RELEVANCE OF RELIGIOUS COURT DECISIONS REGARDING
DISPENSATION IN CHILD MARRIAGE

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Abstract

Child marriage in Indonesia is very vulnerable and has been increasing in recent years. In fact, the granting of marriage dispensation in the Religious Courts triggers several legal consequences that arise. Whereas in practice the judge's consideration is not always accepted regarding the marriage dispensation, the judge can also decide to reject the application for child marriage by looking at the existing legal aspects. Based on these problems, the author explains two problems that are the focus of this paper, namely how the legal consequences of the marriage dispensation on child marriage and the relevance of Religious Court Decisions with positive law. This study used empirical juridical research methods. Using secondary data through literature studies such as laws and regulations, court rulings, and legal theory, the method of data analysis uses qualitative methods. Then, this research conducted an empirical study of the literature from online sources. With the receipt of the application for dispensation for marriage, the right to be able to carry out marriages will be obtained so that the marriages carried out are legally recognized by the state and religion. However, even if the judge rejects the application for dispensation for marriage, the applicant can file an appeal at the Supreme Court. In fact, the role of judges is very important and judges also need to be selective when issuing a request for a marriage dispensation so that the increase in child marriage in Indonesia can be prevented.

Keywords: Marriage Dispensation, Religious Courts, Underage Marriage

A. Introduction

Marriage is essential in human life, which can cause legal consequences for the husband or wife concerned. Marriage aims to form an eternal and happy family based on the One Godhead. In-Law No. 16 of 2019 changes to Law No. 1 of 1974, Article 7 explains that marriage is only permitted if a man and a woman have reached the age of 19 (nineteen) years. The amendment to the Marriage Law resulted from the decision of the Constitutional Court
Number 22/PUU-XV/2017. This ruling substantially influenced and changed the legal system of marriage in Indonesia. In addition, the decision is a solution to the rise of child marriages.\(^1\)

One of the most important reasons for underage marriage is an unfavorable economic, social, and cultural situation.\(^2\) According to the Decision Number 22/PUU-XV/2017, child marriage is indeed vulnerable and has the potential to cause a variety of problems, including physical health (particularly reproductive health), mental health, psychological and social barriers, and economic difficulties in meeting the needs of a decent life. Setting the marriage age limit for girls at 16 (sixteen) years opens the door to marriage at the age of a child. It is a form of violation of the constitutionally guaranteed rights of children.\(^3\)

Islam has also regulated marriage age limits, which can be found in the Qur'an and Hadith but do not explicitly state the age limit for marriage between the prospective bride and groom. The meaning of "old enough to marry" in Surah An-Nisa' verse 6 is after the desire to have a household that can run perfectly when it can take care of assets. Surah Al-Nur verse 32 is described in several ways, including Ibn Katsir's interpretation, which states that an order to marry, in the opinion of some scholars, requires marriage for those who can afford it. Limits on the age of marriage according to the hadith narrated by Imam Muslims is by describing historically related to the age limit for marriage, as exemplified in the marriage of the Prophet Muhammad with Aisyah. In contrast to what Imam Malik stated, someone who has reached maturity or *baligh* is defined as having been marked when the discharge of sperm is absolutely in a state of sleep or fertilization, or the sign is the growth of hair on some parts of the body, Imam Shafi'i also defines the limit in *baligh* as a man with an age limit of 15 years and a woman's age limit as nine years.

Furthermore, according to the science of *fiqh*, marriage in Islam is permissible if both prospective husband and wife have reached puberty, as stated in the *Kitab al-Fiqh 'Ala Madzahib al-Arba'ah*, where the limit of puberty for a child is marked by resistance, but for a man it is sometimes marked by a dream, and for a woman it is experiencing menstruation. Imam Hanafi also argues that puberty for a man is marked after having a dream and the discharge of semen, while for women, it is marked by menstruation. If there are no signs of this, then it can be shown based on their age, namely men with an age limit of 18 years and women with an age limit of 17 years.

However, at the same time, this will be met with another provision in the Indonesian marriage law system: a marriage dispensation. Marriage dispensation is a stipulation given by a judge to permit men and women who are not yet 19 (nineteen) to marry. Through the provisions of the Marriage Dispensation, efforts to prevent child marriage by determining the minimum age limit can deviate. Marriage between those who have not met the marriage age limit, regardless of the limit that the state will set, can get legality in the eyes of the law if it is equipped with a Marriage Dispensation. Marriage dispensation cases are also civil cases submitted voluntarily or petitions that are very different from contentious cases or lawsuits with characteristics, namely being of one-sided interest, which means that the problem for which the request is requested to be resolved is purely about interests. There is no problem with the rights of other people. On the other hand, the problem submitted is not in dispute with other people and is one party or former party in which no third party is drawn as the opposing party.\(^4\)

\(^1\) Indonesia, “Law Number 16 of 2019 Amendments to Law Number 1 of 1974 Concerning Marriage”.


The existence of this application for a marriage dispensation is considered a futile matter because the changes made by the Constitutional Court to the minimum age of marriage can still be violated by minors who have the desire to marry. The application is by requesting a marriage dispensation application to the Head of the local Religious Court in the region of the law. Of course, this intersects with the legal rules governing marriage (das sollen) as well as phenomena or realities that occur in people's lives (das sein). Article 7 paragraph (2) of the Marriage Law stipulates that in the case of deviations from the provisions on the age limit for marriage, parents can apply for a dispensation to the court. One of the reasons often stated in the application for dispensation for marriage is that the relationship between the prospective groom and the prospective bride is already very close. Hence, it is no longer possible to delay the marriage implementation even though both have already had a husband and wife relationship outside of marriage. As a result, parents are concerned that their children will engage in more actions that violate Islamic law.

The Religious Courts frequently consider two disadvantages when adjudicating cases of application for a marriage dispensation: the harm that occurs as a result of marriage at the age of children and the harm that will occur if the marriage dispensation is rejected. The Panel of Judges frequently accepts applications for dispensation for marriage because they believe that the harm that will occur if the dispensation for marriage is denied is greater than the harm that will occur due to early marriage, where the offspring and honor of the bride and groom are likely to be harmed. The legal considerations put forward by the Panel of Judges in determining the case for the application for a marriage dispensation are formulated based on legal facts proven at trial. So far, this legal fact has been obtained based on information from parents, the two prospective brides, and witnesses who were presented before the court. On the other hand, if you look at the Ius Constitutum that applies in Indonesia, it wants marriage not to occur at the age of children.

Because child marriage is a complex issue, as described by the author above, the court, as an institution authorized by law to assess the urgency of the marriage taking place, must consider it based on legal facts extracted from various aspects of consideration, particularly when The marriage age for men and women has been equalized to 19 (nineteen) years as a result of the revision of the Marriage Law. Based on these problems, the author explains two problems that are the focus of this paper, namely how the legal consequences of the marriage dispensation on child marriage and the relevance of Religious Court Decisions with positive law. In this study, the authors used empirical juridical research methods. Using secondary data through literature studies such as laws and regulations, court rulings, and legal theory, the method of data analysis uses qualitative methods. Then, this research conducted an empirical study of the literature from online sources.

B. Discussion

1. Legal Consequences of Marriage Dispensation on Child Marriage

Marriage is so essential for human life that it results in various legal consequences between husband and wife, their families, their children, their parents, and even the community in their environment. One of the purposes of marriage is to create peace and happiness in life, which

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8 Ibid.
women and men do to fulfill their biological needs. In terms of bridging so that the purpose of this marriage is fulfilled, provisions have been established as the foundation for conducting marriages. Law Number 16 of 2019 concerning Marriage relates to the age limit for prospective brides, namely in Article 7 paragraph 1, which clearly states that marriage is permitted if the man and woman reach the age of nineteen. If these conditions cannot be met, then the implementation of the marriage can be canceled or prevented.

Unfortunately, the benchmark for when the marriageable age is regulated in legislation can be stated as very young, where such an age limit does not guarantee the purpose of marriage to obtain inner and outer happiness. Child marriage poses numerous risks and is analogous to a toothless law; in other words, child marriage is becoming more common, and many violations occur as a result of the law without further action; of course, violating the provisions in the legislation can be considered a violation of children's rights. When viewed through the lens of human rights, particularly for women, child marriage is a violation of human rights that results in the child's poor physical and mental growth and development, failure to complete his education, pregnancy, and birth at a young age, and increased risk of sexual violence. Child marriage can also cause anthropometric failures such as wasting, stunting and being underweight.

There are several articles concerning children's rights in Human Rights Law Number 39 of 1999. Article 52, paragraph (1), for example, contains the right of children to obtain protection from both parents, their families, and even the state, while paragraph (2) defines children's rights as human rights and needs that are legally protected from those in the womb. It also explains in Article 58, paragraph 1, how each child is legally protected from acts of physical and psychological violence (1). Furthermore, it is intended in article 66, paragraph (6) that children whose freedom is taken receive practical legal assistance.

Law Number 16 of 2019 concerning Marriage clearly states that the purpose of marriage is to obtain healthy offspring. Therefore, it can be prevented by not carrying out marriages by prospective husband and wife pairs who are still at an early age and are not yet mature. In this regard, the low age limit for marriage also causes an increase in the birth rate, resulting in population problems. Based on reality, the Religious Courts' granting of marriage dispensation will provide opportunities for applicants to carry out child marriages. If you want to marry, you must still go through the process of submitting a marriage dispensation to the appropriate court, in this case, the Religious Courts.

When applying for a marriage dispensation, the judge must make specific decisions on whether to reject or grant the application for the dispensation that has been submitted. A

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15 “Law No. 39/1999 on Human Rights”.
16 Yunanto, *Hukum Perkawinan Indonesia (Kajian Kritis Atas Problematica Dan Implementasinya)* (Semarang: Badan Penerbit Universitas Diponegoro, 2010).
dispensation is a type of relief granted by a judge for a legal prohibition.\textsuperscript{17} Just as a judge grants a request for a marriage dispensation in a matter with case number 0019/Pdt.P/2017/PA. Regency. M N. precisely at the Religious Court of Madiun Regency, wherein applying to carry out the marriage, it has deviated from the marriage age limit. There are several considerations which are the reasons for the judge in granting the case, namely\textsuperscript{18}:

a. Referring to Law No.16 of 2019 concerning Marriage and a rejection letter from the office of religious affairs in which the applicant violates the provisions in Article 7 regarding the age limit for marriage, the Religious Court of Madiun Regency has the authority to settle cases based on Article 49 paragraph (1) letter a and Article 49 paragraph (2) of Law Number 7 of 1989 concerning the Religious Courts which was amended into Law Number 3 of 2006 and the second amendment to Law Number 50 of 2009 which explains that the Religious Courts have the authority to decide, examine and settle cases at the first level for people who are Muslim in terms of marriage. On that basis, the application for dispensation for marriage in the quo case has become the absolute authority of the Religious Courts (PA).

b. Based on the evidence from the applicant, starting from the ID card, Divorce Certificate, Family Card, Marriage Certificate, and Diploma from the prospective bride and groom, the truth has been verified where the applicant is the parent of the prospective bride and groom.

c. The judge reviewed the psychological aspect of children who were able to get married. This is because, at the age of the child, the reproductive organs can function and are added to the child who has menstruated, and from the emotional point of view, the child is considered mature enough.

d. The judge uses the basis of Islamic law, namely the fiqh rules. It is explained that harm must at least be eliminated. Therefore, by looking at the existing legal facts, the two candidates are already in such a close relationship that if they are not married, soon they will be trapped by approaching adultery. The judge also wants to avoid acts prohibited by religion, which in the judge's consideration prefers minor damages to avoid more severe damage in the future.

In this regard, the application for dispensation for marriage may have legal consequences, namely consequences that occur due to legal events. The judge's approval of the dispensation will increase child marriages. Furthermore, upon receipt of the dispensation application, the right to carry out the marriage will be obtained where the state still recognizes the marriage and is registered at the Civil Registry Office and the Office of Religious Affairs, as well as the existence of an inherent law, namely having responsibilities to the wife and husband, and their children. The existence of laws that arise, such as legitimacy, property, and children, provide a clear relationship status for the child, and children who are born have received legal recognition even though the child is underage and pregnant out of wedlock.\textsuperscript{19} The court also provides an excellent opportunity for child marriages that violate children's rights (right to health, education, and growth and development). In short, the judges' role is vital and decisive in protecting children's rights. By giving this marriage dispensation, it is also to provide for the children's best interests. However, this does not mean that the judge does not participate in preventing child marriage due to the receipt of the application for a marriage dispensation.


Still, instead, it will be able to provide justice, benefit, and certainty for the child. Undeniably, if the judge refuses the application for dispensation, it will bring more significant harm.

As stated in the Marriage Law and PERMA Number 5 of 2019 with "very urgent reasons", the fulfillment of child marriage and the judge should consider all aspects. However, if the application for dispensation for marriage is rejected, there will be other legal consequences. In this case, during the examination, the court found that there was no urgent reason for the child. The conditions were, for example:

1. Children are under coercion from parents to marry
2. The child is not ready to marry the bride-to-be
3. Status of children still in school
4. The child is not psychologically and healthy ready for marriage
5. A son who is not financially ready so that he cannot meet the needs of his family in the future
6. Parents from both parties do not support and are committed to being responsible for social, economic, health, and educational issues for the bride and groom.

In addition, there are other legal consequences arising from the refusal of the application for a marriage dispensation by the judge to protect children's rights, such as the rise of underage unregistered marriages, marriage certificates or applications for legalization of marriage for unregistered marriages against children, and pregnancy out of wedlock. The problem is if it is related to the formulation of the criminal offense of adultery in the RKUHP, can this concept still be applied. Therefore, there must be support from various parties, including the parents of the two prospective brides, in which the role of parents should be as a place for the child's crew to experience growth and development. It is stated in Article 26 of Law No. 35 of 2014 concerning Child Protection that parents have the responsibility and obligation to maintain, nurture, educate, provide character education, and protect their children.

2. The Relevance of Religious Court Decisions to Indonesian Positive Law

The passage of Marriage Law Number 16 of 2019 is expected to decrease the number of early marriages in the country. However, this frequently fails because, in practice, the state appears to be expanding the potential for the legalization of child marriage through Supreme Court Regulation Number 5 of 2019. This ambiguity has resulted in the widespread use of marriage dispensations granted by parents and/or minors who wish to marry. The reality is that the number of applications for marriage dispensations has increased in several cities/districts since the reenactment of the Marriage Law. From November 1 to December 5, 2019, there were 14 registered dispensation cases at the Mukomuko Religious Court, compared to only one case from December 2018 to October 2019. Even PTA Semarang noted that following the revision of marriage regulations, Religious Courts in Central Java experienced a

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significant increase of 286.2 percent, from 355 cases in October to 1,371 cases in November, following the amendment to the Law.  

The facts above show that the revision of the existing Marriage Law is not proportionate to the public legal consciousness. Children’s marital problems are susceptible because it deals directly with the legal awareness that lives in society. Although a dispensation application may be submitted with urgent reasons and supporting evidence, several existing studies show that many reasons appear artificial. Many people, particularly perpetrators of underage marriages and their parents, believe that the dispensation softens the obstacles to having a marriage before reaching the age limit specified in the law, for whatever reason.

One example of the decision of the Religious Courts in the Determination of Marriage Dispensation in Decision Number 42/Pdt.p/2018/PA.Batg, in this case, the judges of the Religious Courts assessed that it was to avoid any harm or harmful access for the families of both parties and to maintain the nobility and high religious values in the local community to avoid the growth of free sex culture in society. In the Determination of Marriage Dispensation in Decision Number 48/Pdt.P/2018/PA.Sgt, the judge considered several factors, including this juridical consideration based on the provisions of Article 7 paragraph (1) of Law Number 16 of 2019 regarding the minimum marriage age of 19 years, as well as some sociological considerations, such as using ushul fiqh rules that state that rejecting damage takes precedence over hoping for a benefit.

The judge's considerations in determining the marriage dispensation are in accordance with Article 17 of the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, wherein this article the Judge in determining the application for marriage dispensation considers:

a. protection and the best interests of children in statutory regulations and unwritten laws in the form of legal values, local wisdom, and a sense of justice that live in society;

b. International conventions and/or treaties related to child protection.

The magnitude of applications for dispensation from marriage is unrelated to public awareness of the dangers of underage marriage. It is, however, influenced by legal reasoning (legal considerations) by judges as well as existing legal rules. The application for dispensation must be accompanied by sufficient evidence and reasons to persuade the judge to grant the request. In harmony with the theory of law effectiveness proposed by Soerjono Soekanto, law effective is, or it could also be said that things that affect law enforcement

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26 Ilma, “Regulasi Dispensasi Dalam Penguatan Aturan Batas Usia Kawin Bagi Anak Pasca Lahirnya UU No. 16 Tahun 2019.”


29 “Regulation of the Supreme Court Number 5 of 2019 Concerning Guidelines for Adjudicating Applications for Marriage Dispensation”.

depend on four indicators, namely 1) law/legal norms; 2) law enforcement; 3) facilities and amenities; and 4) community.\(^{31}\)

Regarding the legal norm factor, the principle of dispensing in marriage after revising the marriage law is still maintained. The difference is that Article 7 of Law no. 1 of 1974 consists of 3 paragraphs, while Law Number 16 of 2019 consists of 4. In addition, there are slight changes to some of the phrases. In the latest revision of the Marriage Law, article 7 paragraph (2) states that parents often commit the activities of dispensations from both sides of the male and the female that the Court can only request. The phrase ‘another official’ in the past Marriage Law was omitted because it was considered ambiguous. This ambiguity is caused by the large number of officials authorized to grant dispensations, which are carried out by the Court and employees of the Office of Religious Affairs (KUA) and the Village Head. In practice in the field, if one official refuses to grant a dispensation, another appointed official can grant it. This flexibility shows that previously the dispensation was granted without strict conditions. Therefore, as legal certainty, a dispensation can only be requested from the Court.

There is an additional phrase in verse 7 (2) of a compelling reason for bagging sufficient evidence to support a filling. This has the good intention of limiting petitions to urgent dispensations for which the requirements provide evidence. However, because there is no precise description, it can elicit multiple interpretations, resulting in the judge's subjectivity as a result of the lack of precise regulation. The phrase also prompts those with affairs to seek dispensations for a variety of reasons. Because of the lack of legal certainty, the absence of a description of the phrases "urgent reasons" and "sufficient supporting evidence" will create new problems in the implementation of a dispensation to marriage.

Another addition is in paragraph (3), which states that the court must listen to the opinions of both the bride and groom, male and female. This provision is made as a form of anticipation to avoid coercion in marriage, not with both brides' justification. Several additional articles and phrases relating to the rules of marital dispensations remain unclear. The existing provisions do not provide clarity and limitations on the compelling reasons that can be submitted and a description of the evidence considered supportive. Opportunities for dispensation for marriage without strict regulations are counterproductive to raising the marriage age limit, whose main objective is reducing children's marriage rate. This regulation is materially flawed and needs to be revised to produce laws that can reduce child marriage rates more efficiently.

Furthermore, the Chairperson of the Panel of Judges uses a legal basis in the form of Article 53 paragraph (1) of Law Number 1 of 1974 when deciding on the application, which regulates the following:\(^{32}\)

a. A pregnant woman out of wedlock can carry out the process in an early marriage with a man who has impregnated her;

b. The process of early marriage with a woman who is pregnant out of wedlock can be carried out without having to be preceded by the birth process of the child being conceived;

c. The process of early marriage, which is carried out when a woman is still pregnant, is still considered legally valid without having to perform the second process of marriage when a woman has borne her child.

The judge considers several factors when granting the marriage dispensation application, including the child's urgency. If the trial harms the child, the judge can refuse the dispensation

\(^{31}\) Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*, Cet. ke-16 (Jakarta: Rajawali Pers, 2019).

\(^{32}\) Indonesia, Law Number 16 of 2019 Amendments to Law Number 1 of 1974 concerning Marriage.
If there is a prohibition. In the Baubau Religious Court, there are two reasons which are the primary basis for submitting a marriage dispensation application: the age issue and the woman who is pregnant at the age of 4 months. For that reason, there are two things juxtaposed with the conditions for granting a marriage dispensation. The first is the fulfillment of the legal pillars in marriage. Second, a goal leads to the benefit of human life.

C. Conclusion

Law Number 16 of 2019 is expected to reduce the number of child marriages, but the number of child marriages has increased drastically. This is because there are phrases that have no clear direction and even support the legality of child marriage. Plus the knowledge of the Indonesian people about a low risk of child marriage. Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation has also increased the number of child marriages. In considering the stipulation of the marriage dispensation, the judge of the religious court saw several provisions in Article 17 of the Regulation of the Supreme Court Number 5 of 2019. There is also a judge's benchmark in granting a dispensation to women who have become pregnant outside of marriage in Article 53 paragraph (1) of Law Number 16 of 2019. How can the goal of reducing the number of child marriages be achieved if the rules are unclear? As a result, this law must be revised once more.

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