

ASPECTS OF JUSTICE OF MARRIAGE DISPENSATION AND BEST INTERESTS FOR CHILDREN

Imran

Faculty of Law, Muhammadiyah University of Mataram
rusyadi1975imran@gmail.com

Amran Suadi

Mahkamah Agung RI
amran.suadi@gmail.com

Muh. Risnain

Faculty of Law, University of Mataram
risnain82@gmail.com

Erlis Septiana Nurbani

School of Law, University of New England
enurbani@myune.edu.au

Abstract

Marriage dispensation is an application for a marriage permit made by the parents or family of a prospective husband or wife who is not yet 19 years old to enter into a marriage at the Religious Court. This paper briefly describes the justice of marriage dispensation and the children's best interests. The main topics discussed in this paper are the marriage laws and marriage dispensations according to the Law, the best interests of the child explained according to the Law, and to compromise between marriage dispensation and the child's best interests. The method used in this research is normative research by examining legal norms in legislation and decisions of the Constitutional Court. The content of this paper reveals that despite being deemed as contradictory to the Law as per the ruling of the Constitutional Court No. 22/PUU-XV/2017 dated 13 December 2018, which sets the minimum age for marriage according to Article 7 paragraph (1), child marriages facilitated by marriage dispensations persist in Indonesia. Furthermore, not every petition for marriage dispensation receives approval from the judicial panel. The decision on dispensation requests hinges on a thorough

evaluation of the merits of the application and the potential impact on the child's future well-being, prioritizing the child's best interests.

Keywords: aspect of justice; marriage dispensation; children

Introduction

Marriage is a legal union that generates legal rights and responsibilities. Essentially, it involves a deliberate union between a man and a woman to achieve the goals of matrimony. The institution of marriage is intertwined with lineage, parenthood, familial ties, and societal norms. Hence, every citizen's entitlement to offspring and the formation of a lawful family is safeguarded by the state, along with ensuring the rights of children and protection from violence and discrimination. The amendment of the Marriage Law, which formerly was Law Number 1 of 1974 but now stands as Law Number 16 of 2019, signifies a fresh revolution in securing the rights and responsibilities necessary for establishing a harmonious family. This alteration specifies that marriage may be allowed under the condition that both the man and woman are at least 19 years old (Article 7 of Law No. 16/2019 regarding Marriage). This considers how child marriages (early marriage) can be minimized. This provision simultaneously serves as a solution to mitigate the negative impacts on children's growth, which fundamentally remain unfulfilled due to their young age for marriage.

There are still many applications for Marriage Dispensation in Indonesia, and the number tends to increase. This can be seen from the Annual Report of the Supreme Court and the Religious Courts Agency. According to statistics gathered from the 2021 Supreme Court Activity Implementation Report, there were 13,880 instances of Marriage Dispensation Application cases.¹ The 2021 Supreme Court Activity Implementation Report revealed a notable surge in the quantity of cases falling under the Marriage Dispensation classification, reaching a total of 24,864 cases.² Applications for marriage dispensation are the 4th most common type of case submitted to the religious courts, including

¹Supreme Court, Report on the Implementation of Supreme Court Activities for 2021

²Supreme Court, Report on Implementation of Supreme Court Activities for 2021. See also Report on Implementation of Activities of the Directorate General of Religious Courts for 2018 and 2019.

divorce suits, divorces, and *Itsbat nikah*. This shows that special attention needs to be paid when adjudicating a Marriage Dispensation case.

Applicants who apply for marriage dispensation are frequently found to have violated the regulations specifying the minimum age for marriage. Instances where petitioners request dispensation from this minimum age requirement have been on the rise. While there are legal provisions allowing for exceptions in cases of child marriage, this does not guarantee automatic approval from the Panel of Judges. Each case undergoes careful examination to determine whether granting dispensation would result in more benefits or potential harm. As a result, not all marriage dispensation requests receive approval from the panel of judges.

Even though requests for dispensation from marriage are strictly determined by judges, data submitted by the Directorate of Religious Courts shows that from 2022 to 2024 there has been a significant increase. There were 52,093 applications submitted by applicants, while 50,746 were decided³. The large number of marriage dispensations that have been decided by the courts shows that the spirit of the Constitutional Court's decision to increase the marriage age requirement to 19 years for female and male candidates has actually not been achieved because the marriage dispensation door has become ineffective in preventing underage marriages.

According to Gushairi's study, the application for marriage dispensation is based on preventive and curative aspects. According to Gushairi, the consideration of the panel of judges in deciding whether to accept or reject a marriage dispensation case is the factors, the applicant's legal standing, the reasons for applying for marriage dispensation, whether there is a prohibition on marriage or not, and the benefit/harm⁴.

The petitioner's worry regarding their child engaging in detrimental behavior due to dating and developing romantic feelings for someone in the future should be addressed by ensuring their child

³ https://kinsatker.badilag.net/JenisPerkara/perkara_persatker/362/2022

⁴ Gushairi, *Problematika Dispensasi Kawin Di Pengadilan Agama*, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/problematika-dispensasi-kawin-di-pengadilan-agama-oleh-gushairi-s-h-i-mcl-4-12>

comprehends relationships properly. Instead of resorting to marrying off their child at an age below the legal minimum for marriage, as specified in the Law, it is crucial to provide the child with the necessary understanding of relationships.

The Panel of Judges, when reviewing cases concerning requests for marriage dispensation, necessitates thorough and meticulous deliberation, taking into account legal facts from various perspectives, including the involvement of minors. Moreover, with the recent amendments to the marriage law, the minimum marriage age for both genders has been standardized to nineteen years. Therefore, child marriage through the mechanism of requesting marriage dispensation is an important issue to be discussed.

The study of aspects of justice in marriage dispensations related to the best interests of children is a very urgent study to be carried out for academic and practical reasons. The academic reason for this study is necessary because the dispensation of marriage as a regime in marriage law is correlated with the aim of changing the marriage law and the decision of the Constitutional Court which requires the protection of children from legal regulations which previously did not provide justice for children, especially women, but the desired justice will be achieved. hindered when faced with marriage compensation, which seems to provide an opportunity for the applicant to bypass the prohibition on underage marriage. Likewise, the practical importance of the child marriage prevention regime with the principle of the best interests of the child is a fundamental legal principle in child protection law which will be a reference for religious court judges in giving considerations in deciding cases.

Based on the introduction above, the focus points for discussing the problems in this article are as follows: first, What are the marriage laws and marriage dispensations according to the Law? Second, How is the best interests of the child explained according to the Law? Third, How to compromise between marriage dispensation and the best interests of the child?

The method used in this research is normative research by examining legal norms in legislation and decisions of the Constitutional Court. The approach used is a statutory regulatory approach and a conceptual approach. The conceptual approach is carried out by examining the ideal concept in preventing child marriage with the best

interests of the child in deciding cases regarding applications for marriage dispensation.

Marriage, Marriage Dispensation in Indonesia

Marriages registered in Indonesia of course aim to obtain legal certainty. In this marriage, the rights and obligations of husband and wife are clear. Meanwhile, for marriage to be legally conducted in Indonesia, adherence to age requirements is mandatory, as stipulated in the extensively revised Marriage Law. The revised edition of Law No. 1 of 1974 concerning Marriage, which concentrates particularly on establishing the minimum legal age for marriage, was ratified in adherence to the Constitutional Court decision No. 22/PUU-XV/2017 dated December 13, 2018. This decision established the age limit for marriage as articulated in Article 7, Paragraph (1) of the Marriage Law, which dictates that marriage is permissible only when both parties, male and female, have reached the age of 19 years.⁵

In paragraph (2), it is indicated that if there is a departure from the age requirements mentioned in paragraph (1), the father, mother, or both parents can seek dispensation from the court for compelling reasons supported by adequate evidence. The purpose of the Law is to ensure security, order, and the welfare of society, which is provided by the state as the guardian of society. Legal regulations not only address concerns about potential risks to individuals but also govern interpersonal relationships. It is the role of the Law to identify and address each issue to ensure legal certainty. The principle of legal certainty serves as a safeguard for individuals seeking justice, ensuring protection against arbitrary actions and enabling them to attain their desired outcomes under specific circumstances. This assertion aligns with Van Apeldoorn's view that legal certainty encompasses two facets: the ability to ascertain the Law in specific situations and providing legal security.⁶ Consequently, parties seeking justice seek clarity on the applicable Law before initiating legal proceedings, while also seeking

⁵Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Marriage.

⁶ L.J. Van Apeldoorn, *inleiding tot de studie van het Nederlandse recht*, Pradya Paramita, 1986, p.56

protection throughout the justice-seeking process, ⁷Lord Lloyd said that:

"...The Law appears to necessitate a specific level of consistency and clarity, as without it, it would be challenging to claim that the governing principles within a particular jurisdiction constitute a legitimate legal framework."

From this perspective, it becomes apparent that in the absence of legal certainty, individuals lack clear guidance on their actions, resulting in uncertainty that may culminate in conflicts due to the unpredictable nature of the legal system. Therefore, legal certainty entails the application of Law that is transparent, enduring, and uniform, immune to subjective influences in its enforcement.⁸

To obtain legal certainty, parents often apply for marriage dispensation to the Religious Court. Some applications for marriage dispensation are based on statutory regulations, and some are not. Based on the provisions of statutory regulations, the application submitted has met the formal and material requirements. ⁹On this basis, the request for marriage dispensation can be granted by the panel of judges. If there is no strong basis, it is certain that the application will be rejected.

Marriage dispensation is viewed as the final recourse that a judge can take, provided that there are no other remedies available regarding discrepancies in marriage age. The provision states that the presence of urgent reasons necessitates evidence that includes principles of fairness, certainty, and benefit. This implies that every judge in proceedings at the Religious Courts is obligated to reach the same legal considerations in their judgments. The approval of dispensation follows the existing laws closely. Legal certainty involves having strong regulations in place to avoid arbitrary decision-making. In this context,

⁷Mirza Satria Buana, *The Attractive Relationship Between the Principle of Legal Certainty and the Principle of Justice (Substantial Justice) in the Decisions of the Constitutional Court*, Yogyakarta: Master's Thesis at the Islamic University of Indonesia, 2010, p. 34.

⁸Prayogo R Tony, "The implementation of the Legal Certainty Principle can be observed in Supreme Court Regulation Number 1 of 2011 regarding the Right to Judicial Review and in Constitutional Court Regulation Number 06/Pmk/2005 outlining the Procedure Guidelines for Legal Review", *Indonesian Legislation Journal*, Volume 13, Number 2, 2016, p.194).

⁹Formal and material requirements for applications for marriage dispensation can be found in several laws and regulations. Among them are the Law on Child Protection and Republic of Indonesia Supreme Court Regulation Number 5 of 2019.

legal certainty pertains to the applicable laws regarding marriage. Judges' assurance of legal certainty involves considering legal aspects outlined in Article 29 of the 1945 Constitution, Law Number 1 of 1974, Law Number 16 of 2019, Law Number 7 of 1989, Islamic legal perspectives (An-Nur verse 2 and/or principles of Islamic Law), and customary legal perspectives.

In reference to Determination Number 133/Pdt.P/2019/PA.Lss, which denied the Marriage Dispensation Application, the Panel of Judges cited the observation that a young age at marriage leads to outcomes divergent from the mission and objectives of marriage, which aims to establish harmonious households based on love. Achieving this goal becomes notably challenging if both spouses lack physical and emotional maturity. Personal maturity and stable integrity are crucial for effectively addressing the myriad challenges encountered in marital life, akin to navigating a ship through the unpredictable vastness of the ocean of life, where circumstances frequently shift unexpectedly.¹⁰

As outlined in Article 26, paragraph 1 of Law Number 23 of 2002 concerning Child Protection, as amended by Law Number 35 of 2014, parents bear the obligation and responsibility to: a. nurture, educate, and safeguard children; b. foster the development of children according to their capabilities, talents, and interests; c. prevent child marriages; and d. impart character education and instill moral values in children. These provisions serve as essential guidelines for both parents and the Panel of Judges tasked with assessing cases related to applications for marriage dispensation.

The issue of child marriage is not only a legal problem, but has impacts both on education, health, psychology, economics and family resilience. Child marriage has an impact on the education decisions of the child's partner. Reluctance to continue education after marriage is a fact that occurs when children are undergoing education. The impact is that many children drop out of school and have further impacts. The health impacts are no less dangerous, the threat of cervical cancer is another aspect of child marriage for the child's reproductive health. Psychology has a significant impact on those who enter into child marriage; their emotional and psychological instability causes them to be unable to withstand the challenges of married life with their

¹⁰See page 11 of Determination No.133/Pdt.P/2019/PA.Lss

partner. The economic impact is no less dangerous, couples of child-marriage age generally do not have permanent jobs and only rely on their parents, meaning that household needs cannot be met by the couple themselves. Family resilience is also a challenge for those who carry out child marriages. Vulnerability to divorce is a common thing in society when child marriage partners are unable to maintain their marriage. A further impact is the low human achievement index (HDI) contributed to by the high rate of child marriage¹¹.

Best Interests of the Child According to Law

In the opinion of Prof. Dr. Wardiman Djoyonegoro said that children are the shoots of the nation, the continuation of the nation, because it is in the hands of children that the future fate of the nation can be good.¹² The direction of national development policy should prioritize the protection of children and women. Upholding and ensuring strong protection for children and women contributes positively to the dignity of the nation. It is imperative for the state to fully commit itself to the well-being and benefit of children and women.

According to R.A. Kosnan, "Children are young people at a young age in their soul and life journey because they are easily influenced by their surroundings."¹³ According to the General Indonesian Dictionary, the term "child" is etymologically described as an individual who is young or not yet reached adulthood. Similarly, under Law Number 23 of 2002, a child is defined as someone under the age of 18. However, for the purposes of this study, the specific age limit for educational analysis is set at 18 years or younger, or less than 19 years old. This comprehension of children's roles pertains to whether the State's stance on children can serve as a definitive guideline for effective societal development. The progress in children's development plays a crucial role in shaping the future quality of human resources and the succeeding generation, who will lead the nation. Hence, they should be equipped and guided from an early stage to foster physical and

¹¹ Shafa Yuandina Sekarayu and Nunung Nurwati, Dampak Pernikahan Usia Dini Terhadap Kesehatan Reproduksi, *Jurnal Pengabdian dan Penelitian Kepada Masyarakat (JPPM)*, Vol. 2 No.1, April 2021, p. 37 – 45.

¹²Prof. Dr. Wardiman Djoyonegoro, *Along the Way of Memories Working with Three Great National Figures*, Jakarta, KPG, 2016, p. 29

¹³R.A. Koesnan, *Criminal Structure in the Indonesian Socialist State*, (Bandung: Sumur, 2005), p. 113.

spiritual well-being, independence, and prosperity. This ensures that they evolve into high-quality resources capable of confronting future challenges.¹⁴

The following is an explanation regarding the meaning of children. When referring to Law Number 23 of 2002, a child is someone who is not yet 18 years old.¹⁵ However, in this case, the specific child limit for educational analysis is up to the age of 18 years or less than 19 years. This is adjusted to the child's school age group, namely elementary school 7-12 years, junior high school 13-15 years, and high school 15-18 years.¹⁶ In another explanation, children according to language are second offspring as a result of the relationship between a man and a woman. In consideration of Law no. 23 of 2002 concerning child protection, it is said that children are a trust and gift from God Almighty, in whom the honor and dignity of being a complete human being is inherent. In a visionary view, children are a form of investment that is an indicator of a nation's success in implementing development.¹⁷

International Law also addresses the paramount importance of safeguarding the welfare of children, as evidenced by various conventions governing children's rights. The global acknowledgment of the significance of protecting children's rights is evident in the creation of a series of instruments aimed at affirming children's rights, particularly concerning their treatment. Several instruments explicitly outline children's rights, including: 1) The Geneva Declaration concerning the Rights of the Child (1924 Geneva Declaration on the Rights of the Child); 2) Declaration on the Rights of the Child by the United Nations General Assembly (UN General Assembly Declaration on the Rights of the Child 1959); 3) Covenant on Civil and Political Rights (1966 International Covenant on Civil and Political Rights); 4) Covenant on Economic, Social, and Cultural Rights (1966 International

¹⁴W.J.S. Poerwadarminta, *General Indonesian Dictionary*, (Balai Pustaka: Amirko, 1984), p. 25

¹⁵Solehuddin, *Enforcing Legal Safeguards for Child Employed in the Construction Industry* (Investigation within the CV. Karya Sehati Development Project, Sampang Regency), Published in the Brawijaya University Journal, Malang, 2013, page 5.

¹⁶M. Nasir Djamil, *Children Are Not to Be Punished*, Sinar Graphics, Jakarta, 2013, p. 9

¹⁷Law Number 23 of 2002

Covenant on Economic, Social, and Cultural Rights); and 5) Convention on the Rights of the Child by the United Nations (1988 UN Convention on the Rights of the Child).

These instruments unequivocally outline a comprehensive array of children's rights and the responsibilities incumbent upon countries that endorse and ratify them to safeguard children. These encompass various issues ranging from child labor, adoption, the enlistment of children in armed conflict, juvenile justice, refugee children, child exploitation, to matters concerning health, education, family, and other economic and social rights pertinent to children. Children represent the future generation of the nation and lack the capacity to protect themselves, hence necessitating the involvement of both the State and Society to ensure the fulfillment of their rights. In August 1990, Indonesia formalized its acceptance of the Convention on the Rights of the Child by means of Presidential Decree No. 36 of 1990 and subsequently lodged it with the United Nations on September 5, 1990.

Through this ratification, Indonesia has legally bound itself to adhere to the provisions outlined in the Convention on the Rights of the Child. It is anticipated that this ratification will lead to an enhancement in the quality of children's lives. Upon examining the entire content of the Convention on the Rights of the Child, it can be inferred that there are four overarching principles that must be upheld in endeavors to safeguard children's rights. Firstly, The principle of non-discrimination underscores the importance of uniformly applying the rights outlined in the Convention to all children, regardless of any differences or distinctions. Article 2, paragraph 1 of the Convention mandates: "States Parties must uphold and guarantee the rights outlined in this Convention for every child under their authority without any form of discrimination, regardless of the child's or their parent's or legal guardian's race, color, gender, language, religion, political or personal beliefs, nationality, ethnicity, social background, wealth, disability, birth circumstances, or any other status." Moreover, paragraph 2 affirms: "States Parties are obligated to take all suitable measures to safeguard the child from any forms of discrimination or penalties based on the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." This principle affirms the

imperative that every child should receive equal treatment, regardless of any factors.

Secondly, the principle of prioritizing the best interests of the child is expressed in Article 3, paragraph 1 of the convention, which asserts: "In any activities involving children carried out by governmental or private social welfare institutions, judicial authorities, administrative bodies, or legislative entities, the paramount importance shall be given to the best interests of the child." Other articles closely related to this principle include Article 9 regarding the separation of children from their parents; Article 20 concerning children who have lost their family environment, either permanently or temporarily; Article 21 addressing adoption; Article 37 (c) addressing restrictions on freedom; and Article 40 (2) (b) (iii) concerning bail for children accused of violating criminal Law. Therefore, all forms of protection and treatment towards children should prioritize the consideration of what is in the child's best interests, rather than what serves the interests of adults. Often, adults tend to view children's interests solely from their own perspective, resulting in proposed solutions that fail to adequately address the challenges faced by children.¹⁸

Third, The principle of the right to life, survival, and development of children is regarded by the Committee on Children's Rights as a comprehensive concept, as most provisions of the Convention revolve around issues of child development and survival. Article 6, paragraph 1 of the Convention affirms: "States Parties acknowledge that every child possesses an innate entitlement to life." Additionally, paragraph 2 stipulates: "States Parties shall ensure to the maximum extent possible the survival and development of children." Moreover, to promote children's development, there are at least five aspects that need consideration: physical development; mental development, particularly concerning education, including special education for disabled children; moral and spiritual development; social development, particularly regarding freedom of expression and association; and cultural development.

Fourth, The principle of honoring children's perspectives is encapsulated in Article 12, paragraph 1 of the Convention, which

¹⁸asmaeny Azis, *The Dilemma of Women's Representation in Parliament, (a Legal Approach with a Gender Perspective)*, Yogyakarta: RangkangEducartion, 2013, p. 18.

asserts: "States Parties shall ensure that children who are capable of expressing their own opinions have the right to freely express those opinions in all matters concerning them, and that the child's views are taken into consideration according to their age and level of maturity." The Committee on Children's Rights affirms that this article serves as a foundational principle that intersects with all facets of the Convention's implementation and interpretation.¹⁹ Therefore, every form of decision making or policy that concerns children must always take into account the child's views. Their views must be respected according to their level of maturity.

Indonesian government has revised regulations that underscores the significant importance of safeguarding children's rights. In addition to this, there exist various legislative acts aimed at protecting children's welfare, including Law No. 4/1979 regarding Child Welfare; Law No. 3/1997 addressing juvenile justice; Law No. 39 of 1999 concerning the Elimination of the Worst Forms of Child Labor; Child Protection Law No. 23 of 2002; Law No. 12 of 2005 concerning the Ratification of Civil and Political Rights; along with numerous regional regulations (Perda) focused on protecting child victims of violence.

Giving careful consideration to the fundamental rights of children as outlined in diverse legal documents leads to the observation that these rights closely align with the moral teachings found in various religious scriptures. This suggests that the principles of human rights, including those pertaining to children, are harmonious with the tenets of religious teachings. There exists no inherent contradiction between the two.²⁰

Every legal matter involving children necessitates prioritizing the child's best interests, including both civil and criminal cases. One civil issue often entwined with the best interests of children is marriage dispensation cases, which frequently involve various conflicting interests. Parents' desires for their children to marry swiftly often clash with the child's rights, leading to coercion that

¹⁹Candra Gautama, *Convention on the Rights of the Child: A Guide for Journalists*, Jakarta : LSPP, The Asia Foundation and USAID, 2000, p. 39.

²⁰Musdah Mulia, *Encyclopedia of Reformed Muslim Women, Principles of Thought for Reinterpretation and Action*. (Jakarta: Dian Rakyat 2019), Cet.1, pp 267-272

disregards the child's best interests. Succumbing to parental pressure forces children to compromise their future. Prioritizing the child's best interests in all legal proceedings is mandated by Law, as outlined in detail in the International Convention on the Rights of the Child. The best interests of the child are that all decision making must always consider the child's survival and growth and development.²¹ The best interests of children are always linked to the rights they must obtain. Children's rights that must be obtained include:

a. Right To Survival;

This principle is closely associated with guaranteeing the economic, healthcare, and social welfare of children, with the objective of offering them a high standard of living, securing their welfare, health, and protection. The right to survival represents the most basic entitlement for children, protected by the state, government, community, family, and caregivers.

b. Right To Protection;

Child protection entails a comprehensive array of initiatives geared towards upholding and defending children's rights, facilitating their well-being, growth, development, and active participation in alignment with human dignity, while shielding them from violence and prejudice. These efforts encompass both direct interventions and broader measures aimed at addressing circumstances that jeopardize children's physical and/or psychological welfare.

c. The Right To Growth And Development;

What is meant by child growth and development is that children must receive guarantees to grow naturally, both physically, mentally, spiritually and socially.

Parents or trustees should not only look at the family's interests alone. The best interests of the child include the child's rights and the child's physical and spiritual well-being must be

²¹Explanation of Article 2 letter d of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. See also Article 1 paragraph (6) of the Republic of Indonesia Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications.

prioritized.²² It is not justified if parents only prioritize the interests of the family by ignoring the best interests of the child.

From another perspective, it can be argued that child marriage is related to children's rights as regulated in the Child Rights Convention and human rights as regulated in Law Number 39 of 1999 concerning Human Rights. The perspective of the Convention on Children's Rights is that child marriage is a violation of human rights, and even if it occurs, the most important factor to consider is the best interests of the child, including when there is a marriage compensation mechanism²³. Marriage compensation can only be given if the best interests of the child can be realized through this mechanism. Likewise with the human rights perspective in the Law on Human Rights. Marriage compensation can only be carried out in the best interests of the child and in the context of protecting the child's rights²⁴.

Marriage Dispensation and Legal Protection of the Best Interests of Children

In the preamble of the 1945 Constitution of the Republic of Indonesia, it is articulated that the objective of the Indonesian nation is to ensure the welfare and security of the entire Indonesian population and the territorial integrity of Indonesia. The Grund Norm philosophy is very much animating in the work patterns and policy direction of the Indonesian nation where legal protection for citizens is a necessity.²⁵ In addition to the constitutional directive, the imperative to protect and preserve human life stems from the sacred teachings found in the Quran. Allah SWT's intention in revealing Islamic Law includes the

²²Ali Imron HS, Marriage Dispensation Child Protection Perspective, QISTI Legal Science Journal Vol. 5 No. January 1, 2011, p. 75.

²³ Shintya Kurnia Beti Fardina, Perlindungan Hak Anak terhadap Pernikahan Dini dalam Perspektif Konvensi Hak Anak, <https://conference.untag-sby.ac.id/index.php/seminas/article/view/223>

²⁴ Kadek Devi Regina Melati and A.A. Gede Oka Parwata, Perlindungan Hukum Atas Perkawinan Anak Di Bawah Umur Dalam Perspektif Undang-Undang Hak Asasi Manusia, Jurnal Kertha Semaya, Vol. 10 No. 9 Tahun 2022, hlm. 1994-2002.

²⁵Read Prof. Dr. Irfan Idris, Islam and Constitutionalism The Contribution of Islam in Drafting the Modern Constitution, Makassar, AntonyLib, Cet. 1 2009, pp. 1-3.

protection of humanity. Moreover, reiterated in the fourth paragraph of the constitution is the commitment to establish an Indonesian government dedicated to safeguarding the entire Indonesian populace and promoting the general welfare, fostering national development, and contributing to the establishment of global harmony founded on principles of freedom, lasting peace, and social justice..²⁶ So it is clear that based on this Grand norm, the Indonesian State is obliged to provide legal protection for all Indonesian people. As a country with Law and order and democracy, the Indonesian nation is very strict in regulating the order of national and state life in all dimensions of social life, including regulating the protection of the rights of citizens as a whole without exception. Even the rights of women and children do not escape regulation by the State.²⁷

According to Paulus E. Lotulung, in realizing legal protection, each country has its own methods and mechanisms and the extent to which legal protection can be provided²⁸. Legal protection for society is a universal concept, but the procedures for implementing the Law are regulated by each country through the government. In general, there are three types of government actions, namely government actions in the field of making legislation (*regeling*), and government actions in terms of decrees (*materieledaad*). The first two categories primarily pertain to the public sector, while the last one is specific to the civil sector. Therefore, the Law is subject to regulation and governance based on civil law principles.

According to Muchti A. Fadjar, legal protection can be defined as the safeguarding provided by the Law, which pertains to the rights and duties inherent in individuals as legal entities in their interactions with others and their surroundings²⁹. As legal entities, individuals possess both rights and responsibilities to undertake legal

²⁶Constitution of the Republic of Indonesia 1945, Secretariat of the Constitutional Court of the Republic of Indonesia 2002.

²⁷Read Prof. Dr. Muhammad Daud Ali, *Islamic Law, introduction to the science of Law and Islamic legal system in Indonesia*, RajaGrafindoPersada, 1996, cet. I, p. 12

²⁸ Paulus Effendi Lotulung, (2013), *Hukum Tata Usaha Negara dan Kekuasaan*, Jakarta: Salemba Humanika, p. 7.

²⁹ Abdul Mukthie Fadjar ,*Sejarah, elemen dan tipe negara hukum*, Cet. 1, Malang : Setara Press, 2016, p.12

actions. As described by Lili Rasjidi and IB. Wysa Putra, legal protection serves the purpose of establishing safeguarding measures that are not only adaptable and flexible but also predictive and forward-thinking. An adaptable approach toward societal advancements, including technological advancements, is essential as the Law evolves and progresses within society.

Meaningful laws are those that serve as public guidance. They are not solely based on existing statutes or regulations, but also consider the evolving values within societal norms. These values encompass ethical principles, which play a crucial role in guiding the pursuit of justice. The interplay between ethics (morality) and Law can be likened to a map and destination. Given the dynamic nature of human existence, anticipatory legal protection becomes essential. Predicting events that have yet to occur to formulate ideal laws for the future (*ius constituendum*) is indeed challenging. Therefore, laws are formulated through interdisciplinary studies and projections of the development direction in various aspects of life.

Philipus M. Hadjon articulated that legal protection encompasses safeguarding honor, dignity, and the acknowledgment of human rights possessed by legal entities according to legal provisions of authority³⁰. Conceptually, the legal protection afforded to the Indonesian populace embodies the principle of recognizing and safeguarding human dignity. Two types of legal protection exist: preventive and repressive. Preventive legal protection aims to avert disputes, offering the opportunity for individuals to voice objections or opinions before government decisions are finalized. Conversely, repressive legal protection relies significantly on discretion. This understanding that Law serves both preventive and punitive purposes enriches the concept of ideal legal protection. It serves to prevent criminalization, which is the flip side of technological advancements promising benefits, while also providing certainty regarding law violations. Furthermore, Philipus M. Hadjon put forward two principles of legal protection for Indonesian society, namely:

- a. The principle underlying legal protection for the Indonesian people which is based on the concept of recognition of government actions is knowledge and protection of human

³⁰ Philipus M. Hadjon, *Perlindungan hukum bagi rakyat di Indonesia*, Cet. 1, Surabaya Bina Ilmu 1987, p.56

rights. Basically, Pancasila, which has been agreed upon as the basis of the state, contains values regarding the recognition of human dignity, which also means recognizing the human will to live together which is directed at efforts to achieve common prosperity.

- b. The principle of the rule of Law is that government actions are based on the principle of harmonious relations between the government and the people which is ultimately directed at efforts to achieve harmony and balance in life.³¹

The matter of human rights is of utmost importance and sensitivity, warranting discussion even on a global scale, given its critical role in safeguarding the rights of citizens, particularly women and children. The state ensures and preserves legal certainty for women and children in their daily lives to fulfill its objectives, with one such indicator being the security of women and children. Hence, initiatives to nurture children should commence as early as possible, beginning from prenatal stages through subsequent phases of growth and development. As stipulated in Article 330 of the Civil Code, minors are individuals under the age of 21 who have not been previously married. Hence, a child is defined as someone below the age of 21 who has not entered into marriage. However, if a person marries before turning 21 and subsequently divorces or is abandoned by their spouse before reaching the age of 21, they are still regarded as an adult rather than a child.³² Meanwhile, according to Article 45 of the Criminal Code, children are children whose age has not reached 16 (sixteen) years.³³

As per the regulations stipulated in Law No. 4 of 1979 regarding Child Welfare, A child is characterized as an individual who is under the age of 21 (twenty-one) and has not undergone marriage (Article 1, point 2). On the other hand, as outlined in Law Number 11 of 2012 pertaining to the Juvenile Criminal Justice System, In Article 1, Paragraph (3), a child is outlined as an individual aged between 12

³¹Lelita Dewi, "Legal Protection for Women After Divorce through Law Enforcement: A Gender Equality Perspective", Doctoral Program in Law, Jayabaya University, Jakarta 2020, p. 77-80.

³²Subekti and Tjitrosudibio, Civil Code, (Jakarta: PT. Pradnya Paramita, 2002), p. 90

³³RedaksiSinarGrafika, Child Welfare Law, (Jakarta: Sinar Graphics, 1997), p.

(twelve) and 18 (eighteen) years old who is under suspicion of having committed a criminal act.³⁴ In accordance with Article 1 point 5 of Law Number 39 of 1999 concerning Human Rights, a child is identified as any person below the age of 18 (eighteen) who is not married, including unborn children when it is deemed advantageous for their well-being.

Therefore, children represent the forthcoming generation of the nation and necessitate care and protection from the State, particularly considering the established discourse on safeguarding children and women, which has been addressed in various legislations, including international Human Rights conventions. It is imperative that the protection of children and women aligns with the provisions set forth in regulations and is effectively implemented to prevent acts of violence against them. This proactive approach is essential to ensure their well-being and prevent untoward incidents from occurring. Children should be afforded the opportunity to nurture their intellect and character, thereby contributing to their role as valuable assets to the nation.

This is where it becomes necessary for parents, society and the State to protect and realize the rights of each child in their own way. Parents are obliged to directly protect their children's survival, maintain their health, provide good care, education and other rights within the family sphere.³⁵ Society is also obliged to provide control and supervise directly or indirectly the fulfillment of children's rights, while the State is obliged to make public policies that can protect and realize children's rights as citizens.³⁶

The Indonesian government, in paying attention to children's rights, has ratified several conventions related to children's rights. The condition of the Indonesian nation before and during the process of ratifying international agreements in the field of human rights, especially the ICCPR, ICESCR and CEDAW, was that on September 30 2005 Indonesia had ratified the ICCPR and ICESCR, which means

³⁴Human Rights Law Number 39 of 1999, (Jakarta: Asa Mandiri, 2006), p. 5

³⁵Prof. Dr. H. Satria Effendi M. Zein, MA, Problems of Contemporary Islamic Family Law, Analysis of jurisprudence using the Ushuliyah Approach, Jakarta, Kencana, 2004, p. 523.

³⁶Prof. Dr. Musda Mulia, Encyclopedia of Reformist Muslim Women, Basic Thoughts for Reinterpretation and Action, Jakarta, Dian Rakyat, 2009, p.266.

completing the four international human rights instruments that had been ratified previously, namely CEDAW, ICRC, CAT and CERD.³⁷

This endeavor to ratify international human rights conventions is intricately linked to the government's determined effort to meet the constitutional obligation of safeguarding the human rights of its citizens. The ratification of several international human rights treaties holds significant benefits for Indonesia. Firstly, it facilitates Indonesia's participation in a global network aimed at promoting human rights, thereby enhancing its international reputation. Secondly, it reinforces Indonesia's commitment to upholding the principles of respecting, protecting, and fulfilling human rights, thereby ensuring a more secure future. Thirdly, it demonstrates Indonesia's strong commitment to being an active member of the international community and contributes to the reinforcement of domestic legislation. Nevertheless, there remain various national laws and regulations that require strengthening and refinement to align with these international commitments.³⁸

Regulations in Indonesia basically do not require early marriage of children. According to Article 26, Paragraph 1, Letter c of Law Number 35 of 2014, which amends Law Number 23 of 2002 concerning Child Protection, parents have the duty and responsibility to hinder marriages at an early age for their children.

³⁷Presidential Decree No. 36 of 1990 ratified the Convention on the Rights of the Child (CRC), which was further reinforced by Law No. 23 of 2002 on Child Protection. Additionally, the ILO Convention 182, dated June 17, 1999, which prohibits and takes direct action to eradicate the worst forms of child labor, extended protection against severe forms of child labor to all individuals up to the age of 18. This information is sourced from Katarina Tomasevski's publication, "Neglected Education: Problems and Solutions," which was translated and published with assistance and coordination from the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in partnership with the Indonesian Ministry of Law and Human Rights, and received financial backing from the Swedish International Development Cooperation Agency (Sida), Jakarta. Presidential, page 27.

³⁸Wahyu Nugroho, Consistency of the Indonesian Government in Political Will After Participation in Ratification of International Agreements, in the Human Rights Sector, Page 14.

As per the Constitutional Court's decision, child marriage is deemed a breach of children's rights and has the potential to cause harm. This entitlement is explicitly assured by the 1945 Constitution, In Article 28B, paragraph (2), it is stated that "Each child possesses the right to survival, growth, and development, as well as the right to be protected from violence and discrimination." Furthermore, the Child Protection Law highlights that the rights of children are essential facets of human rights that need to be ensured, protected, and fulfilled by parents, families, communities, the state, government, and regional authorities. A child deserving of these assurances is defined as an individual who has not yet reached 18 (eighteen) years of age. Nonetheless, data indicates a rising prevalence of child marriage, with rates surpassing 10% observed uniformly across all provinces of Indonesia. Moreover, child marriage rates exceeding 25% are reported in 23 out of the nation's 34 provinces.³⁹

This situation is deeply concerning as it signifies the deprivation of rights that should be safeguarded by the state for children. If left unaddressed, it will inevitably propel Indonesia into a state of "Child Marriage Emergency," significantly impeding the attainment of the state's objectives outlined in the Preamble to the 1945 Constitution.⁴⁰

Children represent the future of a nation and are regarded as valuable assets. It is essential that they receive adequate protection to ensure they can live, flourish, and develop organically. Consequently, every request for marriage dispensation should be carefully scrutinized with a focus on the child's best interests. Comprehensive measures must be taken to provide comprehensive protection for children.

Legally, parents are entrusted with the duty of caring for children, as outlined in Article 26, paragraph (1), point c of the Child Protection Law. This article places responsibilities on families and parents to prevent child marriages, with the intention of fostering children's growth and development in accordance with their abilities, talents, and interests.

³⁹The Data of Central Statistics Agency data, 2017

⁴⁰Constitutional Court Decision Number 22/PUU-XV/2017 Page 55.

However, the practice of child marriage still occurs in society. Whether the marriage was carried out 'illegally'⁴¹ or 'legally'⁴². Illegal child marriage represents a breach of children's rights and may involve coercion, violence, exploitation, or abuse. This contravenes Article 1 of Law Number 4 of 1979 concerning Child Welfare and may also infringe upon provisions outlined in the Child Protection Law and the Marriage Law. Moreover, logically speaking, child marriage contradicts Article 28B, paragraph (2) of the 1945 Constitution, which asserts that "Every child has the right to survival, growth, and development, as well as the right to protection from violence and discrimination." Nonetheless, the Law offers a provision where child marriage may be permitted under stringent and rigorous procedures.⁴³

In accordance with Law no. 16 of 2019, which revises the Marriage Law, Article 7, paragraph (1) states that marriage is allowed only if both the male and female parties are at least 19 years old. This amendment is anticipated to significantly reduce the occurrence of early marriages that were previously prevalent. However, Article 7, paragraph (2) offers exceptions to the age requirement, allowing the parents of either party to petition the court for a marriage dispensation in cases of urgency, provided that there is supporting evidence. Common reasons cited in requests for marriage dispensation include the close relationship between the prospective spouses, making postponement of marriage impractical, or instances where the couple has engaged in marital relations outside of wedlock. Hence, parents fear that if their children are not granted permission to marry, they may resort to behaviors that contradict Islamic principles.

A marriage dispensation serves as a solution during urgent circumstances for individuals desiring to marry but do not meet the age threshold established by Law. By seeking a marriage dispensation from the Religious Court, they can formalize their marriage through a judicial process. The aim of the marriage dispensation is to legalize the relationship, thereby preventing potential harm to the union. Despite

⁴¹Illegal in the sense that it is carried out without the correct procedures, according to statutory regulations.

⁴²Legal in the sense that child marriage is carried out based on procedures required by statutory regulations.

⁴³See Article 5, Article 6, Article 7 and Article 10 of Supreme Court Regulation Number 5 of 2019.

the establishment of a minimum age requirement for marriage, there remains the possibility of deviations from this stipulated age limit. For instance, instances may arise where individuals below the age of 19, both men and women, seek marriage due to unplanned pregnancies resulting from premarital relationships. In such cases, Article 7, paragraph 1 of Law Number 16 of 2019, which delineates the minimum age for marriage, can be circumvented through the granting of a marriage dispensation for underage unions. This provision is outlined in Article 1, paragraph 2 of Law Number 16 of 2019, which stipulates that "in cases of deviation from paragraph 1 of this Article, application for dispensation can be made to the court or another designated authority by both the male and female parties involved."

Child marriage, or the request for marriage dispensation presented by the child's parents in court, may be permissible upon meeting statutory requirements. In evaluating cases of marriage dispensation applications, Religious Courts often balance two potential risks: the harm stemming from early marriage and the harm that could result from refusing the marriage dispensation. Judges frequently grant marriage dispensation requests, deeming the potential harm from rejection to outweigh the harm from early marriage. This is particularly due to the likelihood of damaging the offspring and the honor of both the prospective bride and groom. The legal reasoning presented by the Panel of Judges in deciding on marriage dispensation cases is formulated based on proven legal facts presented during the trial. Thus far, these legal facts have been obtained from information provided by the parents, the prospective couple, and witnesses presented before the court..

Nevertheless, the Panel of Judges does not approve all requests for marriage dispensation. Requests for marriage dispensation brought before the Religious Court undergo thorough examination in the courtroom. The Panel of Judges seeks information from the parents and the prospective couple regarding the circumstances and grounds provided in the application for marriage dispensation. The Religious Court judge presiding over the case undoubtedly faces a moral dilemma in making decisions, whether to grant or deny the request. Ultimately, decisions must prioritize the welfare of the child, weighing the potential outcomes between permitting underage marriage and preventing involvement in illicit activities. Each decision carries its own repercussions.

The examinations are conducted strictly adhering to the principle of prioritizing the best interests of the child. One of the primary rationales typically cited is the young age of the applicants, rendering them ill-prepared for marriage. According to the Panel of Judges, permitting their marriage may lead to an inability to fulfill the rights and responsibilities of a marital relationship, potentially resulting in various detrimental consequences that could destabilize or even lead to the dissolution of the marriage. In reality, many divorce cases that occur in the Religious Courts are due to the young age of marriage, even though rejecting mafsadat should take priority over attracting benefits in accordance with the rules of fiqhiyah which read:

دفع المفسد مقدم على جلب المصالح

Meaning: "Resisting damage is more important than attracting benefit"⁴⁴

Judges in deciding Marriage Dispensation cases need to also pay attention to the best interests of the child.⁴⁵ Therefore, applications for marriage dispensation are examined by the Panel of Judges through very strict procedures.⁴⁶ Requests for marriage dispensation are assessed with a focus on prioritizing the welfare of the child. Consequently, during the examination of the case, the concerns raised by the petitioner, the child, the prospective spouse, and the parents or guardians of the prospective spouses must all be taken into consideration. Additionally, during the hearing, the judge is obligated to offer guidance to the involved parties regarding the potential risks associated with child marriage.⁴⁷

Legal experts from the Shafi'i law of thought determine that in order to marry an underage boy, there is a requirement for benefit,

⁴⁴ Cholid Ma'arif, *spek Ushul Fiqih Dalam Tafsir Al Qurthubi: Studi Analisis* Q.S. An Nur: 31, *Ta'wiluna: Jurnal Ilmu Al-Qur'an, Tafsir dan Pemikiran Islam* Volume 1, Number 1, April 2020, p.65

⁴⁵As per Article 2 letter d of Law No. 11 of 2012 regarding the Juvenile Criminal Justice System, "the best interests of the child" refer to ensuring that all decision-making processes prioritize the child's well-being, survival, growth, and development. This principle aligns with Article 2 of the Declaration of the Rights of the Child, which emphasizes that the best interests of the child entail providing special protection and opportunities for their physical and healthy development, as well as ensuring conditions of freedom and dignity.

⁴⁶See Republic of Indonesia Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications.

⁴⁷Rio Satria, *Guidelines for Handling Marriage Dispensation Cases Post Revision of the Marriage Law*, n.d., p. 14

namely based on the best interests of the child. Meanwhile, to be able to marry an underage girl, several conditions are required, including⁴⁸: 1) There is no real hostility or hatred between the daughter and her mujbir trustee; 2) There is no real hostility or hatred between the daughter and her future husband; 3) There is kafaah (social equality) between daughters and their future husbands; 4) The prospective husband is able to provide an appropriate dowry.

Based on the child's best interests, the decision to grant a marriage dispensation may vary. Thus, requests for marriage dispensation are not automatically approved by the Panel of Judges. This is evident in several decisions of the Religious Courts, where requests for marriage dispensation were denied.

Conclusion

From the description above, the author draws several conclusions that Child marriages facilitated by marriage dispensation persist in Indonesia due to specific circumstances that necessitate parents to seek such dispensation. The paramount importance of children's well-being is intricately tied to the rights they are entitled to. These rights encompass survival, protection, and holistic growth and development. Parents or guardians should not solely prioritize the family's interests but must prioritize the child's rights and their overall physical and spiritual welfare. Also, the approval of marriage dispensation requests by the judicial panel is not guaranteed. Each request is evaluated based on its alignment with the child's best interests and the potential implications for their future well-being.

⁴⁸Husein Muhammad, *Women's Fiqh (Kiai's Reflections on Religious and Gender Discourse)*, LKiS, Yogyakarta, 2001, p. 91-94.

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