



## Implementation of the Marriage Dispensation: Exploring the Legal and Social Complexities in Preventing Early Marriage

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### ABSTRACT

*The Marriage Law has undergone changes as Law No. 16 of 2019 concerning Amendments to Law no. 1 of 1974 concerning Marriage, where previously the minimum age limit for being permitted to enter into marriage was 19 (nineteen) years for men and 16 (sixteen) years for women, now it is 19 (nineteen) years for both men and women. Based on this description, the purpose of this research is to explore the implementation of the granting of a marriage dispensation by the Madiun City Religious Court in reducing underage marriages, after the amendment to the marriage law. This study explores aspects of the implementation of the marriage dispensation as well as the constraints that exist in its application. This research method uses empirical juridical, with a qualitative approach. The results of the research show that the procedure for granting dispensation for marriage at the Madiun City Religious Court is that not everything can be done. There were several applications for dispensation that were actually rejected. The refusal is certainly an attempt to reduce child marriage underage. For example, there are reasons for children who are forced to marry or children who still want to continue their education. The obstacle that occurs in this implementation is that there are parents who are forced to continue their child's marriage. Legal protection for children with this has not been realized properly, given the interests of children who must be sacrificed.*

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## 1. Introduction

Marriage is a means of forming a family and continuing offspring. In essence, marriage does not only contain civil human relationships but also involves the relationship between humans and God.<sup>1</sup> Historically, in Indonesia, the guarantee of the right to form a family and continue offspring has been normalized in Law no. 1 of 1974 concerning Marriage, not as a constitutional norm. It was only in the second amendment to the 1945 Constitution (18 August 2000) that everyone's right to form a family and continue their offspring received constitutional guarantees, formulated as a constitutional norm vide Article 28 B paragraph (1) of the 1945 Constitution.<sup>2</sup> As a constitutional norm and legal norm, the state's guarantee and recognition must be by applicable legal provisions, namely through a valid marriage. From the perspective of the religious country of Indonesia, a valid and recognized marriage must fulfill two main principles, namely by religious or belief law and registered by a marriage registrar to issue a marriage certificate.<sup>3</sup> So marriage according to Indonesian positive law lays down the principle that a marriage entered into by a man and a woman must not only comply with the marriage laws of his religion or belief but must also be registered, and a marriage certificate must be made vide Article 2 of Law No. 1 of 1974 concerning Marriage. So, it is very clear that every marriage should be registered.<sup>4</sup> However, in reality, the principle of recording and making a marriage certificate is still widely ignored by married couples (nikah sirri) as according to Nelli<sup>5</sup> and Bahrun.<sup>6</sup>

Regulations related to marriage, in their implementation, are often questioned and tested materially at the Constitutional Court. This bleid contains several articles that are contrary to the constitution and violate the constitutional rights of citizens, as in Constitutional Court Decision No. 46/PUU-VIII/2010 regarding the status of illegitimate children, MK Decision No.69/PUU-XIII/2015 related to marriage agreements, and Constitutional Court Decision No. 22/PUU-XV/2017 regarding the marriage age limit. The implication of the results of this material test is that the Marriage Law has undergone changes through Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage. This Bleid accommodates MK Decision No. 22/PUU-XV/2017 regarding the marriage age limit, which is considered discriminatory and takes away women's rights. Because in the old provisions, there was a three-year difference in the age

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<sup>1</sup> Wasman dan Wardah Nuroniyah, *Hukum Perkawinan Islam di Indonesia Perbandingan Fiqh dan Hukum Positif*, (Yogyakarta:CV. Citra Utama, 2011), 29

<sup>2</sup> Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Sebelum dan Sesudah Amendemen & Garis-Garis Besar Haluan Negara

<sup>3</sup> Mukhtaruddin Bahrum, "Problematika Isbat Nikah Poligami Sirri." *Al-Adalah: Jurnal Hukum Dan Politik Islam* 4, no. 2 (2019): 194-213.

<sup>4</sup> Rachmadi Usman, "Makna Pencatatan Perkawinan Dalam Peraturan Perundang-Undangan Perkawinan di Indonesia", *Jurnal Legislasi Indonesia* 14, no. 3 (2017) : 256

<sup>5</sup> Jumni Nelli, "The Problems of Siri Marriage for Women in Tambang District, Kampar Regency: A Gender Swot Analysis Study." *Al-Istinbath: Jurnal Hukum Islam* 7, no. 2 (2022): 553-578.

<sup>6</sup> Mukhtaruddin Bahrum, "Problematika Isbat Nikah Poligami Sirri." *Al-Adalah: Jurnal Hukum Dan Politik Islam* 4, no. 2 (2019): 194-213.

of marriage for women and men (minimum 16 years for women and 19 years for men).<sup>7</sup> Consideration considering letter b of Law 16 of 2019<sup>8</sup> also stated that the minimum age limit of 16 years for women to marry is basically a marriage that places women still in the status of children, has a negative impact on children's growth and development and deprives children of their basic rights<sup>9</sup>, such as the right to protection from violence and discrimination, rights children's civil rights, health rights, education rights, and children's social rights.

Based on these considerations, the age limit for marriage for women was increased and made equal to that of men, namely that they must be at least 19 years old (Article 7, paragraph 1).<sup>10</sup> The change in the minimum age limit for marriage is essentially aimed at suppressing the practice of child marriage throughout Indonesia. However, this norm does not exclude sociological studies of the social reality of Indonesian society. In another paragraph, with urgent considerations and reasons, the enactment of this norm can be set aside on condition that it obtains the judge's approval.<sup>11</sup> vide Article 7 paragraph 2, namely that if there is a deviation regarding the age provisions, the man's parents or the woman's parents can apply for a marriage dispensation permit to the court accompanied by urgent reasons and supporting evidence. Before a dispensation permit is issued, the court must listen to the opinions of the prospective bride and groom who will get married. As a result, in 2020, there were 64,222 requests for marriage dispensation in all religious courts in Indonesia. In 2021, there will be 62,919 applications, and in 2023, there will be 52,095 applications. This data reflects that Article 7, paragraph 2 is a means to legalize underage marriages.<sup>12</sup>

Furthermore, based on 2022 data published by the Directorate General of Religious Courts, it shows that there are 50,748 applications for marriage dispensation that have been decided by Religious Courts throughout Indonesia<sup>13</sup>. Based on jurisdiction, the highest number of applications for marriage dispensation was within the jurisdiction of the

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<sup>7</sup> Jordy Herry Christian, and Kirana Edenela. "Terampasnya Hak-Hak Perempuan Akibat Diskriminasi Batas Usia Perkawinan." *Lex Scientia Law Review* 3, no. 1 (2019): 1-14.

<sup>8</sup> Changes to law No. 1 of 1974 on Marriage

<sup>9</sup> Arne Huzaimah, et al. "Disregarding the Reproductive Rights of Women in Child Marriage in Indonesia." *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 7, no. 2 (2023): 1097-1120.

<sup>10</sup> Salma Mursyid, and Nasruddin Yusuf. "Changes in Marriage Age Limits and Marriage Dispensations: A Study of Causes and Impacts on the Religious Courts in North Sulawesi." *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 6, no. 2 (2022): 975-996.

<sup>11</sup> A. Rahmani, et al. "Analisis Yuridis Empiris Pencatatan Nikah Siri Pasangan Di Bawah Umur." *Constitutional Law Review* 1, no. 2 (2022): 78-91.

<sup>12</sup> Fahadil Amin Al Hasan, and Deni Kamaluddin Yusup. "Dispensasi Kawin Dalam Sistem Hukum Indonesia: Menjamin Kepentingan Terbaik Anak Melalui Putusan Hakim." *Al-Ahwal: Jurnal Hukum Keluarga Islam* 14, no. 1 (2021): 86-98.

<sup>13</sup> Recap of Marriage Dispensation Applications for the 2022 Period, Directorate General of Religious Courts cq. Sub-Directorate of Statistics and Documentation, Directorate of Religious Court Administration Development.

Surabaya High Religious Court (15,339 applications).<sup>14</sup> The reasons for the request are varied. According to the results of the summary of the reasons for applications for dispensation from marriage in the Surabaya Religious High Court Jurisdiction, it shows that applications for dispensation from marriage for a reason "love" were in the first place, amounting to 10,836 applications, followed by the reason "pregnancy" with a total of 2,393 applications, economic reasons with 977 applications, and economic reasons with 977 applications, and reason for "having had intimate relations" 133 requests<sup>15</sup> This data shows that the majority of the reasons given for applying for a marriage dispensation are based on the relationship between the prospective groom and the woman is very close, so it is impossible for the marriage to be postponed before it can take place. Apart from that, another reason is that the prospective bride and groom have had relations like husband and wife; some are pregnant, and some have had husband and wife relations but are not pregnant.

The high number of requests for marriage dispensation in the jurisdiction of the Surabaya High Religious Court is caused by the existence of 38 religious court bodies under it (level I court), one of which is the Madiun City Religious Court. In 2022, at the Madiun Religious Court, 18 requests for dispensation will be submitted to be decided<sup>16</sup>. There was an increase in the number of applications from the previous year (2021), which only had 11 requests for dispensation. Therefore, it is necessary to research the implementation of marriage dispensations after the renewal of the marriage law to prevent early marriage within the jurisdiction of the Madiun Municipal Religious Court.

It cannot be denied that many studies have been carried out on marriage dispensations, such as Research conducted by Sonny Dewi Judiasih and Susilowati Suparto Dajaan (2020) with the theme of the contradiction between marriage dispensation and efforts to minimize child marriage in Indonesia. The results of his Research show that marriage dispensation through court decisions is an effort to make it difficult for the practice of underage marriage to occur. However, the facts speak differently; there has been a significant increase in requests for marriage dispensation, which contradicts the state's efforts to minimize the practice of underage marriage in Indonesia.<sup>17</sup> Research conducted by Melinda Rahmawati and Heni Ani Nuraeni (2021) with the theme The Role of Marriage Dispensation in increasing the rate of early marriage in the West Jakarta

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<sup>14</sup> Recap of Reasons for Dispensation Cases in Religious Courts Throughout Indonesia in 2022, Directorate General of Religious Courts cq. Sub-Directorate of Statistics and Documentation, Directorate of Religious Court Administration Development.

<sup>15</sup> Recap of Reasons for Dispensation Cases in Religious Courts Throughout Indonesia in 2022, Directorate General of Religious Courts cq. Sub-Directorate of Statistics and Documentation, Directorate of Religious Court Administration Development.

<sup>16</sup> In 2020, there were 20 requests for dispensation from marriage and in 2021 there were 11 requests for dispensation from marriage, source of the results of the Recap of Reasons for Dispensation Cases in Religious Courts throughout Indonesia in 2022, Directorate General of Religious Courts cq. Sub-Directorate of Statistics and Documentation, Directorate of Religious Court Administration Development.

<sup>17</sup> Sonny Dewi Judiasih, Susilowati Suparto Dajaan, and Bambang Daru Nugroho. "Kontradiksi antara dispensasi kawin dengan upaya meminimalisir perkawinan bawah umur di Indonesia." *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 3, no. 2 (2020): 203-222.

Municipal Region. The results of his Research show that marriage dispensation was initially an urgent last resort for the common good but became an opportunity to provide legality for early marriage.<sup>18</sup> Furthermore, Research was conducted by Muhammad Ali Murtadlo and Muhammad Fikri Hakim (2023) with the theme Rejection of Marriage Dispensation by the Panel of Judges at the Madiun City Religious Court (Analysis of Case Determination No.9/Pdt.P/2022/PA.Mn). The research results show that the lack of witnesses and sufficient evidence is a strong reason for the judge to grant marriage dispensation permission.<sup>19</sup>

Unlike previous research, this research uses data on applications for marriage dispensation submitted to the jurisdiction of the Madiun Municipal Religious Court in 2022, so it has novelty value compared with previous studies. Therefore, it is essential to carry out this research by raising two main problem formulations: how to implement the granting of marriage dispensation by the Madiun City Religious Court after changes to the Marriage Law and what obstacles are faced in preventing underage marriage.

## 2. Legal Material and Methods

This research uses empirical juridical methods with a qualitative approach. Researchers will observe and analyze the operation of laws in society relating to granting marriage dispensation permits after changes to the Marriage Law. The aim is to discover concepts regarding the process by which law occurs and the process by which law operates in society. For Zainuddin Ali, "Empirical legal research is directed at studying social phenomena in a society whose legal aspects are visible."<sup>20</sup> The data obtained by researchers comes from observation activities, conducting interviews and documentation as well as supporting documents such as official documents, books related to the research object, previous research, theses, theses and applicable laws and regulations. The qualifications in this research were used only to determine the implementation of the granting of marriage dispensations by the Madiun City Religious Court to reduce underage marriages.

## 3. Results and Discussion

### 3.1 Procedure for granting marriage dispensation

Marriage dispensation is actually a grant of the right for a child to be able to marry even though he has not yet reached the required age. What this means is that children are allowed to enter into marriages outside of the appropriate provisions based on circumstances that require or are urgent, and at the same time, there is no other choice (*last*

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<sup>18</sup> Melinda Rahmawati, and Heni Ani Nuraeni. "Peran Dispensasi Kawin dalam Peningkatan Angka Pernikahan Dini di Wilayah Kotamadya Jakarta Barat." *Al-Istinbath: Jurnal Hukum Islam* 6, no. 1 (2021): 1-14.

<sup>19</sup> Muhammad Ali Murtadlo, and Muhammad Fikri Hakim. "Penolakan Dispensasi Nikah Oleh Majelis Hakim Pengadilan Agama Kota Madiun (Analisis Terhadap Penetapan Perkara No. 9/Pdt. P/2022/PA. Mn)." *JURNAL LEGISIA* 15, no. 1 (2023): 98-111.

<sup>20</sup> Zainuddin Ali, *Sosiologi Hukum* (Jakarta: Sinar Grafika, 2007), 13

resort). According to Supreme Court Regulation no. 5 of 2019, marriage dispensation is the granting of a marriage permit from the court to prospective brides (both male and female) who are not yet 19 years old in order to enter into marriage.<sup>21</sup> In practice, judges who hear applications for marriage dispensation are bound by the principle of the best interests of the child. What is meant by the principle of the best interests of the child are all actions that must be taken into account to ensure the child's protection, care, welfare, survival, growth and development.<sup>22</sup>

In terms of applying for marriage dispensation, there are differences between the old norms and the new norms in the Marriage Law. Before undergoing changes, as regulated in Article 7 Paragraph 2 of Law no. 1 of 1974 regulates that if there is a deviation from the provisions on the marriage age limit, you can ask for dispensation from the court or other official appointed by both the parents of the man and the parents of the woman. So, based on the old provisions, those who could apply for a marriage dispensation were both the man's and the woman's parents, not just one of them. In contrast to the new provisions, which use the phrase "and/or" as regulated in Article 7 paragraph 2 of Law no. 16 of 2019, that the application for marriage dispensation is due to deviations from the age provisions, then the man's parents and/or the woman's parents can submit a request for marriage dispensation to the court. So, if you look at the formulation of the new provisions, the application for marriage dispensation does not have to be submitted by both parents of the prospective bride and groom but can be done by one of the parents of both the woman and the man. The phrase "and/or" has an optional meaning, which gives the option for permission for marriage dispensation to be submitted jointly by both parents of the prospective bride and groom or just one of them.

Furthermore, applications for marriage dispensation can be made at the District Court or at the Religious Court. This is part of the implications of a pluralistic Indonesian society, which consists of several religions adhered to by the population and recognized by the state. Explanation of Article 7, paragraph 3 of Law No. 16 of 2019 explains that the Religious Courts have jurisdiction in examining applications for marriage dispensation for Muslim prospective couples. Meanwhile, the District Court has jurisdiction to examine applications for marriage dispensation for those who adhere to other religions. The other religions in question are Protestant, Catholic, Hindu, Buddhist and Confucian. However, it also needs to be underlined that it does not rule out that there are conditions where the religions believed by parents and children are different. If there is a religious difference between the parent/guardian and the child, then the application for dispensation is submitted to the court in accordance with the child's religion vide Article 7 of the Republic of Indonesia Supreme Court Regulation (PERMA) No. 5 of 2019.

The presence of Perma No. 5 of 2019 is, in principle, to fill legal gaps that are not regulated expressly and in detail in the law. This regulation also serves as a guideline for

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<sup>21</sup> Article 1 number 5 Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning guidelines for adjudicating applications for marriage dispensations

<sup>22</sup> Article 1 number 6 Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications

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judges throughout Indonesia in examining, adjudicating and deciding on requests for marriage dispensation. This is in line with the considerations considering letter d of Perma No. 5 of 2019, which states that before the issuance of this Perma, there were no statutory regulations that strictly and in detail regulate the process of adjudicating applications for marriage dispensation. Therefore, the Supreme Court can further regulate matters necessary for the smooth administration of justice.

The matters referred to include procedures for submitting applications for marriage dispensation. As in Perma No. 5 of 2019, applications for dispensation must pay attention to the following matters: *First*, administrative completeness, including application letter, photocopy of parents' National Identity Card (KTP), photocopy of Family Card, photocopy of KTP or Child Identity Card (KIA) and/or child's birth certificate, photocopy of KTP and KIA or birth certificate of prospective husband and latest education certificate or a certificate of still attending school from the school concerned in the form of a photocopy (Article 5 paragraph 1). *Second*, Checking administrative requirements. The Registrar checks the administrative requirements for submitting an application for marriage dispensation. If the application does not meet the requirements, the clerk will return the marriage dispensation application to the applicant to complete it. In the event that the application requirements have been fulfilled, the applicant is obliged to pay the cash deposit so that the case can be registered {vide Article 9 Paragraph (2), Paragraph (3) and Paragraph (4)}; however, if the applicant is unable to pay the cash deposit, the applicant can submit a request for free or free marriage dispensation. *Third*, in terms of case examination. Article 10 stipulates that on the first day of the hearing, the applicant is obliged to present (i) the child as the subject of the marriage dispensation application, (ii) the prospective husband/wife, and (iii) the parents/guardians of the prospective husband/wife. Application for marriage dispensation can be stated as "*fall*" when at the first and second hearings, the applicant was never present even though he had been legally summoned. Meanwhile, the marriage dispensation application stated "*not acceptable*" when on the first day of the session, on the second day of the session, and on the third day of the session,<sup>23</sup> the applicant cannot present the parties as intended in Article 10 paragraph 1, even though they have been legally summoned.

*Fourth*, the judge is obliged to provide advice to the parties, whether the applicant, children, prospective husband or wife, parents or guardians. The legal consequences that arise if the judge is negligent and does not provide advice are that the judge's decision is null and void, vide Article 12, paragraph 4. In essence, the judge's advice aims to ensure that the parties understand the risks of marriage. The risks of marriage that the judge must address when giving advice include the possibility of the child's right to education not being fulfilled (the child's education being stopped as well as the continuation of 12 years of compulsory education for the child), the child's reproductive system not being ready, the

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<sup>23</sup> If the parties in question are not present on the first day of the trial, the judge will postpone the trial, as well as on the second day of the trial. On the third day of the hearing the applicant still could not

child's psychological, social and economic impact and the potential for disputes to arise. It can lead to acts of domestic violence (KDRT). Apart from providing advice, judges are also obliged to listen to information from children for whom marriage dispensation is requested, prospective husbands or wives for whom marriage dispensation is requested, parents/guardians of children for whom marriage dispensation is requested, and parents/guardians of prospective husbands/wives vide Article 13 paragraph 1. In making his determination, the judge must consider the information as stipulated in Article 13, paragraph 1. If the judge ignores and does not implement as regulated in Article 13, it will result in the decision being null and void according to Article 13, paragraph 3.

*Fifth*, regarding the judge's determination. As stipulated in Article 17 letters (a) and (b), the judge, in determining the marriage dispensation, considers the best interests of the child in statutory regulations and unwritten law in the form of legal values, local wisdom and the sense of justice that lives within the public. Apart from that, it also considers international conventions or agreements related to children. From this norm, the Religious Courts and District Courts, when examining marriage dispensations, are essentially faced with 2 (two) things which are detrimental in nature, namely harm due to early marriage and harm if the marriage dispensation application is rejected. Based on these two considerations, the judge tends to grant the application for marriage dispensation because of the large harm caused by rejecting the application for marriage dispensation from early marriage.<sup>24</sup> Religious Court Judges' considerations in granting marriage dispensations must also look at the provisions *maqashidu al syariahor* the purpose of Islamic law. according to A. Khisni. There must be 3 (three) priorities that the judge must consider when examining marriage dispensations, namely:<sup>25</sup> (i) The safety of the child's soul related to the purpose of protecting the soul (*hifzhun al nafs*), (ii) Continuation of children's education related to the aim of protecting the mind (*hifzhu al aql*); and (iii) Safety of descendants related to the purpose of protection against descendants (*hifzhu al nasl*).

*Sixth*, it is related to legal efforts to determine marriage dispensation by a judge. If the determination of the marriage dispensation does not meet the applicant's expectations, then the legal remedy that can be taken by the applicant is a legal action in the form of cassation vide Article 19. As has been explained, there is such a regulation regarding the marriage dispensation as stated in Law No. 16 of 2019 and followed up by the Supreme Court through Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation shows that legal certainty in terms of granting marriage dispensations to reduce post-age marriages has been well sought and realized. This is similar to the theory of legal certainty, according to Gustav Radburch, which states that legal certainty is a principle that is

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<sup>24</sup> Ahmad Muqaffi, Rusdiyah, Diana Rahmi, "Menilik Problematika Dispensasi Nikah dalam Upaya Pencegahan Pernikahan Anak Pasca Revisi UU Perkawinan", *Journal of Islamic and Law Studies* 5, no. 3 (2021): 361-377.

<sup>25</sup> Irma Suryanti dan Dewa Gde Rudy, "Disfungsi Dispensasi Kawin dalam Upaya Pencegahan Perkawinan Anak", *Journal Magister Hukum Udayana* 10, no. 4 (2021): 782-794.

included in the basic value of the law. This principle requires that legal arrangements be made definitively in written form.<sup>26</sup>

### 3.2 Implementation of the Marriage Dispensation by the Madiun City Religious Court: Exploring the Legal and Social Complexities in Preventing Early Marriage

The Madiun City Religious Court is a Class II Religious Court which annually handles approximately six hundred (600) cases. Madiun City Religious Court is the executor of judicial power for the justice-seeking community with the scope of its authority to examine, adjudicate, decide and resolve certain cases between Muslim people. The phrase "*Muslims*" shows that the Religious Court, in carrying out its authority, is bound by the principles or principles of Islamic personality. This means handling cases from individuals or legal entities voluntarily submitting to Islamic law. Meanwhile, what is meant by some instances are civil cases in specific fields juridically within the scope of the absolute competence of the Religious Courts. The absolute competence in question includes the fields of marriage, inheritance, wills and gifts made based on Islamic law, as well as waqf, sadaqah, zakat, infaq and sharia economics.

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In the explanation of Article 49 letter a of Law no. 3 of 2006 concerning Amendments to the Law on Religious Courts, it is explained that the scope of authority of the Religious Courts in the field of marriage includes matters regulated in or based on the applicable marriage law which is carried out according to sharia. One of them is related to the marriage dispensation. In line with this, in 2019, through changes to the Marriage Law, it was stated and explained that marriage dispensation for Muslim prospective couples is

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<sup>26</sup> A'an Efendi dan Dyah Octorina Susanti, *Ilmu Hukum*, (Jakarta: Kencana, 2021), 69.

<sup>27</sup> Madiun City Religious Court, Graph of Recapitulation of Madiun City Religious Court Cases 202-2023, source: <https://www.pa-kotamadiun.go.id>

<sup>28</sup> The Madiun City Religious Court was formed based on Staatsblad 1882 number 152 Jo Staatsblad 1937 Numbers 116 and 610 jis Article 106 Law no. 7 1989. At that time it had 2 (two) jurisdictional areas, namely Madiun Regency and Madiun Komadya. In 1988 the Madiun City Religious Court was split into 2 (two), namely the Madiun City Religious Court and the Madiun Regency Religious Court. With this solution, the Madiun City Religious Court has a jurisdiction, namely Madiun City, which covers 3 (three) sub-districts.

<sup>29</sup> Article 49 Law of the Republic of Indonesia Number 50 of 2009 concerning Religious Courts

under the jurisdiction of the Religious Court<sup>30</sup>. This bleid was then followed up by the Supreme Court by issuing PERMA No. 5 of 2019. This PERMA is a guideline for judges in resolving marriage dispensation cases. This PERMA also fills the legal vacuum if there are differences in beliefs and religion between parents and children, then the application for marriage dispensation is submitted by the religious beliefs of the child for whom marriage dispensation is requested, not based on the parents' religious beliefs vide Article 7.

Historically and philosophically, changes to marriage laws are based on several objectives, one of which is to protect children from the practice of child marriage. This effort is manifested through the regulation of the minimum age limit for marriage (19 years). If you deviate from the provisions, you must obtain court permission to determine a marriage dispensation. However, data shows that throughout 2019-2022, especially within the jurisdiction of the Madiun City Religious Court, the data and facts show that judges granted most applications for marriage dispensation. Compared to data in 2019, which was only 11 applications, in 2020, there was an increase in the number of applications for marriage dispensation to 20 applications, likewise with the number of applications that were rejected and those that were accepted. 2019, for example, ten of the eleven applications for marriage dispensation submitted were approved, and only one was rejected. In 2020, of the 20 applications submitted, three were rejected. This shows that in 2020, at least the Madiun City Religious Court approved 17 requests for marriage dispensation. This data shows that the number of rejected applications for marriage dispensation differs from the number of cases requested. Marriage dispensation is an instrument for parents to legalize the practice of child marriage. For more details, you can see the data presented below.

Table 1. Data on Handling Applications for Marriage Dispensation at the Madiun City Religious Courts 2019-2022

No.	Year	Total Items Received	Age (Years)		Total Applications Rejected
			> 13 – 16	> 17-18	
1.	2019	11	3	8	1
2.	2020	20	6	14	3
3.	2021	11	2	9	-
4.	2022	18	2	16	1

Source: Dispensation Data at the Madiun City Religious Court 2019-2022

Table 1 above shows that in 2019, there were 11 (eleven) cases regarding marriage dispensation submitted to the Madiun City Religious Court. In 2019, it shows that children who applied for marriage dispensation aged over 13 (thirteen) to 16 (sixteen) years were 3 (three) children. Meanwhile, there are 8 (eight) children aged over 17 (seventeen) to 18

<sup>30</sup> See the explanation of Article 7 paragraph 3 of Law no. 16 of 2019 concerning Amendments to the Marriage Law

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(eighteen) years. In 2019, there was only 1 (one) case that was not granted by the Panel of Judges at the Madiun City Religious Court. Then, it increased in 2020. The number of requests for marriage dispensation received by the Madiun City Religious Court in 2020 was 20 (20) cases. In 2020, it shows that the number of children who applied for marriage dispensation aged over 13 (thirteen) to 16 (sixteen) years was 6 (six). Meanwhile, there are 14 (fourteen) children aged over 17 (seventeen) to 18 (eighteen) years. In 2020, there were only 3 (three) cases that were not granted by the Panel of Judges at the Madiun City Religious Court. In 2021, it shows that children who are applying for marriage dispensation aged over 13 (thirteen) to 16 (sixteen) years are 2 (two) children. Meanwhile, there are 9 (nine) children aged over 17 (seventeen) to 18 (eighteen) years. In 2021, no applications were rejected; all marriage dispensation applications were accepted for various reasons. In 2022, it shows that children who are applying for marriage dispensation aged over 13 (thirteen) to 16 (sixteen) years are 2 (two) children. Meanwhile, there are 16 (sixteen) children aged over 17 (seventeen) to 18 (eighteen) years. In 2022, there will only be 1 (one) case where the application for marriage dispensation was rejected. This data shows that early marriage cannot be prevented optimally.

The difficulty of preventing underage marriages by applying for marriage dispensation in court is influenced by the values and attitudes of the community itself, or in Lawrence M. Friedman's language, it is called the legal culture or legal culture of the community itself. Before determining a marriage dispensation, the judge first hears and considers the urgent reasons put forward by the applicant. This is where Religious Court judges are faced with two choices. The urgent reasons put forward were various, such as being pregnant out of wedlock, having had a relationship like husband and wife but not getting pregnant, children being caught in raids by the community because they were alone with their partner who was not a Muslim, and another reason was economic (dropping out of school). The condition of children who drop out of school if they are not married off is that they will commit acts or deeds that violate religious norms.

In line with what was described above, based on the results of the interview with Nova Sri Wahyuning Tyas<sup>31</sup> one of the judges at the Madiun City Religious Court stated that the following things caused difficulty for judges in preventing underage marriages:

*First*, Children asked for marriage dispensation are not based solely on personal love. This condition becomes a challenge for judges in the consideration process, mainly when the pregnancy occurs before marriage. This aspect needs to be specifically regulated in law, and judges must make legal discoveries to fill the legal gaps. There is a risk if this request is granted because there will be the potential for unexpected events in the future. However, on the other hand, if the dispensation is rejected, it is also necessary to consider the fate of the fetus that is being carried as a measure to protect the child's inherent rights even before the fetus is born. This condition places judges in a dilemma and complex position, considering these two options have significant ethical consequences and

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<sup>31</sup> Judge at the Madiun City Religious Court

considerations. It is necessary to consider how the judge's decision can reflect justice and the best interests of all parties involved. In dealing with this situation, judges need to assume their responsibilities by considering social impacts, family welfare, and individual rights, including the rights of unborn children. Wise legal findings and fair decisions are the key to handling marriage dispensation cases with pregnancy as the main factor.

*Second*, Marriage is arranged by parents (arranged Marriage). This situation becomes a challenge for judges when there are inconsistencies in the information provided by the various parties involved. On the one hand, the parents want the Marriage to take place immediately, but on the child's side, they give the impression that they do not want to continue to the wedding stage. These situations place judges in a difficult position, where it is necessary to assess the wishes and rights of the individuals involved carefully. The judge must consider aspects such as freedom of will, the child's right to determine his or her destiny, and wishes for family life that may be affected by the Marriage.

*Third*, Economic conditions. This means there are cases where finances are limited, especially for men requesting a marriage dispensation. If we look at his income, it is less than Rp. 1,000,000.00 (one million rupiah). This is undoubtedly a factor that complicates the judge's considerations. This condition becomes more complicated if the pregnancy occurs before the marriage takes place. If marriage dispensation is granted, it will increase the risk of problems occurring in the family, including domestic violence (KDRT), which can end in divorce. Limited financial conditions can affect the overall welfare of the family. When dealing with situations like this, judges need to consider the social and psychological impact of the decisions taken. Aspects such as the continuity of family relationships, family members' safety and children's welfare need to be considered carefully. The balance between financial needs and household stability is the primary consideration in assessing requests for marriage dispensation in limited economic conditions.

*Fourth*, Applications for marriage dispensation will become very complex when the child for whom marriage dispensation is requested still has the desire to continue their education but has been expelled by the school because of a previous pregnancy. This condition also creates a dilemma for the judge because the child whose marriage dispensation was requested expressed a desire to continue school but was prevented by the pregnancy that occurred. The judge's decision to reject the application for marriage dispensation can have negative psychological implications for the child, especially about his inability to continue his formal education at school. Schools that refuse to accept post-natal children can also have an impact on their psychological development. On the other hand, granting a marriage dispensation to allow marriage can open the door for children to receive alternative education, although with different qualifications, such as package B or Package C schools. Judges need to understand that this condition is not only about marriage but also involves the child's right to receive an education based on his or her desires and potential. Decision-making must consider the balance between protecting children's rights, especially their educational rights, and accommodating the situation faced by children for whom marriage dispensation is requested.

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*Fifth*, there is Low legal awareness and legal disobedience. This condition becomes an obstacle for the judge when the request for a marriage dispensation is rejected or not granted; the applicant gets emotional during the trial and instead forces the request to be approved even though the judge refused based on the child's unpreparedness for marriage, which could potentially harm the victim in the future. Because after getting married, it does not take long for them to separate (divorce) either because the man leaves or because of domestic violence (KDRT). This is where the parents then go to court and regret it. The judge may reject the application based on the child's unpreparedness for marriage, which has the potential to harm the weaker party in the future.

The urgent reasons, as outlined, align with the results of the 2022 recap of the marriage dispensation of the Indonesian Religious Courts, which categorized five urgent reasons proposed by the marriage dispensation: pregnancy, economics, intimate relationships, love and soul mate. However, the final reason is that "soul mate" is not found in the jurisdiction of religious courts under the scope of the Surabaya High Religious Court, including the Madiun City Class II Religious Court.

As explained previously, the determination of court dispensation in principle places judges in a position to assess and choose between two *harmin* the child's best interests. The judge's granting or rejection of a marriage dispensation request is actually an implementation of the principle of the child's best interests. It is also a manifestation of legal certainty. As previously presented in Table 1, in 2019, one request was not granted by the Madiun City Religious Court, as stated in Determination Number 0072/Pdt.P/2019/PA.Mn.<sup>32</sup>

The facts of the trial show that the child who was asked for a marriage dispensation when giving his statement at the trial prevented the marriage from taking place. Previously, there had been sexual intercourse until the girl became pregnant. In this case, the judge rejected the application submitted by the parents because the child should not enter into a forced marriage. This must be accounted for as it should be. According to Burhanudin, responsibility is the ability to bear the risk of an action carried out.<sup>33</sup> When the child has committed an act of conscious sexual intercourse, he must also be made to be responsible to bear the risk of the act he has committed.<sup>34</sup> This is very important to shape the child's character sustainably and for the child's future growth and development, which is in accordance with the principle of a marriage dispensation.

In the context of implementing the marriage dispensation, there are imperfections in the implementation of laws and regulations which do not appear to have reached the expected level of effectiveness. Marriage dispensation is given with the main aim of

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<sup>32</sup> The judge who examined the matter was led by Syarifah Isnaeni with the member judges consisting of Wahidah and Alfian Yusuf. The Substitute Clerk on the matter is Suriyana, S.H.I. The Substitute Trustee on the matter is Taufik Farida, S.H. The hearing lasted for 14 (fourteen) days.

<sup>33</sup> Nisa Rahmaniya Utami, Hani Subakti, Salamun, *Pengantar Dasar Ilmu Pendidikan* (Surakarta: Muhammadiyah University Press, 2022), 247.

<sup>34</sup> Sastro Mustapa Wantu, et al. "Early Child Marriage: Customary Law, Support System, and Unwed Pregnancy in Gorontalo." *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 780-803.

protecting the prospective wife and her fetus, especially when pregnant out of wedlock or having had sexual intercourse without becoming pregnant while maintaining the dignity of both.<sup>35</sup> In legal considerations, the judge was faced with a dilemma when the application for marriage dispensation based on pregnancy out of wedlock was rejected. This can have negative consequences, such as an increase in the sin of adultery, underhanded marriages, and loss of children's rights.<sup>36</sup> Socially, marriage is considered a solution to maintain honor and avoid stigma against women who become pregnant out of wedlock.<sup>37</sup> However, the psychological impact on the woman, such as isolation and mental stress, can hurt the fetus.<sup>38</sup> Thus, the importance of firm legal certainty in regulating marriage dispensations becomes clear to protect children's rights and overcome the complex obstacles judges face in making decisions.

#### 4. Conclusion

In the context of implementing the marriage dispensation, there are imperfections in the implementation of laws and regulations which do not appear to have reached the expected level of effectiveness. Marriage dispensation is given with the main aim of protecting the prospective wife and her fetus, especially when pregnant out of wedlock or having had sexual intercourse without becoming pregnant while maintaining the dignity of both. In legal considerations, the judge was faced with a dilemma when the application for marriage dispensation based on pregnancy out of wedlock was rejected. This can have negative consequences, such as an increase in the sin of adultery, underhanded marriages, and loss of children's rights. Socially, marriage is considered a solution to maintain honour and avoid stigma against pregnant women without a husband.

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<sup>35</sup> Hasil Wawancara dengan Ibu Nova Sri Wahyuning Tyas, S.H.I. selaku Hakim Pengadilan Agama Kota Madiun pada 21 Maret 2023 di Pengadilan Agama Kota Madiun Pukul 10.00 WIB.

<sup>36</sup> Alwi Jaya, Sumarni Sumarni, Gustika Sandra and Tarmizi Tarmizi. "Implications Of Early Marriage On Health And Household Harmony." *COMSERVA: Jurnal Penelitian dan Pengabdian Masyarakat* 3, no. 2 (2023): 818-822.

<sup>37</sup> M. Mohsi, "Analisis Perkawinan Paksa Sebagai Tindak Pidana Kekerasan Seksual Dalam Rancangan Undang-Undang Penghapusan Kekerasan Seksual PKS." *Al-Adalah: Jurnal Hukum dan Politik Islam* 5, no. 1 (2020): 1-19.

<sup>38</sup> Nurchaliq Chaliq Majid, Anna Rahma Syam, and Suharna Arna Ismail. "Consequences of a Smoker's Husband in the Dimension of Household Harmony Perspective of Islamic Law." *Al-Adalah: Jurnal Hukum dan Politik Islam* 8, no. 2 (2023): 192-206.

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