



Marriage dispensation as a form of legal renewal in marriage legalization

Erma Harri Aliijana*, Purgito

Department of Law, University of Pamulang, Indonesia

Abstract

This study discusses marriage dispensation as a form of legal reform in the legalization of marriage in Indonesia. Marriage dispensation, as stipulated in Article 7 paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, allows marriage to occur under the minimum age determined by the approval of the court. This mechanism aims to provide legal solutions to certain problems, such as pregnancy out of wedlock or cultural reasons, that require a quick resolution but remain within the legal framework. This study examines the juridical, sociological, and implementation aspects of marriage dispensation in the context of legal reform, as well as how this policy seeks to protect children's rights and the best interests of marriage. The results of the study show that marriage dispensation can serve as a tool to bridge legal norms with complex social realities. However, its implementation still faces challenges in the form of a lack of public understanding, abuse of the dispensation mechanism, and potential conflicts with the principle of child protection. Therefore, it is necessary to strengthen regulations, public education, and stricter supervision to ensure that marriage dispensation is used in accordance with the expected purpose. The conclusion of this study emphasizes the importance of the role of marriage dispensation as a form of adaptive legal reform, but must be balanced with a commitment to protect human rights and realize social justice in marriage.

Keywords: Marriage dispensation, legal reform, legalization of marriage

Introduction

Marriage is an innate bond between a woman and a man with the aim of forming a happy and eternal family (household) according to God Almighty. From a legal point of view, marriage is a strong agreement called *mīṣāqan ghalīdżā* which is a very good contract to obey the commands of Allah SWT and its implementation is worship. Besides marriage is worship, marriage is also a *qudrat* and *irat* of Allah SWT in the creation of nature and a tradition that has been carried out by the Prophet PBUH as well as for his people. (Amir Syarifuddin, 2014) The purpose of marriage is to create a family that is *sakinah, mawaddah, and rahmah*. So, marriage is to create a family life between husband and wife and children and parents in order to achieve a peaceful life, love each other, and care for each other. (R.M Dahlan, 2015)

Marriage in Indonesia gets legality according to the law as long as it is carried out according to the provisions of the religion or belief adhered to and does not contradict the applicable laws and regulations. Among the marriage requirements that apply in Indonesia according to Law Number 1 of 1974 concerning Marriage (hereinafter referred to as UUP) is related to the age of marriage, the prospective groom is only allowed to marry as long as he has reached the age of 19 (nineteen) years and the prospective bride has reached the age of 16 (six) years. Based on the provisions of Article 7 of the Constitution, if there is a deviation from the marriage age requirements mentioned above, then the marriage can be held only after receiving a dispensation from the court. So far, often the parents of the groom-to-be and/or the bride-to-be apply for a dispensation to the Religious Court so that their children who have not reached the age of marriage can be given a dispensation to get married due to various urgent considerations. (Amir Syarifuddin, 2014).

In article 2 paragraph (1) which is formulated "Marriage is valid if it is carried out according to the law of each religion and its belief. Law Number 1 of 1974 concerning Marriage in Indonesia is intended to regulate and provide signs about marriage. The minimum age limit for marriage listed in article 7 paragraph (1) is 16 years for women and 19 years for men. Islam as a religion embraced by most Indonesian people does not provide a minimum age limit in marriage as regulated in the Marriage Law. Islamic law sets a measure of maturity for a person if he has reached puberty, not by his age because the age of puberty will vary. Although Islamic law does not regulate the minimum age of marriage, the determination of the minimum age of marriage is believed to be one of the factors of resilience in the household.

As the bride-to-be ages, the more mature a person's physical and mental condition is in facing challenges in domestic life. (Kustini, 2013) The issue of underage marriage is a sensitive issue, because it is in direct contact with the legal awareness that lives in society (the living law). Underage marriage is not something new in Indonesia. The causative factors vary, due to economic problems, low education, understanding of certain cultures and religious values, and others. (Zulfiani, 2017)

Apart from that, a number of circles welcomed the decision of the Constitutional Court (MK) with its decision Number 22/PUU-XV/2017 on the material testing of article 7 paragraph (1) of Law Number 1 of 1974 concerning Marriage which states that the age limit for marriage for men is 19 years and women are 16 years old, changed to both 19 years as outlined in Law Number 16 of 2019. The Constitutional Court (MK) with its decision Number 22/PUU-XV/2017 stated that the age limit for men to get married is 19 years old and women 16 years old.

It is stated in article 7 paragraph (1) of Law Number 16 of 2019 that Marriage is only allowed if the man and woman have reached the age of 19 (nineteen) years. The change in

the regulation has an impact on other regulations, especially on the regulations under it, such as the provisions in the Compilation of Islamic Law (KHI) article 15 paragraph (1) which states "For the benefit of the family and household, marriage may only be carried out by the prospective bride and groom of the age stipulated by article 7 of Law Number 1 of 1974, namely, the prospective husband is at least 19 years old and the prospective wife is at least 16 years old".

Prior to the birth of the amendment to the Marriage Law, the provisions of child maturity can be seen in Law Number 23 of 2002 concerning Child Protection, the formulation of a person who is categorized as a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb, so that the adult provision according to this law is 18 years old. Therefore, it can be concluded that maturity refers to a person's ability to perform legal actions. (Siti Qomariatul Waqiah, 2019).

Then it was also explained that among the responsibilities and obligations of parents to children is to prevent marriage at the age of children. A person can still marry a minor if there are certain circumstances on the basis of a determination from the Religious Court which is called a marriage dispensation. Marriage with a prospective bride who has not reached the age limit of marriage is referred to as underage marriage. This kind of marriage will be legalized and legally valid if it is through a Religious Court institution that has absolute authority in handling marriage dispensation cases.

Based on the above explanation, the formulation of the problem in this study is: 1) What is the concept and legal basis of marriage dispensation in Indonesia based on the applicable laws and regulations? 2) What are the factors that encourage the submission of marriage dispensation in Indonesian society?

Methods

This study uses a normative juridical research method with a qualitative approach to analyze marriage dispensation as a form of legal reform in marriage legalization. This approach aims to examine relevant laws and regulations, such as Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, as well as the legal principles underlying the granting of marriage dispensation. In addition, this study also examines legal theories and legal reform concepts to understand the position and role of marriage dispensation in the context of the Indonesian legal system.

Data collection is carried out through document studies and literature reviews of primary and secondary legal sources. Primary data is in the form of laws and regulations, court decisions, and policy documents related to marriage dispensation. Meanwhile, secondary data includes scientific journals, books, articles, and reports that discuss the topic of marriage dispensation and legal reform. The data analysis technique is carried out in a qualitative descriptive manner with steps to reduce data, present data, and draw conclusions based on legal theory and empirical facts.

This study also uses a limited empirical approach with in-depth interviews with legal practitioners, religious court judges, and legal experts to obtain perspectives on the practice and implementation of marriage dispensation. The data analysis focused on identifying problems, the effectiveness of the implementation of marriage dispensation, and its impact on child protection and

marriage legalization. The results of this study are expected to provide recommendations to strengthen the regulation and implementation of marriage dispensation as part of a just legal reform.

Result and discussion

The concept and legal basis of marriage dispensation in Indonesia based on applicable laws and regulations

Marriage dispensation in Indonesia is a legal exception given to individuals who have not reached the minimum age to get married as stipulated in the Law. Based on Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, the minimum age for marriage is 19 years for both men and women. However, if there is an urgent reason, the party concerned can apply for a marriage dispensation through the court. This dispensation is given with certain conditions that must be met, one of which is evidence that the marriage is in the best interest of the bride-to-be. (Ramulyo, Mohd. Idris, 1996)^[9] The legal basis for marriage dispensation is regulated in detail in Article 7 paragraphs (2) and (3) of the Marriage Law, which states that parents or guardians can apply for dispensation to the court if the prospective bride and groom have not met the minimum required age. In this process, the court is obliged to listen to information from related parties and consider social, psychological, and health factors of the bride-to-be. In addition, the government also stipulates implementing regulations that further regulate the procedure for applying for marriage dispensation, including administrative requirements that must be completed. (Rifai, Ahmad, 2010).

The concept of marriage dispensation was born as a form of compromise between legal norms and social reality in society. On the one hand, the minimum age rule aims to protect children's rights and prevent the negative impact of early marriage. On the other hand, dispensation is granted to accommodate special situations that require immediate settlement, such as pregnancy out of wedlock or other social reasons. However, the provision of marriage dispensation still requires strict supervision so that it is not abused, and must be based on the principle of the best interests of the bride-to-be, especially children, who will undergo marriage. (Rio Satria, 2021).

A person can still marry a minor if there are certain circumstances on the basis of a determination from the Religious Court which is called a marriage dispensation. Marriage with a prospective bride who has not reached the age limit of marriage is referred to as underage marriage. This kind of marriage will be legalized and legally valid if it is through a Religious Court institution that has absolute authority in handling marriage dispensation cases. (Rio Satria, 2021).

The legal rules that have been set by the state against marriages that are not registered, are organized by the Religious Court together with the Office of the Ministry of Religion (KUA) and the Population and Civil Registration Office (Disdukcapil) in various regions in Indonesia as contained in Perma No. 1 of 2015. Abdul Manaf said that the integrated services provided by the courts in the religious justice environment are increasingly increasing and providing benefits to the community. (Amir Syarifudin, 2014).

As stated in Law Number 16 of 2019, the marriage age limit in the previous law, which was 16 years for women, allowed

marriage to occur at the age of children. The high number of marriage dispensation applications in the Religious Court indicates that underage marriage still occurs in society. (Usman, Rachmadi, 2005) The requirements regarding the age limit listed in Article 7 Paragraph (1) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, are not absolute requirements and can be deviated as stated in Article 7 paragraph (2) which reads "In the event of a deviation from the age provisions as referred to in paragraph (1), the parents of the man and/or the parents of the woman can request a dispensation to the Court on very urgent grounds accompanied by sufficient supporting evidence." This provision can be concluded that if there is a prospective husband or wife who is not old enough, namely 19 (nineteen) years for men and women, they can still carry out marriage by applying for a dispensation at the Religious Court for Muslims, and the District Court for non-Muslims. The application for this dispensation is certainly made with strong reasons in order to be able to hold the marriage. (Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI, 2013).

The application for marriage dispensation for those who have not reached the age of 19 and 16 years for the prospective husband and wife is submitted by both male and female parents to the Religious Court in the area where they live. (Mohd. Idris Ramulyo, 1996) ^[9] Judges as one of the pillars in the judicial process and law enforcement in the judicial area, namely accepting, examining, deciding and resolving cases that enter the court. The judge's duties are very strategic and decisive in the process of law enforcement and justice through his decisions. The task of such a judge is called *rechtsvinding*, which is the process of finding the law through its decisions. (Djoko Prasajo dan I Ketut Mustika, 1987) ^[3, 12]

Philosophically, the judge's duty must also strive to exert all abilities including; intellectual intelligence, emotional intelligence, and spiritual intelligence to find "abstract" truth and justice in the midst of people's lives. Justice seekers certainly hope that the cases submitted to the court can be resolved and decided by judges who are professional and have high moral integrity, so as to produce decisions that are not only oriented towards justice based on law (legal justice), but also have a dimension of justice based on moral values (moral justice) and justice based on the sense of justice of the community. (Mahsun Fuad, 2005) ^[6]

The methodological basis for legal discovery by judges in religious courts in marriage dispensation cases is to use three methods of legal discovery, which include interpretation methods, legal construction, and *Istishlah* (*Maslahah al-Mursalah*). Grammar Interpretation Method The grammatical interpretation method is an interpretation method by looking at linguistic rules. This interpretation is the simplest method of interpretation, because it understands the meaning of the text from the text itself.

The panel of judges in using this method can be seen when understanding article 7 paragraph (2) of Law No. 1 of 1974, which reads: "In the event of deviations in paragraph (1) of this article, a dispensation may be requested from the Court or other officials requested by both parents of the male or female parties". The word "deviation" is interpreted as "a person who wants to marry but is still a minor prescribed by law." Why is that, because grammatically, the meaning of "deviation" in the law is "rejection" of paragraph (1) which

reads: "Marriage is only allowed when the man reaches the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years". (Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan).

Seeing this, it is related to the case that the applicant's child with his desire to get married, but was rejected by VAT because he was still a minor, indirectly committed a deviation or rejection of article 7 paragraph (1) of the 1974 Law. Therefore, the panel of judges granted the marriage dispensation application, which of course took into account the concrete facts that existed. The legal regulations contained in the law will not function at all, if there are no concrete facts. Laws are only as legitimacy rather than a concrete fact. In addition, the law as mentioned in the front, that all legal regulations are only a source of legal discovery, and the judge's decision is the real law. (Bambang Sutiyo, 2006) ^[2]

The method of systematic interpretation is to interpret the rules of the law by relating them to other legal regulations or laws or with the entire legal system. In granting the application for marriage dispensation, the panel of judges does not only use one law in finding the law, but several legal sources. In addition to using Law No. 1 of 1974, the determination also links it with the KHI (Compilation of Islamic Law). This can be seen in the interpretation of Law No. 1 of 1974 article 7 paragraph (1) concerning the age limit of marriage, which reads: "Marriage is only allowed when the man reaches the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years." The article is related to the Compilation of Islamic Law (KHI) Article 15 paragraph (1) which reads: "For the benefit of the family and household, marriage may only be carried out by the prospective bride and groom who have reached the age specified in article 7 of Law No. 1 of 1974, namely the prospective husband is at least 19 years old and the wife is at least 16 years old". (Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan)

Looking at the two articles, it is clear that there is a similarity between the marriage age limit contained in the Marriage Law and the KHI, namely for men it is 19 years old and for women it is 16 years old. However, there is a slight difference between the two articles, there is an addition to the KHI, namely "For the benefit of the family and household...". The difference is not too influential, because the substance of the law is related to the age limit of marriage. (Jazuli, Ahmad, 2006) ^[5]

In addition, in granting the application, the assembly also linked to the mandate of article 28 b paragraph (2) of the 1945 Constitution which states; "Every child has the right to survival, growth and development and the right to protection from violence and discrimination" Jo. Article 13 (1) *hurub c* Law Number 23 of 2002, which states; "Every child must be free from neglect...". Why did the assembly connect with the article, because the bride was already 5 months pregnant at that time.

The judge's efforts in connecting with article 28 b paragraph (2) of the 1945 Constitution are to fulfill the purpose of the law itself, namely for the benefit (benefit). With the condition that the woman is 5 months pregnant, it is likely that the baby will be born soon. However, the baby's status is unclear, because her pregnancy is out of wedlock. This will later reap detrimental consequences even neglect by the father-to-be, even his own biological sieve against children born out of legal marriage. (Melinda Rahmawati dkk, 2021) ^[7].

Unfortunately, this is actually justified by law, as in Law No. 1 of 2004 Article 43 paragraph (1) concerning the position of children: "Children born out of wedlock only have a civil relationship with their mother and their mother's family". With the legitimacy of the article, it is feared that there will be neglect by the prospective husband towards the child of the bride. Therefore, the panel of judges when granting the marriage dispensation is linked to article 28 b paragraph (2) of the 1945 Constitution to protect the rights of children. (Undang-Undang No. 19 Tahun 2019 Tentang Perkawinan).

Legal construction is also used in decision-making by judges in marriage dispensation cases. Meanwhile, the legal construction used is by using the legal fiction method. Legal fiction is a method of legal discovery that presents new facts to the judge so that a new personification appears before the judge. In most cases, it appears that the applicant wants to marry his daughter immediately but is still a minor. This is included in the case of applying for marriage dispensation as stipulated in the law. Then it was discovered that the applicant's daughter was already pregnant out of wedlock. The condition of such a girl greatly affects the granting of marriage dispensation, because there are indications that she has had a relationship like a husband and wife outside of wedlock (adultery) and it damages the main joints of life. That is what then shows that the judge uses the method of legal fiction. (Djoko Prasajo dan I Ketut Mustika, 1987) ^[3, 12]

Factors that encourage the application of marriage dispensation in Indonesian society

Among the reasons that are often stated in the application for marriage dispensation is that the relationship between the prospective groom and the bride-to-be is already very close, so it is no longer possible to postpone the implementation of the marriage, or even the two have already had an extramarital relationship. So parents are worried that their children will fall deeper into acts that are contrary to Islamic law. (Djoko Prasajo dan I Ketut Mustika, 1987) ^[3, 12].

If the application for marriage dispensation is not granted under very compelling conditions, there will be huge losses that will be experienced by the prospective bride and the child in her womb. The child in the woman's womb may not have a legitimate father when she is born later. This has a long-term follow-up impact, such as in terms of the management of birth certificates and other documents that will be used to support the future of the prospective child. In addition, there are punishments from the community in the form of gossip and possibly exile from the surrounding environment because they are considered "illegitimate children", as well as other impacts that will be very detrimental to the future of prospective children. (Muhammad Saleh Ridwan)

The legitimacy to grant the application for marriage dispensation is by using Article 7 paragraph (2) of Marriage Law Number 1 of 1974, although it can be seen in it using the *maslahah al-mursalah* method to immediately grant a marriage license, because to stop the damage and bring many benefits, but these efforts are actually without the *maslahah al-mursalah* process, a decision can be made immediately by looking at concrete facts. Because there is already a law that clearly regulates it. Then for child protection, there are also laws and regulations, namely

based on Law Number 23 of 2002. Judges in deciding cases still remain in their hands against the Law. (Muh. Hatta, 2016) ^[10] This shows that "judges as the mouthpiece of the law" can still be considered in accordance with the current condition of judges. There is a real reason why a judge uses the law a lot in making decisions, because the law is seen as fulfilling and answering from the many concrete events submitted to the court.

A judge has the authority to perform *ijtihad* himself even though there is already a law and clearly regulates it, but it is not in accordance (according to the judge) with the facts of the law and its occurrence and looks at the aspect of justice. This is in legal terms called *contra legem*. In the determination granted, the judges looked at the reason for applying for a dispensation because they were pregnant first, and in the legislation the thing that regulates the reason for pregnancy first when applying for a marriage dispensation is not found.

The judge looks at social, psychological, child-future factors, definite and strong guarantees in married life, and consideration of mental maturity. Because a decision must meet three principles, namely the principle of minimum legal certainty for the applicant and the person concerned, the aspect of justice, and the aspect of utility. As for the rejected cases, they do not contain a justice aspect, because what they want is not achieved. (Mahsun Fuad, 2005) ^[6]

Thus, in granting or rejecting the application for marriage dispensation, it is necessary to discover the law which is interpreted as an activity of interpretation, construction, analogy and refinement of the law. Because there are no rules that provide a legal basis for what criteria an application for marriage dispensation is granted.

Law No. I of 1974 and the Compilation of Islamic Law only provide a legal basis for parties who want to get married but are not old enough. The judge as a person who knows the law if he does not find the written law in the form of legislation, then the judge is obliged to find the law and dig up the unwritten law. (Mertokusumo, Sudikno, 2009) ^[8]

Conclusion

The granting or rejection of a marriage dispensation application requires a process of legal discovery carried out through interpretation, construction, analogy, and refinement of the law. This is due to the absence of specific rules in the laws and regulations that provide clear criteria regarding what conditions can be the basis for granting the application. Law Number 1 of 1974 concerning Marriage and Compilation of Islamic Law only provides a legal basis for the ability to apply for a marriage dispensation for individuals who have not reached the age of majority. Therefore, the role of judges is very important in exploring unwritten legal values to provide decisions that are in accordance with the principles of justice and the best interests of the parties. (Hilman Hadikusuma, 2007) ^[4]

As a law enforcer, judges have the obligation to find relevant laws if there are no written provisions in the legislation. In the context of marriage dispensation, judges need to consider moral, social, and humanitarian aspects and explore legal values that live in society. Thus, this process of legal discovery is not only about applying rules, but also creating substantive justice that is in accordance with the concrete situation. This step is important to ensure that the marriage dispensation is given appropriately and does not violate the principles of child protection and the public interest.

The judge has the right and authority to *ijtihad* in exploring and establishing relevant laws to resolve the case he faces. The understanding that judges only act as a mouthpiece of the law, that is, solely applying the available law, is a narrow view. On the other hand, judges have an active role in finding, interpreting, and even creating laws when existing regulations are unable to provide adequate solutions for substantive justice. This shows that judges not only function as enforcers of the law, but also as diggers of the values of justice that live in society. The ability of judges to find law aims to ensure that the decisions taken reflect true justice for the parties to the case. This process involves an in-depth analysis of concrete situations, social contexts, and applicable legal principles. Thus, judges not only carry out the law formalistically, but also act as guardians of justice who consider the dynamics of society and the specific needs of the cases being handled. This step is important to maintain public trust in the justice system and realize justice based on humanity.

References

1. Amir Syarifudin, *Hukum Perkawinan di Indonesia Antara Munakahat dan Undang-undang Perkawinan*, (Jakarta: Pranada Media Group, 2006).
2. Bambang Sutyoso, *Metode Penemuan Hukum*, (Yogyakarta: UII Press, 2006).
3. Djoko Prasajo dan I Ketut Mustika, *Asas-Asas Hukum Perkawinan di Indonesia*, cet ke-1, (Jakarta: Bina Aksara, 1987).
4. Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundang-undangan, Hukum Adat, Hukum Agama Islam* (Bandung: CV. Mandar Maju, 2007).
5. Jazuli, Ahmad, *Kaidah-Kaidah Fikih: kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah Yang Praktis*, Jakarta: Kencana, 2006.
6. Mahsun Fuad, *Hukum Islam Indonesia: Sari Nalar Partisipatoris Hingga Emansipatoris*, (Yogyakarta: Lkis, 2005).
7. Melinda Rahmawati dkk, *Peran Dispensasi Kawin Dalam Peningkatan Angka Pernikahan Dini Di Wilayah Kotamadya Jakarta Barat*, dalam *Al-Istinbath*, Jurnal Hukum Islam, 2021, 6(1).
8. Mertokusumo, Sudikno, *Hukum Acara Perdata Indonesia*, cet pertama Edisi ke-8, Yogyakarta : Liberty Yogyakarta, 2009.
9. Mohd. Idris Ramulyo, *Hukum Perkawinan Islam Suatu Analisis dari Undang-undang No.1 Tahun 1974 dan Kompilasi Hukum Islam*, Edisi ke-2 (Jakarta: Bumi Aksara, 1996).
10. Muh Hatta, *Batasan Usia Perkawinan dalam Perspektif Ulama Klasik dan Kontemporer*, Jurnal *Al-Qānūn*, 2016, 19(1).
11. Muhammad Saleh Ridwan, *Perkawinan Dalam Perspektif Hukum Islam dan Hukum Nasional* (Makassar: Alauddin University Press, 2014).
12. Prasajo, Djoko dan I Ketut Mustika, *Asas-Asas Hukum Perkawinan di Indonesia*, cet ke-1, Jakarta: Bina Aksara, 1987.
13. Ramulyo, Mohd. Idris, *Hukum Perkawinan Islam Suatu Analisis dari Undang-undang No.1 Tahun 1974 dan Kompilasi Hukum Islam*, Edisi ke-2, Jakarta: Bumi Aksara, 1996.
14. Rifai, Ahmad, *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif*, Jakarta: Sinar Grafika, 2010.
15. Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan
16. Undang-Undang No. 19 Tahun 2019 Tentang Perkawinan
17. Perma No. 5 Tahun 2019 Tentang Dispensasi Kawin