

## DISPENSATION OF MARRIAGE AGE IN ISLAMIC LEGAL PERSPECTIVE AND MARRIAGE LAWS

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### ABSTRACT

*The purpose of marriage is to form a harmonious, happy, prosperous family and to last forever. Age and maturity must be considered for the prospective husband and wife who are getting married. However, the reality is that there are still many applications for dispensation of marriage age to the Court for various reasons. Facts in the field show that applications for dispensation of marriage in the religious community of Semarang have increased significantly after a change in the age limit for marriage. It was recorded that within 1 year after the change, the applications for dispensation increased by 64% in 2019 with 125 cases, and there were 226 cases for dispensation in 2020. This is a fairly large number of cases. What are the factors causing the increase in applications for marriage age dispensation at the Religious Courts in Semarang City? What is the legal basis for the Judge's consideration in deciding the marriage age dispensation case? This study used a normative juridical approach. The research specification was descriptive analytical, and the data sources were obtained by collecting library data as secondary data sources supported by primary data sources. The data analysis method used qualitative methods. The results showed that the factors causing the application for marriage age dispensation at the Semarang Religious Court were due to pregnancy out of wedlock, parents' concerns on their children, and changes in the requirements for the age of marriage. The legal basis for the Judge's consideration in deciding the case of age dispensation at marriage of Number 333 / Pdt.P / 2020 / PA.Smg at the Semarang City Religious Court is Article 7 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and the principle of legal benefit for the community.*

Keywords: marriage age dispensation, Islamic legal perspective, Marriage Law.

### I. INTRODUCTION

The meaning of marriage in Article 1 of Law Number 1 of 1974 concerning Marriage (UUP) is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Almighty God. This definition implies that marriage is not a mere civil agreement, but a physical and spiritual bond that implies the existence of consent to be granted, has a specific purpose, namely forming a family, so it is not just for fun, it is hoped that happiness will be achieved on the basis of religious beliefs.<sup>1</sup>

Marriage is something that is very desirable for a man and woman who reach adulthood to form a family. Because marriage is a means to form a happy family, marriage does not only contain elements of human relations with other humans, but also involves civil relations, marriage also contains elements of sacredness, namely the relationship between humans and their God.<sup>2</sup>

The purpose of marriage is to form a family that is harmonious, happy, prosperous and last forever. In realizing the goals and ideals of the marriage, each party who is going to marry must be mature. Maturity is the basis for achieving the goals and ideals of marriage that can determine a person's life path. The maturity of a person is a benchmark in determining whether a person can or cannot be said to be capable of acting to commit a legal act. The maturity of a person refers to a condition that a person has or has not yet matured according to the law to be able to act in the law which is determined by age restrictions.<sup>3</sup> Even so, not a few people pay less attention and are aware of it. This is due to inadequate environmental and social development influences.

Voluntary agreement without coercion between the two parties, both the prospective husband and the future wife, is necessary in order to achieve the goal of a happy marriage. This requires planning in advance so that the marriage produces the dreamed results. Likewise, in a family, planning is required before starting a family with the appropriate maturity age limit for both candidates to marry.

The parameter of maturity in the Marriage Law in Indonesia is when a person is deemed capable of marrying on the grounds that marriage is a forum for someone who has the ability to assume responsibility. The basic provisions and conditions for marriage have been regulated in Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, that the marriage will be declared valid if the conditions of marriage has been fulfilled.

After the renewal of the age limit of marriage in Article 7 paragraph (1) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage which was revised in September 2019, it states that the age limit of marriage for both men and women is 19 years. .

In the Marriage Law, apart from stipulating the age limit for having a marriage, it is also regulated regarding the protection against the lowest age limit in the marriage in Article 7 paragraph (2). By giving concessions to one of the spouses or

<sup>1</sup> Wahyuni Retnowulandari, 2016, *Hukum Keluarga Islam di Indonesia (Indonesian Islamic Family Law)*, Penerbit Universitas Trisakti, Jakarta, p.18.

<sup>2</sup> Wasman dan Wardah Nuronyah, 2011, *Hukum Perkawinan Islam di Indonesia Perbandingan Fiqh dan Hukum Positif (Indonesian Islamic Marriage Law: Comparison of Fiqh and Positive Law)*, Yogyakarta : CV. Citra Utama, p.29

<sup>3</sup> Rosnidar Sembiring, 2019, *Hukum Keluarga: Harta-harta Benda dalam Perkawinan (Family Law: Assets in Marriage)*, Rajawali Pers, Depok, p.9.

both parties who have not reached the lowest age limit to carry out the marriage, through the dispensation requested by the parents to the court.

Marriage dispensation is an allowance or relief provided by law for a pair of prospective husband and wife who will enter into a marriage where the age of the two or one of the prospective brides has not reached the age of marriage as stipulated by law. The age stipulated by the law is 19 years, both male and female. Marriage age dispensation has been regulated in Law Number 16 of 2019 concerning Marriage in Article 7 paragraph (2) which reads: "In the event of deviation from the age requirement as referred to in paragraph (1), the male parents and / or parents the woman can ask for dispensation to the Court with a very urgent reason accompanied by sufficient supporting evidence. "

An application for dispensation can be submitted by the parents of one or both parties of the prospective bride to the court. The dispensation for the age of marriage is given through certain considerations. This is intended to achieve the goals and ideals of the marriage itself. Marriage age dispensation for Muslim husband and wife candidates, who have not reached the minimum age limit, must be submitted to the Religious Court in accordance with Article 1 of Law Number 50 of 2009 concerning Second Amendment to Law Number 7 of 1989 concerning Religious Courts which is absolute authority of Religious courts.

A request for dispensation of marriage age that has been registered in the court will be decided by the judge with a decision to grant or reject the request for dispensation of age of marriage. This application for dispensation has been regulated in Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation which was stipulated on November 20, 2019 and promulgated on November 21, 2019 to be known and enforced for all levels of society.

The basis for the judge's consideration in determining the dispensation for the age of marriage in accordance with the Marriage Law is to limit the age of marriage to at least 19 years. Age and maturity are things that must be considered for the prospective husband and wife who are getting married. However, the reality is that the people of Semarang and its surroundings still ask for a marriage age dispensation for various reasons.

This can be seen from the number of cases that have submitted to the Semarang City Religious Court, some of which filed cases regarding the dispensation of marriage age. In this case the Judge when receiving a request for dispensation of marriage age faces a dilemma. One side is a judiciary that must enforce the law, but on the other hand it collides with the fact that one must grant permission to marry for basic reasons.

The Semarang City Religious Court in 2020 received many applications regarding the dispensation of marriage age, it was noted that there was an increase in the number of applications for dispensation of marriage from January to July 2020 with 99 applications for dispensation. Meanwhile, in 2019 there were 85 applications for dispensation.<sup>4</sup> This is a fairly large number of cases.

There are several factors causing the increase in applications for marriage age dispensation, including the revision of the Marriage Law which regulates the minimum age limit for marriage. Besides that, it is also because of the promiscuity of teenagers who are increasingly happening in the community or what is known as an MBA (*married by accident*).

One of the applications for marriage dispensation at the Semarang City Religious Court is the case number: 333 / Pdt.P / 2020 / PA.Smg. In this case the parties are petitioning for a dispensation for the age of marriage because the applicant's child has not reached the minimum age of marriage. In this petition, the parties' age is still very young, namely in their teens, namely men aged 17 years and women 16 years. And the applicant's child marriage is planned to be married in the near future because they already love each other, even now the applicant's child wife has sex and is 17 weeks pregnant.

Judges in establishing laws, especially regarding marriage dispensation, require juridical and sociological considerations in resolving cases, so that they can determine decisions that will not worsen the situation in the future, so that judges are required to consider selectively in accordance with statutory regulations.

Departing from the aforementioned background, the problems are: What are the factors causing the increase in applications for marriage age dispensation at the Religious Courts in the city of Semarang? What is the basis for the Judge's consideration in deciding the marriage age dispensation case?

## II. DISCUSSION

### 1. Definition of Marriage

*Mitsaaqan* marriage according to Islamic law is a marriage with a very strong contract or *gholiidhan* to obey Allah's orders and carry out it constitutes worship (Article 2 Compilation of Islamic Law). Based on this definition, it means that what is meant by marriage is a marriage contract. The marriage contract is a series of consent pronounced by the guardian and the *kaful* pronounced by the groom or his representative witnessed by two witnesses.<sup>5</sup>

Marriage must be viewed from three points of view:<sup>6</sup>(1) Marriage from a legal perspective, it is an agreement, that is, because there is a way to form a bond that has been arranged in advance, namely by a marriage contract and in harmony and with certain conditions, and how to describe or breaking the ties of agreement; (2) Marriage is seen from a social perspective, that in the society of every nation, a common assessment is found, namely that people who have a family have a position that is more respected than those who are not married; (3) From a religious perspective, marriage is considered a sacred institution.

The provisions regarding marriage according to Islamic law are binding on every Muslim, and every Muslim needs to be aware that marriage contains the values of *ubudiyah*. Therefore, the marriage bond is termed by the Koran as "*mitsaaqan*

<sup>4</sup> <https://news.detik.com/berita-jawa-tengah/d-5065636/angka-pengajuan-pernikahan-dini-di-Semarang-meningkat-apa-sebabnya>, accessed on 21 October 2020.

<sup>5</sup> Mardani, 2017, *Hukum Keluarga Islam di Indonesia (Islamic Family Law in Indonesia)*, Kencana, Jakarta, p.26.

<sup>6</sup> Sayuti Tp.ib, 1986, *Hukum Kekeluargaan Indonesia (Family Affair Law of Indonesia)*, UI Press, Jakarta, p.47.

*ghalidzan*", a strong promise. As a bond that contains the values of *ubudiyah*, paying attention to its validity is a very principal thing.<sup>7</sup>

There are several things from the formulation of marriage according to the Marriage Law: (1) the use of the word "a man and a woman" implies that marriage is only between different genders; (2) the use of the expression "as husband and wife" implies that marriage is the meeting of two different sexes in a household; (3) the purpose of marriage is to form a happy and eternal household; (4) based on the Almighty Godhead, it shows that for Islam marriage is a religious event and is carried out to fulfill religious orders.<sup>8</sup>

Although there are differences of opinion regarding the meaning of marriage, however **one** element which is the commonality of all opinions, namely that marriage is an agreement between a man and a woman, which is a sacred covenant to form a happy and eternal family.

Marriage according to Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Article 1 reads: "Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a family (household), a happy and eternal based on the Supreme Lordship". As has been explained in Article 1 of Law Number 1 of 1974 concerning Marriage which explains the meaning and legal basis of marriage, the Law considers that a marriage is not only a legal act, but also a religious act.

This is based on the fact that the Indonesian nation, which has the basis of *Pancasila*, really must be used as a basis when making legal rules, including when the formation of the Marriage Law. The first precept, namely the Supreme Lordship, was deliberately immersed firmly at the beginning of the Marriage Law to prove that this nation started its life with these precepts.<sup>9</sup>

The definition of marriage according to the provisions of Article 1 of the Marriage Law consists of five elements: a physical and spiritual bond, between a man and a woman, as husband and wife, forming a happy and eternal family (household), based on the One Godhead.<sup>10</sup>

- 1) Physical and mental bonding  
Physical and mental bonds mean that the bond is not sufficient only with the physical bond, but both must be tightly bound. Physical and mental bonds are bonds that can be seen and show that there is a legal relationship between husband and wife. The birth bond is also known as a formal bond. This birth bond binds the husband and wife, as well as the third party. Meanwhile, mental bonds are bonds that are not visible, a bond that can only be felt by husband and wife.<sup>11</sup>
- 2) Between a man and a woman  
This second element of marriage shows that marriage can only occur between a man and a woman. Thus, marriage between a man and a man is not possible. Likewise, marriage between a woman and a woman is also not possible. In addition, this element shows that the Marriage Law regulates the principle of monogamy.<sup>12</sup>
- 3) As husband and wife, a bond between a man and a woman is seen as husband and wife if it has met the requirements stipulated by law. The conditions for the validity of a marriage are divided into internal requirements and external requirements. Internal requirements relate to the parties conducting the marriage, while the external requirements relate to the formalities that must be fulfilled in conducting a marriage.<sup>13</sup>
- 4) Forming a happy and eternal family (household)  
The purpose of marriage is to form a happy and lasting family. Family in this sense is a unit consisting of father, mother and children. A family that is formed is expected to provide happiness for each family member. In addition, it is hoped that the formed family will last forever, unless separated by death.<sup>14</sup>
- 5) Based on the Almighty Godhead  
, the Marriage Law considers that marriage is closely related to religion or spirituality, so that Article 2 paragraph (1) of the Marriage Law demands that marriage is valid, if it is carried out according to the law of each religion and belief.<sup>15</sup>

Marriage according to the Civil Code (KUHPer) does not contain a meaning or definition of marriage, however the understanding of marriage can be seen in Article 26 of the KUHPer "The law considers marriage only in civil relations". In the Article it is stated that the law views marriage only from the point of view of its liaison in civil law, other than that it is not. In other words, the KUHPer still upholds the value of marriage, the procedures and implementation of which are left to the customs of the community or the religion and beliefs of the people concerned.

According to Presidential Instruction of 1991 concerning Compilation of Islamic Law, it defines marriage as a marriage that is a very strong contract or *No.Imiitsaaqon gholiidzan* to obey Allah's orders and carry out it is worship, and marriage aims to realize a *sakinah, mawaddah, and merciful household life*.

<sup>7</sup> Anshary MK, 2010, *Hukum Perkawinan di Indonesia, Masalah-masalah Krusial*, Pustaka Pelajar, Yogyakarta, p.11.

<sup>8</sup> Amir Syarifuddin, 2007, *Hukum Perkawinan Islam di Indonesia, Antara Fiqh Munakahat dan Undang-Undang Perkawinan (Islamic Marriage Law in Indonesia: Between Fiqh Munakahat and Marriage Law)*, Kencana, Jakarta, p.40.

<sup>9</sup> Moch. Isneani, 2016, *Hukum Perkawinan Indonesia (Indonesian Marriage Law)*, PT. Refika Aditama, p.37.

<sup>10</sup> R. Soetojo Prawirohamidjojo, 1988, *Pluralisme dalam PerUndang-Undangan Perkawinan di Indonesia (Pluralism in Marriage Laws in Indonesia)*, Airlangga University Press, p.38.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, p. 39.

<sup>14</sup> *Ibid.*, p. 42

<sup>15</sup> *Ibid.*, p. 43

## 2. Legal Basis of Marriage

The legal bases for marriage in Indonesia are:

- a. the 1945 Constitution Article 28D paragraph 1 which reads: "Everyone has the right to form a family and continue offspring through a legal marriage". This verse regulates the rights of a person to marry and continue the offspring.
- b. Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. is a form of unification and codification of law in Indonesia regarding marriage and its legal consequences.
- c. Presidential Instruction (Inpres) Number 1 of 1991 concerning Compilation of Islamic Law dated June 10, 1991 by Decree of the Minister of Religion No. 154 of 1991 dated July 22, 1991, there are Islamic legal values in the field of marriage, grants, wills, endowments, and inheritance related to marriage, which are contained in book I which consists of 19 chapters and 170 articles (Articles 1 to 170 ).

The legal basis for marriage in the Koran and the Hadiths includes:

- a. QS. Ar. Ruum (30): 21

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ

لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

Meaning: "And among the signs of His power is He created partners for you of your own kind, so that you tend to be at ease with them, and made Him among you a sense of love and affection. In fact, in this there are signs of the greatness of Allah for the people who think. "

- b. QS. Adz Dzaariyaat (51): 49

وَمِنْ كُلِّ شَيْءٍ خَلَقْنَا زَوْجَيْنِ لَعَلَّكُمْ تَذَكَّرُونَ

Meaning: "And everything We created in pairs so that you remember the greatness of Allah".

- c. HR. Bukhari-Muslim: "O young men, whoever is able to get married, get married. Because it is more to lower the gaze and protect the genitals. Whoever has not been able to, then fast because fasting is a medicine to curb his appetite.

## 3. Legitimate Requirements for Marriage

- a. According to Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage (UUP).

In the Marriage Law, the validity of marriage is regulated in Article 2 paragraph (1) which reads: "Marriage is legal if it is carried out according to the law of each religion and belief". The meaning of the law of each religion and belief includes the statutory provisions applicable to said religious and belief groups as long as they do not contradict or are not stipulated otherwise in the Law.

Article 2 paragraph (2) of the Marriage Law reads: "Every marriage is recorded according to the prevailing laws and regulations". Whereas every marriage must go through the civil registration of the area where the marriage will take place, so that later the marriage is recognized by the state and legal according to Indonesian law. Therefore, after fulfilling the requirements of religion and belief, it is immediately followed by a record because the marriage certificate is the only proof of marriage.

- b. According to the Civil Code (KUHPer), Article 26-28 of the Civil Code (KUHPer) states that the law considers marriage only in civil terms. At the same time a man is only allowed to have one woman as his wife, a woman only one man as her husband. According to KUPer, the principle of marriage requires that there is an agreement to be stated freely between the two prospective husband and wife, there is no coercion from either party. The point is that if there is coercion, then the marriage cannot be carried out or after it is done it can be canceled.
- c. According to Islamic Law, the validity of marriage according to Islamic Law must fulfill the following principles and conditions:
  - a) General Conditions
 

The marriage is carried out not in conflict with the prohibitions in the provisions, namely the prohibition of marriage due to religious differences with the exception in Surah Al-Maidah verse (5) that is, especially for Muslim men, they can marry women who are experts of the book, such as Jews and Christians. Then it does not contradict these prohibitions in the Al-Quran Surah An-Nissa 'verses 22,23 and 24.
  - b) Special Requirements
    - 1) for the existence of a groom and a bride.
    - 2) Both prospective brides must be Muslim, mature and mature.
    - 3) There must be a free agreement between the two prospective brides.
    - 4) There must be a marriage guardian.
    - 5) There must be 2 (two) witnesses
    - 6) Paying the dowry (dowry)
    - 7) Ijab and Qabul

In addition, in society after the marriage ceremony is finished with the process of obtaining *qobul* consent, it is also considered to hold a *Walimah walimah*) or a marriage party but it is not obligatory.

#### 4. Underage Marriage

Underage marriage or often referred to as Early marriage is a marriage that is entered into by both prospective husband and wife where the age of the prospective bride and groom has not met the minimum age stipulated by law, namely the age of 19 years, both husband and wife. In other words, the age of one or both parties has not reached or under the age of 19. This is stated in Article 7 paragraph (1) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage which states that marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years. This limitation on the minimum age for marriage is intended to prevent underage marriages and to maintain the health of the husband and wife.

Underage marriages are still rife in society, both in rural and urban communities. There are several factors that cause underage marriages, one of which is economic. Many parents, especially in rural areas, are in a hurry to marry off their children because of economic problems. Parents feel that they are no longer able to pay for their children's needs, so marriage is considered the most appropriate way to ease the burden on parents. Apart from economic factors, underage marriages are mostly caused by promiscuity by teenagers. The increase in early marriage often occurs in the community due to pregnancy outside of marriage or what is often known as MBA, aka *married by accident*.

In Article 7 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, there is still a possibility of deviation,<sup>16</sup> namely by the existence of dispensation from the court for those who have not reached the minimum age limit. In the case of the concept of dispensation of marriage, it may be set aside because it is only an exception, to legalize a marriage that is done underage because the imposition of dispensation has no explicit reason.

#### 5. Marriage Dispensation

Dispensation in the Big Indonesian Dictionary has two meanings, first, exceptions from the rules due to special considerations; exemption from an obligation or prohibition. Second, namely the exception of action based on law which states that a statutory regulation does not apply to a specific matter.<sup>17</sup> According to the Legal Dictionary, dispensation has the meaning of an exception to the provisions (regulations) of law or laws that should have applied formally.<sup>18</sup> While the Marriage Age Dispensation is the exception to the provision of relief from a limitation (age restriction) in making a bond between a man and a woman as a prospective husband and wife with the aim of forming a happy and eternal family (household) based on Almighty God.

Marriage dispensation according to Supreme Court Regulation No.5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, Article 1 states that marriage dispensation is the granting of marriage permits by the court to prospective husbands / wives who are not yet 19 years old to have a marriage. Then, dispensation is the granting of the right to someone to marry even though they have not reached the minimum age limit of marriage. This means that a person may marry outside of these provisions if and only if circumstances "want" and there is no other choice (*ultimum remedium*).

The law in Indonesia regulates restrictions on the minimum age of marriage and exemptions in granting dispensation, regulated in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Article 7 states:

- 1) Marriage is only permitted if a man and a woman has reached the age of 19 (nineteen) years.
- 2) (2) In the event of deviation from the age requirement as referred to in paragraph (1), the male and / or female parents may request dispensation to the Court on very urgent grounds accompanied by sufficient supporting evidence.

From this Article it is clear that a marriage can only be carried out if the conditions that have been determined have been fulfilled. However, in certain cases, even though one or both of the prospective brides do not meet the requirements stipulated by law, it does not mean that they cannot marry because dispensation can be requested to the court. "Deviation" can be done through the submission of a request for dispensation by the parents of one or both parties of the prospective bride to the local Court in the area where the marriage is going to take place. For Muslims, it is the authority of the Religious Courts and followers of religions other than Islam in the District Court.

Even though there has been a concession for "deviation" given by the law to prospective husband and wife who have not met the minimum age of marriage to carry out marriage, this does not mean that every application for dispensation can be granted. The local court has the power to reject the application for dispensation, because the court will check the background of the application. The court will refuse, if it is still possible for things to prevent underage marriage.

In the provisions for granting dispensation for the age of marriage, it has been clearly regulated in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. Courts have an important role in determining the acceptance or rejection of applications for dispensation. In this case, to determine whether or not the prospective husband and wife who are still under age can carry out the marriage by granting dispensation as a complement to the conditions of the marriage.

Marriage age dispensation occurs when there is a request from the guardian of one of the husband and wife candidates who has not met the minimum age for marriage. Marriage under the age limit is not a simple matter, on the one hand the prevailing *constitutum* in Indonesia does not require underage marriages, on the other hand the law also opens up opportunities for other things beyond that.

<sup>16</sup> Bander Jonh Nasution dan Sri Warijati, 1997, *Hukum Perdata Islam, (Islamic Civil Law)*, Bandung: Mandar Maju, Bandung, p. 18

<sup>17</sup> Departemen Pendidikan Nasional, 2014, *Kamus Besar Bahasa Indonesia*, Gramedia, Jakarta, p. 335.

<sup>18</sup> Dzulkipli Umar dan Ustman Handoyo, 2010, *Kamus Hukum (Dictionary of Law New Edition)*, Quantum Media Press, Cet. I, Surabaya,



Judges are given the opportunity to make legal findings on the basis that if the law stipulates certain things for a certain event, it means that the regulation is limited to certain events. Although the minimum age required for marriage has been regulated, the Marriage Law does not explicitly prohibit underage marriage. However, in practice its application is flexible. This means that if the condition is very urgent or impossible and can cause damage, then the judge must defend the goodness / *maslahah* by granting the request for dispensation of marriage.

Judges are not only guided by the law, because if the judge uses a methodological approach in the study of Islamic law (*fiqh*) regarding the application for marriage age, it is necessary to consider *maslahat mursalah* (the method of *ijtihad* in Islamic law based on the general benefit).<sup>19</sup> Likewise with the Religious Courts, the judicial institutions authorized in cases of marriage dispensation (for Muslims) in adjudicating marriage dispensation cases are faced with the consideration of two disadvantages, namely *mudharat* due to marriage at an early age and *mudharat* if the dispensation is rejected. From these two considerations, judges often grant requests for dispensation of marriage by considering that the harm arising from the refusal of the application for dispensation is greater than the harm that occurs as a result of marriage under the age itself. From the rejected petition, it is possible that it could damage the offspring and also the honor of the bride and groom.<sup>20</sup>

In adjudicating applications for marriage dispensation, the judge must judge based on the principles contained in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, regulated in Article 2, namely:

- a. The best interests of the child;
- b. The right to live and develop children;
- c. Appreciation for children's opinions;
- d. Respect for human dignity;
- e. Non-discrimination;
- f. Gender equality;
- g. Equality before the law;
- h. Justice;
- i. Benefits; and
- j. legal certainty.

Emphasis on the principle of legal certainty is more nuanced in creating order and order in society. Emphasis on the principle of justice, meaning that the judge must consider the laws that live in society, which consists of habits and unwritten legal provisions. In this case, the sense of justice must be distinguished according to individuals, groups and society. In addition, the justice of a particular society is not necessarily the same as the sense of justice of certain other societies. So in considering the decision, the judge must describe all of these things, when the judge chooses the principle of justice, for example, as the basis for making a decision. Emphasis on the principle of benefit is more nuanced to an economic point of view, on the premise that law exists for humans, so that the purpose of the law must be useful for society at large.<sup>21</sup>

This study used the approach of *normative juridical*, meaning that the data obtained is guided by juridical aspects, as well as based on the empirical aspects used as a tool.<sup>22</sup> The research specification used is *descriptive analytical*, which is research that aims at solving problems that exist today, where the implementation of the descriptive method is not limited to collecting and compiling data but includes analysis and interpretation of the meaning of the data. Descriptive in nature because in this study it is intended to provide a systematic and comprehensive description of everything related to Judges' considerations in determining dispensation. Sources of data are obtained by collecting library data as secondary data sources supported by primary data sources, namely facts found in the field. The data collection method is obtained by means of literature study and documentation study. Data presentation is useful for seeing the overall picture of the research results. This data analysis method uses qualitative methods, so in this method the data that has been collected must be separated according to their respective categories and then interpreted in an effort to find answers to research problems.<sup>23</sup>

According to the Judge's opinion, although the prospective groom is not yet old enough, both of them have stated that they are able to marry, have known each other for a long time, love each other and are difficult to separate, have loved each other, so that if this is allowed to continue not tied in a marriage rope it is feared that an act that is prohibited by religion will occur and can lead to unwanted slander, considering that the two people are closely related, even the applicant's child wife has sex and is 17 weeks pregnant, and has planned to marry in the near future, so as to avoid slander and the occurrence of even worse damage, the two children should be married immediately, this is in accordance with the rules of *ushul fiqh* which reads

د رء المفاسد مقدم علي جلب المصالح

Artinya : "Menolak kerusakan lebih didahulukan dari pada menarik kemaslahatan";

Considering, the Judge will also quote the hadith of the Prophet Muhammad. narrated by Bukhari Muslim which reads:

يا معشر الشباب من استطاع منكم الباءة فليتزوج

Meaning: "O young men, if there is the ability to get married, then get married";

The applications for dispensation of marriage at the Semarang City Religious Court have increased every year. Based on the table below, it is noted that the number of applications for dispensation for marriage age in 2018 were 92 applications, in 2019 there were 125 applications and in 2020 there were 226 applications. This shows that applications for dispensation after marriage have increased every year

Table 1.

<sup>19</sup> Zainuddin Ali, 2006, *Hukum Perdata Islam di Indonesia (Islamic Civil Laws in Indonesia)*, Jakarta: Sinar Grafika, p. 14

<sup>20</sup> A. Khisni, 2010, *Essay-essay Aliran Pemikiran Hukum Islam (Essays of Islamic Law Schools)*, Unissula Press, Semarang

<sup>21</sup> Zainuddin Ali, *Op Cit*, p. 135.

<sup>22</sup> Ronny Hanitjo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri (Legal and Jurimetric Research Methodology)*, Gp.ia Indonesia, Jakarta, 1994, p. 36.

<sup>23</sup> Burhan Ashshofa, 2004, *Metode Penelitian Hukum (Legal Research Method)*, PT. Rineka Cipta, Jakarta, p. 124.

Number of applications for the dispensation of marriage age in the last 3 (three) years.

No	Tahun	Bulan												Jumlah	Persentas (%)
		Jan	Feb	Mar	April	Mei	Jun	Jul	Agus	Sept	Okto	Nov	Des		
1	2018	13	1	9	10	7	3	10	11	8	4	8	8	92	21%
2	2019	8	5	5	3	4	6	9	6	14	15	30	20	125	28%
3	2020	31	19	17	14	8	16	31	16	24	19	26	5	226	51.00%
<b>Jumlah</b>													443	100%	

Source: The Archive of the Semarang Religious Court of 2020

## 6. The factors behind the application for dispensation of marriage age are:

### a. Pregnancy out of wedlock

Pregnancy outside of marriage is one of the highest reasons for filing a request for dispensation at the Semarang City Religious Court. This is due to the large number of adolescents who are in a relationship before marriage (dating) which is considered normal. Adolescents as the younger generation in accepting western culture have adopted it at random, without first seeing what is good and useful, and which is bad and destroys it. Dating is a teenage lifestyle and they are afraid to be considered old-fashioned if they don't date.

The emergence of promiscuity is increasingly mushrooming in society where adolescents who are not old enough have had sex or unprotected free sex. According to Irawati, adolescents often engage in various kinds of risky sexual behavior consisting of certain stages, starting from holding hands, kissing dry, kissing wet, hugging, holding or touching sensitive parts, (*sexual intercourse*). Premarital sexual behavior in adolescents in the end can have various detrimental impacts on adolescents themselves.<sup>24</sup> This is supported by the rapid development of electronics and mass media which make it easier for teenagers to access pornographic things and make it their mecca. This is a factor or what is often known as MBA, aka *married by accident*.

The research in Indonesia shows that sometimes marriage at a young age occurs as a solution to pregnancies that occur outside of marriage. According to Sarwono, many marriages at a young age occur at puberty, this happens because adolescents are very vulnerable to sexual behavior that makes them engage in sexual activity before marriage. This also occurs because of the freedom of association between sexes in adolescents, which can easily be witnessed in everyday life.<sup>25</sup>

Low understanding of religion is reflected by undergoing a relationship outside of marriage (dating) accompanied by lust and having an unhealthy relationship without thinking about future consequences. It is from this kind of relationship that can make children who are not old enough to get pregnant first without a legal bond and make marriage the only way out to cover up the family's shame and the future of the child (baby).

In the written Islamic Law Compilation, there is no prohibition to marry someone who is pregnant because of extramarital relations. This is stated in Article 53 which reads:<sup>26</sup>

- (1) A pregnant woman out of wedlock can be married to a man who impregnates her.
- (2) Marriages with pregnant women mentioned in paragraph (1) can be carried out without waiting for the birth of their child first.
- (3) By taking place when a woman is pregnant, there is no need for remarriage after the child is born.

### b. Parents' concern for their children

This concern is because parents see their children as adolescents and their children's attraction to the opposite sex. Actually, sexual urge in the form of attraction to the opposite sex is something that is normal and normal. But it is different if the child already knows dating, even when he is very young, of course the parents will worry and try to forbid it. It is the interaction outside the home that is very influencing, where parents cannot control their children because they are busy with work.

Parents' concerns about the activities of their child's relationship with their partner who are tied too far, are afraid that it will lead to sin (adultery), and can cause rumors from the surrounding community, so that it can become a disgrace to the family, thus making parents anxious and worried because of the love relationship. his son is getting more and more intimate. This is the final decision to avoid the child from sin in dating, instead of having to wait for economic stability, one of the obligations of parents is to marry off their children.

Factors supporting parents' concerns about their children are also economic and educational. From an economic point of view, it is due to the condition of the family living below the poverty line, which encourages children to marry young, as a solution to ease the burden on parents, with the hope that the child after marriage will get a better life even though the child's age is not sufficient. In terms of education, the low level of education and knowledge of parents, children and society has resulted in a tendency to marry off their underage children. The low level of education is caused by a lack of family economy. Lack of costs is an obstacle to continuing education.

<sup>24</sup> Irawati and Prihyugiaro, 2005, *Faktor-Faktor Yang Mempengaruhi Sikap Terhadap Perilaku Seksual Pra Nikah Pada Remaja Di Indonesia (Factors Affecting Attitudes Toward Pre-Marital Sexual Behavior among Adolescents in Indonesia)*: BKKBN.

<sup>25</sup> Sarwono WS 2003. *Psikologi Remaja (Youth Psychology)*. Jakarta: Grafindo Persada

<sup>26</sup> Directorate General of Islamic Religious Institutional Development, 2001, *Bahan Penyuluhan Hukum*, Departemen Agama RI (*Legal Counseling Materials*, Ministry of Religion of the Republic of Indonesia), Jakarta, p. 117

### c. Changes to the Requirements for Age of Marriage

The Marriage Law has regulated the requirements for the age limit of marriage, for both men and women, as stated in Article 7 paragraph (1) of Law No.1 / 1974 concerning Marriage, that the minimum age limit for women is 16 years old 19 years old. However, on October 15, 2019, changes to the age limit were made, formally stated in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. The amendment accommodates the Constitutional Court Decision No.22 / PUU-XV / 2017 on the request for a *judicial review* of Article 7 paragraph (1) because it is considered unconstitutional and discriminatory. Due to this change, the government hopes to emphasize the number of underage marriages.

In Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Article 7 paragraph (1) regulates the age limit to 19 years, for both men and women, where previously women were 16 years. This change raises the expectation that there will be a decrease in the rate of underage marriage. However, Article 7 paragraph (2) states that if there is a deviation in the age requirement for urgent reasons, the parents of one of the parties can apply for dispensation to marriage to the Religious Court, accompanied by evidence.

Facts in the field show that applications for dispensation of marriage in the religious community of Semarang have increased significantly after a change in the age limit for marriage. It was recorded that within 1 year after the change, applications for dispensation increased by 64% from the previous year, namely in 2019 there were 125 cases and in 2020 there were 226 cases for dispensation. In this study, the amendments to Law Number 16 of 2019 against the Marriage Law Number 1 of 1974 greatly influence the increase in marriage dispensation in the Religious Courts of Semarang City with an average age of women over 16 years and under 19 years.

In deciding cases, judges apply legal regulations based on certain principles or methods, which are used so that in stating the basis for their consideration of the incident it is carried out appropriately and legally relevant, so that the results obtained from the process of the case can be legally accepted and accountable for.<sup>27</sup>

The legal basis used by the Judge in granting dispensation for the age of marriage is Article 7 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. Article 7 paragraph (2) provides leniency for deviations from the provisions of Article (1) regarding the age limit of marriage, it is said that the parents of the male party or the parents of the woman can request dispensation to the court. So, the judge is given the authority to grant the application for dispensation of marriage age.

Applications for dispensation of marriage for Muslims (Islam), can be submitted to the local Religious Court. This is the absolute authority of the Religious Courts based on the provisions of Article 49 paragraph 1 letter (a) of Law Number 7 of 1989 concerning the Religious Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009. And for non-Muslims can apply for dispensation to the local District Court where the marriage area will take place.

In the process of dispensation of marriage age, Judges have been provided with rules, namely Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, this rule aims to realize the standardization of the process for adjudicating applications for dispensation of marriage in court. Judges must be independent and free from influence from any party. Judges in making decisions are only bound by events or relevant facts and legal principles which become or become a juridical basis.<sup>28</sup>

Judges in making decisions must be based on principles, in the Teaching of Laws (*Idee des Recht*), it states that there are three elements of legal ideals that must exist proportionally, namely legal certainty (*rechtssicherheit*), justice (*gerechtigkei*) and benefit (*zweckmasigkeit*). If it is related to Gustav Redbruch's theory of law enforcement in the *idee des recht*, namely that law enforcement must fulfill these three principles.<sup>29</sup> Judges of the Religious Court regarding the principles of legal certainty, justice and benefit in deciding cases of dispensation of age at marriage, emphasis on the principle of legal certainty, aims to create order in society, law without the value of legal certainty will lose its meaning, because it can no longer be used as a guide. Emphasis on the principle of justice, is defined as a constant and continuous distribution to give everyone the right. Judges must consider the laws that live in society, which consists of habits and unwritten legal provisions, of course, justice according to different individuals, groups and communities. Emphasis on the principle of benefit, good law is law that provides benefits to legal subjects. Usefulness here is defined as happiness. People will obey the law without being forced with sanctions if they feel the benefits.

In deciding Judges prioritize the principle of benefit, taking into account the benefits obtained by the applicant if granted rather than not granted. As is the case in the word Determination No.333 / Pdt.P / 2020 / PA.Smg in this case, both the parents of a boy and a girl submit applications with a boy age of 17 years and a girl of 16 years. The applicant plans to get married but the Office of Religious Affairs (KUA), Ngaliyan Subdistrict, Semarang City refuses, even though the conditions for the marriage, both according to the provisions of Islamic law and applicable laws and regulations are fulfilled, the age requirement for the applicant's child has not yet reached the age of 19 years, in accordance with Article 7 paragraph (1) of Law Number 16 of 2019 concerning Marriage. However, the marriage is very urgent because the relationship between the two is so close that the applicant is very worried that an act that is prohibited by the provisions of Islamic law will occur if it is not immediately married. In these circumstances, the judge has no power to reject the application, the judge will grant the petition of dispensation that, in order to avoid damage / mafads and take precedence over maintaining the goodness / maslahah, then both the bride should immediately mated, it is according to the rules of *usul fiqh* which reads:

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Meaning: "Refusing damage takes precedence over attracting benefit";

<sup>27</sup> Ahmad Rofiq, 1998. *Hukum Islam di Indonesia (Islamic Law in Indonesia)*. Jakarta: PT. Raja Grafindo, p. 23

<sup>28</sup> See Fence M. Wantu, 2007, *Antinomi Dalam Penegakan Hukum Oleh Hakim (Antinomy in Law Enforcement by Judges)*, Journal of the Mimbar Hukum, Vol. 19, October 13, 2007, Faculty of Law, Gadjah Mada University, Yogyakarta, p. 395

<sup>29</sup> *Ibid*, p. 388



Based on the case of determination No.333 / Pdt.P / 2020 / PA.Smg, judges are not bound by positive law. Judges do not only refer to the Marriage Law regarding the requirements for limiting the age of marriage, but judges are progressive in which the judge prioritizes the interests of human benefit rather than interpreting the law from the point of view of logic and regulations. Marriage dispensation cases are *voluntary* cases, dispensation cases are only for obtaining rights from the applicant so only require witness testimony from parties who truly know the applicant's situation.

The judge adheres to the school of *Interessenjurisprudens (freirechtslehre)*. This school argues that the law is clearly incomplete. The law is not the only source of law, while judges and other officials have the widest freedom possible to make legal findings, so judges do not just apply the law, but also include, expand and form regulations in their decisions.<sup>30</sup> It can be interpreted that even though the law stipulates the age limit of marriage, which is 19 years, both men and women in Law Number 16 of 2019 concerning Marriage, the Judge can grant the petition with basic conditions and reasons if it is strengthened by There is a leniency in the dispensation in Article 7 paragraph (2), to reduce the occurrence of damage / facades and fears of unwanted things. To achieve the highest possible justice, even judges may deviate from the law, for the benefit of society. So, here Hakim has *freis ermesen*. Measures with legal awareness and conviction of the community, depend on the size of the judge's conviction, where the position of the judge is absolutely free.<sup>31</sup>

Judges considerations in deciding case No.333 / Pdt.P / 2020 / PA / Smg, prioritizing the principle of benefit based on the readiness of the two candidates, physically and mentally ready to carry out the marriage, the prospective bride is pregnant outside of marriage, so it is urgent to be married, and there are concerns. the prospective bride will violate religious norms if the marriage is not hastened.

### III. CLOSING

Based on the results of the research and discussion above, it can be concluded as follows:

- 1) Factors causing the application for Marriage Age Dispensation at the Semarang Religious Court are pregnant out of wedlock, parents' concerns about their children and changes in age requirements of marriage. Pregnancy out of wedlock (*married by accident*) is the biggest factor in requests for dispensation, the emergence of promiscuity that is increasingly mushrooming in society, where underage teenagers have had sex, parents' concerns about their child's relationship are based on economic factors and low education . And the change in the requirements for the age of marriage to 19 years in Article 7 paragraph (1) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, this change is not well known by the wider community.
- 2) The legal basis for the Judge's consideration in deciding the case of dispensation of marriage age Number 333 / Pdt.P / 2020 / PA.Smg at the Semarang City Religious Court is Article 7 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, and the principle of legal benefit for the community. Judges are not bound by positive law, Judges do not only refer to the Marriage Law regarding the requirements for the age limit of marriage, but Judges are progressive, in which the Judge prioritizes the interests of human welfare rather than interpreting the law from the point of view of logic and regulations. Applications for marriage dispensation for Muslims (Islam) are submitted to the Religious Courts, because it is the absolute authority of the Religious Courts based on the provisions of Article 49 paragraph 1 letter (a) of Law Number 7 of 1989 concerning Religious Courts as amended by Law Number 3 of 2006 and Law Number 50 of 2009. And non-Muslims can apply for dispensation to the local District Court where the marriage area will take place. And the trial process must comply with the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation.

### Suggestions

1. The government should be committed to disseminating information to the public about the ideal age limit for marriage, as well as explaining the worst risks due to underage marriage. Providing understanding to adolescents to avoid free sex, and parents are expected to be firm in limiting the association of children, so that children do not fall into promiscuity, and no longer marry their underage children.
2. Religious Court Judges to be more selective and assertive in granting dispensation for marriage age. Judges considerations prioritize the principle of benefit, taking into account the benefits obtained by the applicant if it is granted rather than not being granted, and in the trial process it must be in accordance with Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation.

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