



## Rechtsvinding of Religious Court Judges in the Case of Marriage Dispensation: Efforts to Protect Children's Rights

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### Abstract

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*Rechtsvinding of Judges, Dispensation of Child Marriage, Children's Rights*

Child marriage is increasing in Indonesia. Changes in nomenclature in 2019 regarding the age limit for marriage as an effort to prevent child marriage had no effect. Child marriage continues to take place by applying for marriage dispensation. Dispensation applications have increased since 2020. This indication can be seen from the increase in marriage dispensation applications granted by Religious Court judges, especially Religious Courts in Lampung Province. The marriage dispensation clause is the basis for judges to grant applications for child marriage with consideration of urgent reasons and supporting evidence. The purpose of writing this article is how the legal discovery (*rechtsvinding*) of religious court judges in the case of dispensation of child marriage, *rechtsvinding* is an effort to protect children's rights. This article uses a qualitative method, and uses a hermeneutic approach, which focuses on issues of interpretation and understanding, which relate to oral and written discourse or text from the determination of Religious Court judges based on consideration of Gustav Radbruch's three legal values (justice, legal certainty and usefulness). The results show that judges face problems in deciding child marriage dispensation cases, where the decision to reject or accept the dispensation application considers the least negative impact, in order to protect the rights of children.

## INTRODUCTION

Child marriage is increasing in Indonesia.<sup>1</sup> Government policies to prevent child marriage have not brought significant changes, for example the change in nomenclature in 2019 regarding the minimum age at which a person can marry. Indonesia targets Zero Child Marriage by 2030, which is the implementation of the Transforming Our World: the 2030 Agenda for Sustainable Development Goals (SDGs) document.<sup>2</sup> This is supported by the enactment of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law).

The amendment to the Marriage Law was motivated by the Constitutional Court Decision Number 22/PUU-XV/2017. The Constitutional Court in its decision considered that setting a different minimum age limit for marriage between men and women in the Marriage Law was discriminatory, and hampered the implementation of the right to form a family as guaranteed in Article

<sup>1</sup> Habib Sulthon Asnawi, "Politik Hukum Perlindungan Hak-Hak Asasi Manusia Kaum Perempuan Di Indonesia (Studi Tentang Upaya Mewujudkan Keadilan Dan Kesetaraan Gender Kaum Perempuan Di Bidang Kesehatan Era Pemerintahan Susilo Bambang Yudhoyono/SBY)" (Program Magister Hukum Pascasarjana Fakultas Hukum Universitas Islam Indonesia (MH UII) Yogyakarta, 2011), <https://dspace.uui.ac.id/handle/123456789/8766>.

<sup>2</sup> Naqiyah Mukhtar and Muflaha Wijayati, "Interconnection of the Caper E-Motion System as a Guarantee of Protection of Women's and Children's Rights After Divorce in the Religious Courts of Bengkulu, Indonesia," *SMART: Journal of Sharia, Tradition, and Modernity* 3, no. 2 (2023): 1–13, <http://ejournal.radenintan.ac.id/index.php/smart/article/view/20015>.

28B paragraph (1) of the 1945 Constitution.<sup>3</sup> In its decision, the Constitutional Court ordered the legislators to make changes to the Marriage Law within a maximum period of 3 years. So that Law No. 16 of 2019 concerning Amendments to Law 1 of 1974 concerning Marriage was born.<sup>4</sup> The Marriage Law changes the minimum age limit to be able to enter into marriage from the original 16 years for women and 19 years for men, now it is 19 years for both prospective spouses. The change in nomenclature regarding the age limit for marriage is one of the efforts expected to prevent child marriage<sup>5</sup>.

Based on the findings of the National Commission on Violence against Women (hereinafter Komnas Perempuan), the change in nomenclature has actually increased child marriage dispensation. Since 2016, the number of child marriage dispensations has tended to increase. The highest increase occurred in 2020 where the number of child dispensations reached 64,211 cases, tripling compared to 2019.<sup>6</sup> Although the age of marriage is limited, the Marriage Law provides a dispensation clause. Dispensation for marriage can be submitted to the Court by the parents of the child bride and groom with urgent reasons and supporting evidence. Child marriage can be carried out because the proposed dispensation has been approved by the Court judge.

Several studies have been found related to efforts to prevent child marriage. These studies show that child marriage causes various problems. Child marriage increases the risk of sexual and mental abuse (CRC, art 19)<sup>7</sup> and domestic violence (Kidman, 2017)<sup>8</sup> in the hands of older partners (Jensen and Thornton, 2003; Mathur et al., 2003); sexual health risks (Cook et al., 2004),<sup>9</sup> obstetric fistula (Cook et al., 2004),<sup>10</sup> permanent infertility (Raj et al., 2009)<sup>11</sup> and even death (Nour, 2009)<sup>12</sup> due to pregnancy (Nove et al., 2014).<sup>13</sup> Based on these studies, child marriage cannot guarantee the rights for the growth and development of children, causing the non-fulfillment of children's basic rights such as the right to

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<sup>3</sup> M. Anwar Nawawi, *Dinamika Hukum Perkawinan Di Indonesia Tinjauan Hukum Keluarga Islam Terhadap Legalitas Perkawinan Kepercayaan Penghayat* (Yogyakarta: CV. Bildung Nusantara, 2022), <https://balaiyanpus.jogiaprov.go.id/opac/detail-opac?id=346958>.

<sup>4</sup> Habib Sulthon Asnawi, "Perkawinan Penganut Aliran Penghayat Kepercayaan Di Provinsi Lampung Dan Dampaknya Terhadap Hak Asasi Perempuan Perspektif: Hukum Keluarga Islam Dan Konvensi Internasional" (dalam DISERTASI Program Doktor (S3) Pascasarjana (PPS) Universitas Islam Negeri Raden Intan Lampung, 2023), <http://repository.radenintan.ac.id/22698/>.

<sup>5</sup> Dicky Zaharuddin and Mulki Sharmani, "State Attorney Law Enforcement in Marriage Annulment and Its Contribution to the Development of Family Law in Indonesia," *SMART: Journal of Sharia, Tradition, and Modernity* 3, no. 2 (2023): 56–70, <http://ejournal.radenintan.ac.id/index.php/smart/article/view/20510>.

<sup>6</sup> Lembar Fakta dan Poin Kunci Catatan Tahunan Komnas Perempuan Tahun 2022, hlm. 6.

<sup>7</sup> CEDAW/CRC (2015). Committee on the Elimination of Discrimination against Women (CEDAW) and Committee on the Rights of the Child (CRC), 'Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices' (4 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18.

<sup>8</sup> Kidman, R. (2017). "Child Marriage and Intimate Partner Violence: A Comparative Study of 34 Countries", *International Journal of Epidemiology*, Vol. 46, Number 2, pp. 662-63. doi: 10.1093/ije/dyw225

<sup>9</sup> Cook, R. et al. (2004). "Obstetric Fistula: The Challenge to Human Rights", *International Journal of Gynecology and Obstetrics*, Vol. 87, hlm. 72-77. <https://doi.org/10.1016/j.ijgo.2004.07.005>

<sup>10</sup> *ibid*

<sup>11</sup> Raj, A. et al. (2009). "Prevalence of Child Marriage and its Effects on Fertility and Fertility Control Outcomes of Young Women in India: A Cross-sectional, Observational Study", *The Lancet*, Vol. 373, Number 9678, p. 1883. [https://doi.org/10.1016/S0140-6736\(09\)60246-4](https://doi.org/10.1016/S0140-6736(09)60246-4).

<sup>12</sup> Nour, N. (2009). "Child Marriage: A Silent Health and Human Rights Issue", *Reviews in Obstetrics & Gynaecology*, Vol. 2, Number 1, pp. 51, 54. PMID: 19399295.

<sup>13</sup> Nove, A. et al. (2014). "Maternal Mortality in Adolescents Compared with Women of Other Ages: Evidence from 144 Countries", *The Lancet Global Health*, Vol. 2, Number 3, hlm. 155-64. [https://doi.org/10.1016/S2214-109X\(13\)70179-7](https://doi.org/10.1016/S2214-109X(13)70179-7).

protection from violence and discrimination, children's civil rights, health rights, education rights, and children's social rights.

The existence of marriage dispensation seems to be a way for child marriage. Although in every court judge on the application for dispensation must consider that the decision ensures the protection, care, welfare, survival and growth and development of children.<sup>14</sup> Not only because of the urgent factors raised in the marriage dispensation application.<sup>15</sup> Court judges must consider the concept of protecting children's rights. This paper complements previous studies to map court judges' decisions granting child marriage dispensation applications. From the background of the above problems, the formulation of the problem of this article is how the legal discovery (*rechtsvinding*) of religious court judges in cases of dispensation of child marriage, *rechtsvinding* as an effort to protect children's rights.

## RESULTS AND DISCUSSION

### Dispensation for Child Marriage in the Legislation

Islam does not limit the age at which marriage can take place, but signs are given. The Qur'an provides a limit based on the quality that must be married (Qur'an letter an-Nisa' verse 6), where someone who is old enough to marry is able to maintain property.<sup>16</sup> In general, the experts of legislation stipulate that a person who is said to be of legal age (*baligh*) can be responsible for his actions<sup>17</sup>. *Baligh* means up or clear, namely children of a certain age who become clear about all matters at hand and are able to consider good and bad (M. Abdul Mujieb, 1994).<sup>18</sup> The Marriage Law clearly provides a limit that the age of adulthood to enter into marriage is 19 years of age (women and men). The consideration for setting the age of adulthood is to realize the purpose of marriage, the benefit of the family and the marriage household.<sup>19</sup>

The purpose of marriage is not easily realized if the parties to the marriage are immature. The maturity of a person determines the sustainability of the household. An unstable person will affect solving household problems. Several studies have shown that child marriage has an impact on the growth and development of the couple's baby (Nur Rusyidy, 2021).<sup>20</sup>

The age limit for marriage is determined by the Marriage Law, but there is an element of exception in Article 7 paragraph (2), where it is possible to be granted dispensation through the court and other officials, appointed by both parents of the male and female parties. The exception is marriage dispensation for child marriage. Dispensation to marry is a license to be exempted from an obligation or prohibition. Dispensation to marry is a concession given to something that was not

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<sup>14</sup> Lihat Pasal 2 Peraturan Mahkamah Agung (Perma) Nomor 5 Tahun 2019

<sup>15</sup> Lihat Pasal 7 ayat (3) UU No. 16 Tahun 109 tentang Perubahan Atas UU No. 1 Tahun 1974 tentang Perkawinan. Lihat Pasal 14 UU Perma No. 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin. Lihat juga dalam Mahkamah Agung, Pedoman Mengadili Permohonan Dispensasi Kawin, (Jakarta: Mahkamah Agung, IJRS dan AIPJ2, 2020), h. 33.

<sup>16</sup> Kementerian Agama RI, Al Qur'an dan Terjemahan, h. 77

<sup>17</sup> Deddy Sutendy and Rozana Isa, "Childcare in Lampung Saibatin Indigenous Community from the Perspective of Mubadalah and Its Contribution to the Development of Family Law in Indonesia," *SMART: Journal of Sharia, Tradition, and Modernity* 3, no. 2 (2023): 41–55, <http://ejournal.radenintan.ac.id/index.php/smart/article/view/20506/6787>.

<sup>18</sup> M. Abdul Mujieb, et.al., *Kamus Istilah Fiqih*, Jakarta: Pustaka Firdaus, 1994, hlm. 37

<sup>19</sup> Ismail, "Discrimination against Wife in the Perspective of CEDAW and Islam Mubadalah," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 20, no. 2 (2020): 253–68, <https://doi.org/10.18326/ijtihad.v20i2.253-268>.

<sup>20</sup> Nur, R., Rusyidi, M., Fajriah, R. N., Larasati, R. D., Fitriyah, S. I., Hendra, S., & Ngemba, H. R. (2021). Effects of family planning and baby care behavior on stunting in early married couples. *Open Access Macedonian Journal of Medical Sciences*, 9, 467–473. doi:10.3889/oamjms.2021.5908

originally allowed.<sup>21</sup> According to the Marriage Law, there are at least two conditions that must be met to apply for dispensation for child marriage. First, the child is not yet 19 years old. Secondly, the application for dispensation must be submitted by the child's parents/guardians to the court and the judge is authorized to decide. Legal remedies that can be filed if dissatisfied with the judge's decision can only be through the cassation process. Thirdly, the judge is obliged to listen to the child's opinion in the absence of the parents, so that the bride and groom's rights will be protected from being married under duress. The administrative and filing requirements of a child dispensation case must be met.<sup>22</sup>

### **Construction of Child Rights Protection**

Children are etymologically defined as humans who are still young or humans who are not yet mature. The age limit of a child is very important in discussing child marriage, because it is used to determine whether a person suspected of marrying is a child or not.<sup>23</sup> The definition of child is also contained in Article 1 of the Convention on the Rights of the Child, the child is defined as every person under the age of 18 years, unless under the law applicable to the child, maturity has been obtained earlier.

Children are a trust and a gift from God Almighty, in whom the dignity of a whole human being is inherent. The state regulates children's rights in written norms. The norms stipulate that children's rights are part of human rights that must be guaranteed, protected and fulfilled by parents, families, communities and the state.<sup>24</sup> Every child receives the widest possible opportunity to grow and develop optimally, both physically, mentally and socially, and with noble character. Efforts have been made to protect and realize the welfare of children by providing guarantees for the fulfillment of their rights and treatment without discrimination, although not many children have received their rights properly.<sup>25</sup>

In juridical limits, child protection is all activities to ensure and protect children and their rights in order to live, grow, develop, and participate, optimally in accordance with the dignity of humanity, and receive protection from violence and discrimination. Because of its different nature from adult humans, child protection has an important principle, namely: the principle of non-discrimination which requires that in child protection carried out by the government must be carried out equally and equally to all children or without discrimination. Treatment of children should not be discriminated based on race, color, sex, language, religion, political beliefs, nationality, ethnic or community origin, wealth, disability, birth or other status.

The principle of non-discrimination is more operative in the treatment of children in every opportunity for protection. Girls should be treated and given the same opportunities as boys. Children of refugee, indigenous or minority groups should be treated the same as children from dominant groups in society. Children with disabilities should enjoy the same life as normal children.<sup>26</sup> The principle of the best interest of the child. This principle requires that in all actions relating to children

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<sup>21</sup>Poerwadarminta, Kamus Hukum Bahasa Indonesia, Balai Pustaka, 2011, h 88

<sup>22</sup> Lihat Peraturan Mahkamah Agung Nomor 5 Tahun 2019 tentang Pedoman Mengadili Dispensasi Kawin.

<sup>23</sup> Habib Shulton Asnawi, "Status Hukum Dan Ham Anak Dalam Sistem Peradilan Pidana Anak Di Indonesia," *Istinbath Jurnal Hukum*, no. 12 (2015): 2, <https://e-journal.metrouniv.ac.id/index.php/istinbath/article/view/581>.

<sup>24</sup>Pasal 1 angka 12 Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak

<sup>25</sup> Habib Shulton Asnawi dan M. Anwar Nawawi, *Hegemoni Patriarkhisme Hak Keadilan Perempuan Dalam Undang-Undang Perkawinan Di Indonesia* (Yogyakarta: The Journal Publishing, 2022), <http://thejournalish.com/ojs/index.php/books/article/view/358>.

<sup>26</sup> Save the Children dan Unicef, *Children's Rights : Turning Principles into Practices*, Roul Wallenberg Institute, Stokholm, 2000, h. 16

taken by the government, society, legislative and judicial bodies, the best interests of the child should be the primary consideration.<sup>27</sup> The importance of this principle in child protection is because children are symbolic of families, groups, nations and even the existence of humanity itself.<sup>28</sup> Based on the description of children's rights, and if it is related to child marriage, there will be various human rights violations, especially everyone under the age of 19 as a child and is entitled to all child protection.

According to a study conducted by UNICEF, there are several children's human rights that are violated when child marriage occurs, namely (1) the right to education, (2) the right to live free from violence and abuse (including sexual violence), (3) the right to health, (4) the right to be protected from exploitation, (5) the right not to be separated from their parents (separated from parents against their will). The cultures of the world place the principle of the best interests of the child as a fundamental principle.<sup>29</sup> In the juridical context, this principle is the philosophical basis for the birth of the international convention on the rights of the child.<sup>30</sup> Article 3 of the Convention on the Rights of the Child provides that: "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration" This explanation states that the principle of the best interests of the child is so important in child protection carried out by all stake holders in providing protection for children.

### **Authority of Judges in Deciding Cases Decision**

The judge is tasked with examining, adjudicating and resolving the case submitted, therefore the judge's task does not stop at finding the law, but how the decision can solve the problem. In addition to fulfilling the formal juridical elements, the decision must also be executable and at the same time solve the problem. After careful consideration, the verdict is rendered and can no longer be withdrawn or changed.

Judges in making decisions are not just applying regulations, but must be carefully pondered, considered and then evaluated. In a decision, ideally it must fulfill the ideals of law proportionally (*idee des recht*), namely legal certainty (*rechtssicherheit*), justice (*gerechtigkeits*), and expediency (*zweckmassigkeit*) (A. Mukti Arto, 2017).<sup>31</sup> Gustav Radburch applies the principle of priority to the three, which starts with legal justice, legal benefits and legal certainty (Muhammad Erwin, 2015)<sup>32</sup> although these three elements are dynamic or can change according to the needs in the field.<sup>33</sup>

In practice, a judge will be faced with a dilemmatic situation facing an antinomy (Immanuel Kant, 2010),<sup>34</sup> (David Humme. 2009)<sup>35</sup> between the values of certainty, justice, and benefits. The conflict occurs between the values of certainty and justice. If the law is applied as it reads, then justice will be

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<sup>27</sup> Penjelasan Pasal 2 Undang-Undang Nomor 23 tahun 2002 tentang Perlindungan anak

<sup>28</sup> Save the Children dan Unicef, Children's Rights.. h 31

<sup>29</sup> Habib Shulton Asnawi, "Hak Asasi Manusia Dan Shalat (Studi Upaya Penegakan Keadilan Gender Kaum Perempuan Dalam Shalat)," *Musawa Jurnal Studi Gender Dan Islam*, 2011, <https://doi.org/10.14421/musawa.2011.101.71-88>.

<sup>30</sup> *ibid*

<sup>31</sup> A. Mukti Arto, Penemuan Hukum Islam Demi Mewujudkan Keadilan "Membangun Sistem Peradilan Berbasis Perlindungan Hukum dan Keadilan, (Yogyakarta: Pustaka Pelajar, 2017), h. 89

<sup>32</sup> Muhammad Erwin, Filsafat Hukum, (Jakarta: Raja Grafindo, 2015), h. 123

<sup>33</sup> Arief Sidharta, Meuwissen tentang Pengembangan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum, (Bandung: PT Refika Aditama, 2007), h 20

<sup>34</sup> Immanuel Kant, Critique of Pure Reason (Cambridge: Cambridge University Press, 2010)

<sup>35</sup> David Humme, A Treatise of Human Nature (Auckland: The Floating Press, 2009)

increasingly pushed aside (*summum ius summa in iuria*), on the other hand, if the law is applied to certain events, it is felt to deny more and more uncertainty (L.J. van Apeldoorn, 2001).<sup>36</sup>

Ultimately, judges have full autonomy in considering and giving a verdict on cases submitted to them. If the dispute at hand has not been regulated by law as written law, then the judge applies unwritten law by promoting justice with the main characteristics of humane, civilized, and appropriate. This is in accordance with the notion of justice that puts forward the postulate, that philosophically, real justice is values that are in accordance with humanity (humanist), civilization (civilization), and appropriateness (reasonable)<sup>37</sup>.

Judges occupy a central position in delivering decisions that fulfill the values and sense of legal justice of society. In essence, what a judge does when faced with a concrete event, case or conflict of interest, he must resolve it thoroughly. For this reason, the judge must know, seek and find the law to be applied to the case before him. Legal discovery is usually a process of formation by judges or can be interpreted as a process of concretization or individualization of legal rules (*das sollen*) which are general in nature given the existence of certain concrete events (*das sein*) (Sudikmo Mertokusumo, 2006).<sup>38</sup>

In the case of an application for dispensation due to urgent reasons argued in the application, the law requires that the applicant prove it at trial. Evidence in marriage dispensation applications has a very strategic role. Based on the evidence, the judge can continue the trial examination and consider the expediency of the decision to be given.

The theory of *maslahah mursalah* is some characteristics that are in line with the actions with the objectives of *shara'* in marriage dispensation, even though there is no specific evidence from *shara'* that justifies or abolishes it, and by determining the law on it, benefit will be achieved and damage will be rejected from humans. This theory is the basis for judges to consider the benefits and harms for children related to (1) protection of religion (*hifdzu al din*), (2) safety of the soul and growth and development of children related to the purpose of protecting the soul (*hifdzu al nafs*), (3) the safety of the child's psychological condition and mental readiness related to the purpose of protection of the mind (*hifdzu al aql*), (4) the safety of the offspring of both prospective spouses related to the purpose of protection of offspring (*hifdzu al nasl*), (5) readiness from an economic perspective related to the purpose of protection of property (*hifdzu al mal*).

### **Rechtsvinding in Child Marriage Dispensation Cases**

In the case of applications for dispensation of child marriage, the reasons submitted by the applicants for dispensation of marriage are generally as follows: (1) the child has become pregnant outside of marriage, (2) the inability of the parents to look after their children and it is feared that they are distantly related because the couple has been dating for a long time, thus making the reason for their children to be married off immediately, fearing that the applicants' children will fall into adultery (3) the inability of the parents to pay for their children's schooling or education.<sup>39</sup>

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<sup>36</sup>L.J. van Apeldoorn, *Pengantar Ilmu Hukum* (Bandung: PT. Pradnya Paramita, 2001) h. 13

<sup>37</sup> Hilmi Yusron, "Husein Muhammad 's Thoughts on Husband 's Iddah and His Contribution to the Development of Family Law in Indonesia," *SMART: Journal of Sharia, Tradition, and Modernity* 3, no. 2 (2023): 29–40, <http://ejournal.radenintan.ac.id/index.php/smart/article/view/20487/6786>.

<sup>38</sup> Sudikmo Mertokusumo, *Penemuan Hukum suatu Pengantar*. Edisi Kedua Cetakan Keempat, Agustus, (Yogya: Liberty, 2006) h.37

<sup>39</sup> Tri Noviana, ""Pemenuhan Layanan Pendidikan Bagi Peserta Didik Penghayat Kepercayaan (Indigenous Religion) Di DIY(Studi Kasus Kabupaten Gunungkidul Pada Tahun 2022)," *Jurnal Ekonomi Dan Bisnis Digital/EKOBIL* 2, no. 1 (2023), <https://jurnal.smartindo.org/index.php/ekobil>.

Based on interviews with Religious Court judges: that if the reason for filing an application for dispensation of marriage is due to child delinquency which results in pregnancy outside marriage, then the legal effect of granting dispensation of marriage is that the marriage is recognized, and the status of the child is saved. If the couple had not been granted dispensation, then they would still be married (under the hand). An underhand marriage leaves the status of the wife and children unclear, with long-term legal consequences.

The judge explained that legal consequences are all the consequences that occur from all legal actions or other consequences caused by certain events. Determination from the Religious Court is one of the requirements for legal validation of someone who wants to marry underage. If the Religious Affairs Office (KUA) wants to legalize by marrying off underage couples without permission from the Court, then the marriage is considered invalid or null and void. This statement is in accordance with Articles 16 and 20 of the Marriage Law, where one of the requirements for marrying a minor is the permission of both parents and marriage dispensation by the local Religious Court and other necessary evidence.

Based on interviews with Religious Court judges, it is recognized that child marriage has various impacts. In terms of religion, child marriage is basically not prohibited, because the purpose of the marriage is to avoid adultery. Where adultery is implicitly or explicitly prohibited by religion and law. The judge assumed that a marriage would provide motivation/encouragement to a person to take responsibility, both for themselves and for others. For this reason, the judge granted the marriage dispensation.

Based on the results of interviews with Religious Court judges: the basis for legal considerations in granting marriage dispensation applications is due to several factors, namely: (1) the legal position of the applicant, which must be submitted by the parent or guardian, (2) whether or not there is a family relationship that results in the prohibition of marriage between the child for whom dispensation is sought and her prospective husband, (3) the existence of adequate income.

The practice of child marriage is faced with two conflicting views. On the one hand, child marriage is seen as a violation of the rights of the child who is actually still entitled to obtain their full rights as a child. On the other hand, the existence of dispensation for child marriage is considered as protection for the couple, as well as protection for the prospective child if the woman to be married is already pregnant.

The judge, in determining the application for dispensation, considers the protection of the child's rights. In the case of child marriage, the bride has already conceived (pregnant outside of marriage), therefore to avoid social sanctions from the community, marriage dispensation is one way to prevent it, and protect the rights of children who are still in the womb. The child in the womb certainly needs a father and mother figure in its growth and development, so the rights of the child in the womb also need to be protected by applying for marriage dispensation.

On the other hand, guaranteeing children's rights is shown by preventing child marriage. This is based on the consideration that child marriage will have a negative impact on children. Child marriage will limit children's growth and not fulfill the basic rights of children. The basic rights of children can be described as the right to education, the right to health, children's civil rights, children's social rights, the right to protection from violence and discrimination.<sup>40</sup>

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<sup>40</sup> M. Anwar Nawawi, "Perlindungan Korban Human Trafficking Perspektif Hukum Pidana Dan Hak Asasi Manusia," *Morality : Jurnal Ilmu Hukum* 6, no. 2 (2022), <https://jurnal.upgriplk.ac.id/index.php/morality/article/view/248>.

The principle of the best interest of the child<sup>41</sup> in Article 3 of UNCROC affirms that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts, government authorities or legislative bodies, the best interests of children shall be a primary consideration." Therefore, the best interests of the child must be made a paradigm and a primary consideration in any decision-making that concerns a child.

Proving "urgent reasons" is an important point in the examination of marriage dispensation. An urgent reason is a situation in which the relationship between the prospective bride and groom cannot be postponed any longer on the grounds that the minimum age of marriage is not enough, given the greater negative impact on both of them. In other words, the application for dispensation can only be granted if the reasons and evidence submitted can convince the judge that the reasons should be accepted. Conversely, the judge will reject a dispensation application if the grounds submitted are incomplete and the evidence presented to the court is imperfect.

In addition, judges are also expected to use the best interests of the child paradigm if the application is granted or rejected. In general, judges will face two evils when facing a marriage dispensation case, the evils resulting from the marriage of a child if the application is granted and the evils that will occur if the application is rejected. This is where the judge's role in *rechtsvinding* is needed to be able to determine the application for marriage dispensation based on the best interests of the child. Judges can consider the least negative impact or harm in deciding on the marriage dispensation in order to protect the rights of children. In Islamic law, this condition is included in the rule, which means: if there are two opposite harms, then the heavier harm must be maintained by doing the lighter of the two. This rule explains that when there is an action that contains two misfortunes or damages, the lighter one should be chosen. Therefore, judges in providing legal reasoning, are required to be able to consider very urgent reasons with sufficient evidence in order to minimize the harm that occurs if the dispensation application is granted or rejected.

## CONCLUSIONS

The judge granted the child marriage dispensation application by considering many aspects. The judge's perception is that the *madharat* is that it is feared that if not married off, it will increase sin and an underhand marriage will occur which will disrupt subsequent legal processes or disrupt the legal rights of the child born according to the law. Judges consider the justice of the community, often marriage is considered as an alternative solution to solve social problems that will occur, namely marrying off a pregnant child first to cover the shame. Judges are only subject to the law and justice, in addition, in making a decision the judge must consider all findings found in the trial and these findings must be considered for further consideration to determine the law.

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