



## DISPENSATION OF MARRIAGE IN THE PERSPECTIVE OF CHILDREN'S RIGHTS: BEST INTEREST OF THE CHILDREN

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### ABSTRACT

Underage marriage with marriage dispensation is very influential in the life of children and adolescents. The Convention on the Rights of the Child has determined that the best interest of the child is the primary interest in any action concerning the child. This study uses a normative juridical method based on a statutory approach. The purpose of this research is to find out the judge's considerations and what factors cause the rise of early marriage. This study concludes that the number of marriage dispensations in Indonesia continues to increase from 2016-2018, and is stagnant from 2019-2020. This figure increases because awareness of the meaning of marriage is reduced and many people in Indonesia think that *adat* must still be maintained. The high dispensation of marriage is caused by economic factors, pregnancy out of wedlock, and cultural factors. Thus, the judge assessed that the granting of a marriage dispensation had the best impact on the child in accordance with the theory of the best interests of the child. The implementation of the regulations that have been implemented still requires derivative regulations that regulate the basics of granting marriage dispensations in court. In order for the application for a marriage dispensation to be granted wisely, it is recommended to refer to Law Number 16 of 2019 concerning Marriage and PERMA Number 5 of 2019 concerning Guidelines for the Termination of Marriage Dispensation. So that judges avoid subjective considerations in adjudicating marital dispensation cases.

**Keywords:** Best Interests of The Child; Children's Right; Marriage Dispensation

### INTRODUCTION

In society, there are many legal issues related to children, for example, issues regarding underage marriage, customs, or social habits that influence such things.<sup>1</sup> Humans, as social beings, are destined to be a couple as well as a birth and death. Marriage is the holy moment of human life since they are created by God with certain conditions and needs, and one of them is marriage. The Indonesian religious cultures bring about marriage as the advised actions by all religions done at the right time with the right people. It needs more preparation for actualizing the marriage moment. In addition to the holy moment in the *ijab Kabul* process, the main focus is on life

after marriage. That is more concern by the people as one of the factors related to our preparation in building a marriage. Moreover, although it is such of recommended thing, we need to consider many aspects to get permission and implementation.<sup>2</sup>

Linguistically, for the layman, the term *kawin* (marriage) or *nikah* (marriage) has been seen as a reflection of religion.<sup>3</sup> However, other efforts in certain circles try to keep the rules seen as religious, but the essence of the marriage is not like that. This is to make it look like a legal contract marriage or *mut'ah* in order to refine the purpose of marriage so that it looks like an Islamic marriage.<sup>4</sup> Marriage is a right enshrined in the

1 Taufik Hidayat Simatupang, "Adult Age in Marriage in Indonesia (Theoretical Study of the Application of the Lex Posterior Derogat Legi Priori Principle)," *Jurnal Penelitian Hukum De Jure* 21, no. 2 (June 24, 2021): 213-222, <https://ejournal.balitbangham.go.id/index.php/dejure/article/view/1618>

2 Ahmad Tholabi. (2015). *Convention on The Rights of The Child*, *Hukum Keluarga Indonesia*. Jakarta: Sinar Grafika, 18

3 Evi Djuniarti, *Perkawinan Pada Gelahang Serta Aspek Hukum Pembagian Harta Warisannya di Bali*. Vol. 20, No. 3 September, 2020, 3 Doi: <http://dx.doi.org/10.30641/dejure.2020.V20.459-471>

4 Mimin and Lukman. *The Legal Status of Mut'ah*

1945 Constitution of the Republic of Indonesia (UUD 1945). Article 28 B states “everyone has the right to form his own family”. Furthermore, Article 2 of the Consent to Marriage Convention explains that in 1964, states parties must set a minimum age for marriage, which is not less than 15 years. In addition, the state party allows the granting of a marriage dispensation followed by serious reasons. However, Article 23 Paragraph 2 concerning the Convention on Civil and Political Rights which has been ratified by Indonesia into Law No. 12 of 2005 states “men and women in a marriage must be approved and an agreement not to determine the age of marriage if the couple must fulfill the ability to marry, and conditions following the law.”<sup>5</sup> This ability means physical, psychological, and ability to provide for his family. So, a child has the right to marry if his guardian allows and has the ability so that the right to grow and develop can be fulfilled properly. In addition, the right to carry out physical and spiritual activities can also be fulfilled. Adults must provide guarantees so that these rights can be fulfilled without discrimination. In addition, Article 28J also provides for restrictions stipulated by law ensures the recognition and respect for the rights and freedoms of others, and to fulfill fair demands in accordance with considerations of morals, religious values, security, and public order in a society. democratic society.

Indonesia regulates the minimum marriage limit through Law Article 7 Number 1 of 1974 which has been changed to Law Number 16 of 2019 concerning Marriage. This regulation stipulates that if there is a deviation from the requirements for the age of marriage, the marriage can only be carried out after obtaining dispensation from the court.<sup>6</sup> So far, the parents of the prospective groom or prospective bride often apply for a dispensation to the Religious Courts because their children who have not yet reached the age of marriage can get

dispensation to marry. Of course, it was considered for some urgent reason.<sup>7</sup>

The Marriage Law or the Indonesian Criminal Code (*KUHPer*) do not state what kinds of detail and complete information and condition are concerned to ask for marriage dispensation could be accepted. Marriage is the right that is written in the 1945 Constitution of the Indonesian Republic (*UUD 1945*) in the Article 28 B which stated “every person has the right to establish their own family, but children also have the right to be protected from the discrimination and violence such written in Verse 2. At an early age, marriage takes many risks due to unready conditions both psychologically and mentally of the two people that caused one hurt or both of them.

Article 2 Concerning the Convention on Consent to Marriage explained that in 1964, the state party must prescribe the minimum age to carry out the marriage in which not less than 15 years old. Besides, the state party allows giving marriage dispensation followed by serious reasons. However, Article 23 Paragraph 2 Concerning the Convention of Civil and Political Rights ratified by Indonesian be Law Number 12 the Year of 2005 stated “male and female in a marriage must be approved and covenant not to determine the marriage age if the couple must fulfill the capabilities and conditions following the law<sup>8</sup> Those capabilities mean physical, psychological, and the ability to provide for his family. So, a child has the right to carry out the marriage if his guardian allows and has the ability for the right to grow and develop can be fulfilled properly. Besides, the right to carry out physical and spiritual activities can be fulfilled as well. The adults must give a guarantee so these rights can comply without any discrimination.

National Commission on Violence Against Women (*Komnas*) recorded that there was a rapid increase in marriage dispensations acceptance from 2016 to 2020. In 2016, there were 8.488 cases and

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*Marriage In Indonesia. Jurnal Penelitian Hukum De Jure* 21, no. 3 (Sept. 2021): 213–222. Doi:<http://dx.doi.org/10.30641/dejure.2021.V21.397-408>

5 Safrin Salam, “Dispensasi Perkawinan Anak di Bawah Umur: Perspektif Hukum Adat, Hukum Negara & Hukum Islam”, *Jurnal Pagaruyuang Vol. 1 No. 1*, (Juli 2017), 111

6 Taufik. *Adult Age Marriage In Indonesia. Jurnal Penelitian Hukum De Jure* 21, no. 2, June. 2021, 7 Doi: <http://dx.doi.org/10.30641/dejure.2021.V21.213-222>

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7 Taufik H. Simatupang, “Disharmoni Peraturan Perundang-undangan Di Bidang Pengawasan Perwalian Di Indonesia (Lintas Sejarah Dari Hukum Kolonial Ke Hukum Nasional)”, *Jurnal Penelitian Hukum De Jure* 20, no. 2 (2020): 221–232.

8 Safrin Salam, “Dispensasi Perkawinan Anak di Bawah Umur: Perspektif Hukum Adat, Hukum Negara & Hukum Islam”, *Jurnal Pagaruyuang Vol. 1 No. 1*, (Juli 2017), 111

64.211 cases in 2020. Although there was a 7,01% decrease with the number of 59.709 in 2021, this early marriage problem still becomes a serious issue in Indonesia.<sup>9</sup> The analysis of the Australia Indonesia Partnership for Justice (AIPJ) conveyed that 35% of marriage dispensation requests as the determination is the issue proposed by the female family. Whereas, 65% percentages are from the male family.<sup>10</sup> Therefore, Judge's consideration for accepting the marriage dispensation pointed to the aspects accepted by the female. Although the bad impact also can be experienced by the male, the female will get the bigger impact. Meanwhile, according to this, it can be seen in the Annual Report of the Supreme Court. From the data obtained from the Report on the Implementation of the Activities of the Supreme Court in 2018, the number of cases of Application for Marriage Dispensation is 13,880 cases. In the 2019 Supreme Court Activity Implementation Report, it was found that the number of cases included in the Marriage Dispensation category was 24,864 cases. There was a significant increase.

Based on the data above, it proves that early age marriage is getting increase found with the examples of public figures, cultures, and habits in the surrounding area that make it such something that usual. Moreover, the most reason found in the marriage dispensation proposal is out-of-wedlock pregnancy. This case is caused by the promiscuity issue and the lack of parental supervision. Besides, through this problem, the teenager lost their education rights and time for playing till they get enough age and be able to work to fulfill their own needs.

Nation, government, community, and even parents must fulfill the children's rights based on their responsibilities. Protection of the children's rights is carried out as the guarantee that a child

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9 Siaran Pers Komisi Nasional Anti Kekerasan Terhadap Perempuan Tentang, Perkawinan Anak Merupakan Praktik Berbahaya (*Harmful Practice*) yang Menghambat Indonesia Emas 2045, Jakarta, 3 Agustus 2021, <https://komnasperempuan.go.id/siaran-pers-detail/siaran-pers-komnas-perempuan-tentang-perkawinan-anak-merupakan-praktik-berbahaya-harmful-practice-yang-menghambat-indonesia-emas-2045-3-agustus-2021>

10 Siti Aisyah Kara, dkk., *Panduan Penelitian dan Pemantauan Perkawinan Usia Anak*, (Makassar: Liblitera Institute, 2019), 12

has the appropriate treatment and opportunity in their life.<sup>11</sup> So, an effort in fulfilling the children's rights are based on the principles of human rights, such as respect, fulfillment, and protection of the children's right including the rights of the marriage process. The court must concern about the best interest of the child to provide marriage dispensation based on the Law of Child protection. Children are the future of Indonesia and must be protected. Unfortunately, in the past, many people were shocked by various types of crimes, including rape, persecution, and even murder, and some of these abusers were young and legally still under the scope of children.<sup>12</sup> In order to consider the decision whether to be granted or not, the Judge needs to determine many aspects, such as children's health.<sup>13</sup> Based on the children's environment, education, and economy, the Judge also considers his decision on whether it can give benefit the children's lives in the future.

The early marriage status has a high risk in some aspects, such as economic readiness, reproduction health, mentally, physically, and even affect their rights on education and career. The limitation of age is not immediately given without any reason because it is based on the research of a child's readiness to carry out marriage, in some aspects of the economy, physical and psychological, and also protect and handle the birth rate in society. The suppression of the young marriage rate<sup>14</sup> will affect some factors of the high education rate, stable economics, and controlled birth rate since the communities are aware of the risks of the early marriage process and the effect caused by ignoring the age marriage factors.<sup>15</sup>

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11 Jody Imam Rafsanjani. *Legal Protection of Kid Influencers From Child Exploitation*. Jurnal Penelitian Hukum De Jure, Vol. 22 No. 1 March 2022, 5 <http://dx.doi.org/10.30641/dejure.2022.V22.093-104>

12 Penny Naluria Utami, The Role of Community Counselor In Handling Child Clients In Class I Correctional Center of Medan. Jurnal Penelitian De Jure Volume 22 Number 2, June 2022, 2 <http://dx.doi.org/10.30641/dejure.2022.V22.271-284>

13 *Ibid*, 21

14 Rosmi Darmi, *Implementasi Konvensi Hak Anak Terkait Dengan Perlindungan Anak Yang Berhadapan Dengan Proses Hukum*. Jurnal penelitian De Jure Vo. 16 No. 4, Desember, 2016, 2

15 Ewa Batyra and Luca Maria Pesando, "Trends in Child Marriage and New Evidence on the Selective Impact of Changes in Age-at-Marriage Laws on Early

Considering some various aspects that affect household life, such as education, economy, conflict management, parenting, and any other things, people sometimes ignore these important aspects that can be the core of marriage conditions and just tend to focus on the general things.<sup>16</sup> In order to reduce the divorce impact at an early age marriage, so they need to consider and focus on these aspects. A divorce is one of the early age marriage effects due to someone's lack of capability and is considered as the immature person to carry out the rights and obligations of a married couple. Another problem is the low economics which is related to the education levels since it connects with getting the proper job. So, if the job cannot fulfill the family's economy, it leads to being the one divorce factor.

This study will examine in depth how the motives of judges to provide marriage dispensation for minors in accordance with applicable regulations. In accordance with Indonesian government regulations, minors who apply for dispensation for marriage must go through various procedures, strong backgrounds, and urgency. So this research will encourage the enforcement of marriage law, the marriage dispensation for children, and the positive role of parents<sup>17</sup>.

This study will examine in depth how the judge's considerations provide marriage dispensation for minors in accordance with applicable regulations. In accordance with Indonesian government regulations, minors who apply for a marriage dispensation must go through various procedures, strong backgrounds, and urgency. So this research will encourage the enforcement of marriage law, marriage dispensation for children, and the positive role of parents. The state must be present in protecting the rights of every citizen, including children who are still in the womb.

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Marriage," *SSM - Population Health* 14 (2021), 11 doi: 100811, <https://doi.org/10.1016/j.ssmph.2021.100811>.

16 Mubasyaroh. *Analisis Faktor Penyebab Pernikahan Dini dan Dampaknya Bagi Pelakunya*. Jurnal Pemikiran dan Penelitian Sosial keagamaan Yusdisia Vo. 7 No. 2 Desember 2016, 3

17 Ibid, 21

## RESEARCH METHOD

The type of research used by the author is normative or juridical-normative, in relation to the type of research juridical normative, the approach used is the legal approach applicable in Indonesia (positive law) which usually uses or is based on data sources in the form of a statutory approach.<sup>18</sup> The researcher tried to understand all the laws and regulations related to the Marriage dispensation, such as the 1945 Constitution of the Indonesian Republic (*UUD 1945*), Law Number 17 of 2019 for the amendment of Law Number 1 of 1974 concerning the Marriage; Law Number 35 of 2014 for the amendment of Law Number 23 of 2002 concerning the Children Protection, Supreme Court Rules Number 5 of 2019 concerning the Guidelines for Adjudicating Marriage Dispensation; Convention on Consent to Marriage; Convention on the Rights of the Child. In addition, the researcher used the case study by analyzing some cases related to the research material decided by the court and having the permanent legal force and the conceptual approach. In this situation, the researcher uses some expert approaches regarding marriage dispensation.

## DISCUSSION AND ANALYSIS

This study found the tolerance given by the judge in granting marriage dispensation for children. Several considerations form the basis for the judge to grant a marriage dispensation. The legal system that regulates such marriages often cannot be applied in some cases, such as pregnancy out of wedlock that occurs to minors, so it is necessary to have a marriage dispensation issued by the religious court. There are various influencing factors such as culture and pregnancy out of wedlock. This condition is still a problem, regarding how the law regulates the problem. When a child becomes pregnant out of wedlock, the legal consequences that arise are conflict with marriage law which regulates the minimum limit. On the other hand, if the child is not given dispensation, then the legal consequence is that the child conceived is illegitimate as a citizen. In addition, it is also contrary to human rights if the child conceived is neglected and does not have permanent citizenship status. Therefore, this study

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18 Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media, 2013), 93.

will review in depth how Indonesian law regulates these dynamics.

### A. The Early Marriage in The Best Interest of the Child Perspective

Child marriage with a marriage dispensation is very influential for the life of the next generation of the nation, there are many negative sides caused by the provision of a marriage dispensation.<sup>19</sup> The cause of the rise of underage marriages is the perspective of parents and guardians, customs and culture that are still considered permissible, and the low level of education that affects the perspective on marriage and economic factors<sup>20</sup>. In some areas, the culture of marrying at an early age is still very strong on the grounds that it has become a tradition and avoids more free association. Even though this also violates the rights of the child because not all children are willing and feel ready to live a married life, especially since most of them are arranged in an arranged marriage<sup>21</sup>. The divorce rate is getting higher every year because many children are married on the basis of arranged marriages and do not have physical or mental readiness. From these conditions, the state must be present in unraveling the problems that continue to occur. When parents no longer have the ability and mindset to provide education about marriage, the government must regulate policies and the legal system to prevent the underage marriage. The state must be present to protect children's rights through laws and various programs of education, economic growth, and social welfare.<sup>22</sup> The culture of early marriage in some regions commonly happens for the reason that it has been their tradition and prevents promiscuity. This tradition has violated the children's rights. Not all

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19 Wahyu Saefudin, Rony Aryono Putro, Sriwiyanti. *Restorative justice in child rape perpetrators: A Case studi On Perspetrators With Intellectual Disability*. Jurnal Penelitian De Jure Volume 22 Number 2, March 2022, 6 Doi: <http://dx.doi.org/10.30641/dejure.2022.V22.049-062>.

20 Messy Avionica, "The Impact Of Young Marriage With Marriage Dispensation For Women And Children," *Agenda - Jurnal Analisis Gender dan Agama* Vol. 1 / N (2017):, 107–123

21 Jayadi, Muhammad Nor, *Pernikahan di Bawah Umur di Kota Kuala Pembuang, Kabupaten Seruyan (Studi tentang Administrasi Perkawinan)*, Palangka Raya: Fakultas Syariah STAIN Palangka Raya, 2012, 2-3

22 Ibid, 11

children are ready to accept this marriage and have a household relationship, even mostly through the matchmaking process. The divorce rate is getting increase since many children have a matchmaking marriage relationship with and are not ready yet either physically or mentally<sup>23</sup>.

The meaning of children's rights stated in the Law on Child Protection is the part of the human rights that must be guaranteed, protected, and fulfilled by the parents, family, community, nation, and central and regional government. The example of children's rights is written in the Law Articles 4 to 18 Number 23 of 2002 Concerning Child Protection and also in the Articles 2 to 18 Number 7 of 1979 Concerning the Children Welfare. Regarding the deprivation of the children's rights, it means that a child will lose his child status due to the marriage relationship and it is considered that he or she is already an adult. Through the changing of that status, the children's rights as stated in the Law Articles 4 to 18 Number 23 of 2002 Concerning Child Protection and also in the Articles 2 to 18 Number 7 of 1979 Concerning the Children Welfare is no longer valid. In addition, it indicates the parent's failure to ensure their children's welfare which is stated in Articles 9 and 10 concerning the Law of Children Welfare. The Law related to the Best Interest of Child states in the General Explanation of Article 2 alphabet d the Law Number 11 of 2012 Concerning the Juvenile Justice System. In the best interest of children, all decisions must consider the life and development of children. It is the principle of the Convention on the Rights of the Child.

Children need a protect since they have weak substances and in a legal system seems like the legal subject is related to the form of responsibility as the normal legal subject.<sup>24</sup> It is the effort to condition and situation that might be implemented of right and obligations of the positive children.<sup>25</sup> One of the children's protection is the best interest of child principle must be main considered involving the children action. Based on Article 2 alphabet d the Law Number 11 of 202 Concerning

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23 Wafa, Moh. Ali. "Telaah Kritis Terhadap Perkawinan Usia Muda Menurut Hukum Islam". *Jurnal Ahkam*, Vol. 17, No. 2, 2017, 5.

24 Darwan Prinst, *Hukum Anak Indonesia*, (Bandung: Citra Aditya Bakti), 14

25 Romli Atmasasmita, *Peradilan Anak di Indonesia*, (Bandung: Mandar Maju), 165

Juvenile Criminal Justice System which means that the best interests of the child are all decisions taken as much as possible to consider the benefit and importance for the children.

The convention on the Rights of the Child is an international instrument in Human Rights that involved the most comprehensive thing consisting of 54 Articles. According to the structures, there are 4 parts which involve: The preamble consists of the Child Right Convention, Part I (Articles 1-4) which regulate the right of all children. Part II (Article 42-45) about monitoring and implementation of the Convention on the Right of the Child, and Part III (Article 46-54) regulate the Convention application Article 2 of the Convention on the Right of Child stated that the best interest of the child theory is the child must have special protection, choice, and facility through the law and in other ways that allow the child to physically develop in a healthy and normal manner with the freedom condition and dignity.

The theory of the best interest of a child is a kind of child protection principle. It comes from the Child Right Convention ratified with the Presidential Decree Number 36 of 1990 concerning of Convention on the Right of the Child/CRC Ratification (10). The theory of the best interest of the child is regulated by Article 3 of the Convention on the Rights of the Child. The Articles stated that:

1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.*
2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
3. *States Parties shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, the number and suitability of their staff, as well as competent supervision.*

Article 3 has an important meaning in the convention since it concedes that the related state officials must give quality for the children's rights. This article stated that in all actions related to the children, whether taken up by public or private social welfare, court, government official, or legislative association, the best interest of the child must be the main consideration.<sup>26</sup> Whereas, based on Article 5 Concerning the Convention on the Right of the Child, the theory of the best interest of the child is the most important and the highest consideration for the child.<sup>27</sup> In terms of regulations, this theory is divided into 4 categories as follows:

- 1) The right to survival. In the Convention on the Right of the Child, this right is stated in Articles 6 and 24. Some provisions required participated nations to guarantee the right to survival and development of the children which is stated in Article 6.
- 2) The right to protection.
- 3) The right to grow. Basically, this right contains acquiring education access in every form and activities related to an adequate standard of living especially for physical, mental, spiritual, child's moral, and social, and the educational child's rights regulated in Articles 28 and 29.
- 4) In the child rights convention is regulated by Articles 12, 13, and 15. Article 12 of the convention on the right of the child stated that participating nations guarantee the children's rights to express their idea and to get consideration based on their opinion in every procedure related to the children.

In addition, this theory is also the principle that must be concerned in permitting marriage dispensation as stated in the Supreme court regulations Number 5 of 2019 Concerning the Guidelines of Adjudicating Marriage Dispensation. Besides, this principle is in the form of Article 28B Verse (2) of the 1945 Constitution of the

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26 Albert Osei, "The United Nations Convention on the Rights of the Child," *Beginning With Brandon's Interest* 19, no. 4 (2019): 136–136.

27 Alice Y. Taylor et al., "Child Marriages and Unions in Latin America: Understanding the Roles of Agency and Social Norms," *Journal of Adolescent Health* 64, no. 4 (2019): 45–51, <https://doi.org/10.1016/j.jadohealth.2018.12.017>.

Indonesian Republic (*UUD 1945*) realization which stated that every child has the right to survive, grow and develop also the protection from violence and discrimination.

Article 16 of the Supreme Court Rules (*PERMA*) Number 5 of 2019 provides the guidelines for the judge concerning the best interest of the child, it can be seen as follows:

- a. Learning requester application in detail;
- b. Examining the law position of the requester;
- c. Looking for information about the background and reason for the child marriage;
- d. Looking for information related to the marriage obstacle condition;
- e. Looking for information related to the understanding and agreement for the married children.
- f. Focus on the age difference of the married couple;
- g. Listening to the reasons of the requester, children, the couple, and their parents;
- h. Determining the conditions of psychological, sociological, culture, education, health, and economics of the children and parents based on the recommendation by the psychologist, doctor/midwife, professional social worker, social welfare worker, integrated service center for the women and children protection (*P2TP2A*), or Indonesian/Regional Child Protection Commission (*KPAI/KPAD*);
- i. Determining the existence of the elements of physical, psychological, sexual, and/or economic coercion; and
- j. Ensuring the parents' commitment to take responsibility related to the problems of economics, social, health, and education of the children.

Related to the H point, the use of the best interest of the child principle in dispensation marriage case must be concerned with some aspects, such as psychological, sociological, culture, education, health, child and parents economics. One example is the education aspect, the Indonesian government has regulated 12 years of compulsory education. Accepting the permission for marriage dispensation can cause a bad negative effect on them to drop out of school. It is because many high schools do not allow students to have married during their studies.

Despite another aspect above, there is a legal aspect of the child. This aspect means the need for a father figure for a child to be born. If a child is born without a marriage relationship, the child only has the mother's name written on his/her birth certificate. The complete name of both parents will be written if they have a relationship marriage. The Office of Occupation and Civil Registry in making the deed will of course ask for complete files regarding the marriage of the parents and if the child is out of wedlock then the administrative provisions of the occupation and civil registry service are by court order in accordance with the decision of the Constitutional Court. In the condition of no father's name being written on the birth certificate, will affect the child's psyche in the future. In most conditions, a child feels different from the other friends, it creates a critical identity due to the unknown father. So, if concerning this aspect, there is no problem in accepting marriage dispensation, but it must be firm and correct in the process and also with the right consideration.<sup>28</sup>

The theory of the best interest of the child must be concerned with the best interest of the community and for the homeland and the nation. This principle is used to guarantee that children as the future generation can grow and develop well. According to John Ekelaar, 'best interest' means the 'basics interests, such as emotional, self-care and physic, intelligence, child education, and interest concerning child own destiny'. However, some other meanings stated that needs are the fulfillment of physical, mental, emotional, and everyone's needs without any discrimination. No more detailed explanation related to the best interest of the child theory in a convention of the child's rights causes different perceptions by the decision-makers to determine based on which point of view and other factors can fulfill the best interest of the child. In taking the decision, child arguments are truly needed to be the main consideration if a couple is married with the reason of matchmaking tradition, so they can convey what they are expected and the implementation of the best interest of the child theory can be implemented properly.

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28 Maila D.H. Rahiem, "COVID-19 and the Surge of Child Marriages: A Phenomenon in Nusa Tenggara Barat, Indonesia," *Child Abuse and Neglect* 118, no. 95 (2021), 8-10 Doi: <https://doi.org/10.1016/j.chiabu.2021.105168>.

According to the author, the best interest of the child theory must also consider the child's future. Since they are at school age, parents must have provided knowledge about the virtues of education and mental readiness, and reproductive health so that the child can take care of himself and his parents also improve literacy along with the times so that they are no longer pegged to customs that can plunge the child into a difficult situation.

#### **B. The Judges and the Government Roles in Reducing the Numbers of Child Marriage**

One of the parties who have important contributions to preventing child marriages is the Judges of the Religion Court. Judge is the main place to get child marriage and underage legalization. If the Judges do not allow marriage dispensation, it means that the children's marriage cannot happen. Otherwise, the facts will reverse if the judges accept child dispensation requests for marriage dispensation with sociological considerations and rationally according to the fact revealed in trials. As a party that has stakes in the process of child marriage prevention, the judges have a role to be more active in carrying out the duties by making various efforts and doing their potential. Numerous attempts have been done by the judge in order to the desire of parents and children who want to get early age marriage can be terminated.

The most important part is the judge has to take into consideration some conditions, such as psychological, sociology, culture, education, and the parent and children's economics. Of all the indicators that must be considered above, the most important indicator is mental and economic readiness. Based on the recommendations of psychologists, doctors/midwives, Professional Social Workers, and Social Welfare Labors, the Service Centre of the Protections of Women and Children Integrated (P2TP2A) or Indonesian Child Protect Commission/Districts. In this case, the judge had considered all the matters with all the facts that occurred in the trial process. But, it is merely not based on recommendations from the related experts. Providing marriage dispensation although it has accomplished the ideal verdict, however, still has a negative side. Basically, the early age of marriage, despite the stages of the trials still impressed instituted acts that snatched the freedom of childhood and teens

to obtain their rights. The definitions and various kinds of children's rights have been written in Laws Number 23 of 2002 concerning Children's Protection accompanied by the amendment of Law Number 35 of 2014 and Law Number 4 of 1979 Concerning Children's welfare.

The norms of children's protection that are ideal in matters of marriage dispensation in the Religion Court must strictly regulate children's criteria that are probably given marriage dispensation. Besides, laws that regulate children's protection marriage dispensation must be established with the minimum age limit that allows marriage dispensation. Each of the related laws is expected can be synchronized and give harmonization regarding Children's Protection and Marriage. After explaining, the judge has been concerned a lot with the aspects before determining to give marriage dispensation to the couple by contemplating the best interest of the child's principal. In order to be able in implementing the obligations and give the right to the children who are in the womb.

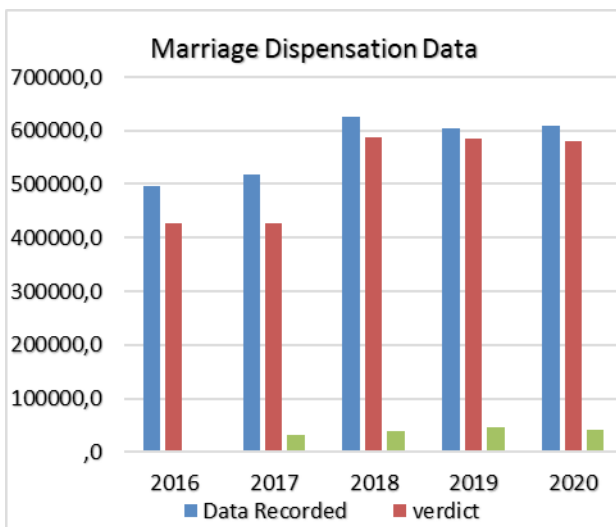
The judge must use the principle of the best interest of the children in delivering the marriage dispensation request. It is expected to give a positive impact on both parties either the prospective bridegroom or his bride-to-be. When, the bride-to-be has a pregnancy, so please pay attention to the fetus that is already contained as a requisite to a civil relationship. Nevertheless, this theory has not fully provided yet a beneficial and positive impact on accepting the marriage dispensation request. Numerous marriage dispensation requests that have been accepted by the Religion Court cause the parent to assume that there is no certain standard in delivering a permit for marriage. Therefore, many societies consider that young age marriage becomes a familiar thing and it can find a solution by requesting marriage dispensation. In fact, if the judge restrictively provides the standard of accepting marriage dispensation, the children will be more careful in carrying out their actions to do not something that is unwed pregnancy. Besides, this issue also endangers both sides, since they are still underage either physically or unprepared mentally, the illnesses in the body and unstable mental will increase the number of divorces.

Mardi Chandra mentioned in his book that several reasons are frequently used in filing the



marriage dispensation request in Religion Court in Indonesia. The reasons are the agreement from children to have a household with all of the consequences; the brides feel there is no obstacle to carrying out the marriage; ready physically or mentally and have been puberty; concerned to violates the religious norms, the bride has been ready for the economy and have parent's permission, unwed pregnancy, the parents help them morally and materially. The relationship between the couple has closely than the bride has pregnant and the baby out of wedlock. The use of these reasons often appears in marriage dispensation matters in the Religious Court, but each matter has its characteristics in the trial process.<sup>29</sup>

**Chart 1**  
**5 Years Marriage Dispensation Cases Data**



Source: Katadata.com, 2022

Based on the data above, it can be concluded that the increasing cases of marriage dispensation in 2018 accomplished 625.000, then decrease in 2019 and similar in 2020. In 2019, Religion Court recorded the remaining dispensation marriage cases with a total of 47.487. Meanwhile, in 2020, there were 608.528 cases. The data by 2020 had recorded as many 579.341 cases, but 41.168 cases have lifted. Then, in 2020, it remains 35.506 that are still in of judiciary.<sup>30</sup>

29 Mardi Candra, *Aspek Perlindungan Anak Indonesia - Analisis Perkawinan Di Bawah Umur* (Jakarta: Kencana, 2018). ,35-37

30 Badan Pusat Statistik dan Kementerian PPN / Bappenas, *Pencegahan Perkawinan Anak: percepatan*

Marriage dispensation can be accepted if, in the judiciary, it can establish that the couple, or bride and one of them are underage to implement marriage, but they have been ready economically as well as the ability to be responsible and the bride has proven pregnancy out of wedlock. However, if the marriage dispensation is rejected, then the arguments mentioned can not be proven and the judge noticed that there has been no readiness among one or both of the brides because it could be this marriage merely coercion from both parents. Another factor of denied marriage dispensation is when the applicant is asked to submit all of the requirements asked by the Religion Prejudice but they did not. Request dispensation is not accepted since the marriage does not comply according to the law. Another reason why the request is deprived is that if they do not apply to civil court and do the wedding without any dispensation or only faith marriage.

UNICEF recorded that around the world predicted that there are twelve million daughters or 1 of 5 children who have married before 18 years old. In developing countries, there are 1 of 3 daughters get married under 18, and 1 of 9 daughters get married before 15 years old. Commonly, daughters who get married early often get age gaps numerously with their couple. The UNICEF data recorded that around 7.8% and 7.4% of children who are married underage are caused by some factors, such as social, economic, cultural, and political. UNICEF revealed that Indonesia has an absolute number of child marriages with the eighth-highest worldwide with a total of 1.459.000 in 2020. The highest number was from Kalimantan with an average of 16%, then followed by Sumatera with an average of 8%. Through the national data, marriage dispensation requests are registered frequently in West Sulawesi, Southeast Sulawesi, Central Kalimantan, South Kalimantan, West Nusa Tenggara, and West Java.<sup>31</sup>

An investigation by UNFPA (2012) and UNICEF & UNFPA (2018) showed that the main factor that encouraged children to marry, especially in a developing country is poverty. Early age marriage often occurs due to the background of the parents that want to increase the household's

*yang Tidak Bisa Ditunda*. Jakarta: 2020, Deputi Bidang Statistik Sosial, 6-10

31 Op.cit, Bappenas, 17

economic prosperity. In poor households condition, most daughters are considered an economic burden, and marriage is perceived as a solution to detach from poverty. Besides, it shows that children from lower economics have more risk of child marriage. The *BPS* data recorded that the average percentage of marriage dispensation occurred in the countryside in 2019-2021 was 0.93% higher than in the city merely an average of 0.29%.

**Table 1**  
**Amount of Marriage Dispensation by Area**

Residential Area	The proportion of Women Age 20-24 Years Who Are Married Or Status Living Together Before Age 15 Years By Region Of Residence (Percent)		
	2019	2020	2021
Living in Village	0,92	0,94	0,93
Living in City	0,33	0,19	0,34
National	0,57	0,50	0,58

Source: Statistics Center, 2022

One of the factors often found in the literature is that girls who are living in the countryside show more twice possibilities to get married than in a city and it is shown by the data above.<sup>32</sup> Moreover, Marshan found that girls living in the city get more opportunities outside marriage and childcare rather than those who are living in the countryside. It indicates that need the intervention at the regional level, especially in the countryside, to prevent or respond the child marriage action. Besides, it needs improvement of the village government's participation is one of the strategies, such as the practical or actions implemented in Rembang Regency through a group named Village Child Protection Group (*KPAD*).<sup>33</sup>

The literature study finds the other factors that encourage children marriage, namely tradition, and religious factors. Some Indonesian traditions still allow child marriage, such as the

culture of *merariq* located in Lombok. This tradition is an action in that women 'are run' to the man's house to be married, or it can be said as "elopement". In 2018, National Economics Survey (*SUSENAS*) recorded that there is a significant difference between the age level of child marriage and the education level. Women under 18 years old who are already married showed a rate of never getting to the school of 0,72%, whereas a man is 0,75%. In the category of while running the education than to get married with the age under 18 years old is 35,39% for women, and 24,39% for men. Those who are already married and don't continue education are about 74,86% for men, and 63,89% for women. Based on those data, it indicates that children decided to end their education for the marriage relationship. In addition, those numbers can be a serious problem for the education issue in Indonesia. For women, aged 20-24 years old who have the marriage under 18 years old or in age children, the percentage who have not/never got to school is slightly higher than those who are married over 18 years old<sup>34</sup>.

In 2019, data recorded that there are female and male children between the age of 20 to 24 years old who have been married under 19 years old as much 18,47% female, and 2,27% male. It showed a decrease rate from the data in 2018 of 19,06% for females and 2,42% for males.<sup>35</sup> The National Socio-Economics Survey (*SUSENAS*) in 2018 showed that 1 of 9 female children is married and the total of 20 to 24 years old females who married before 18 years old is estimated at 1.220.900 females. Although the number of female child marriages is getting a decrease in each year, it is still categorized as a low decrease process. Besides, the absolute number of Indonesian child marriages has the 8th position in the world.<sup>36</sup> It was strengthened by the *SUSENAS 2018* data that indicated that the decreasing prevalence of child marriage is still sloping. On the other side, the rise of child marriage practice can be found in the increase of marriage dispensation applications in the Religious Court. Based on the AIPJ data in

32 Rumble, L., Peterman, A., Irdiana, N., Triyana, M. & Minnick, E. (2018). An empirical exploration of female child marriage determinants in Indonesia. *BMC Public Health* (2018): 18, 407, doi: 10.1186/s12889-018-5313-0; CPPS GMU & Plan Indonesia.

33 BPS-Unicef. *Kemajuan yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia*. Jakarta: Badan Pusat Statistik, 12.

34 Badan Pusat Statistika, [https://www.bps.go.id/indikator/indikator/view\\_data/0000/data/1358/sdgs\\_5/](https://www.bps.go.id/indikator/indikator/view_data/0000/data/1358/sdgs_5/), accessed on 1 May 2022

35 Ibid, 12-14

36 Girls Not Brides. (2019). Indonesia. Retrieved from: <https://www.girlsnotbrides.org/child-marriage/indonesia/>

2018, the Religious Court accepts dispensation applicants 20 times more than the data in 2015 (from 631 cases in 2005 to 13.880 cases in 2018).<sup>37</sup>

According to the Demographic and Health Surveys, globally, the most widespread child marriage occurs in developing countries. There are related proportion data of women with the age 20-24 years old reported that they have been married or lived with the men getting married since 18 years old. The reports of the *BPS* and *BAPPENAS* in 2020 concerning the Child Marriage Prevention; Delayed Acceleration, Indonesia has the eighth highest rank with the absolute number of child marriages in the world. United Nations Children's Funds (UNICEF) stated that Indonesia has an 'absolute number' children couple marriage the eighth highest rank with the number of 1.459.000. Nationally, there are 11,2% of women child who is married before 18 years old, and 0,5% of those women are married when they were 15 years old.

<sup>38</sup>

The Indonesian government has done some efforts to prevent the early age marriage of children. Maturation of Childhood has been the priority in the National Mid-Term Development Plan (*RPJMN*) 2015-2019.<sup>39</sup> The *BAPPENAS* has considered that child marriage prevention is one of the strategies written in the *RJPMN* 2020-2024 for Child Protection in 2019. Technocracy documents that have been arranged by the *BAPPENAS* stated that the Indonesian government has the target to change the child marriage prevalence which

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37 Gaston, Misunas & Cappa. Child marriage among boys: a global overview of available data. *Vulnerable Children and Youth Studies*. Vol 14 Issue 3 (2019), 219-228. Retrieved from <https://www.tandfonline.com/doi/full/10.1080/17450128.2019.1566584>

38 Wodon, Quentin T.; Male, Chata; Onagoruwa, Adenike Opeoluwa; Savadogo, Aboudrahyme; Yedan, Ali; Kes, Aslihan; John, Neetu; Steinhaus, Mara; Murithi, Lydia; Edmeades, Jeff; Petroni, Suzanne. 2018. Economic impacts of child marriage: Ethiopia synthesis report (English). The Economic Impacts of Child Marriage. Washington, D.C.: World Bank Group. <http://documents.worldbank.org/curated/en/149721525196131393/Economic-impactsof-child-marriage-Ethiopia-synthesis-report> , 8-12

39 Moeliono & Ardhiati, 2017 dalam Bappenas. (2019). Studi Latar Belakang RPJMN 2020-2024. (Unpublished); UNICEF Indonesia. (2019). Studi Literatur Peraturan Daerah Pencegahan Perkawinan Anak. (unpublished).

before was 11,2% in 2018 to 8,74% in 2021. The commitment stated in *RPJMN* is strengthened with the strategic arrangement of the National Strategy on Child Marriage Prevention which accordance with the target of the Sustainable Development Goal, which is the deletion of all harmful practices such as child marriage.

On the other hand, the Ministry of Women's Empowerment and Child Protection includes the child marriage issue as one of the indicators in a Child-friendly Cities Program and initiate a national campaign to stop child marriage. These efforts are in accordance with the Sustainable Development Goals which involve child-age marriage, early and forced marriage, and female circumcision. The Supreme Court also create a Supreme Court Regulation (*PERMA*) for Marriage Dispensation. It is expected to tighten the requirements for child marriage and support the process concerning the best interest of the child. The House of Representative (*DPR*) decisions related to raising the minimum age level also tighten the dispensation regulation, and give requirements to listen to the couple's married opinion for the Religious and General Court. At the regional level, there has been a regulation that supports child marriage prevention, at the provincial level through the Circular Letter or the Governor Instruction, at the district/city level through the Circular Letter or regent/mayor regulation, up to the village level through the Village rules.<sup>40</sup>

In addition, the government's effort in reducing the child marriage rate is through 12 years of compulsory education. This program is part of Indonesian system management that can be a powerful thing to relieve early age marriage<sup>41</sup>. The existence of compulsory education has supported them to management limit marriage age, especially for women that have written in Law Number 1 of 1974 concerning Marriage and all derivatives demands. However, it is not enough to delete entirely the early marriage age under 18 years old because there are still many marriage cases for a couple under 16 to 17 years old. It is because of no support media that is expected to be

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40 Hardani, Sofia, Analisis tentang Batas Umur untuk Melangsungkan Perkawinan Menurut Perundang-Undangan di Indonesia, *Jurnal Pemikiran Islam*, Vol.40, No.2, 2015.

41 Ibid, 11

the tools in relieving early age marriage. Besides, the Indonesian compulsory education program only regulates until Senior High School.

Nevertheless, the government program component above is not supported by the law and regulations particularly concerning marriage dispensation. No determination standard about dispensation request both in Marriage Laws or the *PERMA* Number 7 of 2019 has been a bad dream that can cause early marriage if legalized through the judiciary. This situation causes legal uncertainty and appears the multiple interpretations. No explanations in detail related to the phrase 'urgent reason followed by the sufficient supporting divisions' cause the acceptance of marriage dispensation is broadly interpreted. So, it can be defined by various reasons and backgrounds, such as being pregnant out of wedlock, fear of violating religious rules, economic problems, and the local tradition/culture habit.

In *PERMA* Number 5 of 2019 concerning guidelines for adjudicating marriage dispensation, there are some regulations, namely; guiding principles, administration requirements, and the trial procedures. With no regulated reasons, the court must accept any kind of reason proposed for marriage dispensation. As the law determines, the Judge is the only person who considers the marriage dispensation permission for the child under the age. Thus, it is required to give limitations on the kinds of reasons proposed in the dispensation<sup>42</sup>.

The importance of marriage dispensation standardization aims to reduce the number of early marriages increase. According to the concept of Best Interest of the Child theory in protecting the child, the government needs to have a scheme standardization of children marriage regulations then it can be the consideration by the judge. The limitation regarding the dispensation permission is such an inevitability. The marriage issue at an early age is not only the responsibility of the judge and the legal norms but it also the parents in carrying out their roles and responsibility. However, when a family is no longer the child protector, the government has to take action through strategic

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42 Syahuri, Taufiqurrohmah, *Legislasi Hukum Perkawinan Indonesia: Pro Kontra Pembentukannya hingga Putusan Mahkamah Konstitusi*, Jakarta: Kencana, 2013, 24-26

programs to implement the protection for the children (Best Interest of the Child)<sup>43</sup>.

In fact, the government has not looked at this issue as a serious action to be handled. Indeed, sexual education has not spread well in this current condition and is assumed to be something taboo to be discussed.<sup>44</sup> Besides, the lack of parents' attention makes the children free to express their feeling and curiosity. This theory is not only fulfilled by the parents, but the nation also has more effort to realize this theory and could be implemented with the situation and condition. Furthermore, the issue related to the best interest of the child theory in legal protection is really important to be further analyzed and developed<sup>45</sup>.

## CONCLUSION

In accepting the marriage dispensation, the judge must pay attention to the best interest of the child theory including the terms of marriage dispensation. Besides the preventive action, it needs many considerations for understanding this theory since the judge is required to know the good condition both mentally and physically of the children. Indonesian legal foundation strengthens the special position of every child that is realized in the form of legal products, such as Law Number 4 of 1979 concerning Child Welfare, Juvenile Court Law, Law on Child Protection, including Human Rights. Some regulations about a child, both international and national instruments sources, must be concerned to resolve the children's issues dealing with the law condition.

The important role is not only for the judge, but the government that also takes action to decrease the children's marriage rate in implementing the best interest of the child theory. Factor alleviation scheme of children marriage must be concerned by the government. It refers that the more total marriage dispensation request in the countryside

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43 Musfiroh, Rohmi, Mayadina, "Pernikahan Dini dan Upaya Perlindungan Anak di Indonesia". *Jurnal Hukum dan Syari'ah*, Vol. 8, No. 2, 2016, 1-3

44 Fuzi Narindrani. *iLegal Protection For Minors As Victims Of Sexual Harassment In Indonesia*. *Jurnal Penelitian De Jure* Vol. 21 No. 4, December 2021, 4 Doi: <http://dx.doi.org/10.30641/dejure.2021.V21.525-540>

45 Pitrotussaadah, Mimin Mintarsih. "Batas Usia Minimal Perkawinan Menurut Perspektif Hukum Positif di Indonesia dan Hukum Islam". *Jurnal Muttaqien*, Vol. 1, No. 1, Juli 2020, 1

rather than in the city. Education can be the main factor why people living in the countryside tend to have an early marriage. The government already regulated the 12 years of compulsory education scheme up to senior high school.

## SUGGESTION

Based on the description above, the authors provide the following suggestions:

The government should educate parents more often by providing counseling and understanding about the impact on physical and mental health. Teachers or schools are expected to provide sexual education and provide knowledge related to marriage to children from an early age

An important role is not only for judges but also for the government to take action to reduce the number of child marriages by applying the theory of the best interests of the child. The scheme for alleviating the factor of child marriage must be the government's attention. This refers to requests for dispensation from marriage which are more total in rural areas than in cities. Education can be a major factor in why people who live in rural areas tend to marry early. The government has set a 12-year compulsory education scheme up to high school.

Among the others, the most important role is the role of parents. Parents are the first teachers for their children, therefore parents must be able to provide understanding and supervision to children over their interactions. In addition, parents and the surrounding environment must eliminate cultures that harm the child by looking at the consequences and it is advisable to access information on early marriage education so that they can direct their children. Because the main factor is the supervision of parents and the surrounding community.

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