



## Jurisdictional Implications Vagueness of Marriage Dispensation Norms in Law Number 16 Year 2019

Dyah Retno Wahyuningrum<sup>1</sup>; Suhariningsih<sup>2</sup>; Rachmi Sulistyorini<sup>2</sup>

<sup>1</sup> Master of Notary Students, University of Brawijaya, Indonesia

<sup>2</sup> Lecturer of the Faculty of Law, University of Brawijaya, Indonesia

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### **Abstract**

Regulations for the minimum age for marriage and dispensation in the national marriage law have changes because they are not in accordance with the development of society. This study proposes to analyze and find criteria for limiting dispensation to marriage that contains vagueness that can lead to legal uncertainty and juridical implications of norm blur related to marriage dispensation regulation. The research method used in this study is normative juridical legal research, the approach method used is prescription legislation and conceptual and case approaches. From the results of the research and discussion it can be concluded first: Criteria for limiting dispensation to marriage with very urgent reasons accompanied by supporting evidence according to Article 7 paragraph (2) of the Marriage Law is a vague legal norm, even though the intention of the legislators is reflected in the Academic Paper, the very urgent reason is a condition that the prospective bride is pregnant and has been proven by a certificate from a health worker. Meanwhile, the formulation of the norm of Article 7 paragraph (2) does not mention pregnancy as a requirement. Second: The juridical implication of the vagueness of norms regarding dispensation of marriages results in the dispensation of court rulings.

**Keywords:** *Marriage; Age; Dispensation*

### **Introduction**

Marriage is a sacred act between a man and a woman, which is an engagement between two parties in fulfilling the commands and recommendations of God Almighty, so that family and household life can occur. In Indonesia, marriage law is regulated in Law Number 1 of 1974 concerning Marriage (hereinafter referred to as Law No. 1/1974), which is a national marriage law as a unification of various marriage regulations that had been in effect before the establishment of the Indonesian state.

The national marriage law regulates the principles, principles, terms and procedures as well as the prohibition of marriage. One of the principles and principles is that marriage is an agreement, and must be carried out legally according to religious teachings and recorded in a public register. While one of the conditions is the age limit for those who want to get married.

The minimum age to be able to get married is 19 years for men and 16 (sixteen) years for women. Marriages carried out at this minimum age must obtain the consent of both parents. In certain circumstances, the minimum age limit may be deviated by granting a dispensation from the court or an appointed official.

After Law no. 1/1974 is valid for approximately 43 years, so in 2017, 3 (three) mothers who felt that their constitutional rights were disturbed by the provisions of the minimum age limit regulated in Article 7 paragraph (1) of Law no. 1/1974, filed a judicial review application to the Constitutional Court (MK). The reason for the mothers submitting a material test is because the three of them were married off by their respective parents when they were not yet at the minimum age, which was not yet 16 years old.

With regard to the application for judicial review, then on the application for judicial review, the Constitutional Court issued a decision Number 22/PUU-XV/2017, whose decision was essentially as follows:

1. Granting the petition of the Petitioners in part;
2. To state that Article 7 paragraph (1) as long as the phrase "age 16 (sixteen) years" of Law Number 1 of 1974 concerning Marriage is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force;
3. To declare that the provisions of Article 7 paragraph (1) of Law Number 1 of 1974 concerning Marriage are still valid until changes are made in accordance with the grace period as determined in this decision;
4. Order the legislators for a maximum period of 3 (three) years to make changes to Law Number 1 of 1974 concerning Marriage, particularly with regard to the minimum age limit for marriage for women.

As an implementation of the order of the Constitutional Court's decision, then Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage (hereinafter referred to as Law No. 16/1974) was promulgated.

The content of Law no. 16/2019, in addition to regulating changes to the minimum age limit which is in synchronization with child protection law and human rights, it also changes the arrangements and requirements for marriage dispensation as an effort to prevent child marriage as regulated in Article 7 paragraph (2) of Law No. 16/2019 which states:

"In the event that there is a deviation from the age provisions as referred to in paragraph (1), the parents of the man and/or women parents may request a dispensation from the Court on the grounds that it is very urgent, accompanied by sufficient supporting evidence".

Based on the above provisions, it implies that the minimum age limit for marriage becomes invalid and marriage can be carried out under certain conditions, furthermore in the Elucidation of Article 7 paragraph (2) it is stated:

"What is meant by "deviation" is that it can only be done through the submission of an application for dispensation by the parents of one or both parties of the prospective bride to the Religious Court for those who are Muslim and the District Court for the other, if the men and women are of the same age as under 19 (nineteen) years.

What is meant by "very urgent reason" is a situation where there is no other choice and it is very necessary to have a marriage take place.

What is meant by "sufficient supporting evidence" is a certificate proving that the age of the bride is still under the law **and** a certificate from a health worker that supports the parents' statement that the marriage is very urgent to be carried out".

The position of explanation in laws and regulations is an official (authentic) interpretation of the legislators who can help to find out the purpose or background of the formation of laws and regulations (Soerapto, 2007).

Based on the explanation of Article 7 paragraph (2) above which is an official (authentic) interpretation, it contains the following elements:

- a) deviations in the age of marriage may occur with a court dispensation;
- b) very urgent reasons that make the marriage forced to be carried out;
- c) there is sufficient evidence, which includes a certificate of underage **and** certificate from a health worker. In this element there are 2 (two) cumulative conditions. This means that both must be fulfilled, namely the existence of a certificate of not being 19 years old and a certificate from a health worker that supports the very urgent reason.

The author finds a legal issue that the provisions of Article 7 paragraph (2) of Law no. 16/2019 and its explanation are **vague** and **abstract** norms, so that in practice the provisions of Article 7 paragraph (2) of Law no. 16/2019 does not have an impact on the community, because there are still many people who apply for a marriage dispensation for children who have not reached the minimum age for marriage. Likewise, the court that examines the application for a marriage dispensation is still a difference (disparity) in its legal considerations in granting or rejecting the application for a marriage dispensation.

The aim to be achieved through this research is to analyze and find criteria for limiting marriage dispensation which contains ambiguity that can lead to legal uncertainty and juridical implications of the ambiguity of norms related to the regulation of marriage dispensation.

The research method used in this research is normative juridical law research (Marzuki, 2019), which is also called doctrinal legal research. The approach used was statue approach which is done by analyze the law and regulations related to legal issues being handled, and conceptual approach from the expert's point of view and doctrine -doctrines that develop in the science of law, in order to find ideas that give rise to relevant legal understanding, concepts and principles, as a basis in building a legal argumentation as a prescription in solving legal issues faced, as well as the case approach taken by examining cases related to legal issues and understanding the *ratio decidendi* or the reason for the judge in giving a decision (Marzuki, 2019:55).

## **Discussion**

### **A. Criteria for Limiting Marriage Dispensation According to Law Number 16 Year 2019**

#### **1. Age Criteria for Continuing Marriage**

Marriage Law in Indonesia which is regulated in Law no. 1/1974 as amended by Law no. 16/2019, which divides 3 (three) age criteria, namely: a) Ideal Age; b) Minimum Age; and c) Under the Minimum Age.

##### **a. Ideal Age**

The ideal age setting in the Marriage Law is identical to the provisions in the Civil Code, only the variables are changed. In Article 42 of the Civil Code, the ideal age is 30 (thirty) years, while in the Marriage Law the ideal age is 21 (twenty one) years. In other words, for children who are at the ideal age, permission from both parents is no longer needed.

Marriage is highly recommended and very permissible at this ideal age. With the consideration that his body and soul have matured to realize the purpose of a good marriage and get healthy and quality offspring.

##### **b. Minimum Age**

The provisions of the Marriage Law regarding the minimum age limit for marriage are also identical to the provisions in the Civil Code, where the variables are replaced. If according to Article 29 of the Civil Code, the minimum age limit for marriage is even 18 (eighteen) years for men, and even 15 (fifteen) for women. This provision is identical to Article 7 paragraph (1) of the Marriage Law, which changes the number to 19 (nineteen) years for men and 16 (sixteen) years for women.

Furthermore, the determination of the minimum age limit is evaluated, because the age of 16 (sixteen) years is the age at which children should still attend education in accordance with the ideals of the state as stated in Law Number 20 of 2003 concerning National Education, which requires 12 years of compulsory education. If you look at the age of first education, the age of children entering elementary school is at the age of 7 years, then with the 12 year compulsory education, it means that the age of the child to get the right to education until completion is 19 years.

Thus, it is clear that there has been a conflict (conflict of norms) between the minimum age limit for marriage according to 7 paragraph (1) of the Marriage Law and the definition of a child according to Article 1 paragraph (1) of Law no. 23 of 2002 as amended by Law 35 of 2014 concerning Child Protection (hereinafter referred to as the Child Protection Law), also with Article 1 paragraph (3) Law Number 39 of 1999 concerning Human Rights (hereinafter referred to as the Human Rights Law), which is due to the difference in the minimum age limit for prospective brides and grooms. Against the conflict of norms, then an evaluation of the legal product is carried out (in this case the provision regarding the minimum age limit for marriage according to Article 7 paragraph (1) of Law 1/1974). Evaluation of legal products can be done in two ways, namely through *legislative review* and *judicial review*.

*Legislative review* is a means of evaluating legal products carried out by legislators, which is carried out by looking at developments that occur in the community, and if a legal product is deemed no longer meeting the needs in a certain field, the legislators will revise/change the law. -the law.

Another way of evaluating legal products is through a *judicial review* or referred to as *toetsingsrecht van de rechter*. Judicial review evaluates the practice of a law through a testing mechanism with the 1945 Constitution approach at the Constitutional Court (MK). In this test, it will be seen whether a legal product has guaranteed constitutional rights to citizens, if not, then the Constitutional Court can cancel/improve norms by adding phrases/editing norms, or what in practice is referred to as conditional constitutional decisions. This conditional constitutional decision is the result of efforts to reform the law in the context of legal development in Indonesia.

Evaluation of the provisions on the minimum age limit for marriage is carried out through the two methods above, namely through judicial review efforts through the Constitutional Court's decision, followed by legislative review of changes to the law, so that Law no. 16/2019.

Thus, for prospective brides who are under 21 (twenty one) to even 19 (nineteen) years old, it is **allowed/not prohibited** to marry as long as they get permission from both parents as stipulated in Article 6 paragraph (2) of Law no. 1/1974.

### ***c. Under Minimum Age***

As stipulated in Article 29 of the Civil Code, for those who are under the minimum age for marriage, which is not yet 18 (eighteen) years for men and 15 (fifteen) years for women, it is the age that is **prohibited** to do marriage. However, with important reasons, **the prohibition can be removed with a dispensation** granted by the president (executive element).

The above provisions are identical to the provisions of Article 7 paragraph (2) of Law no. 16/2019. For those who are still below the minimum age limit, it is forbidden to get married. However, this provision can be deviated from what was originally prohibited, making the prohibition invalid/abolished if the parents of the male and/or female parties request dispensation from the court (judicial element) on the grounds of being very urgent with sufficient evidence.

## ***2. Parental Permission in Marriage***

In the event that the age of the prospective bride and groom is not even 21 (twenty one) years old to 19 (nineteen) years old, in accordance with the provisions of Article 6 paragraph (2) jo. Article 7 paragraph (1) of the Marriage Law, for them it is allowed/not prohibited to carry out marriages as long as they get permission from both parents. As the concept/definition of permits described earlier, a permit is an approval/approval of things that are indeed allowed/not prohibited. Permits are needed as restrictions and controls on certain behaviors/actions carried out by the community.

The legal arrangement of marriage related to the age of marriage, at a certain age it is allowed to carry out marriage as long as it has permission from both parents. If at a certain age, they continue to carry out the marriage without the permission of both parents, it may result in the law of the parents being able to demand the annulment of the marriage.

Thus, in the age category below 21 (twenty one) years to the minimum age limit of even 19 (nineteen) years, the state/government feels the need to regulate control over those who want to enter into marriage by involving parents as the party giving the permit. Because in this age category it is considered not the ideal age to get married, but it is allowed/not prohibited.

### **3. Criteria for Determining the Very Urgent Reason for Marriage Dispensation**

#### **a. The Meaning of the Reason is Very Urgent**

Before Article 7 paragraph (2) was amended, the provisions of those articles and paragraphs in Law no. 1/1974, still provides an opportunity to legitimize the practice of child marriage through the provision of dispensation without clear boundaries and there is no guide for judges to determine whether the dispensation application can be granted or rejected, so that the dispensation arrangement needs to be changed by making it clear that it is not used as an excuse by the government. the parents of both parties to marry off children who are still under the minimum age.

According to the provisions of Article 19 paragraph (2) and paragraph (3) of Law Number 12 of 2011 concerning the Establishment of Legislation (hereinafter referred to as Law P3), the material of the Draft Law (RUU) must be reviewed and harmonized with other laws and regulations. which is included in the academic text.

There are 2 (two) versions of the academic manuscript, namely:

- 1) an academic manuscript compiled by the Indonesian Women's Coalition for Justice and Democracy, Center for Legal Studies, Gender, Society, Faculty of Law, Gajah Mada University, ICJR, Kalyanamitra and Ecpat Indonesia published in 2019, and
- 2) an academic manuscript compiled by the National Legal Development Agency (BPHN), the Ministry of Law and Human Rights which was also published in 2019.

According to the version of the Coalition of Women's academic text, the Faculty of Law UGM et al., it is stated:

“...The opportunity for violation of women's rights is wide open **because the provisions regarding dispensation are very lax and there is no guide for judges** to determine when the dispensation application can be granted or not. Therefore, the responsibility to protect women, apart from increasing the age of marriage to be equal to the minimum age for men, is **to tighten the regulation on dispensation**”. (Koalisi Perempuan Indonesia Untuk Keadilan dan Demokrasi, 2019)

Based on this, the state has an obligation to actively protect and ensure the fulfillment of human rights and freedoms (Smith, 2008).

Basically, child protection aims to ensure the fulfillment of children's rights and child welfare. Whatever actions are taken by parents or the parties involved must pay attention to these objectives and be based on the best interests of the child. The parties involved with the marriage dispensation must pay serious attention to the rights of the child and also the welfare of the child, both physically and psychologically. In this case what is meant by children's rights are various basic needs that should be obtained by children to ensure survival, growth and protection from all forms of mistreatment, exploitation and neglect of children, including civil, economic, social and cultural rights.

The occurrence of marriages below the minimum age limit is caused by various factors, such as economy (poverty), education, culture, religious interpretation, including the negative impact of the development of technology. In society, which due to economic difficulties, then marrying off their children who are still below the minimum age limit will reduce the economic burden and can even help the family's economic burden without thinking about the positive or negative impact of the marriage of

their children who are still below the minimum age limit. This condition ultimately raises the aspect of abuse of parental "power" over children by viewing children as an economic family asset and not a mandate from God.

Based on the recapitulation of applications for dispensation for marriage in 2016 throughout Indonesia, the main reasons for applying for dispensation for marriage are: a) because pregnancy has occurred; and b) to prevent adultery (Koalisi Perempuan Indonesia Untuk Keadilan dan Demokrasi, 2019:28).

Based on the two main reasons for the request for a friend's dispensation, the direction of setting restrictions on age deviation through the provision of dispensation, apart from tightening the dispensation requirements, also needs to be regulated for factors that are urgent for marriage, namely the occurrence of an unavoidable condition (pregnancy) with supported by written evidence as a requirement. Whereas for reasons of preventing adultery, it is something that can still be avoided and it is the obligation and responsibility of parents to provide education to children who are still their responsibility, so this reason cannot be the basis for granting dispensation, as an effort to prevent child marriage.

### ***b. Formulation of Marriage Dispensation Norms with Very Urgent Reasons***

The marriage dispensation arrangement which was originally regulated in Article 7 paragraph (2) of Law no. 1/1974 which still opens up opportunities for child marriage through the provision of dispensation, in the end an evaluation was carried out through a legislative review (change of law) with the enactment of Law no. 16/2019, the formulation of Article 7 paragraph (2) becomes:

"In the event that there is a deviation from the age provisions as referred to in paragraph (1), the parents of the male and/or female parents may request a dispensation from the Court on the grounds that it is **very urgent**, accompanied by sufficient **supporting evidence**".

As for the Elucidation of Article 7 paragraph (2) it is stated:

“What is meant by **deviation** is that it can only be done through submitting an application for dispensation by the parents of one or both parties of the prospective bride and groom to the Religious Courts for those who are Muslim and the District Courts for others, if the male and female parties are under 19 years old (nineteen years).

What is meant by **very urgent reason** is a situation where there is no other choice and it is very forced to have a marriage take place.

What is meant by **sufficient supporting evidence** is a certificate proving that the age of the bride and groom is still under the law **and** a certificate from a health worker supporting the parents' statement that the marriage is very urgent to be carried out.

Then to ensure the implementation of this provision, the Government conducts socialization and guidance to the community regarding the prevention of early marriage, the dangers of free sex and unregistered marriages for the sake of realizing a superior generation of the nation.

Based on the formulation of the norms above, it appears that the marriage dispensation contains the following elements:

- 1) Only given by the court (judicial), while other official elements are removed
- 2) With very urgent reasons

According to the Elucidation of Article 7 paragraph (2) of the second paragraph, what is meant by the very urgent reason is that there is no other choice and it is imperative that a marriage takes place. However, it is not clearly stated that the reason is very urgent, for example being pregnant.

- 3) Accompanied by sufficient supporting evidence

According to the Elucidation of Article 7 paragraph (2) third paragraph, what is meant by sufficient supporting evidence is:

- a) A statement that the age of the bride and groom is still under the provisions of the law (not yet 19 years old); **and**
- b) A certificate from a health worker that supports the parent's statement.

The phrase of **sufficient supporting evidence** in the form of a statement (written evidence) can be interpreted that the existence of such supporting evidence is one of the requirements or procedures which are a formal requirement in applying for dispensation.

### ***c. Analysis of Marriage Dispensation Arrangements Regarding the Very Urgent Reason***

Based on the provisions of the marriage dispensation according to Article 7 paragraph (2) of Law no. 16/2019 and the explanation above, the elements contained in it contain general and abstract norms that cause multiple interpretations and ambiguity of norms and result in legal uncertainty in society, because people do not clearly know what is meant and desired from Article 7 paragraph (2) and its explanation.

The phrase **very urgent reason is accompanied by sufficient supporting evidence**, which is then described in the explanation in the second paragraph which states the notion of "very urgent" reason, namely a situation where there is no other choice and a marriage is absolutely necessary. However, there is no further explanation regarding the phrase "there is no other choice and is very forced", for example because there has been a pregnancy, so that it still causes multiple interpretations and ambiguity of norms.

Similarly, the phrase words **accompanied by sufficient supporting evidence**. In the explanation of the third paragraph, it is stated that sufficient supporting evidence is:

1. A certificate proving the age of the prospective bride and groom;
2. A certificate from a medical professional that supports the parent's statement.

The certificate from the medical personnel in question is not a certificate from the medical personnel explaining the prospective bride is healthy or explaining otherwise. However, a certificate stating that the bride-to-be is pregnant. The makers of Law 16/2019 did not explain further about the certificate from the medical personnel, although implicitly, the certificate from the medical personnel in question was related to the condition of the prospective bride who was pregnant. The (pregnant) certificate is required to explain the very urgent reasons as the reason for applying for dispensation.



Normatively a legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. It is clear in the sense that it does not cause doubt (multi-interpretation) and logically does not cause clashes and blurring of norms in the norm system with one another. The obscurity of norms resulting from the uncertainty of the rule of law, can occur multiple interpretations of something in a rule.

## ***B. Juridical Implications of Normalizing Article 7 paragraph (2) of Law Number 16 of 2019***

### ***1. Form of Marriage Dispensation***

Article 7 paragraph (2) of Law 16/2019 has explicitly stated that deviations from the minimum age limit for marriage can only be granted by the court. Furthermore, in the Elucidation of Article 7 paragraph (3), it is explained that the granting of dispensation is given by the Religious Courts for those who are Muslim and the District Courts for those of other religions. Thus, the dispensation for marriage can only be in the form of a court order.

To be able to obtain a marriage dispensation from the court, the applicant submits an application (*volunteer*) that is an application for no unilateral dispute (*ex parte*) (Harahap, 2005). With respect to the volunteer's application, the judge who examines and hears it will issue a determination which is usually called a declaratory decision, namely the decision that determines.

In principle, the voluntary application claim aims to resolve the applicant's own interests which are protected by law, so that the facts contained in the *posita* section of the application and the wishes of the applicant in the application written in the *petitum* section of the applicant's application must refer to the facts and the settlement of the applicant's interests in a comprehensive manner. unilaterally supported by applicable legal provisions that support that the application is worthy of being ratified and accepted by the competent court.

In the application for determination, only one party is involved in the application, this party is called the *ex-parte* applicant, while those who are present and appear in the trial examination are only the applicant or his proxies. The *ex-parte* characteristics as referred to are:

- (i) Only hear the statements of the applicant or his proxies in connection with the application;
- (ii) Examine the evidence of letters or witnesses submitted by the applicant; and
- (iii) There is no stage of replication and conclusion as are the stages carried out in civil procedural law in a lawsuit or lawsuit. *Contentious* (party lawsuits with a plaintiff and a defendant).

The examination of the application for a court order submitted by the applicant must be based on evidence of which the full burden of mandatory evidence is borne by the applicant for consideration by the judge concerned in examining the application, in which the evidence as intended must be in accordance with the provisions stipulated in Article 1866 of the Criminal Code. Civil Code and Article 164 HIR (Article 284 RBG). The written evidence in the application for dispensation for marriage as explained in Article 7 paragraph (2) third paragraph of Law 16/2019 which is a special law (*lex specialist*) includes a certificate of age and a certificate from a health worker.

After the judge examines the application along with the evidence that has been submitted by the applicant, and the reasons for the applicant in submitting the application have met the basic provisions of the applicable law, then by containing legal considerations and a dictum, the completion of the

application can be stated in the form of a decision issued / is determined by the court which is a product issued by the judge in solving the problems posed to him. so that by itself the stipulation is an authentic deed ((Setiawan, 1992); (Subekti, 1977)), p. 126.) as referred to in Article 1868 of the Civil Code.

In order to provide guidelines for adjudicating applications for dispensation for marriage, on November 20, 2019, the Supreme Court issued Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Dispensation for Marriage (hereinafter referred to as Perma 5/2019). In the section considering letter c of Perma 5/2019 it is stated: "that marriage is only permitted for those who have met the age requirements, but in certain circumstances the Court may grant a marriage dispensation in accordance with the laws and regulations".

The position of Perma 5/2019 is basically a form of regulation that contains provisions of a procedural (formal) nature which are part of the Supreme Court's supervisory function of the judicial environment under the Supreme Court, with the aim of creating consistency of decisions. According to Article 8 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislative Regulations (hereinafter referred to as Law P3) it is stated: "Types of Legislation... includes regulations stipulated by... Supreme Court...".

In accordance with the hierarchy of laws and regulations, namely the hierarchy of each type of legislation based on the principle that lower laws and regulations must not conflict with higher laws and regulations. Yuliandri argues that other types of regulations (in this context regulations issued by the Supreme Court must also comply with the principle of hierarchy (Yuliandri, 2010).

## ***2. Juridical Implications for Determining the Court to Grant the Application for Marriage Dispensation***

The decision of the court that granted the application for dispensation for marriage can be seen in the Decree of the Gresik Religious Court Number 0124/Pdt.P/2020/PA.Gs. (Case I) and the Determination of the Purwodadi Religious Court Number 576/Pdt.P/2020/PA.Pwd. (Case II). In the two decisions, there are differences in the ratio decidendi of the judge in examining and giving a decision.

### ***a. Determination of PA Gresik Number 0124/Pdt.P/2020/PA.Gs. (Case I)***

#### ***1) Reason for the Application (Posita) and Contents of the Application (Petitum)***

Based on the application letter dated March 5, 2020, Petitioners I and II are a husband and wife couple, who have a biological child named Prospective Wife, age 18, and want to marry off their biological child with a Prospective Husband, age 22.

Whereas the applicants filed for dispensation for marriage because the prospective wife was not yet 19 (nineteen) years old. The reason for the petitioners to apply for a marriage dispensation is because the prospective wife and prospective husband have been dating for quite a long time and getting along well even when the application is submitted the prospective wife is pregnant.

Based on these reasons, the petitioners submitted an application to be granted a marriage dispensation for the children of the petitioners.

## 2) *Ratio Decidendi and Amar Determination*

The judge who examined and heard the application for dispensation for marriage gave legal considerations (*ratio decidendi*) as follows:

- a. The judge has given advice to the applicants and prospective brides. However, the judge's advice did not work because there had been an emergency.
- b. The reason for the application for dispensation is because the prospective bride is not yet 19 (nineteen) years old.
- c. Between the prospective bride and groom there are no obstacles to marriage.
- d. 2 (two) witnesses who are presented under oath have given statements based on their own knowledge and are relevant to the arguments proven by the petitioners, therefore the testimony of these witnesses fulfills the material requirements and has the power of proof and can be accepted as evidence.
- e. The two prospective brides and grooms have stated that they are ready to become husband and wife in fostering a household. Besides that, the prospective bride and groom are pregnant, which if not immediately married, there will be more harm than benefits, so it is quite justified according to law. Therefore, petition number 2 deserves to be granted.
- f. To strengthen the reasons put forward, the applicants in their application letter attach evidence in the form of a certificate including a certificate from a health worker explaining the pregnancy. And also submitted evidence of 2 (two) witnesses.

Based on the reasons and evidence presented, the judge granted his dispensation request.

## 3) *Decision Analysis*

In this dispensation application, the author provides the following analysis:

### a) *Analysis of Dispensation Requirements and Reasons*

Applicant	Candidate Age		Supporting Evidence		Reason
	Woman	Men	Age Description	Medical Description	
Both Parents of Prospective Bride	18 yrs	22 yrs	There is an evidence	There is an evidence	Pregnant

Based on the Table above, it appears that the reasons and requirements for the dispensation application are in accordance with the intent of the legislators, namely the main reason is because a pregnancy has occurred as evidenced by a certificate from a medical professional.

b) *Analysis of Judge's Decidendi Ratio*

The judge who examines and hears has examined the requirements of the application and provided the judge's ratio decidendi in accordance with the meaning of the very urgent reason as referred to in Article 7 paragraph (2) of Law no. 16/2019, which includes:

- The application is submitted by both parents of one of the candidates, namely from the parents of the female candidate.
- The age of one of the prospective brides, namely the female candidate, is not yet 19 (nine) years old as evidenced by a certificate.
- An unavoidable condition has occurred, namely pregnancy, as evidenced by a certificate from a medical officer regarding the pregnancy

**b. Determination of PA Purwodadi No. 576/Pdt.P/2020/PA.Pwd. (Case II)**

**1) Reason for the Application (Posita) and Contents of the Application (Petitum)**

Based on the application letter dated September 08, 2020, Petitioners I and II are a husband and wife couple, based on those who have a biological child named Prospective Wife, aged 18 years and six months, and want to marry off their biological child with a Prospective Husband, age 25 years.

That the applicants apply for a marriage dispensation because the prospective wife is not yet 19 (nineteen) years old. The reason for the petitioners applying for a marriage dispensation is because the Prospective Wife and Prospective Husbands have been dating for a long time and get along well, so that the applicants intend to marry off to prevent adultery.

Based on these reasons, the petitioners requested that a dispensation be granted for marriage, the petitioners' children were granted.

**2) Decidendi Ratio and Determination Amar**

The judge who examined and heard the application for dispensation for marriage gave legal considerations (*ratio decidendi*) as follows:

- a. The judge has given advice to the applicants and prospective brides. However, the judge's advice did not work because the petitioners still wanted to marry off their children.
- b. The reason for the application for dispensation is because the prospective bride is not yet 19 (nineteen) years old.
- c. Between the prospective bride and groom there is no mahram relationship and there are no obstacles to marriage.
- d. Between the prospective wife and the prospective husband, it is feared that they will continue to commit acts that violate religious norms and moral norms.
- e. The judge agrees with the rule of law/rules *fiqhiyah* as contained in the Kitab Al Bajuri page 19 which was later taken over as the opinion of the Judge, the argument reads as follows:

## درأ المفاسد مقدم على جلب المصالح

Meaning:

"Rejecting harm must take precedence over bringing benefit."

Based on these considerations, the judge granted the application for dispensation for marriage.

### 3) Determination Analysis

#### a) Analysis of Dispensation Requirements and Reasons

Applicant	Candidate Age		Supporting Evidence		Reason
	Woman	Men	Age Description	Medical Description	
Both Parents of Prospective Bride	18 yrs 6 months	25 yrs	There is an evidence	Nothing	Prevent adultery

Based on the Table above, it appears that the reasons and requirements for the dispensation application are not in accordance with the intent of the legislators, namely the main reason is to prevent adultery and pregnancy has not occurred.

#### b) Analysis of Judge's Decidendi Ratio

The judge who examines and hears the application seems to have ruled out the Elucidation of Article 7 paragraph (2) third paragraph regarding the application requirements, one of which is the existence of a certificate from medical personnel. Besides that, the judge's ratio decidendi quoted from Kitab Al Bajuri page 19, which means: "Rejecting damage must take precedence over bringing benefit" and putting aside very urgent reasons that cannot be avoided.

This ratio decidendi is not in accordance with the provisions of Article 7 paragraph (2) of Law no. 16/2019 as a special law (lex specialist) which regulates marriage dispensation, so it can be considered as a form of legitimacy for marriage under the minimum age limit.

Prevention of adultery should be the obligation and responsibility of parents to overcome these negative things and not the obligation of the court. Besides that, considering the age of the prospective bride, which is only less than 6 (six) months away, it becomes even 19 (nineteen) years, so that the judge can give advice so that the marriage takes place if the prospective woman is 19 years old, which is only a few months away.

### **3. Juridical Implications of Court Decision Rejecting Application for Marriage Dispensation**

The court's decision to reject the application for a marriage dispensation can be seen in the Pangkajene Religious Court Decision Number 0228/Pdt.P/2020/PA.Pkj. (Case III) whose description is as follows:

#### **1) Reason for the Application (Posita) and Contents of the Application (Petitum)**

Petitioner I and Petitioner II are a husband and wife couple, based on the application letter dated September 21, 2020, filed a marriage dispensation application, arguing that the applicants wanted to marry off their biological child (Prospective Wife) who was born on April 27, 2007 (13 years) with a prospective husband, age 21 years.

The petitioners argued that the marriage was on the grounds that the prospective wife and prospective husband had been in a dating relationship for approximately 2 years and had often been out together and had had marital relations so that the Petitioners felt ashamed and worried if they were not married immediately. The prospective wife and prospective husband have been in a relationship for about 2 years and have even had husband and wife relationships even though they are not pregnant.

To strengthen the reasons/arguments submitted, the applicants in their application letter attach evidence in the form of KK, Birth Certificate and MI (SD) diploma on behalf of the Prospective Wife. The petitioners also presented evidence of 2 (two) witnesses.

Based on these reasons, the petitioners requested that a dispensation be granted for marriage, the petitioners' children were granted.

#### **2) Decidendi Ratio and Determination Amar**

The judge who examined and heard the application for dispensation for marriage gave legal considerations (ratio decidendi) as follows:

- a. The Judge has advised the Petitioner, the prospective bride, the prospective groom and the parents of the prospective bride to postpone the marriage of the Petitioner's child until they meet the minimum age requirements for marriage.
- b. Based on changes in the age limit for women to marry as outlined in Article 7 paragraph (1) of Law Number 16 of 2019 concerning Marriage that "Marriage is only permitted if a man and woman have reached the age of 19 (nineteen) years", it must be interpreted that the Marriage Law does not require the implementation of underage marriages because the principles, purposes and objectives of marriage will not be realized;
- c. The interpretation also departs from the reality in society that underage marriages often lead to divorce, which in general can be concluded because the husband or wife of a young couple who are underage are not physically, mentally and mentally ready to carry out their responsibilities in life. household, facing and solving very complex household problems. And early marriage also has another impact that cannot be underestimated, namely the increasing number of maternal deaths during pregnancy or childbirth due to a young age;

- d. Consistent with the provisions of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Article 26 paragraph (1) number (3) of Law Number 23 of 2002 concerning Child Protection which has been amended by Law -Law Number 35 of 2014 aquo also stipulates that one of the obligations of parents to their children is to prevent marriage at the age of children;
- e. There is a fact that the Petitioner's child named: Prospective Wife, has only reached the age of 13 years and 4 months, in essence it cannot be married considering the age of the Prospective Wife has not yet reached 19 years as determined by Article 7 Paragraph (1) of Law Number 1 of 1974 as referred to in Article 7 paragraph (1) of Law Number 1 of 1974 has been amended by Law Number 16 of 2019 concerning Marriage, jo. Article 1 Paragraph (1) Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, despite the fact that the Petitioner's child has had such a close relationship with the prospective groom since two years ago and the Petitioner's child is ready to be a responsible wife or housewife, however, the existence of the two reasons as revealed in the trial was not sufficient to deviate from the provisions requiring marriage to be permitted only if the prospective groom and bride had reached the age of 19 (nineteen) years considering that the two reasons were not "urgent reasons";
- g. What is meant by "urgent reasons" by which a child who is not yet 19 (nineteen) years old can be given dispensation to marry a candidate of his choice according to the Elucidation of Article 7 Paragraph (2) of Law Number 1 of 1974 as amended by Law Number 16 of 2009 concerning Marriage, is a situation where there is no other choice and it is very necessary to have a marriage take place, while the facts revealed at the trial show the opposite, where the Petitioners' children and their prospective husbands have been in a courtship relationship for approximately 2 years. years old and the Petitioner's child is only 13 (thirteen) years old. Apart from that, the Petitioner's child is also not pregnant;
- h. legal norms contained in Article 26 Paragraph (1) number (3) Law Number 23 of 2002 as amended by Law Number 35 of 2014 and the second amendment to Law Number 17 of 2016 concerning Child Protection which states that Parents are obliged and responsible to prevent marriage at the age of children, it must be understood within the framework of maintaining and protecting the best interests of the child where according to 2014 United Nations Children's Fund (UNICEF) data, women who give birth at the age of 15-19 years are at risk experience death two times greater than women who give birth at the age of over 20 years, even according to dr. Fransisca Handy, Sp.A. in (Summary of Research Results of Child Marriage in Indonesia), marriage of children with early pregnancy (under 18 years of age) is very high risk for the mother, because the mother is still in her growth period which still needs nutrition while the fetus she contains also needs nutrition so that there is competition and struggle for nutrition and nutrition between the mother and promises, with risks, among others, namely; a). potentially giving birth prematurely; b). babies born with disabilities; c). babies born with low weight / less; d). the mother is at risk of anemia (lack of blood); e). the mother is prone to bleeding during childbirth; f). the mother is prone to eclampsia (seizures in pregnant women); g). the increased incidence of depression in the mother due to unstable psychological development; h). increase the Maternal Mortality Rate (MMR); i). Epidemiological studies of cervical cancer show an increased risk of more than 10 times if the number of sex partners is 6 times or more or if the first sex is under the age of 15 years; j). the younger a girl has her first child, the more susceptible she is to cervical cancer; k). risk of contracting sexually transmitted diseases; and l). reproductive organs are not fully developed;
- i. Although underage marriage is traditionally understood as a legal and sacred form of marriage that aims to avoid adultery, is afraid to tarnish the family's good name and does not want to burden parents financially, all of these goals are essentially to realize the benefit in life. the Petitioner's children, but considering the dangers and risks of marriage for children under the age of 19 years, it is much greater

as stated in the 2014 UNICEF data and the research results of dr. Fransisca Handy, Sp.A. in (Summary of Research Results of Child Marriage in Indonesia) compared to the benefits to be realized, then in this connection Islamic law provides a way out by avoiding the greater danger, namely not marrying children who are still under the age of 19 years compared to realizing benefits in the form of worrying about committing adultery, fear of tarnishing the good name of the family and not wanting to burden parents in financial terms which is actually the parent's obligation to overcome these negative things. Such a framework of thinking is also in line with the following rules of Islamic law:

### درأ المفاصد مقدم على جلب المصالح

"Avoiding mafsadah (harm) takes precedence over bringing maslahah (benefit)." (Jalaluddin al-Suyuti in the book *al-Ashbah wa al-Nazha'ir fi Qawa'id wa Furu' Fiqh al-Syafi'iyah*, Riyadh: Maktabah Nizar Mustafa al-Baz, 1997, juz. 1, p. 142);

Based on the considerations above, the petition of the Petitioners to be granted a marriage dispensation was rejected.

### 3) Determination Analysis

#### a) Analysis of Dispensation Requirements and Reasons

Applicant	Candidate Age		Supporting Evidence		Reason
	Woman	Men	Age Description	Medical Description	
Both Parents of Prospective Bride	13 yrs	21 yrs	There is evidence	Nothing	Prevent adultery

#### b) Analysis of Judge's Decidendi Ratio

The judge who examines and hears has examined the requirements of the application and provided the judge's ratio decidendi in accordance with the meaning of the very urgent reason as referred to in Article 7 paragraph (2) of Law no. 16/2019, which includes:

- The application is submitted by both parents of one of the candidates, namely from the parents of the female candidate.
- The age of one of the prospective brides, namely the prospective woman is still not 19 (nine) years old and is still classified as a child, as evidenced by an age certificate (birth certificate and diploma).
- No pregnancy.

So it is appropriate that the dispensation application was rejected, as an effort to prevent child marriage.



#### **4. Juridical Implications for Legal Subjects (Prospective Husband and Wife) Whose Applications are Rejected**

The enactment of the marriage law as regulated in Law no. 1/1974 as amended by Law no. 16/2019, which is a national law, namely the law formed by the Indonesian nation and applies to the entire Indonesian nation, as a unification of marriage law in Indonesia. The formation of marriage law is sourced and absorbed from various sources, namely western civil law, religious law, customary law and modern legal values by taking into account the interests of future generations.

In the national marriage law, it is expressly regulated regarding the age category that can hold a marriage which is divided into 3 (three) categories, namely:

- a. The ideal age is the age that is highly recommended for marriage.
- b. The minimum age is the age that, although allowed, requires control so that permission from other parties is needed.
- c. The prohibited age is the age below the minimum age. This prohibition is not absolutely enforced, meaning that it is still possible to deviate from it in order to provide legal protection, for example for the benefit of the child because pregnancy has already occurred, then in such conditions what was originally prohibited becomes invalid/abolished, so the marriage can be carried out.

Setting the age of marriage in national marriage law, which is absorbed from various legal sources, including religious law, customary law and modern legal values for the benefit of future generations. However, the limitation of the age of marriage in the national marriage law, it seems that there is still a conflict with the age setting in Islamic law and customary law.

It is undeniable that the majority of Indonesian people are Muslim, so that aspects of people's lives who are predominantly Muslim are guided by the teachings of Islam. As mentioned earlier, the relationship between humans and other humans (*muamalat*) is relative, meaning that it can be changed based on existing developments (Afdol, 2003), so that only the principles are absorbed into national law (Mardani, 2009). Because national law must be able to protect and protect the entire nation and state in all aspects of their lives (Harahap, 1999). Likewise, regarding the existence of customary law, although it is recognized and respected in the constitution as Article 18B paragraph (2) of the 1945 Constitution. However, there are several requirements for the recognition and respect for the customary law.

There are 4 (four) constitutional requirements, namely: a) as long as they exist; b) in accordance with the development of the times and civilization; c) in accordance with the principle of the unitary state of the republic of Indonesia, and d) regulated in law (Taqwaddin, 2010). Thus, if concrete matters have been regulated in the national marriage law, then according to Article 66 of Law no. 1/1974, it was stated that other regulations regarding marriage were null and void, including regulations from Islamic law and customary law.

The juridical implication of the dispensation application which is rejected by the court, therefore for them (prospective husband and wife) applies a prohibition to enter into marriage according to the national marriage law. However, as the concept of marriage is also absorbed from religious law, which states that marriage is legal if it is carried out according to religious law and is recorded in the general (state) register. Based on this concept, the role of the state/government in marriage is to recognize and provide legal protection, if the marriage is legal according to religion and recorded (by the state). In the case of marriage in the age category that is **prohibited** in the national marriage law, of course the state cannot be present to recognize (record) and provide legal protection for the marriage.

Because there are differences in the concept of age at which marriages can be carried out between national marriage law and Islamic law and customary law, many marriages are carried out in the community which are only carried out according to legal requirements from the aspect of religious law or customary law.

Against this phenomenon, the national marriage law does not provide sanctions for violations of the minimum age limit, because the state/government is conceptualized only to record marriages.

Regarding the child marriage, the case that has been widely discussed is the case of Syech Puji who married Ulfa (12 years old) in 2009 (<https://www.merdeka.com/Events/Story-syekh-Puji-dijebloskan-ke-penjara-usai-nikahi-bocah-12-tahun.html>). The marriage is only legal according to Islam. In that case, the state could only impose criminal sanctions on Syech Puji because it was deemed to have violated Article 81 of Law no. 23 of 2002 concerning the Protection of Children with a sentence of 4 (four) years in prison. Then Ulfa was returned to his parents. However, the state is not able to annul marriages that are already legal according to the religious law.

Syech Puji was imposed with the criminal sanction, hopefully it will provide a deterrent effect for other parties, but the practice of child marriage is still common, it seems that Case III is studied in this study, namely between a female candidate who is still 13 years old and a male candidate aged 25. years, which both of the woman's parents asked for dispensation to the court. It is not impossible that after their dispensation was rejected by the court, they continued to marry legally according to their religion. Which shows that legally, the state/government has made efforts to prevent child marriages. However, sociologically, child marriage is still widely practiced.

## **Conclusion**

Based on the discussion and research results, the conclusions that can be drawn from this thesis research are as follows:

1. The criteria for restricting marriage dispensation on the grounds that it is very urgent and accompanied by supporting evidence according to Article 7 paragraph (2) of Law 16/2019 is a general and abstract legal norm, even though the intent of the legislators as reflected in the Academic Paper, the very urgent reason is a condition where the prospective bride is already pregnant as evidenced by a certificate from a health worker. Because the formulation of the norm of Article 7 paragraph (2) does not mention pregnancy as a requirement. So it can be said that the norms in Article 7 paragraph (2) give rise to multiple interpretations and ambiguity of norms and result in legal uncertainty in society.
2. The juridical implication of the ambiguity of the norms of Article 7 paragraph (2) causes the court's decision to dispensation regarding marriage dispensation to be uniform, some granting it and some rejecting it.

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