

RECONSTRUCTION OF APPLICATION FOR MARRIAGE DISPENSATION REGULATION IN RELIGIOUS COURT BASED ON ISLAMIC JUSTICE

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Abstract

Marriage dispensation is the granting of a marriage license by a court to prospective husbands and wives who are not yet 19 years old to come into a marriage and must be based on the agreement of both prospective bride and groom. The application for dispensation from marriage for those who have not reached the age of 19 for the prospective husband and wife is submitted by both male and female parents to the Religious Court in the area where they live. After the issuance of Law Number 16 of 2019 and Supreme Court Regulation Number 5 of 2019, the marriage age limit was changed to 19 years for both parties from 16 years to 19 years. However, after the increase in the age limit for dispensation for marriage, the number of applications for dispensation for marriage has increased. This of course raises differences of opinion among law enforcers. The focus of this research is 1). Why is the regulation on requests for marriage dispensation in religious courts not based on Islamic justice? 2). What are the current weaknesses in the Marriage Dispensation Application Regulations in the Religious Courts? 3). How is the Reconstruction of Marriage Dispensation Application Regulations in Religious Courts Based on Islamic Justice? The aims of this research are (1). to analyze and find regulations on requests for dispensation from marriage in religious courts that do not yet have the value of Islamic justice. (2). to analyze and find weaknesses in the regulation of requests for marriage dispensation in the current religious courts (3). to find the reconstruction of regulations on requests for dispensation from marriage to religious courts that do not yet have the value of Islamic justice. Paradigm This research uses a constructivism paradigm, with a social legal research approach that uses primary data. Methods of data collection using interviews, observation, and field systems. The legal theory used in this dissertation is the theory of Islamic justice as a Grand Theory, Middle Theory of legal system theory and Applied theory of Progressive legal theory. The results of this dissertation research found that the regulation on requests for dispensation from marriage in the religious courts has not yet had the value of Islamic justice, namely the normalization of the marriage law Article 7 and Perma No. 5 of 2019 Article 2 and Article 14 have not provided the values of justice that are able to realize the nature of marriage, namely forming a family that is Sakinah, mawadah, wa rahmah, or eternal based on the orders of Allah SWT. The current weaknesses in the regulation on requests for dispensation from marriage in the religious courts are weaknesses in legal substance, legal structure and legal culture. Therefore, with regulations on requests for dispensation from marriage in religious courts that do not yet have the value of Islamic justice, it is necessary to reconstruct the provisions in Article 7 of Law Number 16 of 2019 and Supreme Court Regulation Number 5 of 2019 Article 2 and Article 14.

Keywords: Marriage Dispensation; Reconstruction; Justice; Petition; Court

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A. INTRODUCTION

Islamic law¹ is the entire rule of law which is based on the Qur'an. For a certain period of time, it was concretized by the Prophet Muhammad SAW in his behavior which is commonly called the Sunnah of the Apostle. The principles originating from Allah SWT are more concrete and harmonized with the needs of the times through ijthad or legal discovery by mujtahids and experts in their respective fields.²

Marriage is a very important aspect of human life. It even becomes a basic need for every normal human being. Without marriage, a person's life will be imperfect and more than that, violates his nature. Because Allah SWT., Has created his creatures in pairs. The Prophet Muhammad SAW., also reminded that marriage is his sunnah. Therefore those who carry out the marriage means following his sunnah.³

¹ Yahyanto, *Pengantar Ilmu Hukum*, Trussmedia Grafika, Yogyakarta, 2014. Page.225.

² Achmad Ali, *Menguak Tabir Hukum*, Ghalia Indonesia, Bogor, 2011. Page.29.

³ H. Andi Syamsu Alam, *Usia Ideal Memenuhi Dunia Perkawinan*, Kencana Mas Publishing House, Jakarta, 2005. Page.18.

In essence, the marriage involves the families of both parties, but the dominant role in determining the direction and purpose of the marriage is the husband and wife. The life cycle of husband and wife in married life is indeed very dynamic. None of the families that live goes straight as desired, without the ever-changing problematic waves. The ability of a family to deal with household problems can be determined by the maturity of the husband and wife.¹

Women and children are physically seen as entities that belong to vulnerable groups and often face the process of being domesticated by a patriarchal cultural system. In various community groups, there are many spaces for women's participation that are blocked. This condition is vulnerable to making women and children become objects of violence and neglect of their basic human rights. Data released by the World Health Organization (WHO) in 2021 states that one in three women in the world is estimated to have experienced violence from their spouse.² Likewise in the report of the United Nations Children's Fund (UNICEF), it is estimated that nearly one billion children experience the effects of violence each year.³ There are difficulties in dealing with domestic violence due to a culture that considers this problem a taboo and a family disgrace, so it must be hidden from the knowledge of others.⁴

The religious court as one of the executors of judicial power is faced with two big expectations. First, religious courts are required to uphold law and justice as well as possible, while at the same time being required to apply normative aspects of law. Second, the religious courts are required to pay more serious attention to the interests of women and children who often become victims in disputes that occur within the family sphere.⁵

The implementation of divorce decisions which are accompanied by burdens on the husband to pay iddah, mut'ah, and madhiyah (past income) maintenance in the field of family law in the Religious Courts is realized in two ways, namely; 1). implementation of the decision voluntarily and 2). implementation of the decision by force (execution) by the Court. The emphasis in implementing the decision should be on voluntary implementation. However, in reality, the prevalence of voluntary implementation does not show a significant number.⁶

Another problem in the context of legal protection of women's rights that is occurring at this time is that judges' decisions in contested divorce cases do not sentence the Defendant (husband) to pay iddah, mut'ah, madhiyah and child maintenance. Among the reasons is that the Judge considers that the wife's rights contained in the divorce decision are difficult to execute. This should not be used as an excuse because basically almost all executions of decisions experience difficulties, especially in cases where the husband never attends court, plus the cost of execution is greater than the nominal income earned.

Religious court judges are required to have extraordinary foresight and sensitivity to the suffering faced by women and children who are victims of the behavior of husbands/fathers who have neglected their responsibilities. It is hoped that decisions resulting from these cases will be able to provide quick and appropriate solutions for women and children. Therefore, to guarantee the protection of the rights of women and children, it is not enough to only do with the legal substance, legal structure and legal culture that have been in effect so far, but also must be renewed with an interconnected system.

So far, efforts to protect the rights of women and children have been implemented holistically, meaning that they do not only apply in cases with the nomenclature of children alone, but also in other cases that intersect with the interests of children. One example is the case of the guardian adhal (reluctance of the guardian) as referred to in the Supreme Court Decision Number 703 K/Ag/2021⁷ which rejected the Petitioner's application for guardian adhal because it violated the principle of the best interest of the child, because the Petitioner had not divided and given the rights of his child from the inheritance. inheritance from her late husband, namely the

¹ *Ibid.* page. 16-17.

² <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>, diakses pada hari Kamis, 10 Februari 2022 anstark

³ <https://www.unicef.org/press-releases/countries-failing-prevent-violence-against-children-agencies-warn>, diakses pada hari Kamis, 10 Februari 2022

⁴ Amran Suadi dan Mardi Candra, *Politik Hukum Perspektif Hukum Perdata dan Pidana Islam serta Ekonomi Syariah*, Jakarta, Kencana Prenada Media Group, 2016, page. 123

⁵ Mul Irawan, dkk, *Perlindungan hak Perempuan dan Anak Melalui Putusan Pengadilan Agama*, Jakarta: Kencana Prenada Media Group, 2019, page. 9

⁶ Amran Suadi, *Peranan Peradilan Agama Dalam Melindungi Hak Perempuan dan Anak Melalui Putusan yang Memihak dan Dapat Dilaksanakan*, Jurnal Hukum dan Peradilan, Volume 7, Nomor 3, November 2018, page. 367

⁷ In this case the cassation panel annulled the decision of the South Jakarta PA and tried on his own by dictum rejecting the Petitioner's legal guardian's application and postponing the Petitioner's marriage to her future husband. In its consideration, the cassation panel focused more on efforts to protect the law against the assets of the previous child from the Petitioner because it was feared that there would be a mix-up of assets that had not been divided between the assets that were the rights of the child and the prospective new husband. (Decision Number 703 K/Ag/2021).

father of the child, but the Petitioner wishes to remarry with another man which in essence will result in a mix of assets and of course later it will be more difficult to identify the inheritance rights for their child.

Marriage under the age of 19 or child marriage can have a negative impact on the child, including biological impacts, namely marriage that occurs at a young age will certainly affect the biological condition, especially women. Women who are pregnant and give birth at a young age have a high risk for health, women who give birth at less than 20 years result in infant death, 54 babies die out of 1000 births. In addition to causing death in babies who are quite high, pregnancy and childbirth at a young age are also dangerous for the mother which can result in death. The potential for low birth weight babies from mothers who are still at child age or LBW is also quite high because the reproductive organs of mothers who are still at child age are not mature enough.

Psychological impact, namely marriage that occurs at a young age has an impact on psychological conditions, according to Walgito, marriage that is still too young invites many unexpected problems because from a psychological perspective it is not mature. Immature psychological conditions have the potential to trigger conflicts that result in domestic violence.

The impact on education, namely marriage at a young age will certainly affect the education being pursued. Only a small proportion of children who get married can continue their education, for one reason or another those who marry at a young age cannot continue their education. For women who get married at a young age with all the risks they have to bear such as getting pregnant, giving birth and taking care of children, more of them experience dropping out of continuing their education. Not a few men who married at a young age stopped continuing their education because they were carrying out their duties as the head of the family.

There are several factors in the occurrence of child marriage, namely cultural factors or customs of the local community. The customs of the people around where they live also contribute to the high percentage of child marriages in Indonesia. For example, in one area there is a belief that it is not permissible to refuse a man's proposal to a woman even though the woman is still under 19 years old, because if she is rejected it is considered demeaning to the man's family which causes inevitably the woman's parents have to accept and marry off their daughter even though she is under 19 years old .

Sociological factors in the form of parental coercion. Marriage at a young age can also be caused by parents for various reasons from parents such as economic difficulties or parents' concerns about their child's association. Parents' worry about their child's association which will cause negative impacts such as getting pregnant outside of marriage, marrying off their child is a solution to avoid that. Factors of family economic status, the economic situation of the family is one of the triggers for early marriage. Uncontrolled association of parents to be one cause.¹

Law Number 1 of 1974 adheres to the principle that prospective husbands and prospective wives must have mental and physical maturity in order to carry out a marriage, with the intention that the objectives of the marriage can be realized properly without ending in divorce and to produce good and healthy offspring. Therefore, in Article 7 paragraph (1) of Law Number 1 of 1974, the age limit for entering into marriage for both men and women has been determined, namely 19 years for men and 16 years for women. Based on the provisions of paragraph (1) of Law Number 1 of 1974, if there is a deviation from the marriage age requirement mentioned above, a new marriage can take place after receiving a dispensation from the court. Dispensation for marriage is submitted by the parents of the prospective groom and/or prospective bride to the Religious Court so that their children who have not reached the age of marriage can be given dispensation to marry due to various urgent considerations.

On the other hand, if you look at the *Ius Constitutum* that applies in Indonesia, it wants that marriage does not take place at a young age. This is clearly seen in the provisions of Article 26 paragraph (1) letter (c) of Law Number 23 of 2002 concerning Child Protection which explains that among the responsibilities and obligations of parents towards children is preventing marriage at the age of children. Finally, efforts to prevent child marriage are clearly seen in the Constitutional Court Decision Number 22/PUU-XV/2017 dated 13 December 2018 in conjunction with the UUP Revision, in this case Law Number 16 of 2019 concerning Amendments to Law Number 1 Year 1974 concerning Marriage which equates the marriage age limit for men and women, namely 19 (nineteen) years.²

The Constitutional Court in its legal considerations of the aforementioned decision explained that child marriage is a violation of children's rights which must be protected and can result in harm. Children's rights are part of Human Rights (HAM) which must be guaranteed and protected by parents, family, community, state,

¹ OliviaNursaadah, <https://puspensos.kemensos.go.id/pernikahan-pada-usia-anak-di-indonesia>

² Constitutional Court, "Decision of the Constitutional Court Number 22/PUU-XV/2017" (2018); Nur Suhra Wardyah, Revision of the 19-year-old child marriage law passed in Indonesia," accessed 11 May 2022, <https://www.antaraneews.com/berita/1065926/revisi-uu-usia-perkawinan-anak19-tahun-kisah-di-Indonesia>.

government and local government¹. If child marriage is allowed, then looking at the data on the distribution of child marriage that has occurred so far throughout Indonesia, it is very likely that Indonesia will experience an emergency child marriage which of course will hinder the aspirations of the state as contained in the Constitution of the Republic of Indonesia. Indonesia in 1945.²

Dissolution of marriage is a legal term used in the Marriage Law to describe divorce or the end of a marriage relationship between a man and a woman who have been living as husband and wife. The use of the term "breaking up a marriage" must be done carefully, because in fiqh terms the word "ba-in" is used to understand a broken marriage, which is a form of divorce in which a husband may not return to his wife except through a new marriage contract.³

Based on data from the Makassar Religious High Court, the divorce rate in 2019 recorded approximately 71,000 divorce cases. This means that the divorce rate in the jurisdiction of the Makassar Religious High Court is relatively high. Among these cases they divorced at a fairly young age, thus indicating that their marriage occurred at the age of not even 19 years.

Normatively the legal arrangements for the Marriage Dispensation case are Article 7 of Law Number 1 of 1974 concerning Marriage, Law Number 16 of 2019 concerning the First Amendment to Law Number 1 of 1974, Article 15 of the Compilation of Islamic Law, Supreme Court Regulation Number 5 of 2019 concerning Guidelines for adjudicating applications for marriage dispensation; The implementation of Perma Number 5 of 2019 regarding Guidelines for Trialing Applications for Dispensation of Marriage in the Religious Courts can be formulated in the form of a declarative stipulation dictum (succinct and clear statement) as a product of the court and what are the legal consequences regarding the stipulation of Dispensation for Marriage by the Court which functions for benefit, justice and certainty fair law. So it is interesting to carry out an in-depth study regarding the Regulations for Requests for Dispensation of Marriage in the Religious Courts.

B. RESEARCH METHOD

This research is a type of qualitative research⁴. The research method used constructivism paradigm, sociological juridical research approach⁵, descriptive juridical research type, primary and secondary data types, library data collection methods, observations and interviews⁶. Qualitative data analysis methods.⁷

C. RESEARCH RESULTS AND DISCUSSION

1. The Nature of Marriage in Islam

Basically, Islamic law does not specifically regulate the minimum age limit for marriage. The absence of religious provisions regarding the minimum and maximum age limits for marriage is assumed to provide leeway for humans to regulate it. The Qur'an suggests that people who are going to get married must be people

¹ Anis Mashdurohatun, Adhi Budi Susilo, Bambang Tri Bawono, Copyright Protection towards the Society 5.0, Journal of Southwest Jiaotong University, Volume 56, Issue 2, 2021, pp.394-403

² Mahkamah Konstitusi, Putusan Mahkamah Konstitusi Nomor 22/PUU-XV/2017.

³ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia (Antara Fiqh Munakahat dan Undang Undang Perkawinan)*, Kencana Prenademia Group, Jakarta. 2006. Page. 189.

⁴ Bobby Anugrah Rachman, Anis Mashdurohatun, Achmad Sulchan, Traffic Effectiveness by Law Enforcement Community Through Which are Ticketed Traffic Law in Police of Pekalongan, Jurnal Daulat Hukum, Volume 2, Issue 1.2019, pp. 115-122.

⁵ Mahyuni, Land Acquisition of Toll Roads for Public Interest in The Kendal District, Jurnal Akta, Volume 6 Issue 1, March 2019, pp. 153-158, Anis Mashdurohatun, Zaenal Arifin, The Inconsistency of Parate Execution Object Warranty of Rights in Banking Credit Agreement in Indonesia, International Journal of Applied Business and Economic Research, Vol.15 Issue.20. 2017, see too Sukarmi et.al, Impact of Traffic Congestion on Economic Welfare of Semarang City Community, Journal of Xidian University, Volume 16, ISSUE 2, 2022.

⁶ Carto Nuryanto, Gunarto, Anis Mashdurohatun, Reconstruction Of Criminal Sanction And Rehabilitation Combating On Narcotic's Victims Based On Religious Justice, The 5th International Conference and Call for Paper Faculty of Law 2019, Sultan Agung Islamic University, 2019, pp.91-95. See too Wawan Setiyawan and Anis Mashdurohatun, The Reforming Of Money Politics Cases In Election Law As Corruption Crime. Law Development Journal, Volume 3 Issue 3, September 2021, pp.621 – 629.

⁷ Bambang S and Eman Suparman Anis Mashdurohatun, Legal Protection for Creditors in Providing Business Credit with Object of Inventory Warranties Based on Justice Values, J.Eng. Applied Scinces, Volume 14, Issue 12, 2019. pp. 4176-4182. Yeltriana, Ideal Reconstruction Of Protection For Layoff Victim At The Industrial Relations Court Based On Justice, International Journal of Law, Government and Communication, Volume: 4 Issues: 14 [March, 2019]. pp.32-49. Irwansyah, Ahsan Yunus, Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel, Mirra Buana Media, Yogyakarta. 2020.

who are ready and able, as the word of Allah SWT. as follows:¹ And marry those who are alone among you and those who are worthy (married) of your male slaves and your female slaves. If they are poor, Allah will enable them with His grace. And Allah is almighty (His gifts) and omniscient.”

According to M. Quraish Shihab, the word (الصالحين) is understood by many scholars to mean "those who are fit for marriage", namely those who are mentally and spiritually capable of building a household.² Rasulullah SAW. advising young people to get married on condition that they have the ability, as the hadith of Rasulullah SAW. as follows:³

"From Abdurrahman bin Yazid, he said: "I entered with al-Qamah and al-Aswad to Abdullah's (house), he said: "When I was with the Prophet SAW. as well as the youths and we found no other, Rasulullah SAW. said to us: "O young people, whoever among you is able to marry, then marry, because marriage can lower the eyes and protect the private parts, and whoever is not able to, then let him fast, then in fact that can control lust." . (Narrated by Bukhari)

Explicitly, the Qur'an and hadith acknowledge that maturity is very important in marriage. Adult age in fiqh is determined by signs that are physical, namely the signs of puberty, namely ihtilam for men and menstruation for women.⁴ By fulfilling the baligh criteria, it is possible for someone to get married.⁵ So that the maturity of a person in Islam is often identified with baligh.⁶

If there is an abnormality or delay in a person's physical development, so that at the usual age a person has secreted sperm for men or issued menstrual blood for women but that person has not yet issued signs of maturity, then the puberty period begins based on the age at which a person normally issues signs. baligh sign. The onset of puberty between a person and another is influenced by differences in environment, geography and so on.⁷ The size of maturity as measured by this baligh criterion is relative.⁸ That is, if casuistically it is very urgent that the two prospective bride and groom must be married immediately, as a sadd al-zari'ah method to avoid the possibility of greater harm.⁹

Scholars differ in opinion in determining the age limit for someone who is considered to have reached puberty. Syafi'iyah and Hanabilah scholars stated that:¹⁰

Meaning: *"Boys and girls are considered mature when they are 15 years old."*

Hanafiyyah scholars determine the age of a person who is considered mature as follows:¹¹

Meaning: *"Boys are considered mature when they are 18 years old and girls are considered mature when they are 17 years old."*

While scholars from the Imamiyyah group state the size of maturity as follows:¹²

Meaning: *"Boys are considered mature when they are 15 years old and girls are 9 years old."*

Regarding the 9 year old girl, there are two opinions. First, Imam Malik, Imam Syafi'i, and Imam Abu Hanifah, emphasized that a 9-year-old girl is legally the same as an 8-year-old child, so they are considered not yet mature. Second, the girl is considered to have reached puberty because she has had the opportunity to menstruate, so she is allowed to enter into marriage even though she does not have the right to marry, as an adult woman has.¹³

Considering that marriage is a very strong contract (miitsaqan ghalizan) which requires everyone who is bound in it to fulfill their respective rights and obligations with full justice, harmony, harmony and balance.¹⁴ Therefore, marriage as a form of legal imposition is not enough just to require puberty. Legal imposition (taklif) is based on reason (mumayyiz), baligh (age enough), and understanding. This means that a person can only be

¹ Al-Qur'an Surat an-Nur ayat 32

² M. Quraish Shihab, *Tafsir al-Misbah*, Lentera Hati, Jakarta, 2005, Page. 335

³ Abdullah Muhammad bin Ismail al-Bukhari, *Shahih al-Bukhari*, Dar al-Kitab al-Ilmiyyah, Beirut, 1992, Juz V, Page. 438

⁴ Salim bin Samir al-Hadhramy, *Safinah an-Najah*, Dar al-abidin, Surabaya, tt., Page. 16

⁵ Amir Syarifuddin, *Ushul Fiqh I*, Prenada Media, Jakarta, 2008, Page. 394

⁶ Baligh dalam bahasa Indonesia dengan cukup umur. Lihat Anton M. Moeliono, *Kamus Besar*

⁷ Dirbinbapera Islam, *Ilmu Fiqh*, Departemen Agama, Jakarta, 1985, Jilid II, Page. 4

⁸ Ahmad Rofiq, *Hukum Islam di Indonesia*, Rajawali Press, Jakarta, 2003, Page. 78

⁹ *Ibid.*

¹⁰ Muhammad Jawad Mughniyah, *al-Ahwal al-Sakhsiiyyah*, Dar al-Ilmi li al-Malayain, Beirut, tt., Page. 16

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Ibn Qudamah, *al-Mughni*, Dar al-Kutub al-Ilmiyyah, Beirut, tt., Juz VII, Page. 384

¹⁴ Dedi Junaedi, *Bimbingan Perkawinan (Membina Keluarga Sakinah Menurut al-Qur'an dan as- Sunnah)*, Akademika Pressindo, Jakarta, 2003, Page. 1

burdened by law if he is intelligent and can understand well the taklif addressed to him.¹ Thus, the condition for the prospective bride and groom is amukallaf.²

Regarding the principle of maturity in marriage, the scholars tend not to discuss the age limit for marriage in detail, but rather discuss the law on marrying young children. Child marriages that are still in fiqh are called ash-shaghir/shaghirah or az-zawaj al-mubakkir marriages. Literally ash-shaghir/shaghirah means small, but what is meant by ash-shaghir/shaghirah is a man/woman who has not yet reached puberty.³

The marriage of minors is inseparable from the right of ijbar, namely the right of the guardian (father/grandfather) to marry off his daughter without having to obtain prior approval or permission from the daughter to be married, as long as she is not a widow. A father can marry off a child his daughter who is still small and a virgin until she reaches puberty without his permission.⁴ and there is no khyar right for the girl if she has reached puberty. On the other hand, fathers may not marry off their young sons.

Even so, a daughter cannot be raped by her husband right away if she is still too young, so that she is old enough to have a husband-wife relationship. Scholars who allow guardians to marry off their daughters who are still underage, are generally based on the hadith of the Prophet Muhammad's marriage. as follows:⁵

Meaning: *"From Aisha ra. said: Rasulullah SAW. married me when I was 6 years old and lived with me when I was 9 years old and he died when I was 18 years old. (HR. Muslim)*

Abu Bakar ra. married Aisha ra. with Rasulullah SAW. as a child without his prior consent. Because at that age his consent cannot be considered perfect. However, regarding the marriage of Aisha ra. with the Prophet Muhammad SAW. some scholars argue that this is an exception or specialty for Rasulullah SAW. as he is allowed to have more than four wives who are not allowed to be followed by his people.⁶ Another opinion stated that the marriage of Rasulullah SAW. with Aisyah more motivated by preaching and giving freedom to Abu Bakr ra. entered the household of Rasulullah SAW.⁷

Underage marriages are not recommended, because the perpetrators are considered not to have the ability to manage assets (rusyd). In addition, they also do not need marriage yet. It is feared that they will not be able to fulfill the obligations that must be borne in life as husband and wife, especially in managing household finances. This is based on the word of Allah SWT Surah An Nissa Verse 6 as follows: "And test the orphans until they are old enough to marry. then if in your opinion they are smart (good at maintaining wealth) then give them their wealth "(An Nisa: 6)

With regard to young girls who are widowed, either because they are divorced by death or because they are divorced, their guardian may not remarry her. Likewise for other people (guardians other than father) to marry her until she reaches puberty.⁸ Based on this, young children who are widows have the same position as adult widows, that is, they must obtain permission when they are going to marry them, as confirmed in the hadith of Rasulullah SAW. as follows:⁹

Meaning: *"From Ibn Abbas ra. that the Prophet SAW. said: a widow has more rights over herself than her guardian, and a virgin must be with her permission, and her permission is her silence. (HR. Muslim).*

Several Muslim countries differ in determining the minimum age limit for marriage.¹⁰ Therefore, differences in setting age limits are inseparable from environmental, geographical and cultural influences in each country. Although each country has a different age standard for marriage, the point is to pay close attention to the principle of maturity and maturity. Thus the validity of marriage is not solely due to the fulfillment of the pillars but develops in fulfilling the conditions of marriage.

¹ Ali Imron, *Kecakapan bertindak dalam Hukum (Studi Komparatif Hukum Islam dengan Hukum Positif di Indonesia)*, Badan Penerbit Universitas Diponegoro, Semarang, 2007, Page. 3

² Mukallaf adalah orang yang telah dianggap mampu bertindak hukum, baik yang berhubungan dengan perintah Allah maupun larangan-Nya. Mukallaf diindikasikan dengan cukup umur (baligh), berakal dan memahami taklif yang dibebankan kepadanya. Lihat, Rachmat Syafe'i, *Ilmu Ushul Fiqh*, Pustaka Setia, 1999, Page. 336

³ Hussein Muhammad, *Fiqh Perempuan (Refleksi Kiai atas Wacana Agama dan Gender)*, LkiS, Yogyakarta, 2007, Page. 90

⁴ Abi Muhammad Ali bin Ahmad bin Said bin Hazm, *al-Muhalla*, Dar al-Fikr, Beirut, tt., Page 462. Lihat juga Tengku Muhammad Hasbi Ashshiddieqy, *Hukum-Hukum Fiqh Islam (Tinjauan Antar Madzhab)*, Pustaka Rizki Putra, Semarang, 2001, Page. 232

⁵ Husain Muslim bin Hajjaj, *Shahih Muslim*, Dahlan Bandung, tt., Page. 595

⁶ Mahmud Yunus, *Hukum Perkawinan dalam Islam*, Hidakarya Agung, Jakarta, 1985, Page

⁷ Amir Syarifuddin, *Op.cit.*, Page. 67

⁸ Abi Muhammad Ali bin Ahmad bin Said bin Hazm, *Op.cit.*, Page. 97

⁹ Husain Muslim bin Hajjaj, *Op.cit.*, Page. 597

¹⁰ Muhammad Amin Suma, *Hukum Keluarga Islam di Dunia Islam*, Raja Grafindo Persada, Jakarta, 2004, Page. 184

The Indonesian Ulema Council gave a fatwa, that the age of eligibility for marriage is the age of the ability to act (ahliyatul ada') and the ability to receive rights (ahliyatul wujub).¹ Ability to act (ahliyatul ada') is a person's legal ability to act who has been considered perfect to be responsible for all his actions, both positive and negative actions. Whereas ahliyatul wujub is a person's ability to accept the rights that are his right and is not capable of being burdened with all obligations.² Based on this, Islamic law does not determine the age limit for marriage and maturity through age, but according to the size of puberty and "mukalallaf".

2. Factors Causing Underage Marriage

Many factors can lead to underage child marriage. In practice, in general, the factors that contribute to the occurrence of marriages with minors are religious factors, cultural (customary) factors, social factors, and legal factors that develop in society, these factors can be described as follows:

a. A religious norm

Religious norms, in this case religion does not forbid or oppose underage marriage and there is no criminalization of underage marriage, even in the Islamic view "marriage" is human nature and is highly recommended for Muslims, because marriage is ghariza insaniyah (human instinct).) which must be fulfilled in a legal way so as not to seek a misguided path or a path that plunges into an adulterous relationship. And marriage at a young age is an anticipation of parents to prevent negative consequences that can defame and damage the dignity of parents and family.³

The orders and recommendations for marriage do not provide a limit on a person's age for marriage, but emphasize the need for maturity for someone to marry to prevent harm or bad things. This is very relevant to positive law in Indonesia and other related laws regarding underage marriages, in that there is no legal rule that confirms it in the form of providing legal sanctions against the perpetrators or people involved in underage marriages. Even though Article 26 of Law Number 23 of 2002 obliges parents and families to prevent marriage at a young age, underage marriage is not necessarily seen as a criminal act according to law, the Marriage Law which gives dispensation to both couples who are not old enough to be able to do marriage. With various reasons for legal considerations before the court.

b. Culture (tradition)

In terms of culture or traditions that are still inherent in some communities in Indonesia and some consider that underage marriage is a normal act. In fact, in most Indonesian societies, it is a matter of pride if their daughters at a young age have been proposed to and married by another man. This is because the customs or habits that are still inherent in the community, participate in influencing the way of thinking of the community. The community believes that there is no prohibition on underage marriages, and believes in a belief that a girl who has been proposed for must be accepted, if not accepted it could result in the child not being sold (unable to get a mate). There are also some indigenous peoples in Indonesia who marry their children at an early age to avoid slander for the two partners who are dating, the same thing also happens in villages or in several areas in Indonesia whose customs are known as siri (secret) marriages, so as not to there is a defect from the marriage bond in the future.

In line with this, in practice the reason that is often raised to convince the judge to grant the request for a marriage dispensation in the Religious Courts, is because according to custom the child is already engaged and the conditions in accordance with the rules of Islamic law have been met, and the requirements for submitting the application are complete. . Empirically, and in this case the Religious Court always grants the request for a marriage dispensation.

c. Social (customs)

From a social point of view, in society or habits that are common in the smallest unit (family) that encourage a pro or supportive attitude towards early marriage. More so because of the low level of education and the low level of the economy as well as the attitudes or views of the people who usually underestimate the problem of promiscuity that causes underage marriages. And usually people's ignorance of the adverse effects experienced by someone who is married underage both from health and psychological reasons, becomes an excuse for the parties involved, both family and the surrounding community. Besides that, the paradigm or view of some people who think that the existence of a marriage will raise economic problems or problems they are facing, which in fact is the opposite.

d. Legal Factors

In terms of the rule of law, in this case the law progressively plays a role in solving several problems that arise in a marriage, especially in underage marriages. If the legal rules regarding marriage boundaries exist and

¹ Majelis Ulama Indonesia, *Ijma' Ulama, (Keputusan Ijtima' Ulama Komisi Fatwa se-Indonesia III Tahun 2009)*, Majelis Ulama Indonesia, Jakarta, 2009, Page. 78

² Ali Imron, *Op.cit.*, Page. 24

³ Mudzakaroh Al-Azhar, *Tentang Perkawinan di Bawah Umur*, tp. Jakarta, 1985, Page. 62

are clear and run well, the impact that will arise is that every year early marriage will decrease. The consequences of underage marriages arise due to several factors that give rise to early marriages such as the tendency of promiscuity which is not limited or restricted by the family or related parties, or less strict supervision from the people around, so that when the expectation is that teenagers who should have a responsible attitude towards oneself and follow the rule of law which is reasonable has been taken into account very much, especially in modern times like this where pre-marital sex and even free sex or underage marriage has become a very common epidemic and is considered reasonable.

Underage marriage, as explained above, is an event that is considered normal, and rarely does society consider this issue important, however, when this case or problem appears in the mass media or becomes an important topic discussed in various circles, then this case is considered new and important response by the public, a very recent and very well-known example is the case of Syekh Puji with Lutfiana Ulfah who is still 12 years old, even though in reality Sheikh Puji was declared acquitted and the judge stated that the demands of the public prosecutor were canceled because of the demands of the prosecutor unclear. In this case, long before the Syekh Puji case appeared, there were still many other cases of early marriage, which usually often appeared outside Jakarta or small towns.¹

3. Consequences of Underage Marriage

The consequences of underage marriage have several impacts on people's lives, especially for the perpetrators. Although there are positive impacts on underage marriages, there are also some negative impacts. Most of the consequences of underage marriages have bad consequences, even causing various problems which not least end in divorce in the Religious Courts. The bad consequences that often arise are due to the immature age and maturity of the perpetrators of underage marriages. The negative and positive impacts as a result of underage marriage can be described as follows:

a. Negative impact

- i. Increase in divorce due to underage marriages;
- ii. Underage marriages have a very large influence on high infant and child mortality rates;
- iii. Medically, research shows that women who marry at a young age, have sex and then get married, and then get pregnant in a condition that is not ready, the negative impacts that often arise, such as uterine cancer or cervical cancer due to free sex or having sex by changing -change partners;
- iv. The pro attitude towards underage marriage argues that marriage at a young age is a habit and tradition that has become entrenched in several societies.

b. Positive impact

- i. Clarify marital status;
- ii. Clarify the fate of children who need a father figure or figure;
- iii. Received good recognition from the environment;
- iv. Protected from views or good moral values from society;
- v. Protect from adultery that is out of control.

4. Reconstruction of Regulations for Requests for Dispensation in Religious Courts Based on Islamic Values of Justice

The Supreme Court is very concerned about the implementation of Law Number 16 of 2019 concerning changes to Law Number 1 of 1974 concerning marriage. This change specifically concerns the age of marriage for both men and women, namely 19 years. When the age of the prospective bride and groom has not reached that age, the marriage registrar can only register the marriage after a decision is made to grant dispensation by the Religious Court. The Supreme Court is of the view that children are a mandate and gift from the one and only God who has the dignity and worth as a whole human being and has the same right to grow and develop. All actions regarding children carried out by social welfare institutions, the state or the private sector, including courts, are carried out in the best interests of the child.²

Marriage can only be permitted for those who meet the age requirements, but in certain circumstances the court can grant a dispensation from marriage in accordance with applicable laws and regulations. Because the laws and regulations governing adjudicating the granting of dispensation for children who are not yet old enough to marry clearly and unequivocally have not yet been regulated, the Supreme Court issued a regulation which is used as a guideline for judges of religious courts in adjudicating cases of requests for dispensation of marriage

¹ Nani Suwondo, *Hukum Perkawinan dan Kependudukan di Indonesia*, Bina Cipta, Bandung, 1989, Page.108

² Effendy, Dalih, *Problematika dan Solusi Pelaksanaan Undang-Undang No. 16 Tahun 2019* diakses melalui <https://www.pta-pontianak.go.id/berita/artikel/862-problematika-dan-solusi-pelaksanaan-undang-undang-no-16-tahun-2019-tentang-perkawinan>

for Muslims who have not sufficient age to marry, namely by issuing Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Dispensation of Marriage.

In the Supreme Court Regulation, the judges who adjudicate applications for marriage dispensation are:

1. Judges who already have a Decision Letter from the Chief Justice of the Supreme Court as a Juvenile Judge, have attended training and/or technical guidance on Women in Conflict with the Law or are certified in the Juvenile Criminal Justice System or have experience adjudicating applications for Dispensation of Marriage.
2. If there are no judges as mentioned above, then each judge can hear the request for dispensation for marriage.

The stipulation is also "null and void" if the Judge in the stipulation does not hear and consider the statement:

- a) Children who are requested for Marriage Dispensation;
- b) Prospective Husband/Wife who is requested for Marriage Dispensation;
- c) Parents/Guardians of Children who are being requested for Marriage Dispensation;
- d) Parents/Guardians of the Prospective Husband/Wife.

In the examination at trial, this Supreme Court Regulation emphasizes that the judge handling the marriage dispensation case must first identify:

1. The child submitted in the application knows and agrees to the marriage plan;
2. Psychological condition, health and readiness of children to enter into marriage and build a family life; And
3. Psychological, physical, sexual or economic coercion against children and/or families to marry or give birth to children.
4. In addition, during the examination, the judge pays attention to the best interests of the child by:
5. Thoroughly and carefully studied the Petitioner's petition;
6. Checking the legal position of the Petitioner;
7. Exploring the background and reasons for child marriage;
8. Exploring information regarding whether there are marital obstacles;
9. Exploring information related to children's understanding and consent to be married;
10. Taking into account the age difference between the child and the prospective husband/wife;
11. Hearing the statements of the applicant, children, prospective husband/wife and parents/guardians of the prospective husband/wife;
12. Pay attention to the psychological, sociological, cultural, educational, health, economic conditions of children and parents, based on recommendations from psychologists, doctors/midwives, professional social workers, social welfare workers, integrated service center for the protection of women and children (P2TP2A) or the Commission for Protection Indonesian/Regional Children (KPAI/KPAD);
13. Paying attention to whether or not there is an element of psychological, physical, sexual and/or economic coercion; And
14. Ensuring parental commitment to take responsibility for economic, social, health and child education issues.

Therefore, in examining the child being requested for Dispensation for Marriage, the Judge may:

1. Hearing the statement of the child without the presence of parents;
2. Hearing the child's testimony through a remote audio-visual communication examination at the local court or elsewhere;
3. Suggest that the child be accompanied by a companion;
4. Ask for recommendations from Psychologists or Doctors/Midwives, Professional Social Workers, Social Welfare Workers, Integrated Service Center for Women and Children Protection (P2TP2A), Indonesian/Regional Child Protection Commission (KPAI/KPAD); And
5. Presenting translators/people who usually communicate with children, if needed.
6. The judge in determining the application for dispensation of marriage considers: The protection and best interests of the child in statutory regulations and unwritten laws in the form of legal values, local wisdom and a sense of justice that lives in society; And
7. International conventions and/or agreements related to child protection. Against the stipulation of marital dispensation, cassation can only be filed.

Determining the age limit for marriage is not against Islamic law. The size of the marriage age is determined based on the 'urf that applies in society by taking into account various advances, such as progress in

the economic, educational, social, cultural, health and other fields of progress that are not contrary to Islamic law;

Marriage Dispensation is the granting of a marriage permit by a court to a prospective husband/wife who is not yet 19 years of age to enter into a marriage. The application for dispensation from marriage aims to implement the principles (best interests of the child, the right to life and development of the child, respect for the opinion of the child, human dignity and worth, non-discrimination, gender equality, equality before the law, justice, benefits and legal certainty), guaranteeing a justice system that protects children's rights, increases parental responsibility in the context of preventing child marriage and identifies the presence or absence of coercion against children.

Marriage dispensation is a complex issue. In adjudicating cases on requests for dispensation from marriage, the Religious Courts must present considerations from various aspects, such as syar'i, sociological, psychological, juridical, and health aspects. Dispensation can only be given if it does not conflict with the objectives of Islamic law (maqasidu al-shari'ah) in safeguarding the safety of offspring (hifzhu al-nasl) at the level of al - d aruriyyah or at least al hajiyyah, without endangering the safety of the souls of the parties involved. bound in marriage ties (hifzhu al-nafs) as well as continuing the education of children who are given a marriage dispensation (hifzhu alaql).

The Supreme Court issued Supreme Court Regulation Number 5 of 2019, specifically responding to how the court provides justice in handling cases of requests for marital dispensation in order to provide protection for children, so the Religious Courts stand by and rely on the process of handling them. Judges of the Religious Courts must have a presumption and consider the benefits and harms in determining the application for marriage dispensation.

In this regulation, the process of adjudicating a marriage dispensation application is only permitted if it meets the age requirements of Indonesia as a state party which ratifies the Convention on the Child (Convention on the Rights of the Child) confirms all actions regarding children carried out by state social welfare institutions or private sector, courts, administrative authorities or legislative bodies are carried out in the best interests of the child.

The age limit for marriage is an age limit for marriage or marriage for both men and women. In practice, the age of the prospective bride and groom filing a marriage dispensation application at the Religious Court ranges from 13 to 16¹ years old. The age of the prospective bride and groom is clearly much different, even lower than the marriage age limit set by the marriage law and other positive laws in Indonesia. The age limit for marriage according to Indonesian laws and regulations is as follows:

- a. The age limit for marriage according to Law Number 1 of 1974 concerning Marriage, is contained in chapter II of the conditions for marriage Article 6 paragraph (2), namely: "To enter into a marriage a person who has not reached the age of 21 (twenty one) years must obtain permission both parents". Whereas in Article 7 paragraph (1) of the Marriage Law: "Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years. And in paragraph (2) "In case of deviation from paragraph (1) of this article, you can request a marriage dispensation from the Religious Court or other official appointed by both the male and female parents. And in paragraph (3) "The provisions concerning the condition of one or both parents in article 6 paragraph (3) and (4) of this law also apply in the case of a request for dispensation referred to in paragraph (2) of this article with does not reduce what is meant in Article 6 paragraph (6).²
- b. The age limit for marriage according to the Compilation of Islamic Law in Article 15 paragraph (1), namely: "For the benefit of the family and household, marriage may only be carried out by the bride and groom who have reached the age specified in Article 7 of Law Number 1 of 1974, namely the prospective husband at least 19 years old and the prospective wife is at least 16 years old. And in paragraph (2), "for prospective brides who have not reached the age of 21, they must obtain permission as stipulated in Article 6 paragraphs (2), (3), (4), and (5) of Law Number 1 year 1974 concerning Marriage.³
- c. The age limit for marriage according to the Civil Code, is emphasized in chapter IV concerning marriage in Article 29,⁴ namely: "Men who have not reached the full age of 18 (eighteen) years and women who have

¹ Kontrol Arsip Perkara pada Pengadilan Agama Makassar, diakses pada hari Senin tanggal 8 Nofember 2022

² Nuansa Aulia, *Kompilasi Hukum Islam*, Nuansa Aulia, 2008, Bandung page 82-83

³ *Ibid.*, Page. 5-6

⁴ Soesilo dan Pramudji R., *Kitab Undang-Undang Hukum Perdata; Bugerlijk Wetboek*, Rhedbook Publisher, Jakarta, 2008, Page. 8

not reached the age of 15 (fifteen) years full, not allowed to hold a marriage. However, if there are important reasons, the government has the power to remove this prohibition by granting dispensation.¹

Law No. 16 of 2019 concerning amendments to Law Number 1 of 1974 Concerning Marriage

Before reconstruction	Weaknesses	After the reconstruction
<p>Article 7 (1) Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years. (2) In the event of a deviation from the age requirement as referred to in paragraph (1), the parents of the man and/or the parents of the woman may request dispensation from the Court with very urgent reasons accompanied by sufficient supporting evidence. (3) The court granting dispensation as referred to in paragraph (2) must listen to the opinions of both bride and groom who will enter into marriage. (4) The provisions regarding the condition of one or both parents of the prospective bride and groom as referred to in Article 6 paragraph (3) and paragraph (4) also apply to the provisions regarding the request for dispensation as referred to in paragraph (2) without prejudice to the provisions referred to in Article 6 paragraph (6)</p>	<p>In the event of any deviation from age provisions provide a higher basis than Law no. 1 of 1974 concerning Marriage, originally the bride's side was 16 years old and the man's side was 18 years old, whereas in the law on the protection of children under the age of 18 years. Associated with complete supporting information and health experts.</p>	<p>Article 7 (1) Marriage is only permitted if the man and woman have reached the age of 19 (eighteen) years. (2) In the event of deviation from the age requirement as referred to in paragraph (1), the parents of the male and/or the parents of the female may request dispensation from the Court for certain reasons accompanied by complete supporting evidence. (3) The court granting dispensation as referred to in paragraph (2) must hear the opinions of both the bride and groom who will carry out the marriage and the statement of a physical and psychological health expert. (4) The provisions regarding the condition of one or both parents of the prospective bride and groom as referred to in Article 6 paragraph (3) and paragraph (4) also apply to the provisions regarding the request for dispensation as referred to in paragraph (2) without prejudice to the provisions referred to in Article 6 paragraph (6)</p>

¹ Penghimpun Solahuddin, *Kitab Undang-Undang Hukum Pidana, Acara Pidana, dan Perdata*, Visimedia, Jakarta, 2008, Page. 226

Regulation of the Minister of Religion of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Dispensation of Marriage

Before reconstruction	Weaknesses	After the reconstruction
<p>Section 2 Regulation of the Minister of Religion of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Dispensation of Marriage.</p> <p>The judge adjudicates the application for Marriage Dispensation based on the following principles: the best interests of the child; the right to life and development of children; respect for the child's opinion; respect for human dignity; non-discrimination; gender equality; equality before the law;</p> <p>h. justice;</p> <p>l. expediency; And</p> <p>J. legal certainty.</p>	<p>In practice, the application for a marriage dispensation is based more on the fact that an accident has occurred beforehand, the judge decides to base it more on the principle of benefit</p>	<p>Section 2 Regulation of the Minister of Religion of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Dispensation of Marriage.</p> <p>The judge adjudicates the application for Marriage Dispensation based on the following principles: a. the best interests of the child; b. the right to life and development of children; c. respect for the child's opinion; d. respect for human dignity and worth; e. non-discrimination; f. gender equality; g. equality before the law; h. justice; l. expediency; and benefit J. legal certainty.</p>
<p>Article 14 During the examination at trial, the judge identified:</p> <p>a. The child submitted in the application knows and agrees to the marriage plan; b. psychological condition, health and readiness of the child to enter into marriage and build a family life; And c. psychological, physical, sexual or economic coercion against the child and/or family to marry or give in to the child in marriage.</p>	<p>In practice, there are many requests for dispensation for marriage in order to eliminate/abort criminal sanctions, which are caused by sexual violence</p>	<p>Article 14 During the examination at trial, the judge identified: a. The child submitted in the application knows and agrees to the marriage plan; b. psychological condition, health and readiness of the child to enter into marriage and build a family life; And c. psychological, physical, sexual or economic coercion against the child and/or family to marry or give in to the child in marriage. d. the occurrence of criminal acts of sexual violence with evidence through</p>

D. CONCLUSION

Whereas the regulation on requests for dispensation from marriage in religious courts has not yet had the value of Islamic justice, namely the normalization of the marriage law Article 7 and Perma No. 5 of 2019 Article 2 and Article 14 have not provided the values of justice that are able to realize the nature of marriage, namely forming a family that is Sakinah, mawadah, wa rahmah, or eternal based on the orders of Allah SWT. The current weaknesses in the regulation on requests for dispensation from marriage in the religious courts are weaknesses in legal substance, legal structure and legal culture. Therefore, with regulations on requests for dispensation from marriage in religious courts that do not yet have the value of Islamic justice, it is necessary to reconstruct the provisions in Article 7 of Law Number 16 of 2019 and Supreme Court Regulation Number 5 of 2019 Article 2 and Article 14.

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