

The Problem of Marriage Dispensation Between Theory and Practice

***Nabil Fikri Palasenda**

Universitas Islam Negeri Sunan Kalijaga Yogyakarta

*Email: nabilfikripalasenda@gmail.com

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Abstract

The dynamics of marriage law in Indonesia show the great influence of political power, which is shaped by religious interpretations that allow child marriage. This religious view is often the basis for legal decision-making, which legitimizes child marriage in the eyes of society. Although the Marriage Law has been revised, the existence of the marriage dispensation article creates a loophole that allows child marriage to continue to occur, with many judges approving dispensation applications due to the influence of legal norms and religious beliefs. This study uses a type of qualitative research with literature analysis and literature study methods. The type of data in this research will be collected from a variety of sources, including books, scientific journals, and other related documents. Through a comprehensive literature review and analysis of various journal articles, books, and other relevant sources, the purpose of this study is to examine the meaning of what a marriage dispensation is and how the application process is, why theories and practices regarding its regulations still have problems in its implementation and how solutions can be offered from it. The results of the study show that the Revision of the Marriage Law in Indonesia is not enough to overcome child marriage, because there is a gap in the dispensation article that still allows child marriage to occur and does not even clearly regulate the practice.

Keywords: Marriage Dispensation; Theory and Practice of Marriage; Problems of Marriage Dispensation.

Abstract

Dinamika hukum perkawinan di Indonesia menunjukkan pengaruh besar kekuasaan politik, yang dibentuk oleh penafsiran agama yang memperbolehkan perkawinan anak. Pandangan agama ini sering menjadi dasar dalam pengambilan keputusan hukum, yang melegitimasi perkawinan anak di mata masyarakat. Meskipun telah dilakukan revisi terhadap Undang-Undang Perkawinan, adanya pasal dispensasi kawin menciptakan celah yang memungkinkan perkawinan anak terus terjadi, dengan banyak hakim yang menyetujui permohonan dispensasi karena pengaruh norma hukum dan keyakinan agama. Penelitian ini menggunakan jenis penelitian kualitatif dengan metode analisis literatur dan studi kepustakaan. Jenis data dalam penelitian ini akan dikumpulkan dari berbagai sumber, termasuk buku, jurnal ilmiah, dan dokumen-dokumen terkait lainnya. Melalui tinjauan literatur yang komprehensif dan analisis berbagai artikel jurnal, buku, dan sumber relevan lainnya, tujuan penelitian ini mengkaji pengertian apa itu dispensasi perkawinan dan bagaimana proses pengajuannya, mengapa teori dan praktik mengenai regulasinya masih terjadi masalah dalam pelaksanaannya dan bagaimana Solusi yang dapat ditawarkan dari itu. Hasil dari penelitian menunjukan bahwa Revisi

Undang-Undang Perkawinan di Indonesia belum cukup untuk mengatasi perkawinan anak, karena adanya celah dalam pasal dispensasi yang masih memungkinkan perkawinan anak terjadi bahkan belum mengatur jelas mengenai praktiknya.

Kata Kunci: Dispensasi Pernikahan; Teori dan Praktek Pernikahan; Permasalahan Dispensasi Pernikahan.

INTRODUCTION

Dispensation is an exemption from the rule due to special considerations, exemption from an obligation or prohibition. Dispensation is a government action that causes a law or regulation to become invalid for something special. So dispensation is an attempt to penetrate something that is not normally allowed.

Dispensation is a relaxation for matters that are specific from the provisions of the law. Dispensation means an exemption from the application of legal provisions given by the Court or other competent officials in the context of marriage, where one of the prospective brides has not reached the minimum age set in the laws and regulations. In another sense, a marriage dispensation is a permit given by the Court to a prospective husband or wife who is not yet 19 years old to be able to get married.¹

The provisions of Article 2 paragraph (2) of the Marriage Law, marriages are recorded based on the prevailing laws. Marriage dispensation filed at the Religious Court is dominant because of pregnancy out of wedlock or adultery. Underage marriage refers to marriages carried out by couples whose age has not reached the minimum limit set by law. This kind of marriage, if not officially registered by the state, only follows the rules of religion (Islam) to legalize the relationship. In society, the practice of underage marriage is often only carried out religiously (nikah siri) without administrative registration by the state, so the legal provisions only refer to Islamic marriage law for those who are Muslims.

The recommendation to carry out marriage in Islam aims to prevent adultery or actions that violate social and religious norms. This recommendation emphasizes the importance of marriage as a form of

¹Novitalia Novitalia, "THE POLITICS OF ISLAMIC LAW AND POSITIVE LAW IN THE REGULATION OF MARRIAGE DISPENSATION IN INDONESIA", *Lex LATA*, vol. 5, no. 3 (2023), p. 344, <http://journal.fh.unsri.ac.id/index.php/LexS/article/view/2431>, accessed 14 Nov 2024.

moral responsibility, not just a mere recommendation. However, differences arise when Indonesian youth who are below the minimum age limit in the laws and regulations want to get married, because in Islam, maturity or puberty is considered sufficient as a condition for marriage for both men and women. In this case, the marriage dispensation is not considered a violation of the age rules in the law, but rather the readiness of individual men and women who want to get married.

The amendment of Law Number 1 of 1974 to Law Number 16 of 2019 concerning Birth Marriage is one of them on the basis of the debate on the marriage age limit stated in article 7 paragraph (1) because it is considered discriminatory and unconstitutional. Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974, in Article 7 paragraph (1), stipulates that marriage can only take place if the prospective husband and wife are 19 years old. This provision aims to reduce the number of early marriages which previously occurred a lot. However, in paragraph (2) it is stated that if there is an exception to the marriage age limit, then the parents of the prospective bride can apply for marriage dispensation to the court with urgent reasons and supporting evidence. The provisions in paragraph (2) can actually be considered to weaken and obscure the objectives intended to be achieved by paragraph (1).

The Indonesian government has made various efforts to prevent child marriage. In Article 26 Paragraph 1 of the Child Protection Law, it is stated that parents have an obligation to prevent child marriage. In addition, the amendment to the Marriage Law after the approval of the House of Representatives of the Republic of Indonesia to raise the minimum age of marriage for women to 19 years aims to protect girls from early marriage. This move raises the minimum age for women to marry, from 16 years old to 19 years old, as stated in the amendment to Marriage Law Number 1 of 1974.²

The increase in the minimum age limit for marriage and the existence of provisions that allow exceptions to these limits show the impression that the state is less assertive. In fact, the provision of marriage dispensation should be a form of protection to prevent underage

² Ahmad Muqaffi, Rusdiah Rusdiah, and Diana Rahmi, "Examining the Problems of Marriage Dispensation in an Effort to Prevent Child Marriage After the Revision of the Marriage Law", *JOURNAL OF ISLAMIC AND LAW STUDIES*, vol. 5, no. 3 (2022), p. 363, <http://jurnal.uin-antasari.ac.id/index.php/jils/article/view/5914>, accessed 14 Nov 2024.

marriage. However, the law does not provide sanctions or penalties for couples who marry at a young age, so the practice of underage marriage has the potential to continue. This happens because a child can still get married even though his age does not meet the requirements if he obtains a marriage dispensation issued by the Court.

The increase in the minimum age limit for marriage, along with provisions that allow exceptions to the limit, gives the impression that the state is less assertive. Marriage dispensation should serve as a protective measure to prevent underage marriage. However, the law does not list sanctions or penalties for couples who marry at a young age, so the practice of underage marriage has the potential to continue. A child can still get married even though his age has not met the provisions, as long as he obtains a marriage dispensation from the Religious Court.

RESEARCH METHODS

This research is a library research with a qualitative approach to understand the problem of marriage dispensation in Indonesia. This study uses a descriptive analysis method, which aims to describe and analyze the differences between legal regulations and practices in the field. The approach used is normative juridical, by examining positivist legal theory (Hans Kelsen) that separates law from morality. The subject of the research is government institutions related to marriage policy, while the object of the research is the regulation and practice of marriage dispensation. The main data comes from law No. 1 of 1974 and No. 16 of 2019, as well as related literature. The analysis technique used is data reduction to filter and summarize relevant information. The purpose of this study is to understand the implementation of marriage dispensation in accordance with applicable legal provisions.

RESULTS AND DISCUSSION

Codification And Amendment Of Marriage Law In Indonesia.

Before the amendment, the age of 16 to get married was not considered a problem, but now it is considered a serious problem, because it is considered to deprive children of their rights and endanger the health of girls. The age difference in marriage between men and women is considered a form of discrimination that is contrary to the spirit of Article 27 paragraph (1) of the 1945 Constitution concerning equal rights before the law. In the Constitutional Court's ruling, there are at least two important points: first, that the age of 16 to marry is considered unconstitutional and constitutes a violation of human rights and exploitation of girls; Second, the Constitutional Court ordered the

lawmakers to make changes to the minimum age limit for marriage within a maximum of 3 years.

Indonesia, as a country with a majority Muslim population, has legal regulations that govern marriage. Before 1975, marriage law in Indonesia was pluralistic, meaning that there were several rules of marriage law that applied to various groups of the population. This is due to the application of positive laws that applied during the Dutch East Indies colonial period, where the Indonesian population was divided into several groups, namely the European group, the Bumiputera group, the Chinese Foreign Eastern group, and other foreign Eastern groups.

In early 1937, the Dutch East Indies government submitted a preliminary plan for the Marriage Ordinance which contained the main points of regulation regarding marriage, divorce, maintenance, *hadhanah* (child custody), division of common property, and various other matters. However, the preliminary plan does not include a minimum age of marriage. When this plan was discussed by the government with various organizations, especially those representing the interests of Muslims, it was rejected because it was considered contrary to Islamic law. This rejection reflects the tension between the colonial policies implemented by the Dutch government and the religious legal norms that prevailed in Indonesian Muslim society at the time.

In August 1950, the Indonesian government established the NTR Legal Regulation Investigation Committee with the task of evaluating various existing laws and drafting a Marriage Bill (RUU) that was in accordance with the conditions and needs of the times. This committee was formed by the Minister of Religious Affairs and consisted of legal experts from various religions, including Islam, Christianity, and various sects, and involved figures of the women's movement.

This committee was led by Mr. Teuku Mohammad Hasan, with members such as Maria Ulfa, Mr. Nani Soewondo, Mr. Toeti Harahap (from Protestants), Mrs. Mahmudah Mawardi (Islam), and Mrs. Kwari Sosrosoemarto (Catholic). In the process of drafting it, the committee collected materials from various circles, both from women and from other groups, to ensure that the bill prepared could cover various perspectives and needs of the community. This committee played an important role in formulating marriage law regulations that were more in line with the values of Indonesian society at that time.

The NTR committee took a long time to draft the Marriage Bill. In 1952, the committee finally completed two Marriage Bills, namely the General Marriage Bill and the Special Marriage Bill. The first bill is

aimed at all groups of society, while the second bill regulates marriage based on each religion. On December 1, 1952, the committee presented the two bills to various organizations to ask for their opinions.

Some of the provisions in the Marriage Bill include that marriage must be carried out on the basis of the will of the bride and groom, as an effort to protect against forced marriage. In addition, this bill also sets the age limit for marriage, namely 18 years for men and 15 years for women, as a protection measure for child marriage.

Unfortunately, both bills were rejected by most organizations at the Conference in Jakarta held on February 24-26, 1953. This rejection shows that there is disagreement between various parties related to the proposed rules, especially regarding the age limit for marriage and several other principles that were considered controversial at the time.³

The Marriage Law in Indonesia was first regulated in Law No. 1 of 1974 concerning Marriage. In this law, it is regulated regarding the conditions for the validity of a marriage, the rights and obligations of husband and wife, as well as provisions regarding the minimum age for marriage. In article 7 paragraph (1) it is stated that the minimum age for marriage is 21 years old. However, if there are specific reasons, then a man or woman under the age of 21 can marry with the consent of a parent or guardian, and a religious court can grant a dispensation.

In 2019, the Indonesian government amended the Marriage Law by issuing Law No. 16 of 2019, which raised the minimum age of marriage for women to 19 years old. These changes aim to provide greater protection of women's rights, reduce early marriage, and protect children from the potential negative impacts of child marriage.

Although there is a minimum age limit for marriage, Indonesian law provides leeway with a marriage dispensation. In Law No. 1/1974 and Law No. 16/2019, it is stated that a person who has not reached the minimum age for marriage can apply for a dispensation to the court to obtain a marriage license. This dispensation is given based on certain reasons submitted by the prospective spouse or guardian.

This dispensation is mainly used to address marriages that are performed due to social, cultural, or religious factors that may be urgent, such as in the case of pregnancy out of wedlock, or certain traditions that consider marrying young to be an obligation. The court will consider

³Muhammad Jazil Rifqi, "Dynamics of the Development of the Age Limit of Marriage in the Perspective of Progressive Law", *Legal Arena*, vol. 15, no. 2 (2022), pp. 290–1.

these reasons, as well as whether the bride-to-be has met the physical, emotional, and social requirements necessary to undergo the marriage.

However, in practice, there is a difference between the theory and implementation of this policy in the field. Although there are regulations that prohibit early marriage, the reality is that underage marriage still occurs quite a lot, either through legal dispensation or through informal channels in the community.

Changes in the age limit for marriage in law no. 1 of 1974 which was amended or amended by law no. 16 of 2019, The target of this regulation change is to revise Article 7 Paragraph (1) and Paragraph (2) of the Marriage Law. Decision Number 22/PUU-XV/2017 regarding the examination of the Marriage Law states that Article 7 Paragraph (1), especially the phrase "16 years", is contrary to the 1945 Constitution (1945 Constitution) and does not have legal force. Therefore, the Constitutional Court (MK) ordered lawmakers to make changes to the article, especially regarding the minimum age of marriage for women.

This amendment to Article 7 Paragraph (1) of the Marriage Law is part of the mandate of the constitution, especially those contained in Article 27 Paragraph (1) of the 1945 Constitution, which states that "All citizens have the same position in the law and government and are obliged to uphold the law and government without exception." This provision shows the principle of "Equality before the law", namely that there is no difference in rights and positions between men and women in law and government. Therefore, the distinction between the age limit of marriage between men and women, as in the article, needs to be abolished. Instead, the age of marriage for women and men should be equalized at 19 years old.

The equalization of the age limit for marriage at the age of 19 is also in accordance with the human rights framework that has been accommodated in Indonesian legal politics, through the ratification of various international conventions, such as the Convention on Civil and Political Rights, the Convention on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women. The age of 19 years is considered an age that is no longer included in the category of children, in accordance with the provisions of the Convention on the Rights of the Child, which stipulates that the age limit for children is up to 18 years old. Thus, the age of 19 is the ideal age for marriage, where a person is already outside the category of children and has the right to make big decisions in life, including marriage.

In addition, Article 7 Paragraph (2) also needs to be revised because it provides an opportunity for deviations to the minimum age of marriage, without any clear limitations regarding the situations in which such deviations can occur. Therefore, there needs to be a firmer provision so that deviations from the marriage age limit do not occur easily.

The age of 16 years is not the right age to get married, because at that age girls should still be in the education stage, in accordance with Law Number 20 of 2003 concerning National Education, which requires 12 years of education for children. If the child starts school at the age of 7, then the age to complete formal education is at 19 years old, which should be the minimum age for marriage, so that girls can complete their education and have the full opportunity to develop physically, mentally, and emotionally before entering married life.⁴

As explained in Law Number 16 of 2019 concerning amendments to the Marriage Law, the purpose of increasing and equalizing the marriage age limit to 19 years is to ensure the mental and physical maturity of the bride-to-be. Thus, it is hoped that marriage can be realized properly, reduce the risk of divorce, and produce healthy and quality offspring. In addition, this change also aims to fulfill children's rights, optimize children's growth and development, and ensure children's access to better education.

However, although the amendment to the Marriage Law has good intentions, its implementation in the field does not fully go as expected. The change in the marriage age limit, which is now set at 19 years old, has not significantly reduced the rate of early marriage in Indonesia. Facts on the ground show that most of the marriage dispensation applications submitted to the court are still granted. This shows that although there are regulations regulating the age limit, the practice still allows early marriage to occur through the dispensation process.

Understanding the best interests of children can indeed vary, depending on factors such as background, understanding of laws, customs, and community culture. Meanwhile, if the priority is the spirit of prevention to protect children's rights, then firmer steps can be taken to reduce the rate of early marriage. In this case, stronger policies and higher awareness from various parties are needed to effectively

⁴Yuliani Catur Rini and Ari Tri Wibowo, "Dynamics of Amendments to Law No. 1 of 1974 concerning Marriage Regarding the Minimum Age of Marriage", *AL WASATH Journal of Law*, vol. 3 (2022), p. 85, <https://journal.unusia.ac.id/index.php/alwasath/article/view/330>, accessed 18 Nov 2024.

implement changes and reduce the practice of underage marriage that is still vulnerable.

Marriage Dispensation In Theory And Practice

Marriage is one of the important events in a person's life, in law number 1 of 1974 explains the purpose of marriage that, marriage is a bond of birth and mind between a man and a woman as husband and wife with the aim of forming a happy and eternal household based on the one and only Godhead. In addition, it is stated in article 3 of the KHI that marriage aims to realize a household life that is Sakinah Mawadah warahmah.

Another purpose explained in the Qur'an states that a peaceful domestic life (sakinah) is created by the existence of love and affection, which is built through mutual understanding between husband and wife. This happens because each couple realizes that they are clothes for each other. In addition, one of the main hopes of every married couple is to have children. This purpose is also part of the purpose of the sharia marriage, where in addition to maintaining the continuity of good offspring, marriage also aims to educate the soul to be more full of affection, tenderness, and love.⁵

Dispensation, according to the Great Dictionary of Indonesian (KBBI), means permission to be exempted from certain obligations or prohibitions. Meanwhile, according to W.F. Prins and R. Kosim Adisapoetra, dispensation is a government action that overrides a law and regulation for special cases (relaxation legis). The main focus of dispensation is to provide benefits as well as avoid greater losses. Some of the aspects that are considered in this dispensation include: first, the physical and psychological aspects, where the perpetrator must be assessed whether he is old enough to carry out the marriage; second, pregnancy that occurs due to sexual intercourse outside of marriage; Third, the income owned by the bride-to-be. Pregnancy is often used as a valid consideration to grant a marriage dispensation application.

According to Ateng Syafrudin, the dispensation aims to overcome obstacles that should not be allowed normally, so that the dispensation can be interpreted as a waiver of prohibitions in special cases (relaxation legis). In the Legal Dictionary, dispensation comes from the word "dispensatie," which means exemption or deviation from a regulation.

⁵Muzaiyanah and Anies Shahita Aulia Arafah, "Marriage Dispensation After the Enactment of Law Number 16 of 2019 Amendments to Law Number 1 of 1974 Maqashid Sharia Perspective", *Literacy Journal of Islamic Studies Multi-Perspective* (2021), p. 168.

Subekti and Tjitrosubodo interpret dispensation as deviation or exception from an order.

Dispensation of marriage age refers to the permission or waiver granted by the court to the bride-to-be who has not reached the prescribed age for marriage. Marriage dispensation is an application submitted by parents or prospective brides to ask for permission for their child to be allowed to marry even though his age does not meet the provisions of the applicable Marriage Law. In practice, the judge's consideration in the marriage dispensation decision shows that the judge is often permissive. In some cases of marriage dispensation, the judge grants permission even though both parties are still below the minimum age set for marriage.⁶

Law No. 1 of 1974 Article 6 paragraph 2 stipulates that a man and a woman who want to get married but have not reached the age of 21 must obtain permission from both parents. Marriage is only allowed if the man is 19 years old and the woman is 16 years old. In September 2019, Indonesia officially passed Law No. 16 of 2019 which is an amendment to Law No. 1 of 1974 concerning marriage, based on the decision of the Constitutional Court. This change only includes a limited revision to Article 7 paragraph 1, which sets the minimum age limit for marriage for men and women, namely 19 years for both, which previously the minimum age limit for marriage was 19 years for men and 16 years for women.

However, a person can perform a marriage outside the provisions of this law by applying for a marriage dispensation. Marriage dispensation is for the marriage of the prospective groom or bride who is still underage so that they are not allowed to get married based on the applicable laws and regulations in Indonesia, there is an age limit in marriage that has been regulated juridically, namely to limit the occurrence of underage marriage.

The government sets a minimum age limit for marriage in Indonesia with the aim that couples who are going to get married already have maturity in thinking, mental maturity, and adequate physical strength to build a family. This aims to reduce the possibility of domestic rifts that lead to divorce, because married couples are expected to have a more mature awareness and understanding to achieve the goals of

⁶Rayhani, Suriyadi, and Yahya Julianto Eko Prasetyo, "Procedure/Legal Basis for Determining Minors Who Want to Get Married in Religious Courts", *Sagacious Journal*, vol. 6, no. 1 (Rumah Jurnal Press, 2019), pp. 67–8.

marriage. This marriage age limit is regulated in Law No. 16 of 2019, which is an amendment to Law No. 1 of 1974 concerning marriage.

In Islamic law, neither the Qur'an nor the hadith explain in detail the minimum age limit for marriage. However, the general requirements for marriage in Islam are puberty, common sense, and being able to distinguish between good and bad, so that they can give consent to get married.

If there is a deviation in society, the party concerned can apply for a marriage dispensation to the Court or other officials who have authority, with the consent of both parents. The purpose of submitting this marriage dispensation is so that the marriage can be legalized by the Office of Religious Affairs (KUA). The KUA has the right to reject or accept the application on the condition that the two prospective brides must first apply for a marriage dispensation at the local Religious Court.⁷

As for the procedure for applying for a marriage dispensation, we can summarize it as follows:

Submission of Application: The marriage dispensation case is a civil case that is filed voluntarily (*voluntair*). Based on Article 6 number (1) of Perma Number 5 of 2019, the parties who have the right to apply for marriage dispensation are: (1) Parents of the child who is applying for marriage dispensation, referred to here are the biological father and mother. (2) If the parents are divorced, the application can still be filed by both parents or by one of the parents who has custody of the child based on a court decision (for example, one of them has been designated as the custody holder). (3) If one of the parents has died or the place of residence is unknown (*ghoib*), then the application can be submitted by one of the surviving parents. (4) If both parents have passed away or their powers have been revoked, then the application shall be submitted by the person appointed as the guardian of the child. (5) Parents or guardians of children who are unable to do so may delegate the submission of the application to the power of attorney granted (Article 6 numbers 2-5 of Perma Number 5 of 2019).

The *posita* or *fundamentum of the* applicant must contain the legal basis and events that are the basis of the application and explain the legal relationship between the Applicant and the legal issues requested. In accordance with Article 7 paragraph (2) of Law No. 16 of 2019, the

⁷Muzaiyanah and Anies Shahita Aulia Arafah, "Marriage Dispensation After the Enactment of Law Number 16 of 2019 Amendments to Law Number 1 of 1974 Perspective of Maqashid Sharia", pp. 170–2.

application for marriage dispensation is a form of irregularity, which means that it can only be done through the application for dispensation by the parents. The petition must also contain "very urgent reasons," describing circumstances in which there is no other option and the marriage must proceed immediately.

Petition in an application is usually in the form of a declarative request, for example:

- 1) Granting the Applicant's application.
- 2) Stipulating the granting of dispensation to the Applicant's child named bin/ti to marry bin/ti
- 3) Determine the cost of the case in accordance with the applicable legal provisions.

Adjudication Authority: An application for marriage dispensation is submitted in accordance with the authority of the court as follows: (1) For Muslims, the application is submitted to the Religious Court. (2) If there is a religious difference between the child and the parent/guardian, the application is submitted to the court in accordance with the child's religion (Article 7 Perma No. 5 of 2019). (3) If the two prospective brides are under the age limit of 19 years, the application for each candidate is submitted to the same court in accordance with the domicile of one of the parents/guardians (Article 8 of Perma No. 5 of 2019).

Administrative Requirements: Several administrative requirements that must be met by the Applicant when applying for a marriage dispensation, in accordance with the provisions of Article 7 paragraph (2) of Law No. 16 of 2019 and Article 5 of Perma No. 5 of 2019, including: a. Application letter. b. Photocopy of Identity Card of both parents/guardians. c. Copy of Family Card. d. Photocopy of Identity Card or Child Identity Card and/or Child Birth Certificate. e. Photocopy of Identity Card or Child Identity Card and/or Birth Certificate of the prospective husband/wife. f. Photocopy of the child's last education diploma, or School Still Certificate from the child's school. g. A certificate from a health worker (doctor or midwife) supporting the parents' statement that the marriage is very urgent. h. Statement of Commitment of Parents of Children, which states responsibilities related to economic, social, health, and educational issues of children.

All documents submitted must be sufficiently sealed and dinezegelen by the post office, and the originals of the documents must be presented to the judge at the time of the hearing to match the copies submitted. Duties of the Court Clerk: The Court Clerk is obliged to ensure that all administrative requirements are complete before the

application is registered in the register. If there is a shortage, the Registrar can return the application to the Applicant to be completed (Article 9 of Perma No. 5 of 2019).⁸

Although the regulation regarding dispensation has theoretically been regulated in the law, in fact practice in the field still finds issues or cases where there are still no rules or unclear rules in the law. An example of a case that we can find from the practice in the field regarding marriage dispensation is in a thesis written by Wafa Suci Ningrum entitled Juridical analysis of the problem of marriage dispensation for widows or widowers under age as a prerequisite for marriage registration (case study in Ponorogo district).

In his thesis he explained the chronology of the case which was arguably new at the KUA where on February 17, 2021, there was a case of the marriage of an underage widow at the Religious Affairs Office (KUA) of Sambit District. The woman came from Gajah Village, Sambit District. She first married at the age of 16, then divorced at the age of 17. A year after the divorce, she intends to remarry at the age of 18, although according to Law No. 16 of 2019 concerning the Minimum Age of Marriage, she is still considered underage to marry.

From the results of his interview with the local KUA, the party from KUA also felt confused The case of underage widow marriage is the starting point for the emergence of pros and cons related to the need for a Marriage Dispensation for the underage widow. Law No. 16 of 2019 only mentions the nominal number, which is at least 19 years old without explaining a person's marital status. So, when there is someone who is still under 19 years old but has married status, problems arise related to the Marriage Dispensation which will later have an effect on the feasibility of marriage registration for the widow.⁹

From the case we see above, the regulation regarding the marriage dispensation between theory and practice is still problematic where there is still a problem in the regulation that has not clearly and firmly regulated the cases that arise. We still find that marriage dispensation in theory and practice is not in line, this causes anxiety about the strictness of the regulations that govern it, and causes confusion for office holders involved in dealing with the issue of marriage dispensation.

⁸ *DISPENSATION NIKAH.pdf*, <https://www.pta-pekanbaru.go.id/images/stories/DISPENSASI%20NIKAH.pdf>, accessed 25 Nov 2024.

⁹ Wafa Suci Ningrum, "Juridical Analysis of the Problem of Marriage Dispensation for Widows or Widowers under Ages as a Prerequisite for Marriage Registration", *Journal of Legal Anthology*, vol. 2, no. 1 (2022), pp. 51–3.

In addition, the problem that arises is the infirmity in the article of the law for the granting of dispensation, even though in Article 7 Paragraph (2) of Law Number 16 of 2019 concerning Marriage is not explained in detail what kind of urgent reasons can underlie the submission of an application for marriage dispensation, in addition to that, the judge immediately grants the application for dispensation without looking further and more carefully as urgent as whether the reason is so that the The prospective bride who is a minor deserves to be given a marriage dispensation or not.

Underage marriage disproportionately and negatively impacts girls, who tend to marry more at a young age than boys. This is contrary to the right of every child, including girls, to receive education that is essential for personal development, preparation for adulthood, and effective contribution to the welfare of families and society in the future. However, in reality, child marriage actually hinders children's education, psychological well-being, and health. Therefore, judges must be more careful in considering marriage dispensation applications, assessing whether the reasons submitted are really urgent or can be postponed. However, often judges grant dispensation applications to prospective brides who are minors for non-urgent reasons. For example, a marriage that occurred in Bantaeng Regency, South Sulawesi, between a 15-year-old, 10-month-old boy and a 14-year-old, 9-month-old girl who is still in junior high school.

Their marriage dispensation application was rejected by the Religious Affairs Office on the grounds that they were too young, but then they applied to the Religious Court and were finally granted. The reason behind this dispensation application turned out to be because the bride-to-be was afraid to sleep alone. This shows that if the judge continues to grant the marriage dispensation only on non-urgent grounds, then child marriage in Indonesia will be difficult to abolish, despite various efforts made by the government and the international community.¹⁰

The dynamics of marriage law in Indonesia shows how the political power of the state is greatly influenced by the first episteme, namely religion (religious interpretation) that allows child marriage. At the first level, decisions are often based on religious views that allow

¹⁰Sonny Dewi Judiasih, Susilowati S. Dajaan, and Bambang Daru Nugroho, *CONTRADICTION BETWEEN MARRIAGE DISPENSATION AND EFFORTS TO MINIMIZE CHILD MARRIAGE IN INDONESIA*, vol. 3 (2020), p. 216.

child marriage and gender bias. This view plays a role in shaping behavior that is considered correct by society. In Foucault's terms, epistemically, child marriage is accepted as something true by the general consciousness of society.

In the second level, there was a fight between the two forces. The first is a group that supports the status quo that justifies child marriage, with the argument of conservative religious interpretations and traditions that exist in society. The second group is those who oppose the status quo and support the ban on child marriage, with human rights values, the protection of women and children, and women's reproductive health behind them. This battle was won by the pro-status quo party, which succeeded in including the marriage dispensation article in the revision of the Marriage Law. This dichotomy not only appears in the preparation of the Marriage Law, but also continues in its implementation. Although the age limit for marriage is increased, this is ineffective due to the existence of the marriage dispensation article. In practice, many judges have approved dispensation applications, which shows that epistemic awareness influences judges in the decision-making process. Therefore, in addition to being guided by the law, judges are also influenced by the epistemic truth of religious interpretation in deciding on dispensation.

A solution that can be used for evaluation in the context of state decision-making, law revision alone is not enough. The implementation of the Marriage Law needs to be closely monitored, considering that the existing dispensation article has become a loophole to legalize child marriage. In the 2020-2024 RPJMN, the prevention of child marriage is one of the strategic issues with a target of a decrease of 2.47 percent by 2024. To achieve this goal, the House of Representatives through its supervisory function can encourage the involvement of various government actors, such as the Ministry of Women's Empowerment and Child Protection, the Indonesian Child Protection Commission, and the National Commission on Anti-Violence against Women. In addition, the House of Representatives can also encourage the government to form special institutions at the district/city level involving KPAI/KPAD and P2TP2A, which have the task of accompanying children who marry early and their families.

In terms of strengthening judicial institutions, the House of Representatives of the Republic of Indonesia can encourage the government to increase the number of women judges in religious courts as part of the implementation of gender mainstreaming. Commission VIII of the House of Representatives of the Republic of Indonesia can

also encourage the Supreme Court to prepare technical guidelines as a complement to Perma 5/2019, which can be used as a reference for judges in rejecting marriage dispensation applications.¹¹

The Theory And Practice Of Marriage Dispensation According To Positive Law Or Hans Kelsen's Pure Law.

The Pure Law Theory put forward by Hans Kelsen has several key elements that distinguish it from other legal theories. First, Kelsen emphasizes the importance of separation between law and morality. In his view, law is a system of norms created to regulate human behavior through regulations enforced by the state, while morality is a value system that is subjective and must be separated from the law. Therefore, according to Kelsen, legal analysis must be free from moral considerations. In addition, Kelsen also emphasized that law must be studied as an independent normative system, which means that law must be seen as a stand-alone entity without being influenced by external factors such as politics, sociology, or ideology.¹²

According to Hans Kelsen, the essence of law lies in the need to clean it from elements that are not part of the law, such as ethics, morals, customary laws that are sociological, and the concept of justice that contains political elements. For Kelsen, the law is not just a description of reality, but an order that must be obeyed without considering external factors. Compliance with the law is an obligation that should be carried out, and non-compliance will result in sanctions as a consequence.¹³

In relation to the problem of theory and practice in marriage dispensation. As explained above, the law is not just a description of reality, but an order that must be obeyed without considering external factors. Kelsen emphasized that the law must be analyzed and applied without the interference of moral values, positive legal theory or pure law Hans Kelsen provides an understanding of how legal norms work in a structured system. However, the application of law in practice, especially related to marriage dispensation, raises several problems that need to be observed, both in theory and practice.

¹¹Tri Hendra Wahyudi and Juwita Hayyuning Prastiwi, "Sexuality and the State: The Problem of Child Marriage Dispensation in Indonesia", *Aspiration: Journal of Social Issues*, vol. 13, no. 2 (2022), pp. 221–2, <https://jurnal.dpr.go.id/index.php/aspirasi/article/view/2988>, accessed 29 Nov 2024.

¹²Yunda Rahayu N, Rizqia Aufo H, and Syifa Rohima, "A Thought of Hans Kelsen's Pure Law Theory", *TERAJU: Journal of Sharia and Law*, vol. 5, no. 02 (2023), p. 98.

¹³*Ibid.*, p. 106.

One of the problems in this dispensation theory is the indecisiveness in its regulation or application. According to pure legal theory, law is considered an objective system and does not care about external factors such as morality or social context. This indecisiveness can be a problem in the application of marriage dispensation, especially when there are cases involving social or cultural considerations, for example the example described above regarding the judge granting dispensation to the bride-to-be on the grounds that she is afraid to sleep alone. In this context, the positive law that regulates is not strictly only looking at the existing regulations, but in practice the judge still gives dispensation to the bride-to-be who is afraid to sleep alone.

In addition, one of the problems in practice is the lack of supervision and standardization. Marriage dispensations granted by courts are often not accompanied by adequate oversight mechanisms to ensure that the decision is appropriate. In practice, there are inconsistencies in court decisions, as individual judges can have different interpretations related to the granting of this dispensation. This creates uncertainty in the implementation of laws related to marriage dispensation, which should be clearer and standardized.

In the perspective of positive law theory or Hans Kelsen's pure law, law must be understood objectively as a system of norms that are structured and validly enforced. However, the application of the law in practice, especially in relation to marriage dispensation, suggests that there is a tension between the objectivity of the law and the need to consider social and moral factors in legal decisions. Marriage dispensations, while legally valid, sometimes run counter to the purpose of protecting individual rights and social justice. Therefore, improvements in practice and stricter oversight of court decisions in granting marriage dispensations are important to ensure that legal decisions are in line with broader principles of justice.

In the context of marital dispensation, Kelsen's theory of pure law teaches that the law must be applied without considering social or moral factors. However, in practice, the application of this law faces problems. One of them is the indecisiveness in the regulation and application of laws related to marriage dispensation. Moreover Many factors affect the judge's decision to provide dispensation for the bride-to-be. Positive laws governing marriage dispensation can seem unambiguous, as court practice often takes into account non-urgent reasons or external factors, such as social or cultural reasons, that should not be taken into account in pure legal theory.

CONCLUSION

The dynamics of marriage law in Indonesia show that there is a tension between religious, cultural, and state policies in regulating child marriage. Although the revision of the Marriage Law has been carried out, the implementation of the policy is still hampered by the dispensation article that allows child marriage to still occur. Despite efforts to prevent child marriage in the 2020-2024 RPJMN with a target of a reduction of 2.47 percent by 2024, the main challenge remains in effective policy monitoring and implementation.

Prevention of child marriage requires the participation of various parties, including the government, child protection institutions, and the community. Strengthening the judiciary with the addition of female judges in religious courts and the preparation of technical guidelines for judges in handling marriage dispensation are also important steps to achieve this goal. With more comprehensive policies, stricter supervision, and the empowerment of various related institutions, it is hoped that it can reduce the number of child marriages and protect the rights of children and women in Indonesia.

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