


PROTECTING CHILDREN'S RIGHTS IN MARRIAGE DISPENSATION CASES: EVIDENCE FROM RELIGIOUS COURTS IN INDONESIA

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Abstract: The protection of children's rights is essential to ensure their well-being and development. In Indonesia, Law No. 16 of 2019 raised the minimum marriage age to 19 years, yet marriage dispensation remains an option for underage marriage in exceptional circumstances. This research examines trends in marriage dispensation cases in West Java and their implications for children's rights. The study employs an empirical, philosophical, sociological, and historical juridical approach, analyzing decisions from ten religious courts between 2019 and 2021. Findings reveal a significant increase in marriage dispensation cases after the law's enactment, driven by fears of moral transgressions (87%) and pre-marital pregnancies (8%). Despite legal provisions, 99% of applications were granted, often prioritizing cultural and religious norms over the principle of the child's best interests. This study highlights the need for strengthened judicial oversight and community engagement to align legal practices with protecting children's rights. The findings call for more robust preventive measures and an evaluation of the dispensation process to ensure compliance with the rights-based framework.

Keywords: children's rights; Indonesia; legal protection; marriage dispensation; religious courts.

Introduction

The minimum legal marriage age increase under Law No. 16/2019 reflects an effort to safeguard children's rights, as outlined in Law No. 35/2014 on Child Protection (PA Law). According to Article 1, Point 2 of Law No. 35/2014, "child protection" encompasses all actions aimed at ensuring and protecting children and their rights, enabling them to live, grow, develop, and participate optimally in alignment with human dignity, while also safeguarding them from violence and discrimination. Marriages involving individuals under the age of 18 are classified as "child marriages," as both Indonesian law and international standards define a child as any individual under the age of 18.

Marriage itself is defined as "a very strong contract or *mitsaqan ghalizhan* to obey the commandments of Allah, and carrying it out is an act of worship." Marriage aims to realize a household life that is "*sakinah, mawaddah, and warahmah*."¹ Regarding the term "underage marriage" or "child marriage," until now it has not been clearly defined in various laws related to children and marriage. Therefore, there are various terms that are often used, such as "child marriage," "underage marriage," "early marriage," or "child marriage." The author here, like I Ketut Sudantra and I.G. N. Dharma Laksana², uses the term "child marriage," following the term used by BPS.³

The change in the minimum age of marriage for men and women to 19 years each has several impacts on society, especially on underage marriage. According to Roscoe Pound's theory, "Law as a Tool of Social Engineering," law is a tool of social engineering or law as a tool of development (law as a means of development), as stated by Mochtar Kusumaatmadja.⁴ Law, as a tool for social engineering, is expected to bring about positive changes in society. One of the objectives of the revision of the age limit for marriage is to reduce the number of child marriages because they can have a negative impact on the growth and development of children and will lead to the non-fulfillment of children's basic rights such as the right to protection from violence and discrimination, children's civil rights, health rights, education rights, and children's social rights. At this age, children are not ready to assume the responsibilities that arise as a result of marriage, including those related to the maturity of the reproductive organs. Child marriage occurs in both boys and girls, with the highest ratio occurring in girls.

To date, the rate of child marriage is still high. Indonesia has one of the highest rates of child marriage in East Asia and the Pacific region. The 2013 207 report shows that in 2013, the prevalence of child marriage was 23%. This figure dropped slightly in 2015, to 23%.⁵

West Java alone has the second highest rate of child marriage in Indonesia, at 50.2% for the age range of 15–18 years. The high rate of marriage dispensation cases in West Java follows the high rate of child marriage in West Java. In 2016–2019, there were 6,897

¹ Articles 2 and 7 of Presidential Instruction No. 1/1991 on the Compilation of Islamic Law.

² I. Ketut Sudantra and I. Gusti Ngurah Dharma Laksana, 'Di Balik Prevalensi Perkawinan Usia Anak Yang Menggelisahkan: Hukum Negara Versus Hukum Adat', *Jurnal IUS Kajian Hukum dan Keadilan* 7, no. 1 (19 April 2019): 56–72, <https://doi.org/10.29303/ius.v7i1.594>.

³ Direktorat Statistik Kesejahteraan Rakyat, *Usia Anak Di Indonesia (2013 Dan 2015)*, Edisi Revisi (Jakarta: Badan Pusat Statistik-UNICEF Indonesia, 2017), 1.

⁴ Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan* (Bandung: Alumni, 2022), 88.

⁵ Subdirektorat Statistik Rumah Tangga, *Kemajuan Yang Tertunda: Analisis Data Perkawinan Usia Anak Di Indonesia* (Jakarta: Badan Pusat Statistik-UNICEF Indonesia, 2016), 1.

marriage dispensation cases received by religious courts throughout West Java. Based on West Java PTA data from 2017 to 2020, PA Indramayu occupied the first position with 1,235 marriage dispensation cases. According to various studies, the causes of the high rate of underage marriage include economic factors, culture, low levels of education, and religious doctrine. Other causes include women getting pregnant first, customs that require child marriage (especially for women), and so on.⁶

On the other hand, the Marriage Law also provides an opportunity for legal remedies for those who do not meet the age requirements for marriage or who have deviations from the specified age limit for marriage, namely by applying for marriage dispensation to the court. This is governed by Article 7, paragraph (2) of the Marriage Law, which states that in the event of a deviation from the age provisions referred to in paragraph (1), the parents of the male party and/or the parents of the female party may petition the Court for a dispensation on very urgent grounds, accompanied by adequate supporting evidence. The submission of an application for dispensation of marriage must be based on very urgent reasons, and the applicant must be able to prove it during the trial. This marriage dispensation case is further regulated in Supreme Court Regulation (PERMA) No. 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Cases.

After the stipulation of changes in the age of marriage, the filing of applications for dispensation of marriage in the Religious Courts has increased. As for the number of marriage dispensation cases entered in all religious courts in Indonesia before the amendment of Law Number 1 of 1974, from January to September 2019, the number of cases applying for marriage dispensation amounted to 12,624 cases or an average of 1,403 cases per month. Meanwhile, after Law No. 1 of 1974 was amended by Law No. 16 of 2019, from January to September 2020, marriage dispensation cases amounted to 49,326 cases, or an average of 5,480 cases per month.⁷ Based on the data above, it is known that with the increase in the age limit for marriage, more and more people apply for marriage dispensation. This fact shows that revising the marriage law is not proportional to public legal awareness. The higher the level of marriage dispensation cases submitted to the court, the more the judge examining the case must consider the case properly by considering all the reasons for the application and the possible impacts if the dispensation is granted.

Based on the explanation above, researchers are interested in examining how marriage dispensation cases are handled in religious courts in the West Java region. Then what is the form of protection of children's rights in marriage dispensation cases that religious courts must guarantee? Finally, what obstacles and efforts can judges at religious courts in West Java can make in handling marriage dispensation cases?

Methodology

This research utilizes a multi-dimensional approach, integrating empirical, philosophical, sociological, and historical juridical perspectives. Primary data were

⁶ Dede Kania et al., 'Marriage Dispensation Post The Decision Of The Constitutional Court No. 22/PUU-XV/2017', *Jurnal Hukum Islam* 19, no. 1 (1 June 2021): 43–64, <https://doi.org/10.28918/jhi.v19i1.3491>.

⁷ Purwosusilo, 'Peran Hakim Melindungi Anak Dalam Perkara Dispensasi Kawin', 2020, Presentasi Hakim Mahkamah Agung.

collected from marriage dispensation case decisions issued by ten religious courts in West Java: Sumber, Majalengka, Sumedang, Sukabumi, Cianjur, Ciamis, Banjar, Soreang, Purwakarta, and Bandung. The study focuses on cases filed between 2019 and 2021 to analyze the impact of Law No. 16 of 2019 on marriage dispensation trends and decision-making. Secondary data sources include relevant laws, academic literature, and interviews with judges to understand the considerations in granting or rejecting dispensation requests. The methodology ensures a comprehensive examination of the legal and sociocultural dimensions influencing the protection of children's rights in marriage dispensation cases.

Results and Discussion

Marriage Dispensation Cases in Religious Courts in the West Java Region

Religious courts are Islamic courts in Indonesia that specifically hear people who are Muslims using Islamic law. In fact, religious courts are limited to Islamic courts adapted to the situation in Indonesia. On the other hand, religious courts are civil courts, while general courts are also civil courts in addition to general courts. If we look at the principles of procedural law, then, of course, there are general principles of similarity, but there are also specific differences between the procedural law of general courts and the procedural law of religious courts. In other words, the Religious Court is one of the executors of the judiciary, which functions and plays a role in ensuring justice, truth, order, and legal certainty in certain Islamic cases. Therefore, religious courts are referred to as specialized courts.⁸ When viewed from a juridical point of view, the product of the Religious Court is a product in the nature of a determination; in the case of a determination, there is an opponent and there is a dispute in it; there is also one that has no opponent and there is no dispute in it, such as an application for dispensation of marriage.⁹ With this explanation, the application for marriage dispensation is voluntair, which is a case that can be requested to the court in which there is a petitum or request of a civil nature in which there is a legal interest and in which there is no dispute, and it is stated that the court can accept, examine, hear, and determine it.¹⁰

The change in the minimum age of marriage resulted in a surge in marriage dispensation cases in the 10 PAs studied. Data on the determination of marriage dispensation cases in the West Java Religious Courts after the enactment of Law Number 16 of 2019 increased in 2020, then in 2021 the numbers tended to fall back. This can be seen in the following table:

⁸ Andi Intan Cahyani, 'Peradilan Agama Sebagai Penegak Hukum Islam Di Indonesia', *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam* 6, no. 1 (30 June 2019): 119–32, <https://doi.org/10.24252/al-qadau.v6i1.9483>.

⁹ Sulaikin Lubis, Wismar Ain Marzuki, and Gemala Dewi, *Hukum Acara Perdata Peradilan Agama di Indonesia*, Edisi 1, Cetakan 1 (Jakarta: Kencana : Fakultas Hukum, Universitas Indonesia, 2018); Roihan A. Rasyid, *Hukum Acara Peradilan Agama* (Jakarta: RajaGrafindo Persada, 2013), 214.

¹⁰ Aah Tsamrotul Fuadah, *Hukum Acara Peradilan Agama Plus Hukum Acara Islam Dalam Risalah Qadha Umar Bin Khattab* (Depok: Rajawali Pers, 2019), 91.

Table 1. Determination of Marriage Dispensation Cases in Religious Courts 2019-2021

No	RC	2019	2020	2021
1	Sumber RC	534	527	474
2	Majalengka RC	166	167	136
3	Sumedang RC	130	469	313
4	Sukabumi RC	27	68	80
5	Cianjur RC	164	589	237
6	Banjar RC	43	52	50
7	Ciamis RC	215	316	212
8	Soreang RC	221	452	338
9	Bandung RC	104	239	192
10	Purwakarta RC	92	258	141

Source: Processed from SIPP 10 RC

The enactment of Law Number 16 of 2019 led to significant changes in the trends of marriage dispensation cases across 10 Religious Courts (RCs) in West Java. As presented in **Table 1**, cases surged dramatically in 2020 following the law's implementation and showed a decline in 2021. For example, Cianjur RC experienced an increase from 164 cases in 2019 to 589 in 2020 before dropping to 237 in 2021. Similar trends were observed in other RCs, such as Sumedang and Soreang. This data suggests that the law's stricter minimum marriage age led to an initial adjustment period marked by increased applications, followed by stabilization as the public adapted to the legal requirements.

The reasons for filing a marriage dispensation case in the 10 PAs studied were mostly because parents were worried that an act prohibited by Islam would occur: being pregnant first and having had sexual intercourse (adultery) with their partner. The following table relates to the reasons for filing a marriage dispensation case:

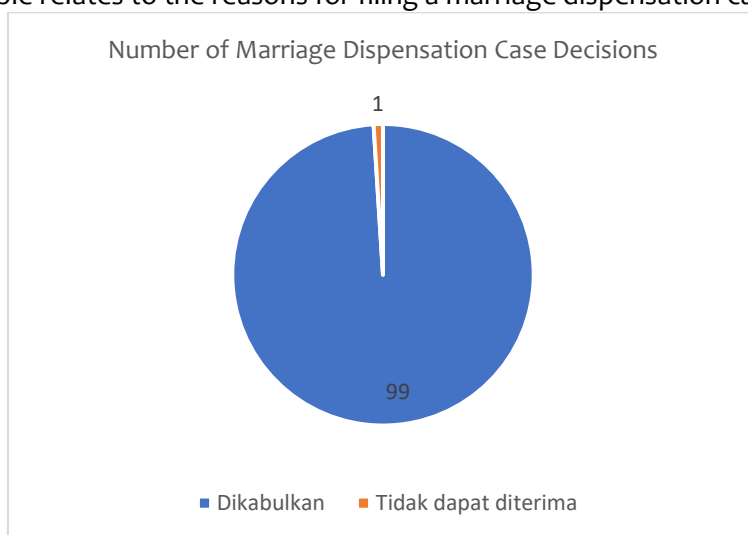


Figure 1. Decisions on Marriage Dispensation Cases at Religious Courts in the West Java Region in 2019-2021

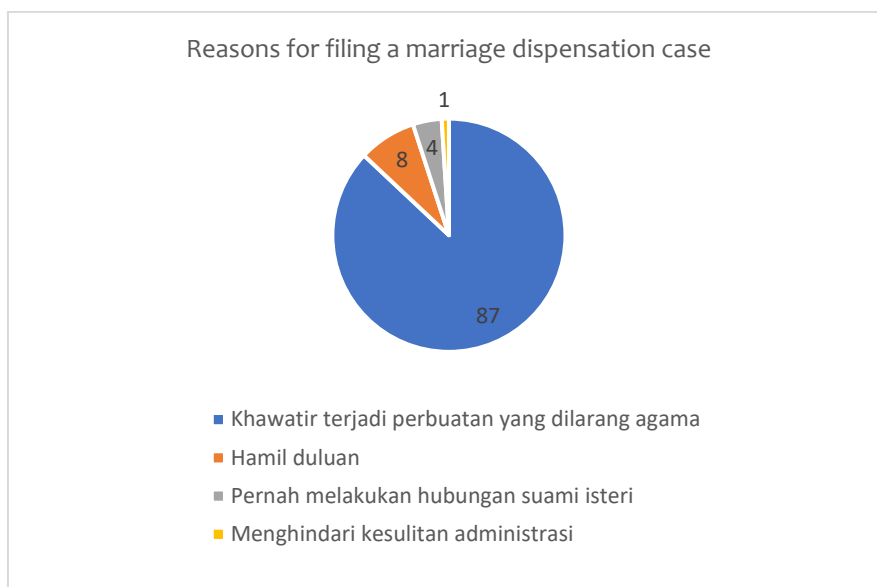


Figure 2. Reasons for Filing Marriage Dispensation Cases at Religious Courts in West Java Region in 2019-2021

The reasons for filing marriage dispensation cases are critical in understanding the societal impact of this legal change. As shown in **Figure 2**, 87% of cases were filed due to parents' concerns over the possibility of acts prohibited by Islam, such as pre-marital sexual relations. This dominant reason underscores the role of religious and cultural values in shaping parental decisions. The remaining cases were driven by factors such as pregnancy before marriage (8%) and previous sexual relations (4%).

The high approval rate of 99% for these cases, as indicated by **Figure 1**, raises questions about the balance between cultural values and children's rights. The data shows that legal reforms alone may not suffice to prevent early marriages if societal pressures, such as the fear of moral transgressions, remain strong. For instance, the significant proportion of cases granted due to fears of pre-marital sexual activity highlights the need for complementary measures, such as sexual education and community engagement, to address the root causes of early marriage beyond legal interventions.

While the quantitative data provides a clear picture of trends, qualitative insights from interviews with judges reveal a tendency to prioritize familial and religious considerations over broader implications for children's rights. The correlation between the reasons cited (e.g., fear of prohibited acts) and the approval rates suggests a systemic preference for resolving social and religious concerns through marriage dispensations. This highlights an urgent need for policymakers to address these issues more holistically, ensuring that legal frameworks and cultural practices do not inadvertently compromise children's rights.

Protection of Children's Rights in Marriage Dispensation Cases

Under the International Convention on the Rights of the Child, Article 2 Number 1, each state party to the convention shall respect and guarantee the rights of every child within their jurisdiction without discrimination of any kind, whether race, color, sex,

language, religion, political or other opinion, nationality, ethnic or social origin, property, disability, birth, or other status of the child, parent, or legal guardian. The Convention affirms that in all actions concerning children, whether carried out by public or private social welfare institutions, courts, state or government officials, or other state institutions, the best interests of the child must be considered. Indonesia, as a state party to the Convention on the Rights of the Child, must pay attention to the rights of the child, including in the administration of justice. Children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, the state, government, and local governments. Children's rights include the right to live, grow, and develop; to participate reasonably in accordance with human dignity; and to be protected from violence and discrimination.

The regulation of marriage dispensation cases has sparked debate. On the one hand, marriage dispensation is a form of protection for the best interests of children. However, on the other hand, there are certainly violations of children's rights. The government provides legal protection for children who have not met the age requirements for marriage by allowing them to apply for marriage dispensation as stipulated in Article 7 Paragraph 2 of Law Number 16 of 2019. Of course, this is a very urgent reason, namely a situation where there is no other choice and it is very forced that a marriage must take place, or, in another sense, if marriage dispensation is not granted, it will cause danger. The application for marriage dispensation is submitted by the parents of the prospective bride and groom to the court because the prospective bride and groom who will enter into marriage are not yet legally competent, as Article 330 BW determines that an immature child is a child who has not yet reached the age of 21 years or has not yet married, so that the prospective bride and groom do not have legal standing to apply for marriage dispensation in court. However, in the process of examining an application for dispensation of marriage, the court is obliged to hear the opinions of both prospective brides and grooms who will enter into marriage. Therefore, in examining a marriage dispensation case, the court, in this case the judge examining the case, must continue to provide protection for children's rights to ensure that there is no violation of children's rights because the court is one of the elements that must organize child protection.

Marriage dispensation cases are not simple cases. Marriage dispensation applications are usually motivated by various issues related to children's rights. Basically, child protection aims to ensure the fulfillment of two things, namely children's rights and children's welfare. Any actions taken by parents or parties involved with children must pay attention to these two objectives. The best interests of the child must come first. In Law Number 1 of 1974 concerning Marriage, the principles regarding marriage and everything related to marriage are determined, which have been adjusted to the developments and demands of the times. The principles contained in the Marriage Law are: (1) the principle of eternal marriage; (2) the principle of marriage according to religious law or religious beliefs; (3) the principle of registered marriage; (4) the principle of monogamous marriage; marriage is based on voluntariness or freedom of will (without coercion); (5) the balance of rights and positions of husband and wife; (6) the principle of not recognizing polyandrous marriages; and (7) the

principle of making divorce easier.¹¹ Ali Afandi said that, according to the Civil Code, a valid marriage is a marriage performed before the duties of the Civil Registry Office. A marriage performed according to the procedures of a religion alone is not valid. In contrast, the Marriage Law as *ius constitutum* law has formulated legal norms regarding valid marriages imperatively as stipulated in Article 2 of the UUP, which reads that "(1) Marriage is valid if it is carried out according to the laws of each religion and belief; (2) Every marriage is recorded according to the applicable laws and regulations."¹²

There are two kinds of marriage requirements, namely material requirements and formal requirements. Material conditions are conditions that exist and are attached to the parties to the marriage; these material conditions are also called subjective conditions. Meanwhile, formal requirements, also known as objective requirements, are procedures or procedures for marrying according to religious law and law. The conditions for marriage in national law are regulated in the provisions of Article 6 through Article 12 of Law Number 1 Year 1974 concerning Marriage, which include material and formal requirements.¹³

Article 1 of Law No. 1 of 1974 states that the purpose of marriage as husband and wife is to form a happy and lasting family (household) based on the will of God Almighty. Furthermore, it is explained that husband and wife need to help each other and complement each other so that each can develop their personality and help achieve spiritual and material welfare.¹⁴ Article 3 of the Compilation of Islamic Law explains that marriage aims to create a household life that is *sakinah*, *mawaddah*, and *warahmah*. Marriage is a life value according to customary law in order to continue offspring, lineage, and the position of the family concerned.¹⁵

Legal protection for children can be interpreted as legal protection efforts against various fundamental rights and freedoms of children and various interests related to the welfare of children. So the issue of legal protection for children covers a very broad scope. So the scope of legal protection for children includes protection of children's freedoms, protection of children's human rights, and legal protection of all children's interests relating to the welfare of children.

The juridical commitment of the state to protect its citizens, as mentioned in the fourth paragraph of the 1945 Constitution, is further elaborated in Chapter XA on Human Rights. Specifically for the protection of children, Article 283 paragraph (2) of the 1945 Constitution states,

"Every child has the right to survival, growth, and development, as well as the right to protection from violence and discrimination".¹⁶ Children's rights are specified in Article 4 through Article 18 of Law 23 of 2002 on Child Protection. Article 2 of Law 23 of 2002 on Child Protection states that the implementation of child protection is based

¹¹ Rosnidar Sembiring, *Hukum Keluarga: Harta-Harta Benda Dalam Perkawinan* (Jakarta: RajaGrafindo Persada, 2017), 51–54.

¹² Sembiring, 53.

¹³ Sembiring, 55.

¹⁴ Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat Dan Hukum Agama* (Bandung: Mandar Maju, 1990), 22.

¹⁵ Nurhidayat Akbar, 27.

¹⁶ Waluyadi, *Hukum Perlindungan Anak* (Bandung: Mandar Maju, 2009), 1.

on Pancasila and the 1945 Constitution and the principles of the Convention on the Rights of the Child, which include: (1) non-discrimination; (2) the best interests of the child; (3) the right to life, survival, and development; and (4) respect for the child's opinion.

The definition of the principle of the best interests of the child is that in an action concerning children carried out by the government, society, legislative bodies, and judicial bodies, the best interests of the child must be the main consideration in: (1) nurturing, maintaining, educating, and protecting children; (2) developing children in accordance with their abilities, talents, and interests; (3) preventing child marriage; and (4) providing character education and instilling ethical values in children. In paragraph (2), it is said that in the event that a person does not exist, or his whereabouts are unknown, or for some reason cannot carry out his obligations and responsibilities, those obligations and responsibilities, as referred to in paragraph (1), may be transferred to the family, which carries them out in accordance with the provisions of laws and regulations.

The protection given to children is an effort made to make every child able to carry out their rights and obligations in accordance with their growth and development. On the one hand, the Child Protection Law mandates that parents have an obligation to be responsible for the occurrence of marriage at the age of a minor. However, on the other hand, the Marriage Law in practice allows parents to seek marriage at the age of their children, which in essence allows the parents of the male or female party to request marriage dispensation from the Court or authorized officials even though the child who wants to enter into marriage is not old enough. This is as stipulated in the Marriage Law, which states that marriage is permitted if the boy has reached the age of 19 years and the girl has reached the age requirement of 16 years.

Looking at the facts today, underage marriage is still high, although the marriage law still provides leeway for people who want to get married. However, for those who want to obtain a marriage dispensation permit from the Religious Court, they can provide the right reasons for marrying at an early age. Whether these reasons are acceptable and meet the criteria or not, if all people who apply for marriage dispensation are granted, it automatically does not fulfill what has been determined by Law Number 1 of 1974.

Another factor that results in underage marriage is low education. Most of the perpetrators of underage marriage have first experienced dropping out of school. Parents should be responsible for their children's education, even if they sometimes neglect it. This is possible because parents, who should be protectors and examples for their children, have a low level of education, and there are even parents who have never received any formal education at all.

The Supreme Court issued technical guidelines for handling marriage dispensation cases in the form of Supreme Court Regulation (PERMA) Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Cases, which came into effect on November 21, 2019. One of the objectives of the guidelines is to ensure the standardization of the process of adjudicating marriage dispensation in court in order to protect the rights of children.

The forms of protection provided to children's rights in the process of examining marriage dispensation cases during court proceedings are regulated in the provisions of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Cases, which include the following:

Firsts, Heard by a competent single judge. During the examination process in court, children are treated in accordance with their age. This is not discrimination, but rather a form of protection of children's rights so that children feel calm and do not feel afraid when questioned by the judge. In addition, the examination is also conducted by a single judge who has the competence to try children, so that in adjudicating the application for marriage dispensation, it is truly conducted by judges who are qualified in their fields. This is as stipulated in Article 11 of Perma No. 5/2019, that the examination of marriage dispensation is examined by a single judge who has the ability to try children. The judge already has a decree from the Chief Justice of the Supreme Court as a juvenile judge, has participated in training and/or technical guidance on women in conflict with the law, has been certified in the juvenile criminal justice system, or has experience hearing marriage dispensation applications.

Second, Provide a sense of comfort in court. The examination of an application for marriage dispensation is conducted differently from the examination of an adult case. During the examination process of a marriage dispensation application, as stipulated in Article 11 paragraph (2) of Supreme Court Regulation No. 5/2019, judges and substitute clerks do not use court attributes such as togas and ties for judges and suits for substitute clerks. Judges and substitute clerks use formal clothing without court attributes. These court attributes will create a "scary" image, thus affecting the child's mentality when delivering his or her testimony. In addition, judges must use language and methods that are easy for children to understand and comprehend (Article 11 paragraph 1, Perma Number 5 of 2019). This provision aims to prevent children from feeling pressured and burdened so that children can convey information calmly, properly, and correctly. Perma No. 5/2019 does not yet stipulate that the hearing of an application for marriage dispensation be conducted in a closed session for the public. The hearing should be closed to the public to protect the privacy of the child. If the hearing is open to the public, it may give other people a negative view of the child because they will marry underage.

Thirds, Presenting the child in the examination process In examining an application for marriage dispensation, the judge is obliged to present the child. As stipulated in Article 7 paragraph (3) of Law Number 16 of 2019, the court must hear the opinions of both parties to the marriage before granting a dispensation. Likewise, Article 10 of Supreme Court Regulation No. 5 of 2019 stipulates that during the first hearing, the applicant is obliged to present a number of parties for questioning, namely: (1) the child for whom the application for dispensation of marriage is filed; (2) the prospective husband or wife; and (3) the parents or guardians of the prospective husband or wife. The opportunity to present these parties does not arise until the third adjournment of the hearing, so the order to present the child is very urgent; even if it is not presented, the Marriage Dispensation application cannot be accepted. The purpose of presenting the child in court is to have him questioned. by ensuring that the underage marriage is indeed carried out without coercion and that they are ready to be married

later. The child does not feel coerced by the parents and really knows the impact that will arise if they marry underage. The child's statement can be strengthened by other evidence, for example, the results of a postmortem or the results of a child protection agency assessment, or even by presenting experts at trial. As a result, the judge can make a fair decision by considering the child's point of view.

Fourth, The judge presents and gives advice to the parents, children, prospective husband or wife, and parents or guardians of the prospective husband or wife. The examination of marriage dispensation cases is carried out by providing advice to the parties present in the trial, namely the Parents, Children, Prospective Husband or Wife, and Parents or Guardians of the Prospective Husband or Wife, in order for them to understand the risks of marriage, which are related to: (1) the possibility of children ceasing their education; (2) the continuation of children in taking the 12-year compulsory education; and (3) the unpreparedness of children's reproductive organs.

The applicant must present the parties at the hearing with the opportunity to postpone the third hearing. If on the third hearing day the applicant is also unable to present these parties, then the application for dispensation of marriage cannot be accepted. This provision takes into account the importance of the involvement of these parties in the examination of the marriage dispensation to be questioned.

Fifth, Prioritizing the best interests of the child. One of the principles of child protection is to prioritize the best interests of the child. In examining an application for Marriage Dispensation, the Judge prioritizes the best interests of the child as a form of child protection by: (1) carefully and meticulously studying the petition; (2) examining the legal position of the petitioner; (3) exploring the background and reasons for the marriage of the child; (4) exploring information related to whether or not there are obstacles to marriage; (5) exploring information related to the understanding and consent of the child to be married; (6) paying attention to the age difference between the child and the prospective husband/wife; (7) hearing testimony from the petitioner, the child, the prospective husband/wife, and the parents/guardians of the prospective husband/wife; (8) considering the psychological, sociological, cultural, educational, health, economic conditions of the child and parents, based on recommendations from psychologists, doctors/midwives, professional social workers, social welfare workers, the Integrated Service Center for the Protection of Women and Children (P2TP2A) or the Indonesian/Regional Child Protection Commission (KPAI/KPAD); (9) considering the presence or absence of psychological, physical, sexual and/or economic coercion; and (10) ensuring the parents' commitment to take responsibility for the economic, social, health, and educational problems of the child. (Article 16 perma 5/2019).

Legal considerations by judges that realize certainty, benefit, and justice for children In providing legal considerations, judges must consider the following matters in order to realize the objectives of the law, which include certainty, expediency, and justice for children, so that the protection of children's rights is realized:¹⁷

¹⁷ Sugiri Permana and Ahmad Zaenal Fanani, *Dispensasi Kawin Dalam Hukum Keluarga Di Indonesia: Kajian Atas Norma Dan Praktek Hukum Acara Pasca Disahkannya UU No. 16 Tahun 2019 Dan Perma No. 5 Tahun 2019* (Surabaya: CV. SAGA JAWADWIPA, 2019), 35.

Firsts, Consideration of the judge's advice to the applicant, child, prospective husband or wife, and parents or guardians of the prospective husband or wife to understand the risks of marriage, related to: the possibility of stopping education for the child; the continuation of the child in taking 12 years of compulsory education; the unpreparedness of the child's reproductive organs; the economic, social, and psychological impact on the child; and the potential for discord and domestic violence. (Article 12 of Supreme Court Regulation 5/2019).

Second, Consideration that the judge has heard the testimony of the child for whom the Marriage Dispensation is sought, the prospective husband or wife for whom the Marriage Dispensation is sought, the parents or guardians of the child for whom the Marriage Dispensation is sought, and the parents or guardians of the prospective husband or wife (Article 13 of Supreme Court Regulation 5/2019).

Thirds, Consideration of the child submitted in the application knowing and agreeing to the marriage plan; consideration of the psychological condition, health, and readiness of the child to enter into marriage and build a family life; and consideration of the presence or absence of psychological, physical, sexual, or economic coercion against the child and/or family to marry or marry the child. (Article 14 of Supreme Court Regulation 5/2019).

Fourth, Consideration of the protection and best interests of the child as stipulated in laws and regulations and unwritten law in the form of legal values, local wisdom, and a sense of justice that lives in the community; and international conventions and/or treaties related to child protection. (Article 17 of Supreme Court Regulation 5/2019). As provided in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power that Judges and constitutional judges are obliged to explore, follow, and understand the values of law and a sense of justice that live in society. As for the values that live in society in Indonesia, for example, family honor must be maintained and disgrace must be covered, family morality will be in the spotlight of the community, so it must be maintained.

Fifth, Consideration of the reasons for being very urgent, namely that there is no other choice and it is very urgent that the marriage be held, and the consideration of these reasons is accompanied by sufficient evidence, namely a certificate proving that the age of the bride and groom is still within the provisions of the law and a certificate from a health worker supporting the parents' statement that the marriage is very urgent to be carried out. (Explanation of Article 7 Paragraph 2 of Law Number 16 of 2019) 6) In considering the marriage of the applicant's child with the prospective husband or wife, no relationship prevents marriage, either blood relationship or consanguinity, and it is not in the proposal of another person. There are no other obstacles, either related to the terms and conditions of marriage or administrative requirements, except that the prospective bride and groom have not reached the age of 19. (Articles 6, 7, and 8 of Law Number 1 of 1974, which has been amended by Law Number 16 of 2019 concerning marriage)

In deciding marriage dispensation cases, judges must apply the principle of the best interests of the child. This means that all actions, whether making rules or policies or even decisions, must consider the best interests of the child. The interests of the child can be seen through various considerations, including the child's views, the child's

identity, child safety, child welfare, the child's environment and social relationships, vulnerability, the child's ability to develop, the need for health and education, and various other considerations. In marriage dispensation cases, judges need to make a determination based on considerations that take into account the best interests of the child. For example, by hearing the child's opinion, looking at the child's physical and psychological condition by taking into account the opinions of psychologists and medical personnel, considering the child's age, also paying attention to the child's rights related to education, and so on. In addition, the judge must also ensure that no child's rights are violated. For example, before the judge gives a marriage dispensation decision, the judge is obliged to hear the child's testimony first. If the child has difficulty communicating, the judge can order a translator or sign language interpreter to facilitate the child in giving his or her statement. The judge can also request information from a psychologist to ensure that the child is not in a depressed condition, or the judge can request information from the health service provider agency regarding the child's physical condition¹⁸.

Constraints and Efforts of Judges at Religious Courts in West Java in Handling Marriage Dispensation Cases

Where is the provision of Article 7 paragraph (2) of Law Number 16 of 2019? The explanation of the article explains that the urgent reason must be accompanied by sufficient supporting evidence, namely a certificate proving that the age of the bride and groom is still within the provisions of the law and a certificate from a health worker supporting the parents' statement that the marriage is very urgent to be carried out.

In the cases submitted, most of the "very urgent reasons" boiled down to the condition of the child who was already pregnant, which was the reason that there was no other choice and it was very compulsory for the marriage to take place. The judge was of the view that the granting of dispensation to marry had the greatest legal consequences for both the applicant and the child for whom dispensation was sought, as well as the legal status of the child who would be born. Pregnancy outside of marriage will cause disgrace and shame to both the family and the child because they are pregnant without a husband, and the legal status of the child who will be born later will also be unclear, so marriage is the last solution to reduce these legal consequences. Only the reason for being pregnant outside of marriage falls into the category of very urgent reasons, according to this interpretation.

However, it does not rule out the possibility of very urgent reasons based on reasons other than pregnancy outside of marriage. because indeed Law No. 16/2019 can be interpreted broadly by considering moral, religious, customary, and cultural aspects, psychological aspects, health aspects, and the impact caused. This is as explained in Article 7 paragraph (3) of Law Number 16 of 2019: the granting of dispensation by the Religious Court for those who are Muslims and the District Court for those of other religions is based on the spirit of preventing child marriage, moral considerations, religion, customs, and culture, psychological aspects, health aspects, and the impact

¹⁸ Supreme Court Regulation No. 5/2019 on Guidelines for Adjudicating Marriage Dispensation Applications

caused. Judges must explore these aspects and the values of society in order to provide justice and legal protection for the child for whom dispensation is sought. Therefore, it is possible that urgent reasons other than pregnancy outside of marriage will be granted by the judge after the judge considers the application for dispensation of marriage from these various aspects. On the other hand, if the application for dispensation of marriage is rejected, it will also have other legal consequences. The application is rejected because, during the examination, it was found that there are no very urgent reasons for the marriage of the child. Although the denial of the Marriage Dispensation application contributes to preventing underage marriage, thereby protecting children's rights such as the right to education, the right to health, and the right to grow and develop, it will also have other legal consequences, including the large number of underage nikah siri, itsbat nikah for underage nikah siri, and pregnancy outside of marriage.

In adjudicating marriage dispensation cases, the religious courts have not always granted the applications, although according to data submitted by Deri Fahrizal Ulum, Child Protection Officer of UNICEF Indonesia, more than 90% (ninety percent) of marriage dispensation applications are granted by the courts. Among the considerations put forward by the Religious Courts in granting applications for dispensation to marry are that the applications are based on Shar'i, juridical, and sociological grounds, where: (a) For the child for whom dispensation to marry is sought, if the man has a job with sufficient income and if the woman is accustomed to performing household duties, (b) The families of both parties have consented to the marriage; (c) Based on the legal facts at trial, the relationship between the prospective bride and groom is already so close that there are indications that if they are not married off immediately, they will commit acts that are contrary to Islamic law, which can damage the good order of social life; (d) The bride and groom have no Shar'i impediment to marriage. (e) The consideration of the Religious Court when rejecting a dispensation petition is when the Religious Court does not find the legal facts on which the petition is based to be syar'i, juridical, and sociological grounds to be granted. Judges must carefully consider the various aspects of consideration, as mentioned above, case by case, which cannot be generalized.

The Panel of Judges must consider the application for dispensation of marriage from various aspects of consideration, both Shar'i and juridical, sociological, psychological, and also health-related. For this purpose, more detailed technical instructions for examining marriage dispensation cases are needed from the Religious Chamber of the Supreme Court of Indonesia, especially after the revision of the Marriage Law.

To show that the application for dispensation of marriage is the last alternative pursued by the parties, the author argues that there needs to be some special provisions in the examination of marriage dispensation cases, namely as follows: (a) An application for dispensation to marry must be filed by both parents of the child for whom dispensation to marry is sought, as petitioners, unless one of them is deceased, and if both parents are deceased, an application for dispensation to marry may only be filed by a guardian who has been appointed based on a court order; (b) An application for dispensation to marry shall be filed voluntarily with the Religious Court whose jurisdiction covers the residence of the child for whom dispensation to marry is sought;

(c) The Panel of Judges can only make a decision on the case of an application for dispensation to marry after hearing the testimony of the parents of both parties and the prospective bride and groom; (d) A statement from the child for whom marriage dispensation is sought that he/she is able to fulfill all obligations arising from the marriage bond; (e) A statement of income from the child for whom marriage dispensation is sought and acknowledged by the competent authority; (f) The child for whom the marriage dispensation is sought must have completed 9 (nine) years of compulsory education, evidenced by a diploma or a written statement from the person concerned and a certificate from the educational institution where he or she is undergoing the education process; (g) An application for dispensation of marriage must be proven in accordance with the provisions of the applicable civil procedural law, among the letter evidence that must be submitted by the applicants is a letter of medical recommendation/consideration, such as the results of examinations from obstetricians and psychologists, as well as two witnesses from the family or closest people.

Based on the various technical requirements for filing a marriage dispensation application listed above, the author argues that they need to be classified into two categories, namely, formal and material requirements. The formal requirements result in the application not being accepted when they are not met, such as the requirement that the application be submitted by both parents. The material requirements result in the application being rejected if they are not met, such as a statement of ability to carry out the obligations of marriage from the child for whom the marriage dispensation is requested and a statement that he or she will complete the nine (9) years of schooling.

Dispensation to marry can be granted only if, based on the legal facts proven at trial and after taking into account various factors such as shari'i, juridical, sociological, psychological, and health aspects, the marriage is urgently required to take place in order to realize the objectives of Islamic law (maqasidu al-shari'ah) in order to maintain the safety of offspring (hifzhu al-nasl) without endangering the soul of the child. These objectives must be at the level of al-daruriyyah or at least al-hajiyah.

If the marriage does not take place immediately, based on the legal facts proven at trial, there will be damage caused by a relationship forbidden by Allah SWT, namely zina. The trial found legal facts such as that the parties had been caught by the community while together in a quiet place (khalwat), or at least the parties were often together, met, or showed other close relationships that were contrary to the applicable laws and regulations and the living law in the community (living law), even though both had been warned by their families and various other authorized parties.

In addition to the legal facts above, as a guarantee of the safety of the souls of the parties bound in the bonds of marriage (hifzhu al-nafs) and the continuation of the education of children granted marriage dispensation (hifzhu al-aql), it must also be found that the legal facts concerned have the ability to carry out obligations in the household, there is a medical recommendation (fahsu al-tib), and the person concerned has a commitment to complete the nine-year compulsory education (hifzhu al-aql) of themselves. Only legal facts are found that show that marriage is urgent to be carried out solely because the behavior of the prospective bride and groom has led to committing or approaching adultery, but on the other hand, no legal facts are found that can guarantee the preservation of the soul and mind, as mentioned above, then the

application has no reason to be granted. The parties concerned, the prospective bride and groom and their families, are obliged to prevent the occurrence of acts forbidden in Islamic law.

One form of improvement in the quality of judges' decisions and the professionalism of judicial institutions is when judges are able to make decisions by paying attention to three very essential things, namely justice (*gerechtigheit*), certainty (*rechsecherheit*), and usefulness (*zwachmatigheit*).¹⁹ Seeking and finding harmony in the law is neither difficult nor easy. The difficulty in achieving ideal law is ensuring that the parties to a dispute or those dealing with the law are satisfied with or accept the results of the decision gracefully.

Basically, every decision issued by the court must represent the conscience of the justice-seeking community. Judges' decisions are needed to examine, resolve, and decide cases submitted to the court. The decision should not confuse the problem or even cause controversy for the public or other legal practitioners. Things that might cause controversy in the judge's decision are that the judge lacks mastery of various fields of science that are currently developing rapidly along with the changing times and that the judge lacks accuracy in processing a case. The judge's decision is a product of the trial process in court. While the court is the last place where justice seekers can go, the judge's decision should be sufficient to meet their needs. Against this, the judge in deciding the case must reflect three elements, namely justice, legal certainty, and expediency.²⁰

Judge decisions that reflect legal certainty, of course, play a role in the process of resolving cases in court. Judges, in making decisions, do not only refer to the law because it is possible that the law does not clearly regulate, so judges are required to be able to explore legal values such as customary law and unwritten laws that live in society.²¹ The decision of the judge is part of the legal process, which has as one of its goals the realization of legal truth or certainty. Legal certainty, as outlined in the judge's decision, is a law enforcement product based on legally relevant trial facts from the results of the case settlement process in the trial.²²

The application of the law must be in accordance with the case, so judges are required to always be able to interpret the meaning of laws and other regulations that are used as the basis for decisions. The application of the law must be in accordance with the case so that the judge can wisely and objectively construct the case being tried as a whole. Judges' decisions that contain elements of legal certainty will contribute to the development of science in the field of law. This is because the judge's decision that has permanent legal force is no longer the opinion of the judge himself but the opinion of the court institution, which will become a reference for the community.

In their legal considerations, judges with good reasoning can decide a case by placing the decision when it is closer to justice and when it is closer to legal certainty.

¹⁹ Abdul Manan, *Penerapan Hukum Acara Perdata Di Peradilan Agama* (Jakarta: Kencana, 2019).

²⁰ Margono, *Asas Keadilan, Kemanfaatan Dan Kepastian Hukum Dalam Putusan Hakim* (Jakarta: Sinar Grafika, 2012), 37.

²¹ Busyro Muqoddas, 'Mengkritisi Asas-Asas Hukum Acara Perdata', *Jurnal Hukum IUS QUIA IUSTUM* 9, no. 20 (2002): 21, <https://doi.org/10.20885/iustum.vol9.iss20.art2>.

²² Margono, *Asas Keadilan, Kemanfaatan Dan Kepastian Hukum Dalam Putusan Hakim*, 51.

Basically, the principle of expediency is located between justice and legal certainty, where the judge assesses the purpose or usefulness of the law in the interests of society. The emphasis on the principle of expediency is more likely to be economic. The rationale is that the law is for the community or many people, therefore the purpose of life must be useful for humans.²³

As a result, an ideal hazard management program for data collection must address the following issues. However, in each hakim project, there is often a focus on a single aspect that is dominant. This does not imply that the putusan in question is causing other problems. It is clear that the fourth asas has a strong connection to making law as a person who faces challenges in every judicial proceeding. However, if the aforementioned asas is consistent with reality, keadilan berbenturan with kepastian hukum, atau kepastian hukum berbenturan with kemanfaatan, will occur on a regular basis.

Marriage as a sacred bond between a man and a woman as husband and wife, in Islam, is intended to achieve peace of life, sakinah, mawaddah, and rahmah. The age limit in marriage is intended so that the purpose of marriage can be achieved. It is hoped that with sufficient age, the bride and groom will be ready in understanding knowledge, material, physical, and psychological. However, when viewed in light of the high number of marriage dispensation cases, it is certain that the number of child marriages is still high.

The rules regarding marriage dispensation are a manifestation of child protection itself. The regulation of marriage dispensation is a form of protection for the best interests of children. The Religious Courts in adjudicating cases of marriage dispensation often consider two evils: the evils that occur as a result of marriage at a child's age (early marriage) and the evils that will occur if the marriage dispensation is refused. The Panel of Judges often accepts applications for dispensation of marriage because it considers that the harm that will occur if the dispensation is refused is greater than the harm caused by early marriage, which is likely to damage the offspring (*al-nasl*) and honor (*al-'irdl*) of the prospective bride and groom.

The legal considerations (*tasbib al-ahkam*, or "legal reasoning") expressed by the Panel of Judges in determining the case of an application for dispensation of marriage are formulated based on legal facts proven at trial. The legal facts have so far been obtained based on testimony from the parents, the bride and groom, and witnesses presented to the court. Among the obstacles that arise in handling child marriage are those related to the culture in the community regarding female marriage. For some communities, especially in rural areas, 16 years of age is considered old enough to get married.²⁴ In relation to the verdict, the judge is bound by the case before him or her.²⁵ In marriage dispensation cases, most of the prospective brides are pregnant. so that it can be categorized as an urgent condition. The cause of the large number of marriage dispensation cases is that teenage relationships tend to be freer nowadays. with a lack

²³ Amir Ilyas, *Kumpulan Asas-Asas Hukum* (Jakarta: Rajawali, 2016), 91.

²⁴ Asep Mujtahid, Interview with Chair of the Ciamis Religious Court, interview by Dede Kania, 25 July 2022.

²⁵ Abdul Majid, Interview with Vice Chair of the Cianjur Religious Court, interview by Dede Kania, 19 July 2022.

of religious understanding and formal education, which causes many teenage children to commit adultery, even causing pregnancy. Families who feel worried about the condition of their children's relationships feel that their children are capable and appropriate for marriage. In addition, economic factors are also one of the causes of child marriage.

To overcome the obstacles, all parties must be involved to prevent child marriage. Parents, the educational environment, and the community must take part in prevention. In addition, there must also be improvements in economic levels. The religious courts themselves cannot directly make efforts to reduce the number of child marriages. Of the 100 marriage dispensation decisions studied, only one stated that it could not be accepted. The religious court is passive in this regard. As long as all the necessary documents are complete, the religious court will not make it difficult to submit a marriage dispensation case. As a result, parents, schools, and the community, including the Indonesian Ulema Council, must focus more on preventing child marriage. In Cianjur district, there is Regent Regulation Number 10 of 2020 concerning the prevention of child marriage.²⁶

To prevent cases of pregnancy before marriage, various programs for children and adolescents need to be created as a form of child protection. Educational facilities and community empowerment to protect children must also be improved. In addition, in the rule of law, it is still necessary to harmonize the legal rules regarding the age limit of children,²⁷ as well as the rules regarding the legalization of underage marriage. Firmness is still needed at the level of implementation and fulfillment of children's rights in Indonesia. Socialization of the marriage age limit is still needed. In addition, fulfilling the requirements for marriage dispensation also requires recommendations from several stakeholders such as psychologists, doctors/midwives, P2TP2A, and KPAI/KPAD.²⁸

Conclusion

Protection of children's rights in the examination of marriage dispensation cases is carried out on the basis of the child's best interests. The process of examining a marriage dispensation case refers to Supreme Court Regulation No. 1 of 2019 on Guidelines for Adjudicating Marriage Dispensation Cases in Court. The forms of protection of children's rights in the examination of marriage dispensation cases include: 1) being examined by a competent single judge; 2) providing a sense of comfort in court; 3) presenting children in the examination process; 4) judges presenting and advising parents, children, prospective husbands or wives, and parents or guardians of prospective husbands or wives; 5) Prioritizing the best interests of children; and 6) Legal considerations by judges that realize certainty, expediency, and justice for children. The legal implications that can arise in marriage dispensation cases in the context of protecting children's rights, whether the application is granted or rejected, If the judge grants it, it will increase the number of legal underage marriages; if it is denied, it will have other legal consequences, such as the

²⁶ Majid.

²⁷ Djulia Herjanara, Interview with Vice Chair of the Cianjur Religious Court, interview by Dede Kania, 19 July 2022.

²⁸ Media Rinaldi, Interview with Vice Chair of the Majalengka Religious Court, interview by Dede Kania, 22 July 2022.

number of underage nikah siri, itsbat nikah for underage nikah siri, and pregnancy outside of marriage.

Marriage dispensation cases have increased after the raising of the minimum age of marriage to 19 years for men and women in Law No. 16 of 2019. Among the obstacles that arise in handling child marriage are those related to the culture in society regarding the age of marriage for women. For some communities, especially in rural areas, 16 years old is considered old enough to get married. The more alarming the pattern of teenage relationships, the more many fall into promiscuity. This can be seen in the marriage dispensation cases, where many of the prospective brides are pregnant. The judge who decided then classified it as an urgent condition. To deal with the obstacles, all parties must be involved to prevent child marriage. Parents, the educational environment, and the community, as well as local governments, must take part in preventing child marriage.

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