

Quo Vadis Marriage Dispensation in Indonesia: Judge's Decision in Preventing Child Marriage at the Jepara Religious Court

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Received: 2022-08-27	Revised: 2022-12-23	Published: 2022-12-30
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Abstract:

This article aims to explore how to optimize the judges of the Jepara Religious Court in preventing child marriage amid increasing requests for dispensation every year as a result of changing the age limit for marriage in the Marriage Law. To answer these objectives, this article uses a type and research approach, namely sociological juridical with a qualitative basis. The primary data source was obtained directly from the informants, namely the Jepara Religious Court judges. The secondary data sources are in the form of books and journals which are still relevant to this theme. To obtain the data and information needed in this article, data collection techniques such as interviews were used. After the data is obtained, the next step is to process the data using data analysis techniques in the form of descriptive qualitative. The results of this study indicate that the optimization carried out by the judges of the Jepara Religious Court in preventing child marriage along with the increase in cases of requests for dispensation of marriage include carrying out administrative tightening and adding recommendation letters from doctors or midwives, and recommendation letters from social services or workers following Court Regulation Number 5 the Year 2019. In addition to conducting massive and simultaneous outreach by involving all elements of society such as religious leaders, community leaders, parents or guardians, families, educational institutions, NGOs, and local government to provide education to the public so they have legal awareness and provide an understanding of negative effects of child marriage.

Keywords : marriage dispensation; religious court; child marriage.

Introduction

Discourse on the practice of child marriage or in other terms early marriage is still an interesting issue to be discussed among academics, government, child activists, and the world community given the fact that the practice of child marriage

still occurs in many countries, especially developing countries.¹ Although in the last few decades the number of child marriages has decreased globally, it still leaves many people concerned because child marriage is a form of violation of children's human rights, limits children's opportunities, and choices, and makes children vulnerable to exploitation, abuse, and violence.² Research shows that in most developing countries the practice of child marriage is dominated by young girls.³ Child marriage tends to be defined as marriage under the age of 18.⁴

Bahriyah et al in their research said that globally there are around 650 million (girls) who married less than 18.⁵ Reporting from the databox as written by Rizaty⁶ Reporting from the databox as written by Rizaty said that from 2015 to 2021 there were several developing countries with the highest rates of female child marriage in the world, including Niger with the percentage of marriage age under 18 reaching 76 percent. North Africa and Chad with the same percentage of 61 percent. Mali with the percentage of married women under the age of 18 reaching 54 percent. Mozambique with 53 percent, Burkino Faso and South Sudan with the same percentage, namely 52 percent, and followed by Bangladesh with 51 percent. In a study by Chloe M. Harvey et al⁷ mentioned Thailand and the Philippines the percentage reached 36 percent. Meanwhile, according to Elnakib et al⁸ Lebanon, the percentage reached 32.56 percent.

Indonesia, based on the 2020 Edition of the Central Bureau of Statistics and the *United Nations Children's Fund* (UNICEF) report, stated that in 2018 vulnerable women aged 20 to 24 married under the age of 18 were estimated to reach approximately 1,220,900. This figure places Indonesia in the 10th country with the highest child marriage rate in the world.⁹ The highest prevalence of married women

¹ Eddy Fadlyana and Shinta Larasaty, "Pernikahan Usia Dini Dan Permasalahannya," *Jurnal Sari Pediatri* 11, no. 2 (2009): 136, <https://doi.org/http://dx.doi.org/10.14238/sp11.2.2009.136-41>.

² Lia Meita Sari and Muhammad Azinar, "Kejadian Pernikahan Usia Dini Pada Wanita Usia 15-24 Tahun Di Kecamatan Arut," *Higeia Journal of Public Health Research and Development* 6, no. 2 (2022): 252, <https://doi.org/https://doi.org/10.15294/higeia.v6i2.54231>.

³ Simin Montazeri et al., "Determinants of Early Marriage from Married Girls' Perspectives in Iranian Setting: A Qualitative Study," *J Environ Public Health* 8615929 (2016), <https://doi.org/10.1155/2016/8615929>.

⁴ Muazzam Nasrullah et al., "Girl-Child Marriage and Its Association with Morbidity and Mortality of Children Under 5 Years of Age in a Nationally-Representative Sample of Pakistan," *Journal of Pediatrics* 164, no. 3 (2014): 639, <https://doi.org/10.1016/j.jpeds.2013.11.017>.

⁵ Fitriyani Bahriyah, Sri Handayani, and Andari Wuri Astuti, "Experience of Early Marriage In Developing Countries: Scoping Review," *Journal of Midwifery and Reproduction* 4, no. 2 (2021): 95, <https://doi.org/https://doi.org/10.35747/jmr.v4i2.709>.

⁶ Monavia Ayu Rizaty, "8 Negara Dengan Perkawinan Anak Perempuan Di Bawah Umur Tertinggi," *Databoks*, July 2022, <https://databoks.katadata.co.id/datapublish/2022/06/01/8-negara-dengan-perkawinan-anak-perempuan-di-bawah-umur-tertinggi>.

⁷ Chloe M. Harvey et al., "Premarital Conception as a Driver of Child Marriage and Early Union in Selected Countries in Southeast Asia and the Pacific," *Journal of Adolescent Health* 70, no. 3 (2022): 544, <https://doi.org/10.1016/j.jadohealth.2021.11.003>.

⁸ Shatha Elnakib et al., "Investigating Incidence, Correlates, and Consequences of Child Marriage Among Syrian Refugees Residing in the South of Lebanon: A Cross Sectional Study," *Journal of Adolescent Health* 70, no. 3 (2022): 565, <https://doi.org/10.1016/j.jadohealth.2021.08.022>.

⁹ Gaib Hakiki et al., *Pencegahan Perkawinan Anak Percepatan Yang Tidak Bisa Ditunda*, Badan Pusat Statistik, UNICEF, Kementerian Perencanaan Pembangunan Nasional (PPN)/Bappenas (Jakarta, 2020), x, <https://www.unicef.org/indonesia/media/2851/file/Child-Marriage-Report-2020.pdf>.



under the age of 18 in Indonesia, namely the provinces of Sulawesi and Kalimantan, ranges from 14-19 percent. Meanwhile, in several other provinces, such as Java, Bali, and Nusa Tenggara, it was 15.48 percent.¹⁰ The high number of child marriage practices in several developing countries including Indonesia is influenced by several factors including tradition and religion, economy, level of education, pregnancy out of wedlock, and regulations.¹¹

The world community realizes that child marriage is a serious problem, so a strategy is needed to end it and increase public awareness of its negative implications.¹² In reality, child marriage has negative implications for children who are forced to marry, namely the limited access to education, exploitation, health quality, the potential for violence, and intergenerational poverty.¹³ In the Indonesian context, various policies to end child marriage have been implemented, and the government is even committed to targeting the reduction of child marriage nationally in the 2020-2024 National Medium-Term Development Plan (RPJMN). From a regulatory perspective, the age of marriage has also been tightened through Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage. So Article 7 paragraph (1) is amended to read "Marriage is only permitted if a man and a woman have reached the age of 19 years".¹⁴ The age of 19 according to this law is that a child is considered an adult and has the readiness to enter into marriage both physically and spiritually.

Historically, the regulation of the age of marriage was also intended to prevent child marriage and restore women's constitutional rights and prevent them from various violations of human rights such as exploitation and violence.¹⁵ However, the enactment of the amendment to the Marriage Law is considered not effective enough and even tends to have the potential to provide opportunities for increasing child marriage through filing applications for dispensation from marriage. The state of cases for requests for dispensation after the enactment of Law Number 16 of 2019 has increased in almost all Religious Courts in Indonesia, including the Jepara Religious Court. Data for Badilag of the Supreme Court of the Republic of Indonesia¹⁶ shows that the state of cases for requests for dispensation in 2018 totaled 13,822 cases, in 2019 there were 24,864 cases, in 2022 there were 64,196 cases. Meanwhile, the case data for requests for dispensation at the Jepara

¹⁰ Hakiki et al., 11.

¹¹ Tri Ardayani, "Faktor-Faktor Yang Berhubungan Dengan Pernikahan Usia Dini," *Jurnal Ilmu Kesehatan* 11, no. 2 (2020): 24, <https://doi.org/https://doi.org/10.35966/ilkes.v11i2.184>.

¹² Fraidy Reiss, "Child Marriage in the United States: Prevalence and Implications," *Journal of Adolescent Health* 69, no. 6 (2021): 58, <https://doi.org/10.1016/j.jadohealth.2021.07.001>.

¹³ Heribertus Rinto Wibowo et al., "One Household, Two Worlds: Differences of Perception Towards Child Marriage Among Adolescent Children and Adults in Indonesia," *The Lancet Regional Health - Western Pacific* 8 (2021): 2, <https://doi.org/10.1016/j.lanwpc.2021.100103>.

¹⁴ Undang-Undang RI, "Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," 2019.

¹⁵ Aristoni, "Kebijakan Hukum Perubahan Batasan Umur Minimal Umur Pernikahan Perspektif Hukum Islam," *Jurnal USM Law Review* 4, no. 1 (2021): 407.

¹⁶ Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI, "Data Perkara Peradilan Agama Tingkat Pertama," Mahkamah Agung Republik Indonesia, 2022, <https://badilag.mahkamahagung.go.id/perkara-diterima-dan-diputus-pada-tingkat-pertama/data-perkara/perkara-diterima-dan-diputus-pada-tingkat-pertama>.

Religious Court in 2018 totaled 117 cases, in 2019 188 cases, in 2020 there were 423 cases, and in 2021 there were 509 cases.¹⁷

The reality of the increasing number of cases requesting dispensation from marriage every year at the level of trying cases is that almost most courts, including the Jepara Religious Court, are faced with the problem of limited juvenile judges or having a certificate of the Juvenile Criminal Justice system as stipulated in Article 20 letter a of the Republic of Indonesia Supreme Court Regulation Number 5 the Year 2019 concerning Guidelines for Adjudicating Applications for Dispensation of Marriage. The limitations on the classification of judges can potentially affect the quality of judges' considerations in their decisions, although in the provisions of Article 20 letter b there is an exception where if there are no qualifications referred to then each judge can hear a request for dispensation from marriage. Another problem faced by judges in trying cases of marital dispensation is the reason for having had conjugal relations with the child being requested for marital dispensation so this becomes a separate problem for judges in legal considerations to grant and reject the request for dispensation.

Marriage dispensation is defined as granting permission to marry by a court to a prospective husband or wife who is not yet 19 years of age to enter into a marriage. This article aims to describe and explain how the Jepara Religious Court judges optimize in preventing child marriage in the midst of increasing requests for dispensation from marriage every year as a result of changing the age limit for marriage in the Marriage Law. To these objectives, the type of research used in this study is sociological juridical research based on a qualitative approach. The location of this research is the Jepara Religious Court. The data source used is in the form of primary data, namely direct interviews with judges at the Jepara Religious Court. In-depth interviews were conducted with the informants to obtain the data or information needed to answer the problem. After the data or information is obtained, then the data is validated with a credibility test and processed using data analysis techniques, namely descriptive qualitative so that it becomes information.

Results and Discussion

Marriage Dispensation Arrangements Before and After Amendments to the Marriage Law

Historically, the *legal policy* for the formation of Law Number 1 of 1974 concerning Marriage, hereinafter abbreviated as the Marriage Law, was intended to carry out legal unification in various marriage law issues that were applicable in Indonesian society at that time.¹⁸ With the passing of this Marriage Law, by the 1945 Constitution of the Republic of Indonesia and the principle of *lex specialis derogat legi generalis*, the marriage rules in the provisions of the articles in Book 1 of the Civil Code (*Burgerlijk Wetboek*) are declared repealed and no longer valid.¹⁹ nd

¹⁷ Pengadilan Agama Jepara Kelas 1A, "Laporan Tahunan Pengadilan Agama Jepara," Mahkamah Agung Republik Indonesia, 2022, <https://pa-jepara.go.id/informasi-umum/laporan-tahunan>.

¹⁸ Muhammad Daud Ali, "*Hukum Islam Dan Peradilan Agama*" (Jakarta: Raja Grafindo Persada, 1997), 83.

¹⁹ Moh. Alli Wafa, *Hukum Perkawinan Di Indonesia Sebuah Kajian Dalam Hukum Islam Dan Hukum Materil* (Tangerag Selatan: Yayasan Asy-Syari'ah Modern Indonesia, 2018), 26.



all marriages refer to Law Number 1 of 1974 as the national marriage law (*ius constitutum*).²⁰ In the provisions of Article 1 of Law Number 1 of 1974, it is stated that marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family based on the Belief in One Almighty God.²¹

Some say that Law Number 1 of 1974 concerning marriage as the first Marriage Law substantially adopts Islamic law. This law is also considered to be quite comprehensive from a regulatory perspective, including regulating the age limit for marriage.²² Setting the age limit for marriage as stated in Article 7 paragraph (1) where it is stated that men are only allowed to marry at the age of 19 and women at 16 years, actually, from the beginning the regulation was intended to elevate the dignity and status, especially for women.²³ In addition, the policymakers consider that the age of marriage has matured physically and mentally compared to the provisions in civil law which state that a man is 18 years old and a woman is 15 years old.²⁴

The provisions of Article 7 paragraph (1) along with its implementation by some groups are also considered to have many loopholes that have the potential for child marriage so that it has a negative impact, especially on women.²⁵ That is why some groups, especially women activists, voiced and fought for the substance of Article 7 paragraph (1) of Law Number 1 of 1974 to be changed because it was no longer by the times and the legal needs of society and the constitution which was marked by strengthening guarantees and protection against human rights. Through a long process of struggle, finally, on October 14, 2019, the government passed Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

The passing of Law Number 16 of 2019 is a separate record in the history of the renewal of marriage law in Indonesia. From the point of view of legal politics, the birth of this law must be interpreted as a form of consistency and seriousness of the government as the legislator in carrying out the Decision of the Constitutional Court of the Republic of Indonesia Number 22/PUU-XV/2017 and responding to the demands of society who want the elimination of all forms of discrimination and prevention child marriage which has an impact on the exploitation of children, so that the provisions of Article 7 paragraph (1) are amended to read "Marriage is only

²⁰ Muhammad Maksum, "Kedudukan Syariah Sebagai Sumber Hukum Positif: Kajian Awal Atas Hukum Perkawinan, Ekonomi Islam, Dan Hukum Ketenagakerjaan Di Indonesia Dan Maroko," *Istinbath Jurnal Hukum Islam* 15, no. 2 (2016): 289, <https://media.neliti.com/media/publications/90562-ID-kedudukan-syariah-sebagai-sumber-hukum-p.pdf>.

²¹ Undang-Undang Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan" (1974).

²² Wafa, *Hukum Perkawinan Di Indonesia Sebuah Kajian Dalam Hukum Islam Dan Hukum Materil*, 27.

²³ Mardi Candra, "Aspek Perlindungan Anak Indonesia: Analisis Tentang Perkawinan Di Bawah Umur" (Jakarta Timur: Kencana, 2018), 13.

²⁴ Amiur Nuruddin and Azhari Akmal Tarigan, "Hukum Perdata Islam Indonesia: Studi Kritis Perkembangan Hukum Islam Dari Fikih, Undang-Undang Nomor 1 Tahun 1974 Sampai Kompilasi Hukum Islam" (Jakarta: Kencana, 2006), 70.

²⁵ Habib Shulton Asnawi, "Tinjauan Kritis Terhadap Hak-Hak Perempuan Dalam UU. No. 1 Tahun 1974 Tentang Perkawinan: Upaya Menegakkan Keadilan Dan Perlindungan HAM Perspektif Filsafat Hukum Islam," *Jurnal Fikri* 1, no. 1 (2016): 42, <https://journal.iaimnumetrolampung.ac.id/index.php/jm/article/view/27/22>.

permitted if a man and a woman have reached the age of 19 years. Even though the legal policy of changing Article 7 paragraph (1) of the Marriage Law has a beneficial dimension, namely as an effort to prevent child marriage, on the other hand, it has created new problems, namely the increase in cases of requests for dispensation of marriage.²⁶

Marriage dispensation consists of two words, namely dispensation, and marriage. Dispensation has the meaning of an exception from regulation due to special considerations or exemption from something that is prohibited or an obligation.²⁷ While marriage is defined as a physical and spiritual bond between the prospective husband and wife following religious and state rules.²⁸ Thus it can be understood that a marriage dispensation is a form of deviation or exception to the age of marriage. This is confirmed in the provisions of Article 7 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, which states that "In the event of deviation from the age provisions referred to in paragraph (1), the person the parents of the man and/or the parents of the woman can ask for a dispensation from the Court with very urgent reasons accompanied by sufficient supporting evidence. According to the Regulations of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, what is meant by marital dispensation is the granting of a marriage permit by the court to a prospective husband or wife who is not yet 19 years old to enter into a marriage.

Philosophically, the regulation of marriage dispensation after the amendment to the Marriage Law through the issuance of Supreme Court Regulation Number 5 of 2019 aims to realize the smooth running of the judiciary, especially related to the process of adjudicating applications for marital dispensation, which previously had not been regulated in more detail and strictly in statutory regulations. so that it has implications for non-uniformity between courts in adjudicating applications for marriage dispensation. Apart from these main objectives, several other objectives of Supreme Court Regulation Number 5 of 2019 include: (1) implementing the principles referred to in Article 2; (2) ensuring the implementation of a justice system that protects children's rights; (3) increasing parental responsibility in the context of preventing child marriage; (4) identify whether or not there is coercion behind the request for dispensation from marriage; and (5) realizing standardization of the process of adjudicating applications for marriage dispensation in court.

The above objectives at the same time emphasize that the Supreme Court Regulation serves as a technical guideline and legal umbrella for judges in examining, adjudicating, and determining applications for dispensation based on the principles of the best interests of the child, the right to life and development of the child, respect for the opinion of the child, respect for the dignity of the child. human rights, non-discrimination, gender justice, legal equality, fairness, benefits,

²⁶ Lilik Andar Yuni, "Analysis of The Emergency Reasons in The Application of Marriage Dispensation at The Tenggara Religious Court," *Samarah* 5, no. 2 (2021): 976, <https://doi.org/10.22373/sjhk.v5i2.9135>.

²⁷ Roihan A. Rayid, *Hukum Acara Peradilan Agama* (Jakarta: Raja Grafindo Persada, 2002), 203.

²⁸ Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia Pusat Bahasa* (Jakarta: Gramedia Pustaka Utama, 2008), 335.



and legal certainty. In the context of examining marriage dispensation cases, the thing that must be considered by the judge is to pay attention to the best interests of the child, one of which is by exploring the background and reasons for child marriage, meaning that there is coercion or not, the child being requested for the marriage dispensation is so that there is no violation of human rights towards children. Because referring to the considerations of Supreme Court Regulation Number 5 of 2019, children are essentially a mandate and a gift from God Almighty who has dignity as a whole human being and has the same right to grow and develop.

Even though marriage dispensation is legally permitted, based on Supreme Court Regulation Number 5 of 2019 several administrative requirements must be met by parents as applicants. Several administrative requirements in submitting a marriage dispensation application include (1) an application letter; (2) a photocopy of the parent's or guardian's KTP; (3) a photocopy of Family Card; (4) a photocopy of KTP or child identity or birth certificate; (5) photocopy of ID card or child's identity card or birth certificate of the prospective husband/wife; and (6) a photocopy of the child's last education certificate or a certificate of still going to school from the child's school. Regarding the administrative requirements, the aim is to find out the legal position of the applicant with the child being requested for dispensation from marriage.

Circumstances of the Case and Factors Causing the Community to File an Application for Marriage Dispensation at the Jepara Religious Court

It has been previously explained that the spirit of changing the Marriage Law has the goal of benefiting, namely preventing child marriage in Indonesia. However, on the other hand, the presence of Law Number 16 of 2019 in its implementation by some circles is considered a productive contract of the desired goals.²⁹ The fact that the increase in dispensation for marriage every year occurs in almost all courts, including the Religious Court of Jepara, is proof that the purpose of changing the Marriage Law is far from true, meaning that with almost the majority of the number of applications for dispensation proposed being granted, it will increase the number of marriages. children in Indonesia.

The findings of this study indicate that the circumstances of the marriage dispensation application in the Jepara Religious Court after the amendment to the Marriage Law have continued to increase every year. In 2018 there were 117 cases, in 2019 188 cases, in 2020 there were 423 cases, in 2021 there were 509 cases. In percentage terms, 2018-2019 has increased by 61 percent, 2019-2020 by 125 percent, and 2020-2021 by 20 percent. From the results of these percentages, it is known that a drastic increase in cases of requests for marriage dispensation occurred from 2019-2020. Meanwhile, from 2020-2021 the increase is not very significant, however, in terms of numbers, during this time there is a very large number of cases of requests for dispensation of marriage.

Referring to the findings above, this study would say that in quantity, the increase in cases of requests for marriage dispensation was caused by two factors,

²⁹ Supriyadi and Siti Suriyati, "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 Dan Pranata Sosial* 17, no. 1 (2022): 142, <https://doi.org/10.19105/AL-IHKAM.V17I1.6060>.

namely regulatory and social factors. According to Sudjadi³⁰, the tendency of the community to apply for a marriage dispensation due to changes in the age of marriage (regulation) is recognized as having implications for the increasing number of child marriages in Indonesia. Even so, not all applications for dispensation of marriage submitted by the applicant in the process of adjudicating the case were granted by the judge because some were rejected because they did not meet the urgent and *syar'i* elements. Furthermore, regarding social factors, according to him, they include low levels of education, economic difficulties, promiscuity among young people, and the fear of falling into free sex so that it violates norms (religion, decency, and customary norms). Meanwhile, according to Rifai³¹, several factors caused the community to apply for a marriage dispensation at the Jepara Religious Court, including the prospective wife or child who was applying for a marriage dispensation who was pregnant and had had conjugal relations. In addition, the most common reason for submitting requests for dispensation from marriage is that the applicant (parents) is committed to taking responsibility for economic, social, health, and child education issues.

Apart from the two factors that cause the community to apply for the marriage dispensation above, the thing that needs to be considered here is the extent to which the community has an awareness of obeying the law, meaning that the juridical and social factors of the community cannot be used as a justification claim for the community (applicant) to apply. marriage dispensation. The applicant as a citizen should have implemented the provisions referred to in Article 1 paragraph (1) of Law Number 16 of 2019, even though the law has exceptions that provide opportunities for the public to apply for a marriage dispensation (*ultimum remedium*) to the Religious Courts if not fulfilled the requirements as referred to in Article 1 paragraph (1).

The government's policy to amend Law Number 1 of 1974, Article 7 paragraph (1) by increasing the age limit for marriage for women has certainly gone through a long process and various considerations of benefit and harm. This can be seen from the considerations of the latest Marriage Law that "marriage at a young age hurts the development of children and will result in non-fulfillment of children's basic rights such as the right to protection from violence and discrimination, children's civil rights, health rights, rights education, and social rights of children". The right to protection as referred to in the preamble can be interpreted as a form of legal protection given to protect one's interests by allocating a human right. Satjipto Raharjo³² stated that protection is to protect human rights that are harmed by other people or that protection is given to the community so that they can enjoy all the rights granted by law. The substance of the preamble also contains the intention that both prospective husbands and prospective wives have psychological and physical readiness and maturity in carrying out marriages so that they can realize the goals of marriage, without ending in divorce and obtain quality offspring.

Considerations of Jepara Religious Court Judges in Granting and Rejecting Marriage Dispensation Applications from the Maqasid Syariah Perspective

³⁰ Interview with Sudjadi, Judge of the Jepara Religious Court, 24 September 2021.

³¹ Interview with Rifai, Head of the Jepara Religious Court, 24 September 2021.

³² Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2000), 53.



Law Number 3 of 2006 Amendments to Law Number 7 of 1989 concerning the Religious Courts, confirms that "Religious Courts have the authority to examine, decide, and resolve cases at the first level between people who are Muslim in the areas of marriage, inheritance, wills, grants, endowments, zakat, infaq, alms, and sharia economics."³³ In the context of examining, decoding, and resolving cases according to the formulation of Article 49 above, according to Abdul Manan, judges have a very crucial role in adjudicating cases and fulfilling the needs of the applicant in upholding law and justice based on applicable laws and regulations. However, a judge must have accuracy in observing and evaluating evidence as a consideration in deciding or establishing the law accurately.³⁴

The implications of these duties require professionalism and integrity for a judge by freeing himself from worries, tensions, and pressure from any party.³⁵ To guarantee the upholding of justice, judges are not allowed to use subjectivity in examining, and deciding cases they handle and must be free from the influence and interference of anyone following the code of ethics guidelines for judges' behavior.³⁶ The rationality of judges in carrying out the functions of this court and the honor of judges can be seen from the decisions or decisions they make by exploring, elaborating, and synergizing between legal doctrine, legal norms, morals, and legal facts.³⁷

The findings of this study indicate that judges' considerations in adjudicating cases of the dispensation of marriage in granting or refusing are based on several considerations including juridical, *syar'i*, sociological, psychological, health considerations, and whether or not there is an element of compulsion (psychic, physical, sexual or economic). According to Sudjadi³⁸, juridical considerations were taken by looking at the reasons for the request for dispensation from marriage, the evidence, and the witnesses presented at the trial which in conclusion "fulfill the elements of very urgent reasons" whether or not the child for whom the application for dispensation was requested can be married off. Furthermore, the trial process for the child who requested the dispensation from marriage, the prospective husband or prospective wife, and the parents/guardians of the prospective husband or prospective wife are presented at the trial to be asked for information. If the parties mentioned above are not present at the first session and have been duly summoned, the judge adjourns the trial and recalls the applicant legally to hear his statement, and if at the second session he is also not present at the hearing, then the application for dispensation from marriage is declared fall.

³³ Undang-Undang RI, "Undang-Undang Republik Indonesia Nomor 3 Tahun 2006 Perubahan Atas Undang-Undang Nomor 7 Tahun 1989 Tentang Peradilan Agama," n.d.

³⁴ Abdul Manan, *Etika Hakim Dalam Penyelenggaraan Peradilan Suatu Kajian Dalam Sistem Peradilan Islam* (Jakarta: Kencana Prenada Media Grup, 2007), 32.

³⁵ Yani Andriyani, "Implementasi Kode Etik Hakim Dalam Memeriksa, Mengadili Dan Memutus Perkara," *Logika: Journal of Multidisciplinary Studies* 10, no. 01 (2019): 14, <https://doi.org/10.25134/logika.v10i01.2170>.

³⁶ Meylin Sihaloho, "Seleksi Pengangkatan Hakim Dalam Sistem Peradilan Indonesia: Kajian Putusan Mahkamah Konstitusi Nomor 43/Puu-Xii/2015," *Jurnal Wawasan Yuridika* 33, no. 2 (2015): 205, <https://doi.org/http://dx.doi.org/10.25072/jwy.v33i2.103>.

³⁷ Eman Suparman, "Menolak Mafia Peradilan: Menjaga Integritas Hakim-Menyelaraskan Perbuatan Dan Nuraninya," *Jurnal Hukum & Pembangunan* 47, no. 1 (2017): 69, <https://doi.org/10.21143/jhp.vol47.no1.136>.

³⁸ Interview with Sudjadi, Judge of the Jepara Religious Court, 24 September 2021

The granting of the request for dispensation apart from being based on juridical considerations is also based on syar'i legal considerations. In this *syar'i* legal consideration, the judge saw the aspect of the harm that would arise if the request for dispensation was granted or rejected. Most of the requests for dispensation from a marriage that were granted by the Jepara Religious Court (judge) were requests for dispensation for marriage which in the application letter stated that the child to be married had had sexual intercourse, and the bride and groom were pregnant first and between the two (husband and wife) which is prohibited by Islam.

Other findings show that in addition to the two reasons above, the request for a marriage dispensation submitted by the petitioner was granted because there is no obstacle between the two (prospective husband and wife) to get married according to the Shari'a. So that in their legal considerations, judges tend to use the legal basis, namely the Fiqh rule "*dar'ul mafasid muqaddam ala jalbil mashalih*" which means preventing harm must take precedence over attracting benefits. From these rules, it can also be understood that madharatan must be eliminated. Other considerations are also based on sociological aspects. In this aspect, the judge sees which impact is lighter than granting the application for a marriage dispensation compared to rejecting it, especially in the case of a prospective bride who is pregnant first, namely maintaining the honor and dignity of the extended family, the good name of the prospective bride herself and especially the prospective child she is carrying when born in society.

The next consideration is health. This balance is based on the health aspect as evidenced by a letter of recommendation from a doctor or midwife stating that both the bride and the child she is carrying are physically healthy. While the psychological aspect is in the form of a letter of recommendation that the child who is asked for a marriage dispensation application can be burdened with responsibility, in other words, the child in question can carry out household life. Another consideration is whether or not there is an element of compulsion (psychological, physical, sexual, or economic) which is also considered by the judge in granting the request for dispensation from marriage submitted by the applicant (parent/guardian).

The judge in the trial identified these elements by asking the child directly. This is aimed at protecting children from forced or unilateral forced marriage exploitation by their parents or guardians. For this reason, the judge's spirit of prevention is needed for the best interests of the child who is asked for a marriage dispensation that is oriented towards preventing early marriage. Several studies have stated that early marriage tends to lead to child exploitation and violates human rights. Grijns & Horii said that the worst impact of early marriage is that it has the potential to create intergenerational poverty.³⁹ In line with this statement, Rachel Kidman said that early marriage places women at high risk, namely domestic violence which in turn affects their physical and mental conditions. Some

³⁹ Mies Grijns and Hoko Horii, "Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns," *Asian Journal of Law and Society* 5, no. 2 (2018): 453–66, <https://doi.org/10.1017/als.2018.9>.



of the reasons that accompany acts of violence against women due to early marriage are low education, poverty, and following traditional gender norms.⁴⁰

Meanwhile, the request for dispensation from marriage by the Jepara Religious Court submitted by the applicant was not granted based on legal considerations that the element of urgency (emergency) was not fulfilled or there was no *syar'i* element, therefore the applicant's application must be declared rejected, as in the case of an application for dispensation for marriage Number 358/Pdt.P/2020/PA.Jepara where the applicant wants to marry off his biological child who is only 18 (eighteen) years old. Several reasons in the application for divorce from marriage include (1) the children of the applicant do not meet the minimum age requirements for marriage according to the provisions of Article 7 paragraph (1) in conjunction with Article 15 paragraph (1) Compilation of Islamic Law as amended by Law Number 16 The year 2019, and the children of the applicants have been dating and the relationship has been very close for 1 year so there are fears that they will fall into adultery so that the children of the applicants are very urgent to get married immediately; (2) There is no obstacle between the applicant's child and her husband-to-be to enter into a marriage according to *shari'i* law or applicable laws; (3) The applicants have tried to apply for marriage to the KUA (Office of Religious Affairs) but the KUA rejected it; (4) The children of the applicants have reached puberty and are ready to become good wives or housewives; (5) The applicants affirm their commitment to take responsibility in relation to the economic, social, health and education of children; (6) The families of the applicants and the parents of the prospective husbands of the applicant's children have approved the wedding plans and there are no other third parties who object to the marriage taking place; (7) The applicants are able to pay all costs incurred as a result of this case.

Regardless of whether the applicant's application is accepted or rejected, there is also a marriage dispensation application that is revoked by the applicant through their attorney. The revocation of this application certainly cannot be separated from the judge's success in advising the applicant and the child whose marriage dispensation is requested to postpone marriage until it is permitted according to the Law on Marriage. So that in this case, the Jepara Religious Court issued Decree Number 435/Pdr.P/2020/PA. Jepara regarding the revocation of the application for marriage dispensation. The judge's success in advising the applicants can essentially be said to be a form of the judge's active role in voluntary lawsuits *to* create public awareness in complying with applicable law and law enforcement against Law Number 16 of 2019 and preventing early marriage.

It is important to understand here that in voluntary lawsuit *trials* in civil cases (marriage dispensation) advising the applicant, in this case, the parents/guardians and children who are requested for marital dispensation is a must for the judge as mandated by the Supreme Court Regulation of the Republic of Indonesia Number 5 of 2019 regarding Guidelines for Adjudicating Marriage Dispensation Applications. In fact, in Article 12 paragraph (4) it is stated that if during the trial the judge does not give advice, then the consequence will be that the decision is null

⁴⁰ Rachel Kidman, "Child Marriage and Intimate Partner Violence: A Comparative Study of 34 Countries," *International Journal of Epidemiology* 46, no. 2 (2017): 662–75, <https://doi.org/10.1093/ije/dyw225>.

and void. In the context of the obligation to advise, this is in line with the obligation for judges to seek settlement of all civil disputes in court, including resistance (*verzet*) decisions *verstek* and resistance to litigants (*partij verzet*) and third parties (*derden verzet*) against the implementation of decisions that have legal force through mediation as regulated in Article 4 paragraph (1) of the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts. Thus it can be underlined that the success of a judge in a marriage dispensation application case is not only measured by the quantity of cases he handles in realizing justice for justice seekers, but the extent to which he can create legal awareness in the community.

Starting from the explanation of the research findings above when viewed from the perspective of maqasid sharia, it can be said that the process of examining or adjudicating cases of requests for dispensation of marriage carried out by judges has implemented the precautionary principle by paying attention to benefits and harms. It can be seen that not all cases of marriage dispensation that were examined by the Judge of the Jepara Religious Court were granted, but some were rejected even though a small number of hundreds of cases of requests for marriage dispensation were submitted to the Jepara Religious Court. The granting of the application for dispensation of marriage with the *syar'i* considerations, that is, the child being applied for is already pregnant is appropriate because this is an embodiment of realizing the benefit of protecting offspring (*hifzh nasl*). This view is in line with Muzaiyanah⁴¹ in her research study that the dispensation of marriage caused by pregnancy can be interpreted by the judge as having benefited by keeping the baby in the womb so that it has a clear lineage. Especially if the child is conceived as a girl, when she grows up and gets married, the guardianship goes to the biological father and not the adoptive father.

This level of benefit, according to Imam al-Syatibi in Rosyidah and Aristoni,⁴² is a primary need (*dharuriyyat*), meaning that if the need for *dharuriyyat* is not carried out or fulfilled it will cause harm to the child who is being requested for dispensation, the child he is carrying and his extended family will receive continuous reproach from the community. Meanwhile, the request for dispensation from marriage is not granted in the perspective of maqasid sharia, which is interpreted as an effort to protect the soul (*hifdz an-nafs*) because if the request for dispensation is granted and the husband and wife are not old enough, it will have negative implications, such as being prone to divorce, violence, death of mother and child. intergenerational poverty.

Judges Decision to Prevention of Child Marriage at the Jepara Religious Court

⁴¹ Muzaiyanah and Anies Shahita Aulia Arafah, "Dispensasi Nikah Setelah Berlakunya Undang-Undang Nomor 16 Tahun 2019 Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Perspektif Maqashid Syariah," *Literasi: Jurnal Kajian Keislaman Multi-Perspektif* 1, no. 2 (2021): 183, <https://doi.org/https://doi.org/10.22515/literasi.v1i2.3712>.

⁴² Nor Kholifaturosyidah and Aristoni, "Tinjauan Maqashid Al-Syari'ah Terhadap Pembebasan Narapidana Asimilasi Di Lembaga Pemasarakatan Kelas IIB Pati," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 12, no. 2 (2021): 309, <https://doi.org/http://dx.doi.org/10.21043/yudisia.v12i2.12324>.



The Religious Courts as a place to seek justice and resolve problems being faced by the Muslim community are in principle prohibited from rejecting lawsuits or requests submitted by the plaintiff/applicant. From this statement, it is clear that the Religious Courts cannot refuse to examine, adjudicate, and resolve the case, especially on the pretext that the legal basis does not exist or is unclear. This is where the important role of the judge as a jurist in Islamic civil cases is demanded to be able to resolve cases based on existing laws and regulations to realize law enforcement and justice.

The dilemma faced by judges in examining, decoding, and resolving cases of requests for dispensation of marriage is understandable by several circles considering that the judge's job as a jurist is certainly not easy, especially in practice in court the documentary evidence and witnesses submitted by the applicant can convince the judge, especially the child. Applicants who are requested for marriage dispensation are pregnant or have had intercourse prohibited by religion, namely having sexual relations like husband and wife so that it becomes a consideration for a separate judge in granting a determination of a marriage dispensation permit, even though the stipulation given to the applicant is considered by some to increase series of cases of child marriage in Indonesia.

Marriage dispensation is important to get serious attention from all groups and find a solution. Suppressing the high number of requests for dispensation for marriage as an effort to prevent child marriage, of course, cannot be borne solely by judges, instead, it requires the involvement of policymakers such as the Regional Government and Village Government, and the community to prevent people from practicing early marriage through marriage dispensation loopholes. According to Sudjadi, it is not easy to suppress the high number of applications for marriage dispensation, especially since legally, the marriage dispensation is regulated in the provisions of Article 7 paragraph (2) as the last alternative for people who want to hold a marriage, hindered by the age limit as required in the provisions of Article 7 paragraph (1) Law Number 16 of 2019 concerning Marriage. However, according to him, several efforts to optimize judges in preventing child marriage in the marriage dispensation case at the Jepara Religious Court which the community requested include:

First, the court must tighten the administrative requirements for filing a marriage dispensation application. The administrative tightening is not only limited as required in Supreme Court Regulation Number 5 of 2019, such as a request letter, photocopy of KTP (Resident Identity Card) of both parents or guardians, photocopy of KK (Family Card), photocopy of KTP (Resident Identity Card) or identity of the child for whom the marriage dispensation is requested or birth certificate for the prospective husband or wife, as well as a photocopy of the child's education certificate for which the marriage dispensation is requested or SKMS (Certificate of Still Schooling) from the child's school. However, the court is to legally apply additional conditions according to existing laws and regulations, including a letter of recommendation from a doctor or midwife stating that both the prospective bride and the child she is carrying are physically healthy, a letter of recommendation from the service or social worker that the child it is requested that the request for dispensation from marriage can be burdened with responsibility, in other words, that the child in question can carry out household life.

Second, massive and simultaneous socialization by involving all elements of society such as religious leaders, community leaders, parents or guardians, families, educational institutions, NGOs, local governments, and so on to provide education to give awareness to the public to obey and practice the provisions of Article 7 paragraph (1) of Law Number 16 of 2019 concerning Marriage as an *ius constitutum* in building a household life. This opinion is in line with Nawal M. Nour's⁴³ view which states that various bad consequences arising from child marriage can be prevented by providing education to the community by involving religious and community leaders as well as parents regarding the dangers of early marriage. Malhotra and Elsakib's⁴⁴ study shows that providing education and supporting girls' schools is an effective way to delay children from child marriage. Apart from that, providing education by all elements through socialization is in line with the mandate of Law Number 16 of 2019, namely the explanation of Article 7 paragraph (2). The explanation referred to in Article 7 paragraph (2) is "then to ensure the implementation of this provision, the Government conducts outreach and guidance to the public regarding the prevention of early marriage, the dangers of free sex and unregistered marriages for the sake of creating a superior generation of the nation".

When examined through a legal protection theory approach, the intended solution can be understood as an effort to prevent child marriage as an implication of increasing the age limit for marriage for women. Legal protection for preventing child marriage is to protect children from all forms of exploitation and prevent children from harm due to early marriage such as the risk of death during childbirth due to unprepared reproduction, divorce caused by not having physical or psychological maturity so that it results in being unable to manage conflicts in household and so on. The statement of this article is in line with several research results, including the results of Nguyen & Wodon's⁴⁵ research, stating that child marriage which is common in several countries has a major negative impact on development in the fields of health, education, empowerment, and violence. Kamal et al⁴⁶ stated that there is a greater risk for child marriage couples if the husband has low education while the wife does not have a job to be able to support the family's economy.

Conclusion

Based on the results of the discussion above, this article concludes that the community factor in applying for a marriage dispensation at the Jepara Religious Court was caused by 2 (two) factors, namely juridical factors (changes in the minimum age limit for marriage, especially for women, and social factors in the community. The judge's considerations in granting and rejecting the request for

⁴³ Nawal M. Nour, "Health Consequences of Child Marriage in Africa," *Emerging Infectious Diseases* 12, no. 11 (2006): 1644–49, <https://doi.org/10.3201/eid1211.060510>.

⁴⁴ Anju Malhotra and Shatha Elnakib, "20 Years of the Evidence Base on What Works to Prevent Child Marriage: A Systematic Review," *Journal of Adolescent Health* 68, no. 5 (2021): 860, <https://doi.org/10.1016/j.jadohealth.2020.11.017>.

⁴⁵ Minh Cong Nguyen and Quentin Wodon, "Global and Regional Trends in Child Marriage," *Review of Faith and International Affairs* 13, no. 3 (2015): 6–11, <https://doi.org/10.1080/15570274.2015.1075756>.

⁴⁶ S. M. Mostafa Kamal et al., "Child Marriage in Bangladesh: Trends and Determinants," *Journal of Biosocial Science* 47, no. 1 (2015): 120–39, <https://doi.org/10.1017/S0021932013000746>.



dispensation of marriage, namely it is granted with juridical, *syar'i*, sociological, health, and psychological considerations, whether or not there is an element of compulsion (psychological, physical, sexual, and economic) to the child for whom the request for dispensation is requested by the parent/guardian. Optimization of judges at the Jepara Religious Court in preventing child marriage as cases of marriage dispensation are increasing as a result of changing the age limit for marriage in the Marriage Law by carrying out administrative tightening and adding letters of recommendation from doctors or midwives, and letters of recommendation from agencies or social workers in accordance Court Regulation Number 5 of 2019. In addition, there is a need for massive and simultaneous outreach involving all elements of society such as religious leaders, community leaders, parents or guardians, families, educational institutions, NGOs, local government, and the government to provide education to the public to have legal awareness and understand the bad effects of child marriage.

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