



# PERSPECTIVE ON PROTECTION OF THE RIGHTS OF MINORS IN MARRIAGE DISPENSATION IN RELIGIOUS COURTS

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Article Info	Abstract
<b>Article History</b> Received : 2024-12-03 Revised: 2024-12-10 Published: 2025-01-15  <b>Keywords:</b> <i>Marriage Dispensation,</i> <i>Child Protection,</i> <i>Marriage Law,</i> <i>Maqashid Syariah.</i>	<p>Child marriage is still a serious problem in Indonesia even though the minimum age for marriage has been raised through Law Number 16 of 2019. One of the legal loopholes that allows child marriage to continue to occur is the marriage dispensation mechanism that can be submitted to the Religious Court for urgent reasons. In practice, almost all requests for marriage dispensation are granted, with the main reasons being pregnancy outside of marriage and social pressure. This shows that increasing the minimum age for marriage has not been fully effective in preventing child marriage.</p> <p>This study uses a sociological legal approach with a qualitative descriptive method to analyze the legality of marriage dispensation for minors. The results of the study indicate that there is inconsistency in the application of marriage dispensation, where judges often grant requests without considering the child's physical, mental, and social readiness. In addition, there is a contradiction in the regulation, where the Child Protection Law requires parents to prevent child marriage, but on the other hand, the Marriage Law still provides an opportunity to apply for dispensation.</p> <p>From an Islamic legal perspective, child marriage should not only be viewed from a formal legal aspect, but also consider the maqashid sharia, namely protection of the soul, mind, and descendants. Therefore, stricter legal reform is needed in granting marriage dispensation, including strengthening regulations, supervision of religious court decisions, and increasing public awareness of the negative impacts of child marriage. Thus, marriage dispensation must really be used as a last resort (ultimum remedium) in emergency conditions and not as a means to legalize child marriage, so that the protection of children's rights can be realized optimally.</p>

## I. INTRODUCTION

Child marriage is still a common practice in Indonesia, despite regulations that limit the age of marriage. Factors such as promiscuity, pregnancy outside of marriage, social pressure, and economic conditions are often the main reasons for child marriage. Law Number 16 of 2019 has raised the age limit for marriage to 19 years for men and women, as an effort to reduce the negative impacts of child marriage. However, there are still legal loopholes that allow child marriage to occur through a marriage dispensation mechanism that can be submitted to the Religious Court for urgent reasons.(Suprayogi 2023)

Marriage dispensation as regulated in Article 7 Paragraph (2) of Law Number 16 of 2019 provides an opportunity for parents to submit an application to the court if their child has not reached the minimum age for marriage. This mechanism should only be used in emergency situations, such as pregnancy outside of marriage. However, in practice, almost all dispensation

requests are granted by the court, so that the purpose of increasing the age limit for marriage becomes less effective. Marriage dispensation that is too flexible actually creates a loophole for child marriage to continue to occur, without considering the physical, mental, and social readiness of the child who is going to marry.(Suprayogi 2023)match

From an Islamic legal perspective, there are no specific provisions regarding the age limit for marriage, but the principle of family and household welfare is strongly emphasized. The Compilation of Islamic Law (KHI) provides space for the marriage of women who are pregnant due to adultery, although there are differences of opinion among scholars regarding the permissibility of marrying pregnant women. Some scholars allow it, while others prohibit it on legal grounds related to the honor of the fetus and the status of lineage. This disagreement also has an impact on the application of law in the judicial system in Indonesia.(Lawalata, Titahelu, and Latupeirissa 2022)

Child marriage has serious impacts, both in terms of health, psychology, social, and economic. From a health perspective, girls who marry early are at higher risk of experiencing pregnancy and childbirth complications, including maternal and infant mortality. From a psychological perspective, children who marry at an early age often do not have the mental readiness to manage a household, which ultimately contributes to high divorce rates. In addition, child marriage also hinders children's rights to education and develop their potential, thereby increasing the risk of long-term poverty. (Ramadan 2023)

Legal uncertainty in granting marriage dispensation is also a major concern. On the one hand, the Child Protection Law requires parents to prevent child marriage, as regulated in Article 26 Paragraph (1) of Law Number 35 of 2014. However, on the other hand, Article 7 Paragraph (2) of Law Number 16 of 2019 actually opens up opportunities for parents to apply for marriage dispensation. This creates a contradiction in regulation, where one rule aims to protect children's rights, while the other rule still provides a way for child marriage on urgent grounds.

The Supreme Court has issued Supreme Court Regulation (PERMA) Number 5 of 2019 as a guideline in adjudicating applications for marriage dispensation. This PERMA aims to limit the granting of dispensation only to certain conditions that are truly urgent. However, the provisions in this regulation are still general and do not provide clear limitations regarding the urgent conditions in question. As a result, the subjectivity of judges in deciding applications for dispensation becomes very dominant. In many cases, judges grant dispensation without considering the psychological and physical readiness of the child who is going to get married.

Empirically, almost all applications for marriage dispensation submitted to the Religious Court are granted, with the main reasons being pregnancy outside of marriage and social pressure from family or society. Several court decisions show that judges consider social and cultural aspects more than protecting children's rights. For example, in several decisions, judges reject applications for marriage dispensation on the grounds that the applicant is still too young and not yet economically ready, but in many other cases, dispensation is granted only for reasons of maintaining family honor.

The role of judges in adjudicating marriage dispensations greatly determines the direction of

legal policies related to child protection. Judges should not only focus on formal legal aspects, but also consider the long-term impacts of child marriage. In some cases, judges have used *maqashid sharia* (the objectives of Islamic law) considerations in rejecting marriage dispensations, on the grounds that child marriage brings more harm than good. However, the application of this approach is still inconsistent across courts. (Suprayogi 2023)p

The lack of clarity in regulating marriage dispensation causes the number of child marriages to remain high, even though the minimum age for marriage has been raised. This situation shows that revising the law alone is not enough to reduce the number of child marriages. More comprehensive policy strengthening is needed, including socialization to the community about the negative impacts of child marriage, increasing access to education for girls, and strengthening the role of child protection institutions in supervising the practice of underage marriage. (Ramadan 2023)

Child marriage also has consequences for the legal status of children born from the marriage. One of the main problems is the status of guardianship and inheritance rights of children born from marriages that occur due to pregnancy outside of marriage. In Islamic law, there are differences of opinion regarding the lineage of children born from extramarital relationships, which have implications for guardianship and inheritance rights. In Indonesia, the KHI regulates that children resulting from adultery only have a lineage relationship with their mother, which means that the child does not have inheritance rights from their biological father. This often becomes a source of legal problems in the future, especially in terms of responsibility for child support and civil rights.

In the context of child protection, there needs to be further confirmation regarding the mechanism for granting marriage dispensation so that it is not misused. One effort that can be made is to tighten the marriage dispensation trial process, where the judge must ensure that the prospective bride and groom are truly physically, mentally, and economically ready before granting the request. In addition, a stricter approach is needed in assessing the evidence submitted by the applicant for dispensation, so that urgent reasons are not used carelessly to legalize child marriage.

It is important for the government and related institutions to raise public awareness about the negative impacts of child marriage.

Legal counseling and education on children's rights must continue to be encouraged, especially in areas with high rates of child marriage. In addition, the government needs to strengthen policies that provide incentives for girls to continue their education, so that they have a better chance of building a more stable future.

In the long term, more progressive legal reform is needed to truly eradicate the practice of child marriage in Indonesia. Revisions to the Marriage Law must be carried out by reviewing the provisions on marriage dispensation, so that it no longer becomes a legal loophole for child marriage. As a country that has ratified various international child rights instruments, Indonesia has an obligation to ensure that every child receives maximum protection of their rights, including the right to live their childhood without pressure to marry at an early age.

Thus, this study confirms that the protection of children's rights in marriage dispensation still faces many challenges, both in terms of regulation, policy implementation, and public awareness. Concrete steps are needed to improve the existing legal system, so that child marriage is no longer a recurring phenomenon. Reforms in legal policy, education, and social systems are the main keys in efforts to reduce the practice of child marriage in Indonesia.

## **II. RESEARCH METHODS**

This study uses a sociological legal approach with a qualitative descriptive method to analyze the legality of marriage dispensation for minors at the Tebing Tinggi Religious Court.(Yam 2022)Data were collected through observation, document study, and analysis of court decisions related to marriage dispensation. Qualitative analysis techniques were used to understand the legal, social context, and factors that influence judges' decisions in granting or rejecting applications for marriage dispensation. Previous studies have shown inconsistencies in the application of marriage dispensation, where judges often grant applications without considering the long-term impacts on children. The conceptual framework of this study focuses on the reinterpretation of "urgent reasons" in Law Number 16 of 2019, the role of the court in upholding legal certainty, and the balance between benefit and justice in the application of marriage dispensation. The hypothesis of this study emphasizes that the implementation of stricter and more measured regulations in

granting marriage dispensation is very important to ensure the protection of children's rights and prevent early marriages that have the potential to harm children physically, psychologically, and socially.

## **III. RESULTS AND DISCUSSION**

### **A. Legal Basis for Application for Marriage Dispensation**

Marriage dispensation cases have increased significantly after the enactment of Law Number 16 of 2019 which raised the age limit for marriage to 19 years for men and women. Based on data from the Director General of Badilag MA RI, in 2020 the number of applications for marriage dispensation increased by 152% compared to the previous year, with 64,196 cases filed. This phenomenon shows that even though the rules have been tightened, marriage dispensations are still widely submitted and granted by religious courts.(NURFADILLAH 2023)

The main factors for applying for marriage dispensation include pregnancy outside marriage (31%), love affairs between couples (25%), religious values (21%), premarital sexual relations (16%), social pressure (8%), and the risk of sexual relations (4%). Of the number of cases submitted, 99% were granted by the judge, indicating that religious courts still provide ample room for child marriage through the marriage dispensation mechanism.

In response to the surge in marriage dispensation cases, the Supreme Court issued PERMA Number 5 of 2019 as a guideline for judges in adjudicating marriage dispensation applications. This PERMA aims to prevent child marriage, guarantee the protection of children's rights, and ensure that decisions taken by judges consider aspects of legal certainty, justice, and benefit. In examining marriage dispensation cases, judges are required to provide counseling to the applicant, the child for whom the dispensation is requested, and the prospective spouse. This counseling must include educational risks, reproductive health, economic impacts, and potential conflicts in the household.

One of the important provisions in PERMA No. 5 of 2019 is the requirement for judges to consider the best interests of the child before granting a marriage dispensation. This is based on the fiqh principle "Dar'ul mafasid muqaddamun 'ala jalbil mashalih" which means avoiding harm must be prioritized over gaining benefits. This means that if child marriage brings more harm

than benefit, the marriage dispensation should not be granted.(Syarifah 2015)

However, in practice, judges often grant marriage dispensation on the grounds of avoiding adultery or saving the family's honor. Judges also consider that if the request for dispensation is not granted, a secret marriage may occur which has the potential to harm the rights of women and children. Several decisions show differences in the judge's attitude in granting or rejecting marriage dispensation. For example, in decision Number 67/Pdt.P/2020/PA.Amb, the request for dispensation was rejected because the child was only 16 years and 8 months old and did not have the economic and mental readiness to start a household. On the other hand, in the majority of other cases, judges granted the request for dispensation on the grounds of pregnancy outside of marriage and social pressure experienced by the family.

From an Islamic legal perspective, the Compilation of Islamic Law (KHI) Article 53 states that a woman who is pregnant due to adultery can be married to the man who impregnated her without having to wait for the birth of the child. However, in the tradition of Islamic jurisprudence, there are differences of opinion among scholars. Imam Abu Hanifah, Imam Syafi'i, and Ibn Hazm allow marrying a woman who is pregnant due to adultery, while Imam Ahmad bin Hanbal and Imam Malik prohibit it on the grounds that there is a fetus that is not the result of a legitimate marriage.

The controversy over marriage dispensation is also related to the inconsistency of laws and regulations in Indonesia. Article 7 paragraph (2) of Law No. 16 of 2019 allows for marriage dispensation on urgent grounds, while Article 26 paragraph (1) of Law No. 35 of 2014 concerning Child Protection actually requires parents to prevent child marriage. The unclear definition of "urgent reasons" in Article 7 paragraph (2) provides room for judges to use subjective interpretations, so that many marriage dispensation cases are granted without clear standards.(Cape 2018)

In terms of legal discovery, judges do not only apply the wording of the law, but also interpret the law based on social and cultural values that develop in society. Based on Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power, judges are required to explore, follow, and understand the legal values and sense of justice that exist in society. This means that judges have the authority to reject a marriage

dispensation application if it is considered inconsistent with the principles of justice and child protection.

Judges also face a legal dilemma between legal certainty, justice, and utility in deciding marriage dispensation cases. According to Gustav Radbruch's theory, the law must consider three main elements, namely legal certainty, justice, and utility. However, in practice, it is difficult to balance these three aspects simultaneously. Judges often consider the aspect of social utility more on the grounds of preventing adultery, even though this has the potential to perpetuate child marriages that are contrary to the best interests of the child.(Suadi 2018)

In the perspective of maqashid sharia, child marriage can be contrary to the principle of protecting the soul (hifz al-nafs), reason (hifz al-aql), and descendants (hifz al-nasl). If the child who is married does not have mental, physical, and economic readiness, then the marriage risks having negative impacts, such as dropping out of school, limited economic access, and high divorce rates. Therefore, in the Indonesian legal system, marriage dispensation should only be given in truly emergency conditions (dharurat syar'iyah), not simply for social or cultural reasons.(Fitriani 2012)

Normatively, PERMA No. 5 of 2019 has provided guidelines for judges in adjudicating marriage dispensation cases. However, in its implementation, there are still weaknesses in supervision and law enforcement, so that the marriage dispensation mechanism actually becomes a loophole for the legalization of child marriage. Therefore, it is necessary to strengthen regulations by clarifying the parameters of "urgent reasons" and tightening supervision of religious courts in deciding marriage dispensation cases.

In conclusion, although the legal objective in determining marriage dispensation is to ensure legal certainty and benefit for society, in practice there are still multiple interpretations that make this policy potentially contradict the principle of protecting children's rights. Therefore, stricter legal reform is needed to ensure that marriage dispensation is truly used as a last resort (ultimum remedium) in emergency conditions, not as a means to legalize child marriage. Top of Form

## **B. Legal Protection of the Rights of Minors in Relation to Marriage Dispensation**



Legal protection for children is an effort to guarantee children's rights so that they can live, grow, and develop optimally in accordance with the 1945 Constitution, and receive protection from violence and discrimination. As part of human rights protection, child protection emphasizes that children must receive protection so that they do not become victims of actions that are detrimental mentally, physically, or socially. (Saladin 2017) religion

Law Number 35 of 2014 concerning Child Protection, which is an amendment to Law Number 23 of 2002, defines child protection as all efforts to guarantee and protect children's rights so that they can live and develop in accordance with human dignity. Article 3 of the Child Protection Law emphasizes that child protection aims to guarantee the fulfillment of children's rights so that they can live, grow, develop, and participate optimally, and receive protection from violence and discrimination.

Marriage dispensation is granted as an exception to the minimum age for marriage provisions stipulated in Article 7 paragraph (1) of Law Number 16 of 2019, which raises the minimum age for marriage to 19 years for men and women. However, in Article 7 paragraph (2) of Law Number 16 of 2019, it is stated that in very urgent circumstances, marriage dispensation can be granted by the court. This creates a legal loophole that allows child marriage to continue to occur, even though there are regulations aimed at preventing it. (Tanjung and Tanjung 2022)

In practice, many applications for marriage dispensation are submitted on the grounds of pregnancy outside marriage, maintaining family honor, or social pressure, all of which are not entirely in line with the principle of the best interests of the child as regulated in Article 3 paragraph (1) of the Convention on the Rights of the Child (CRC), which has been ratified by Indonesia through Presidential Decree No. 36 of 1990. This principle requires that every policy and decision concerning children take into account their best interests, not just the interests of their parents or family.

In Article 12 PERMA No. 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications, judges are required to provide advice to applicants, children and prospective partners regarding the risks of early marriage, such as:

1. Potential for dropping out of school and losing access to education.

2. The reproductive organs are not ready yet, which poses a risk to the health of the mother and baby.
3. Economic, social and psychological impacts on children.
4. Potential for domestic disputes and violence due to mental and emotional unpreparedness.

In Islamic law, there is a principle "Dar'ul mafasid muqaddamun 'ala jalbil mashalih" which means avoiding harm must be prioritized over gaining benefits. Therefore, when a judge grants a marriage dispensation on the grounds of maintaining family honor without considering the negative impact on the child, then this consideration is contrary to the main principle of Islamic law which prioritizes the welfare.

Laws relating to the protection of children in early marriage include:

1. Law Number 35 of 2014 concerning Child Protection, which in Article 26 paragraph (1) requires parents to prevent child marriage.
2. Law Number 1 of 1974 concerning Marriage, which states that marriage aims to form a happy and prosperous family, so that children who are not yet physically and mentally mature should not be forced to marry.
3. Article 6 of the CRC, which states that every child has the right to life and development, means that the state must guarantee the life of the child by providing access to education and protection from forced marriage.

In practice, judges' decisions in marriage dispensation are often subjective and do not consider the long-term impact on children. Article 17 of PERMA No. 5 of 2019 emphasizes that considerations in granting marriage dispensation must be based on the protection and best interests of the child, and prioritize preventing damage rather than gaining benefits. However, data shows that 99% of dispensation requests are granted by the court, indicating that enforcement of the rules is still weak. (Ahmatnizar 2022)

Based on legal studies and child protection principles, there are two forms of legal protection that can be provided in the context of marriage dispensation:

1. Preventive Legal Protection
  - o Increasing legal awareness among the public, especially parents, regarding the negative impacts of child marriage.

- Encourage strengthening of regulations so that marriage dispensations are only granted in very urgent conditions.
  - Tightening supervision of religious court decisions regarding marriage dispensations.
2. Repressive Legal Protection
- Impose sanctions on parties who force children to marry for illegitimate reasons.
  - Ensuring that the court truly applies the principle of the best interests of the child in every marriage dispensation decision.
  - Increasing the role of the state in assisting children affected by early marriage, including providing access to education and health services.

According to Gustav Radbruch's legal theory, law must reflect three main values, namely:

1. Legal certainty (Rechtssicherheit) – provides assurance that applicable rules are implemented consistently.
2. Justice (Gerechtigkeit) – ensuring that every decision taken is fair to all parties, especially children who do not yet have the full capacity to make their own decisions.
3. Legal benefit (Zweckmassigkeit) – ensuring that the legal rules applied provide real benefits to society and do not harm children.

However, in practice, marriage dispensation decisions consider more aspects of benefit for parents and families, ignoring aspects of justice for children. Article 5 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power states that judges must explore, follow, and understand the legal values and sense of justice that exist in society. Therefore, judges should not only consider aspects of legality, but also the social and psychological impacts that children will experience due to early marriage. (Widyaningsih 2019)

Legal protection of children's rights in marriage dispensation must refer to the principle of the best interests of the child, as regulated in the Convention on the Rights of the Child, the Child Protection Law, and PERMA No. 5 of 2019. Although the law has provided strict guidelines in granting marriage dispensation, practice in the

field still shows that the majority of requests are still granted without careful consideration.

Therefore, stricter legal reform is needed to ensure that marriage dispensation is truly only used in emergency conditions (dharurat syar'iyah) and does not become a tool to legalize child marriage. The state must also strengthen supervision of religious court decisions, and increase public awareness of the dangers of child marriage. Thus, legal protection for children can be enforced in accordance with the principles of legal certainty, justice, and benefit, in order to create a healthier, more educated generation with a better future.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

Based on the analysis of legal protection of children's rights in relation to marriage dispensation, it can be concluded that existing regulations still have loopholes that allow child marriage to continue to occur. Although Law Number 16 of 2019 has raised the minimum age limit for marriage to 19 years, the marriage dispensation mechanism regulated in Article 7 Paragraph (2) opens up opportunities for courts to grant requests for child marriage on urgent grounds. In practice, it shows that almost all dispensation requests are granted without careful consideration of the child's physical, mental, and social readiness, thus contradicting the principle of the best interests of the child as regulated in the Convention on the Rights of the Child and the Child Protection Law. In addition, the ambiguity in the regulations and the subjectivity of judges in interpreting "urgent reasons" lead to a high rate of child marriage, which has a negative impact on children's rights, reproductive health, education, and their economic and social welfare.

Therefore, stricter legal reform is needed to ensure that marriage dispensation is truly only given in very urgent conditions (dharurat syar'iyah) and not as a legal loophole to legalize child marriage. Strengthening regulations through revision of laws, a more active supervisory role from the government and child protection institutions, and increasing public awareness of the negative impacts of child marriage are crucial steps in reducing the number of child marriages in Indonesia. In addition, judges in deciding marriage dispensation cases must be oriented towards the best interests of the child by considering the long-term impacts, both psychologically, socially, and economically, so that legal protection of children's rights can be

realized optimally in accordance with the principles of legal certainty, justice, and benefit.

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