused and directed to apply for a dispensation to marry, while in the Religious Court, there are differences of opinion among judges in the application for dispensation to marry a second time, some reject, and some accept. Second, there is contestation between the Office of Religious Affairs and the Religious Courts in viewing dispensation for widow and widower marriage because of the different legal basis used. Third, despite the contestation between the two institutions, the Religious Courts, as justice-seeking agencies, must accept the application submitted to ensure legal certainty for its citizens, namely widows and widowers under age. Thus, this article recommends two actions: namely, the need for communication between the two executive and judicial institutions to discuss the issue of marriage dispensation for underage widows and widowers so as not to contradict each other and legal certainty for underage widows and widowers who want to marry is essential.

**Keywords:** Rejection; Marriage Dispensation; Widow and Widower; Legal Certainty

### **Introduction**

Ironically, the increase in the minimum age of marriage resulted in a significant increase in the number of applications for marriage dispensation in religious courts. Although the original purpose of the marriage dispensation was to guarantee the child's interests. Generally, applications for marriage dispensation are carried out by children who are not old enough and unmarried. Still, the facts in the field show a request for marriage dispensation made by a widow and widower who is a minor (hereinafter referred to as the widow and widower marriage dispensation). So, the existence of this case triggers problems both between agencies and the applicant himself. As explained by Munadhiroh, the second application for marriage dispensation of widows or widowers may trigger a new problem, namely legal uncertainty for widows/widowers who want to remarry because the Religious Affairs Office rejects their marriages. (Munadhiroh, 2008)

Applications for marriage dispensation are generally made by couples who have never been married. This is not a problem, because it already has clear procedures and rules. However, it will be difficult if the bride-to-be wants to register their marriage with the Office of Religious Affairs (KUA) but

has the status of having been married (widower/widow) (Hamim, 2015). For example, there was a refusal of marriage registration filed by a widow at the Religious Affairs Office of Kauman District, Ponorogo. Then, the refusal to register a marriage by a widow at the Office of Religious Affairs of Central Metro District, Metro City, Lampung. It is known that both refusals were because the applicant at the time of registration was under 19 years of age (despite being a widow) and was directed to apply for marriage dispensation to the Religious Court.

However, the facts on the ground show that widows/widowers who apply for dispensation to marry for the second time to the Religious Court are rejected, this happened in the Yogyakarta City Religious Court and the Metro City Religious Court. This rejection is on the grounds that a person who has married is an adult, as explained in the Civil Code and Supreme Court Regulation Number 16 of 2019. Marriage dispensation is only intended for children who want to get married, while widows/widowers are not children. So, seeing these conditions, it is interesting to examine the problems related to the dispensation of a marriage of underage widows/widowers in both the Religious Affairs Office and the Religious Court and the legal certainty of the status of underage widows/widowers who want to remarry.

However, based on the facts of the literature, the study of the marriage dispensation only discusses the general concept both from the aspect of judge consideration and the aspect of maslahah (Taufiq, 2020), as well as the study of the marriage dispensation of widows/widowers. Existing studies tend to analyze using only three perspectives. The first is the study by analyzing the views of religious courts in an area only. (Yulia, 2020). The second is a study analyzing the views of the Office of Religious Affairs in a region as well, (Ningrum, 2022). The third, a study that analyzes the comparative views of judges and KUA parties in the case of widow and widower marriage dispensation. (Setiawan, 2022; Munadhiroh, 2008). So that there has been no study that maps the marriage dispensation of widows/widowers thoroughly and in detail from the aspects of problems, contestation, and legal certainty of widows/widowers who have experienced the rejection of marriage registration and applications for marriage dispensation.

The study in this article seeks to fill in the gaps in the literature related to detailed issues related to the dispensation of the marriage of widows/widowers, contestations between the two agencies between the Office of Religious Affairs and religious courts, and legal certainty for widows/widowers. Thus, it can answer three questions: (1) what is the problem with a widow and widower who experiences denial of marriage registration and a second application for marriage dispensation? (2) How are the two agencies contending with each other on the issue of widow and widower dispensation? (3) And what is the legal certainty for widows/widowers in this matter?

This article departs from the argument that widows/widowers are legal subjects who certainly need to get legal certainty and protection. There is a variety of opinions between the Office of Religious Affairs and the Religious Court in the case of the marriage dispensation of widows/widowers who need to find common threads and harmony of opinion. The form of legal protection for underage widows/widowers who have been denied marriage by the Office of Religious Affairs is not by re-applying for a marriage dispensation to the Religious Court but simply by a copy of the determination of the first marriage dispensation because it has been attached to the parties and if the marriage dispensation is re-filed then the principle of simple, expeditious and light cost cannot be achieved.

## Literature Review

### Widow's Marriage Dispensation

The revision of the marriage law regarding the age limit of marriage to 19 years has consequences if you have the will to marry below that age, then you are directed to apply for a marriage dispensation to the Religious Court. Dispensation means the granting of permission for exemption from an obligation or prohibition (Andar Yuni, 2021). So that it gives leeway for someone to do things that were initially not allowed to be allowed (Yulia, 2020). According to Subekti, a dispensation is defined as a deviation or exception to a rule (Subekti & Tjitosoedibio, 1996). So that the marriage dispensation is defined as a legal policy that can provide the ability for a child to carry out a valid marriage according to religious law and

state law (Bahroni et al., 2019). Candra argues that dispensation can provide legal certainty and protection to children, because in this case through the procedures of the Religious Courts which will be carried out examination and determination (Candra, 2021). Therefore, a child who is under the age of marriage is charged to apply for a marriage dispensation to the Religious Court (Norhasanah, 2019). Furthermore, the Court will give considerations based on Islamic laws and regulations (Kamarusdiana & Sofia, 2020). The application for marriage dispensation is made in the form of a volunteer (voluntary) application (Azizah & Wahid, 2019).

Marriage dispensations are generally filed if there is a child, either a boy or a girl, who wants to get married but has not reached the minimum age of marriage (Fadhl & Warman, 2021). Still, in other cases, there is an application for marriage dispensation filed by a widow who is a minor. This is known as the marriage dispensation of underage widows/widowers and this application is made by someone who has applied for a marriage dispensation, then married and divorced. The person wants to remarry but is still a minor and gets a rejection from the KUA and applies for a remarriage dispensation (Setiawan, 2022). Regarding the dispensation of the marriage of widowed widows or underage widowers, there are no rules that regulate in detail, giving rise to various interpretations from various agencies, both KUA and PA. According to Ningrum, this problem can be solved by reviewing the minimum age limit. This problem can be resolved by reviewing the minimum age limit for marriage using the comparative interpretation method and subsumptive interpretation, namely to interpret the legal status of underage widows/widowers can use the Civil Code, PERMA 16/19 so that it no longer requires marriage dispensation from the Court for underage widows/widowers who want to get married (Ningrum, 2022). Thus, due to the absence of written rules regarding the completion of the marriage dispensation of underage widows/widowers, so in this position underage widows/widowers do not have certainty before the law.

### Contestation and Legal Certainty

Contestation is defined as an activity carried out by parties or actors who interact with each other dynamically by discussing what is in the interests of each party (Danial et al., 2022). In practice, contestation is often associated with the inevitable power, various aspects are also the main factors of contestation, such as the leadership of the aristocracy, democracy, and gender differentiation of the leader (Islamy, 2019). Often there is a contestation between parties and even agencies of different interests will have an impact on legal certainty.

Legal certainty is defined as a rule made and passed definitively that governs logically and clearly. It is evident here in the sense that not causing doubt (multi-interpretation), while logical in this context, is the absence of mutual collisions between norms and norms that can give rise to conflicts. The existence of conflicts between norms is caused by the uncertainty of the constructed rules, giving rise to the contestation, reduction, and distortion of norms (Rahmawati, 2017). Legal certainty is illustrated by the principle of resolving conflicts that are carried out quickly and simply (Anggraeni, 2023). The pragmatic aspect in realizing legal certainty needs to emphasize the value of the effectiveness of the legislative process, where: 1) the rule of law is made in the text and present in context, 2) legal norms are built on the provisions of interpretation and 3) normative systems are seen as constructs that need to be analyzed by logical methods or contexts (Sodik, 2020). Legal certainty is seen only as a methodological thing and not as a substantial dimension (Kordela, 2008). Finally, legal certainty is seen as what is referred to as a collective principle that consists of and is determined based on several principles (Aditya & Waddington, 2021).

Legal certainty or legal clarity in the case of marriage dispensation of underage widows/widowers should be by giving them the right to marry without interference (Munadhiroh, 2008). The concept of legal certainty that provides justice, order, benefit, and peace has an impact on the community to be able to enjoy all the rights given by the law itself (Aditya & Waddington, 2021). To ensure legal certainty for widows/widowers, they can make repressive efforts, namely, by requesting the revocation of the refusal of marriage by the KUA to the Religious Court, and preventive efforts, namely with the KUA, they can

directly accept marriage applications from underage widows/widowers and can communicate and negotiate with each other with the parties and institutions involved (Munadhiroh, 2008).

## Method

This article departs from the phenomenon of marriage dispensation carried out by widows to the Lampung Metro Religious Court, namely in 2021. This is interesting because the widow experienced confusion in registering her second marriage because she received a refusal of marriage registration by the Religious Affairs Office and the Religious Court also refused the dispensation to marry the widow and widower and explained that the widow did not need to apply for a dispensation to marry again. Thus, the author is trying to see and find out whether this phenomenon occurred in a forge of mine or indeed has occurred in some area.

This article focuses on several factors that will be discussed, namely the problems experienced by widows, the relationship between the two agencies, and legal certainty. The data in this article was collected using the data source triangulation method, namely by collecting data from various sources of related literature, which in this case is the phenomenon of widow and widower marriage dispensation. So several studies were found, namely in the regions of West Sumatra, Lampung, East Java, and D.I Yogyakarta. In addition, the author collects data, namely relevant laws and regulations. After the data was collected, the authors confirmed and affirmed several related institutions, namely the Metro Religious Court and the Yogyakarta City Religious Court, then the Sambit Religious Affairs Office (Ponorogo Regency), the Metro Central Religious Affairs Office (Metro City), and the Gondokkusuman Religious Affairs Office (Yogyakarta City). The data collected was then categorized systematically in the form of tables 1-3. Then the data were analyzed using the interpretation method to understand the meaning collected from previous research data and relevant legislative texts.

## Results and Discussion

In this section, data related to the phenomenon of the dispensation of underage widows or widowers will be presented both at the Office of Religious Affairs and Religious Courts in various regions in Indonesia. The data are obtained from related literature, for the following:

### Problems and Contestation of Institutions

This study succeeded in finding a situation where the phenomenon of marriage dispensation of underage widows/widowers raises problems for widows/widowers who are going to marry a second time, that there has been confusion for widows/widowers in taking steps to be taken in registering their marriages, this is due to the refusal of marriage from the Office of Religious Affairs and the refusal of marriage dispensation from the Religious Court (Musawwamah et al., 2023). Nonetheless, it was found various opinions, namely: Firstly, there is a difference of opinion in the Religious Courts as to whether or not underage widows/widowers need dispensation, and secondly, there is a difference of opinion in the Religious Affairs Office as to whether or not underage widows/widowers should have their marriage registration accepted. The differences of opinion in the Religious Courts are shown in Table 1.

**Table 1. Description of the Dispensation of Marriage of Widows/widowers**

No.	Religious Courts	Description of the Dispensation of Marriage of Widows/widowers
1.	PA Tulung Agung (East Java)	The Religious Court granted the application for marriage dispensation for underage widows, through determination Number: 0026/Rev.P/2011/PA. FY 23 February 2011 (Hamim, 2015)
2.	PA Ponorogo (East Java)	There has never been an application for a marriage dispensation of underage widows/widowers. However, in the event of a PA, it will still not accept/granted because the person concerned has been married, so it is considered an adult. In this causes it is necessary to look at some of the

	existing rules not just fixated on one rule. There is a cross-section of opinions in the KUA, caused by the confusion of the KUA because there are no detailed rules, but if you re-register the dispense to the PA, it is not following the principle of simple, fast, low cost (Ningrum, 2022)
3. PA Bantul (DIY)	The Bantul Religious Court held that even if the request for marriage dispensation has the status of a widow and a minor, it must still reapply for the marriage dispensation to the Religious Court (Yulia, 2020).
4. PA Jember (East Java)	Underage widows/widowers will still be considered adults because they are married, this is based on Article 1 (5) of Law 39/1989 on Human Rights, as long as they can prove a divorce certificate, they can remarry without a marriage dispensation letter from the PA. (Yulia, 2020)
5. PA Sawahlunto (West Sumatra)	An application for a marriage dispensation by an underage widow or widower should not be necessary to reapply, the katana has been deemed an adult, and the KUA should not refuse their marriage application. In the case of a KUA that refuses, this is due to confusion caused by the absence of instructions or not having a technical explanation for the implementation of Article 7 of Law Number 16 of 2019 (Yulia, 2020)
6. PA Tanjung Pati (West Sumatra)	The Religious Court held that a person who was married was considered an adult not a minor anymore. When you have obtained a marriage dispensation, you have received permission from the PA, because the court's decision is inherent to the parties applying for the dispensation (volunteer), but if anyone applies then the case is <i>Netisen Iden</i> , and the PA will only legalize a copy of the judgment in the previous marriage dispensation (Yulia, 2020).
7. PA Batusangkar (West Sumatra)	Formally, a person is considered an adult after reaching the age of 21 (twenty-one) years or has been married, so in this case, the underage widow and widower does not need to apply for dispensation again. If there is a KUA that refuses, it could be because it does not understand the content of Law 16/2019, even if legally, the KUA has violated the applicable rules and can be sued (Yulia, 2020).
8. PA Metro (Lampung)	The Religious Court held that the KUA should no longer need to direct brides-to-be (underage widows/widowers) to the Religious Court to request marriage dispensation because based on Perma No. 5/2019, it is explained that children who have been married are considered adults according to law. However, if there is still a KUA that refuses and requests a marriage dispensation to the PA, then the PA will still accept the application (Setiawan, 2022).
9. PA Yogyakarta (DIY)	If a person is married, then he is considered to have grown up. An adult is a married person, so the Religious Court will reject the application for marriage dispensation of a widow and widower who is a minor, this is because he has been considered an adult because he has been married.

Based on the table above, data was obtained that there were various opinions from the Religious Courts regarding the dispensation of the marriage of underage widows/widowers. Most religious courts (Ponorogo, Jember, Sawahlunto, Batusangkar, and Yogyakarta) hold that widows/widowers even though they are underage (19 years old) because they are married, are considered adults as per the law, so there is no need to ask for a dispensation for remarriage. This is as stated in an interview with Sukahata Wakano, Judge of the Ponorogo Religious Court;

"In the case of an application for dispensation to marry a minor widow or widower, the court will not grant it because she is already a widow or widower. She is a person who has been married and is an adult. Many rules are mentioned, ranging from fiqh, laws, PERMA, as well as the Marriage Dispensation determination that she received for her first marriage." (S. Wakano, personal communication, March 2022)

Similarly, the judge of the Yogyakarta Religious Court explained that:

"If someone is married, they are considered an adult. An adult is a married person. The dispensation in question is for a child who is underage, and is married and divorced, then wants to remarry, then is considered an adult and does not need dispensation anymore." (Marfu'ah, personal communication, 8/22)

In addition, there are Religious Courts (Tulung Agung and Bantul) that are firmly of the opinion that if a person is underage, they must still apply for marriage dispensation even though they are already married. There are also Religious Courts (Tanjung Pati and Metro) that will still accept requests for dispensation of marriage for the second time because the Court cannot refuse incoming cases.

"Widows/widowers whose status has been married even though they are still under the minimum age regulated by law do not need to apply for marriage dispensation again. This is because his status is no longer a child but is considered an adult. However, we will accept the application because the Court cannot reject the case" (Judge of the Metro City Religious Court). (M. Amin, personal communication, 2/22)

Furthermore, the cross-opinions in the Office of Religious Affairs, are shown by the results of observations as in Table 2.

**Table 2. Description of the Dispensation of Marriage of Widows/widowers in Religius Office Affairs**

No.	KUA	Description of the Dispensation of Marriage of Widows/widowers
1.	Kauman (Tulungagung, East Java)	The KUA is based on Article 7 (2) of the marriage law and the applicable KHI, so if there are registrants who do not meet the minimum age requirements, the marriage registration will be rejected and directed to apply for a marriage dispensation to the Religious Court (Munadhiroh, 2008).
2.	Sambit (Ponorogo)	The KUA will directly grant marriage licenses to underage widows/widowers without prior dispensation, this is based on Article 330 of the Civil Code. (Ningrum, 2022)
3.	Babadan (Ponorogo)	There has never been a phenomenon like this, but because it is considered an adult, marriage registration is acceptable, this phenomenon does not only look at one rule but must pay attention to other laws (Ningrum, 2022).
4.	Jetis (Ponorogo)	This phenomenon has not been found in KUA Jetis, but if it refers to Perma 5/19 then widows/widowers can apply for a second marriage dispensation, although in this case there has never been a formal discussion in Ponorogo (Ningrum, 2022)
5.	Balong (Ponorogo)	There is no need to apply for a remarriage dispensation, because it has been considered an adult and refers to the Population Law, as well as in the SIMKAH statement, if the registrant is a widow and widower, you can immediately register (Ningrum, 2022).
6.	Sempung (Ponorogo)	If there is such a phenomenon, then the KUA will follow the Law and will refuse marriage registration and be directed to request a marriage dispensation from the PA (Ningrum, 2022).

7. Central Metro (Metro)	Kua rejects marriage registration for widows/widowers who are underage, because it is based on the Marriage Law and also PMA, although, in Perma 5/2019, married children are considered adults, KUA cannot follow these rules, because the KUA is under the Ministry of Religious Affairs (Setiawan, 2022).
8. Gondokusuman (Yogyakarta)	Regarding widows/widowers who want to remarry and are under the age of marriage, they still have to get a marriage dispensation from the PA. Because in the Marriage Act it is not made clear whether she is a virgin or a widow.

Based on the above, there may be a difference in understanding in terms of the registration of marriages for widows/widowers who are underage. Most of the Religious Affairs Offices (Kauman, Sempung, Central Metro, and Gondokusuman) reject underage widows/widowers who want to get married, this is because it is based on the Marriage Law, KHI and PMA. This is as the results of the interview as follows:

“Because the marriage law does not explain whether she is a virgin or a widow. So, we must continue to use marriage dispensation based on the applicable legislation until there is a regulation in force so that the direction, purpose and requirements must be completed” (Head of the Gondokusuman Religious Affairs Office). (Mukhlis, personal communication, August 2022)

“The provisions of Law Number 1 of 1974 concerning Marriage. These regulations do not provide exceptions for prospective husbands or wives who have already been married and are only based on the age required by the Marriage Law. There is no regulation that allows the prospective bride and groom in question to no longer need to apply for dispensation either from the Minister of Religious Affairs Regulation or other regulations above it” (Head of the Central Metro Religious Affairs Office). (G. Ahmad, personal communication, 1/22)

Besides that, there is also a Religious Affairs Office (Sambit, Babadan, Jetis, and Balong) arguing that it will accept marriage registration for underage widows/widowers who do not need to apply for marriage dispensation to the Religious Court and this is because it has been considered mature and does not override other rules.

“Widows or widowers who are still minors but want to remarry, then they do not need to attach a Marriage Dispensation. The reason is that they have the status of someone who has already been married. Article 330 of the Civil Code states that if a person is divorced when he or she is still a minor, then he or she does not return to the status of a minor” (Head of Sambit Religious Affairs Office). (N. Kholis, personal communication, March 2022)

### Legal Certainty of the Dispensation of Widows of Mourning

It was also found that the legal certainty for underage widows/widowers who will perform a second marriage has not found a bright spot, because this is a cross-section of opinion between the two KUA institutions and the PA or others, this can be seen in Table 3.

**Table 3. Advice for widows/widowers to take steps and legal remedies that can be taken**

Advice for widows/widowers to take steps and legal remedies that can be taken	Office of Religious Affairs	Religious Courts
	First, widows/widowers must still apply for a Marriage Dispensation to the Religious Court (KUA Kauman, Sempung, Metro Pusat, and Gondokusuman)	First, the incoming Case will remain and must be examined, even if it has previously obtained the one applying for dispensation and will grant it. (Metro)

Secondly, widows/widowers no longer need to apply for a Marriage Dispensation to the Religious Court because according to the regulations they have been considered adults (KUA Sambit, Babadan, and Balong).

Secondly, Since the suspension of the marriage dispensation is *of a volunteer* nature so that it is attached to the parties, so the appellant will judge this application as *Ne Bis in Idem* (the same application), so the PA will only legalize a copy of the marriage dispensation determination in the previous application. (Tanjung Pati Religious Court )

Based on the table above, it was concluded that there are differences in respect of certainty and legal remedies that are amended, for example in the KUA there are two views, first, you still have to apply for marriage compensation, while second, there is no need to apply. In addition, the Religious Court explained that legal certainty can be made by registering with the Religious Court and it will be accepted and granted (PA Metro), while PA Tanjung Pati suggested remaining to the Religious Court but with the application of Netsiden Iden, so it is only necessary to legalize a copy of the previous marriage dispensation determination.

### **Rule Vacuum Results in Multi-Interpretation of the Law**

The difference of opinion regarding the legal status of the marriage dispensation of widows or widowers between the KUA and the Religious Court is due to the existence of a definite legal vacuum that can be used as a handle in solving the problem. This legal vacuum is due to several overlapping, inconsistent, and multi-interpretation laws, and regulations (Musawwamah et al., 2023). The absence of rules that regulate the procedure for resolving cases of underage widows results in the existence of interpretation muti which results in legal uncertainty. The role of the Religious Court in this matter is that judges have a very important role in overcoming this problems. According to Sambikakki, if there is a legal vacuum or there are no clear rules, then the judge must have the ability and be active to find a law (recht vinding) (Sambikakki, 2020). Judges can adapt the law to concrete facts in the field and if needed the judge can also add to the rules of the law (Supriyadi & Siti Suriyati, 2022). The Religious Court may take the step of accepting the application for marriage dispensation with a note i.e. into netisen iden and sufficiently legalize the determination of the previous marriage dispensation, not to carry out the marriage dispensation as previously implemented.

### **Contestation of Interagency Authority**

It is known that contention is a pattern of interaction that is opposed to each other to realize their respective interests. Likewise, between the Office of Religious Affairs and the Religious Court, the KUA, as an Executive Institution (under the Ministry of Religious Affairs), has the interest of trying to always carry out the rules of the Ministry (Musawwamah et al., 2023). Likewise, the Religious Court, as a Judicial Institution whose task is to enforce the law, is interested in carrying out laws and regulations to realize justice (Furqan et al., 2019). The existence of these two institutions creates an attitude that insists on each other in carrying out their duties.

It should be understood that the denial of the marriage of a widow or underage widower by the KUA is also not entitled to blame. But before that, it is necessary to understand the duties and functions of the KUA and the Religious Courts and the function of the KUA in general as a servant for the Muslim community in the field of religion, marriage, etc., which refers to administration. Meanwhile, the function of the Religious court is to adjudicate cases by issuing a product of determination or judgment. These two agencies have a cooperative relationship in solving problems based on their duties and functions. The rejection of widow and widower marriages carried out by the KUA has been considered correct, and this is because the KUA is an executive institution that carries out the laws and regulations, and what is carried out by the KUA is its duty as a servant in terms of marriage administration, which is in line with Musthofa,

who argues that the administrative function in marriage is the authority of the government (KUA). In contrast, the Religious Court functions as a judicial institution, i.e. giving a verdict or determination in a marriage case (Ahmatnijar et al., 2022).

Meanwhile, Perma no. 5/19, which is the basis for the Religious Court, the Kua has no obligation to follow it, and this is because the KUA is an executive institution and follows the regulations of the Ministry of Religious Affairs. The Supreme Court rules are regulations governing the procedural law (Tamin, 2018). Thus, the Supreme Court Rules are complementary regulations to fill the voids and shortcomings of the law (Asshiddiqie, 2010). Then, to resolve the contention between these two institutions, there needs to be a dialogue between the Supreme Court as the judicial institution and the Ministry of Religious Affairs as the executive to discuss the dispensation of the marriage of widows or widowers, considering that these two institutions (KUA and PA) have an essential role in marriage control so that cross-sectoral cooperation is needed.

### Legal Certainty: Text to Context

The Religious Affairs Office's refusal of widows who want to marry will certainly have an impact on legal uncertainty. This is due to two things, namely; the absence of rules governing in detail and the existence of a contestation of thought that is intubated between institutions. Thus, to end this problem, it is necessary to shift the paradigm (Shipping Paradigm) from textualist to contextualist (Taufiq, 2019a). The refusal of marriage and the refusal of the marriage dispensation of widows are based on the existence of written rules, even though the rules are only text, not the final rules so that they can still be further regulated (Asshiddiqie, 2010). So, it is necessary to bring up a paradigm contextually and will even provide legal protection and protection for children.

Legal certainty needs to be built in this case, to provide justice (Andaryuni, 2018; Evans, 2016), where legal justice is seen as a way to create balance (Wijayati et al., 2022). To realize legal certainty, the Religious Court is the owner of the authority to examine and decide a case, one of which is the marriage dispensation. Judges must issue legal products that are appropriate, and have the value of justice as well as legal certainty (Fitri, 2011). As Harahap argues, one of the determinations of Religious Pawning in the field of family law is the dispensation of marriage (Harahap, 2013). So that even though there is an application for marriage dispensation by the widow or widower, the Court still carries out its duty to receive, analyse, adjudicate and resolve every case filed against him, then the judge reviews the case and finally adjudicates, which means to give to the interested right or law (Sururie & Susanto, 2020).

So that the problem of dispensation for underage widow and widower marriages needs to be clarified because this is related to marriage registration so that unregistered marriages (*nikah sirri*) do not occur (Taufiq, 2019b). Because the registration of marriage will guarantee and protect the rights of husbands, wives, and even children (Zamroni, 2019). So, the Religious Court and the Kua must coordinate with each other on this matter and ask to explain this matter to the Ministry of Religious Affairs and the Supreme Court because hierarchically, those who have the right to provide explanations and further rules are both.

### Conclusion

The absence of rules that specifically regulate the dispensation of the marriage of widows or widowers gave rise to multiple interpretations from several agencies involved, namely the Office of Religious Affairs and religious courts. Ironically, this vacancy triggers legal uncertainty for widows or widowers who want to apply for remarriage but are rejected. It should be understood that the rejection of marriage of underage widows or widowers by the KUA is an act that is not entitled to blame, considering that the KUA is an agency that has religious-related service functions, one of which is marriage, so the KUA has an administrative duty instead of interpreting or deciding a law because the right to decide or determine is the authority of the Religious Court. Because of the importance of a complementary cooperative relationship between the KUA and the Religious Courts, to resolve cases of widow and widower marriage dispensation, it is necessary to have a dialogue between the Supreme Court as a judicial

institution and the Ministry of Religious Affairs as the executive to discuss the dispensation of the marriage of widows or widowers, considering that these two institutions (KUA and PA) have an important role in marriage control so that cross-sectoral cooperation is needed.

The Religious Affairs Office's refusal of widows who want to marry will certainly have an impact on legal uncertainty for the widow herself. Thus, the Religious Court as an Institution that provides justice must accept this application for marriage dispensation by making extrajudicial efforts. Because the marriage dispensation is a matter of volunteerism and the determination is binding the Re-filing is considered the same application, so the Religious Court can only provide legal certainty for the widow by re-legalizing the determination of the previous marriage compensation. The Religious Court and the Kua must coordinate with each other on this matter and request to explain the matter to the Ministry of Religious Affairs and the Supreme Court because hierarchically, those who have the right to provide explanations and further rules are both.

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## Conflict of Interest

This article has not a conflict of interest

## References

Aditya, R. I., & Waddington, L. B. (2021). The Legal Protection against Child Marriage in Indonesia. *BESTUUR*, 9(2), 126. <https://doi.org/10.20961/bestuur.v9i2.55144>

Ahmad, G. (1/22). *Interview on Dispensation of Marriage for Underage Widows/Widowers* [Personal communication].

Ahmatnijjar, A., Tenrilawa, D. F., Asmuni, A., Matsum, H., & Subha, R. (2022). WHEN RELIGIOUS JUDGES PROTECT CHILDREN'S RIGHTS Case of Divorce: In Padangsidempuan Religious Court. *Al-Ahwal: Jurnal Hukum Keluarga Islam*, 15(2), 223. <https://doi.org/10.14421/ahwal.2022.15204>

Amin, M. (2/22). *Interview on Dispensation of Marriage for Underage Widows/Widowers* [Personal communication].

Andar Yuni, L. (2021). Analysis of the Emergency Reasons in the Application of Marriage Dispensation at the Tenggarong Religious Court. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, 5(2), 976. <https://doi.org/10.22373/sjhk.v5i2.9135>

Andaryuni, L. (2018). The Program of Circuit Isbat Nikah as the Embodiment of Access to Justice in Indonesia. *Mazahib*, 69–95. <https://doi.org/10.21093/mj.v17i1.1054>

Anggraeni, R. D. (2023). Islamic Law and Customary Law in Contemporary Legal Pluralism in Indonesia: Tension and Constraints. *Ahkam: Jurnal Ilmu Syariah*, 23(1). <https://doi.org/10.15408/ajis.v23i1.32549>

Asshiddiqie, J. (2010). *Perihal Undang-Undang*. Rajawali Pers. <https://simpus.mkri.id/opac/detail-opac?id=10382>

Azizah, U., & Wahid, N. (2019). Historisitas dan Tujuan Aturan Umur Minimal Perkawinan dalam Perundang-Undangan Keluarga Islam di Indonesia. *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 2(2), 163–177. <https://doi.org/10.24090/volksgeist.v2i2.2822>

Bahroni, A., Sari, A. G., Widayati, S. C., & Sulistyo, H. (2019). Dispensasi Kawin dalam Tinjauan Undang-Undang Nomor 23 Tahun 2002 Juncto Undang-Undang Nomor 35 Tahun 2014 tentang Perlindungan Anak. *Transparansi Hukum*, 2(2). <http://dx.doi.org/10.30737/transparansi.v2i2.446>

Candra, M. (2021). *Pembaruan Hukum Dispensasi Kawin Dalam Sistem Hukum di Indonesia*. Prenadamedia Group.

Danial, D., Usman, M., & Sari Dewi, N. (2022). The contestation of Islamic legal thought: Dayah's jurists and PTIN's jurists in responding to global issues. *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 22(1), 19–36. <https://doi.org/10.18326/ijtihad.v22i1.19-36>

Evans, M. (2016). Structural Violence, Socioeconomic Rights, and Transformative Justice. *Journal of Human Rights*, 15(1), 1–20. <https://doi.org/10.1080/14754835.2015.1032223>

Fadhl, A., & Warman, A. B. (2021). 'ALASAN KHWATIR' PADA PENETAPAN HUKUM DISPENSASI KAWIN DI PENGADILAN AGAMA BATU SANGKAR. *Al-Ahwal: Jurnal Hukum Keluarga Islam*, 14(2), 146. <https://doi.org/10.14421/ahwal.2021.14203>

Fitri, H. (2011). Peran Hakim Peradilan Agama Dalam Mewujudkan Keadilan Dan Kepastian Hukum Mellui Putusan. *JURIS: Jurnal Ilmiah Syari'ah*, 10(1). <https://doi.org/10.31958/juris.v10i1.919>

Furqan, A. A., Alfitri, A., & Haries, A. (2019). The Difference of a Child (Walad) Concept in Islamic Inheritance Law and its Implications on the Decisions of the Religious Courts in Indonesia. *Mazahib*, 119–145. <https://doi.org/10.21093/mj.v17i2.1212>

Hamim, S. (2015). *Penolakan Kantor Urusan Agama Atas Pernikahan Janda Di Bawah Umur Yang Pernah Mendapat Dispensasi Kawin Dari Pengadilan Agama* [Skripsi, UIN Maulana Malik Ibrahim]. <http://etheses.uin-malang.ac.id/876/>

Harahap, Y. (2013). *Hukum Acara Perdata*. Sinar Grafika.

Islamy, A. (2019). Eksistensi Hukum Keluarga Islam di Indonesia dalam Kontestasi Politik Hukum dan Liberalisme Pemikiran Islam. *Al-Istinbath: Jurnal Hukum Islam*, 4(2), 161. <https://doi.org/10.29240/jhi.v4i2.1059>

Kamarusdiana, & Sofia, I. (2020). Dispensasi Nikah Dalam Perspektif Hukum Islam, Undang-Undang Nomor 1 Tahun 1974 dan Kompilasi Hukum Islam. *Salam: Jurnal Sosial Dan Budaya Syar-i*, 7(1). <https://doi.org/10.15408/sjsbs.v7i1.14534>

Kholis, N. (2022, March). *Interview on Dispensation of Marriage for Underage Widows/Widowers* [Personal communication].

Kordela, M. (2008). The Principle of Legal Certainty as a Fundamental Element of the Formal Concept of the Rule of Law. *Revue Du Notariat*, 110(2), 587–605. <https://doi.org/10.7202/1045553ar>

Marfu'ah. (8/22). *Interview on Dispensation of Marriage for Underage Widows/Widowers* [Personal communication].

Mukhlis. (2022, August). *Interview on Dispensation of Marriage for Underage Widows/Widowers* [Personal communication].

Munadhiroh. (2008). Perlindungan Hukum Terhadap Janda/Duda Pasca Dispensasi Kawin Dan Akibat Hukumnya. *Aktualita*, 1(1), 222–241. [https://doi.org/10.29313/aktualita.v1i1.3720\](https://doi.org/10.29313/aktualita.v1i1.3720)

Musawwamah, S., Taufiq, M., Haryanto, E., Supraptiningsih, U., & Maimun. (2023). *Resistance to Child Marriage Prevention in Indonesia and Malaysia* (Vol. 23, Issue 1).

Ningrum, W. S. (2022). *Analisis Yuridis Terhadap Problematika Dispensasi Kawin Bagi Janda Atau Duda di Bawah Umur Sebagai Prasyarat Pencatatan Pernikahan (Studi Kasus Di Kabupaten Ponorogo)* [Skripsi, IAIN Ponorogo]. <http://etheses.iainponorogo.ac.id/18461/>

Norhasanah, N. (2019). Dispensasi Kawin di Bawah Umur (Analisis Putusan MK No.74/PUU-XII/2014 Uji Materiil Pasal 7 Ayat 2 UU Perkawinan). *El-Mashlahah*, 8(1). <https://doi.org/10.23971/elmas.v8i1.1092>

Rahmawati, R. (2017). Kontestasi Pemikiran Ulama dalam Pembaruan Hukum: Studi pada Fatwa MUI tentang Perkawinan Beda Agama. *Al-Manahij: Jurnal Kajian Hukum Islam*, 10(1), 31–42. <https://doi.org/10.24090/mnh.v10i1.915>

Sambikakki, M. M. I. (2020). *Analisis Dasar Pertimbangan Hakim Dalam Memutus Perkara* [Tesis, Universitas Islam Indonesia]. <https://dspace.uii.ac.id/handle/123456789/20661>

Setiawan, A. (2022). *Analisis Implementasi Perma No. 5 Tahun 2019 Berkaitan Dengan Dispensasi Nikah Duda/Janda Dibawah Umur Di Kota Metro* [Skripsi]. IAIN Metro.

Sodik, A. A. (2020). JUSTICIABLEN: Penegakan Hukum di Institusi Pengadilan dalam menghadapi

Pandemi Covid-19. *Khazanah Hukum*, 2(2), 56–64. <https://doi.org/10.15575/kh.v2i2.8661>

Subekti, & Tjitrosoedibio. (1996). *Kamus Hukum*. PT. Pradnya Paramitha.

Supriyadi, S. & Siti Suryati. (2022). Judges' Legal Culture in Dealing with High Number of Applications for Child Marriage Dispensation during Covid-19 Pandemic at the Kudus Religious Court. *AL-IHKAM: Jurnal Hukum & Pranata Sosial*, 17(1), 273–298. <https://doi.org/10.19105/ali-hkam.v17i1.6060>

Sururie, R. W., & Susanto, Y. A. (2020). Legal Aid Post Services at the Indonesian Religious Courts during the COVID-19 Pandemic. *AHKAM: Jurnal Ilmu Syariah*, 20(2). <https://doi.org/10.15408/ajis.v20i2.17469>

Tamin, B. E. D. (2018). Tinjauan Yuridis Terhadap Kedudukan Peraturan Mahkamah Agung (PERMA) Dalam Hierarki Peraturan Perundang-Undangan Di Indonesia. *Lex Administratum*, 6(3). <https://ejournal.unsrat.ac.id/index.php/administratum/issue/view/2178/showToc>

Taufiq, M. (2019a). Istishhâb Sebagai Teori Hukum Islam Sebuah Tinjauan Historis. *Ijlil*, 1(1), 33–44. <https://doi.org/10.35719/ijl.v1i01.74>

Taufiq, M. (2019b). Nikah Sirri Perspektif Maqashid Syariah. *Al-Manhaj: Journal of Indonesian Islamic Family Law*, 1(2), 114. <https://doi.org/10.19105/al-manhaj.v1i2.3138>

Taufiq, M. (2020). A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text. *Millati: Journal of Islamic Studies and Humanities*, 5(2), 121–128. <https://doi.org/10.18326/mlt.v5i2.121-128>

Wakano, S. (2022, March). *Interview on Dispensation of Marriage for Underage Widows/Widowers* [Personal communication].

Wijayati, M., Abdullah, I., White, S., Rosadi, A., Yamin, A., & Larasati, Y. G. (2022). Justice Brokers: Women's Experiences with Injustice and Dependence in the Divorce Process. *Cogent Social Sciences*, 7(1). <https://doi.org/10.1080/23311886.2021.1966208>

Yulia, M. (2020). *Pandangan Hakim Terhadap Pasal 7 UU No.16 Tahun 2019 Tentang Usia Perkawinan Dihubungkan Dengan Dispensasi Nikah Bagi Janda/Duda Di Bawah Umur* [Skripsi, IAIN Batusangkar]. <https://repo.iainbatusangkar.ac.id/xmlui/handle/123456789/20028>

Zamroni, M. (2019). *Prinsip-Prinsip Hukum Pencatatan Perkawinan di Indonesia*. Penerbit Media Sahabat Cendekia. <http://repository.um-palembang.ac.id/id/eprint/10501>