



# Hearing The Voice of The Child: Marriage Dispensation Adjudication in Purwodadi

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**Abstract.** This paper aims at understanding the adjudication of marriage dispensation in Religious Court, especially in the hearing of child's testimony. Interviews are conducted with judges, officials, parents and children, there is also observation of the hearing process in religious court. The Supreme Court Regulation No 5/2019 aims at protecting children and reducing child marriage among the society. However, there are several aspects should be taken into consideration by the judges, such as: increase number of cases, limited judges, social and cultural aspects.

**Keywords:** Child Marriage · Marriage Dispensation · Religious Court

## 1 Overview of Marriage Dispensation Application in Purwodadi Religious Court

Applications for marriage dispensation in PA Purwodadi increased by 400% in 2020 compared to 2019. One of the aspects underlying the increase is the passage of Law Number 16 of 2019 which changes the minimum age of marriage to 19 years for women and men. A very significant increase in the age limit for women, previously 16 years old to 19 years old, has an impact on increasing applications for marriage dispensation, not only in Grobogan District but also in other areas.

Another factor that caused the increase in the number of applications for marriage dispensation in 2020 was the Covid-19 pandemic that hit the whole world, including Indonesia. Women and children are vulnerable to gender-based violence due to the Covid-19 Pandemic [1]. Research by Chakraborty [2], Knox [3], Hutchinson [4], and Schlecht [5] shows that natural and humanitarian disasters are one of the factors in the increase in child marriage.

Based on data from the Purwodadi Religious Court, applications for marriage dispensation submitted by the Panunggalan community until March 2019 amounted to 32 cases. However, from 2015 to 2016, there was only 1 case each. In 2017 there were 10 cases and in 2018 there were 15 cases. In March 2019 there were 5 applications for marriage dispensation.

The application for marriage dispensation was mostly submitted by parents who had jobs as farmers (19 applications). Other submissions by parents working in the informal sector such as laborers and building coolies. The high application for marriage dispensation due to the factor of pregnancy outside of marriage was affirmed by Drs. Sudjadi,

M.H., judge of PA Purwodadi, in general, more than 50 percent of applications for marriage dispensation were due to the prospective wife being pregnant. The percentage is greater because the prospective husband and wife have had sex even though some are not pregnant (Sudjadi, interview, 2019).

In Panunggalan Village, where this study was conducted, based on data provided by PA Purwodadi, between 2015 and July 2019 there were 71 applications for marriage dispensation that were heard. The description of the proposed marriage dispensation case can be presented as follows.

### 1. Marriage Dispensation Petitioner

Based on Article 6 paragraph (1) of Perma No. 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications, those who are entitled to apply for marriage dispensation are parents. In the next paragraph, an application for dispensation can be filed by one of the parents if both are divorced or one of them has died. If both parents die, then the application can be requested by the child's guardian. Data from PA Purwodadi, 75% of the application for dispensation was requested by both parents.

### 2. Education of the applicant for marriage dispensation

Based on the educational background, the applicants for the marriage dispensation have a low level of education, the majority only graduated from primary school and did not go to school.

### 3. The work of the petitioners

The majority of the population in Pulokulon District are farmers or farm laborers. Likewise with the applicants for the marriage dispensation, the majority of whom are farmers [6].

## 2 Proceedings of Marriage Dispensation Application in PA Purwodadi

The proceedings of the marriage dispensation application were carried out by presenting the parties, namely the applicant, the requested child, the prospective husband/wife, the prospective in-laws, and two witnesses. Using loudspeakers, the substitute clerk called the parties waiting outside the courtroom. All walked into the courtroom at once, except for the witnesses.

The trial was presided over by a single judge and one substitute clerk. The judge wears the judge's robe, the substitute clerk wears a black suit. The petitioner (husband and wife) sits in front of the right of the judge, while the candidate sits in front of the left. Brides-to-be are welcome to choose a seat and they choose to sit in the back row. That afternoon, the marriage dispensation hearing began around 11:00 a.m., after the judge had finished examining the divorce case. In PA Purwodadi there are 4 courtrooms used. Observation by participating in the trial in courtroom 4 with judge Drs. Sudjadi, M.H. In the schedule there are 7 cases of marriage dispensation to be examined, but the author is only allowed to participate in 3 trials.

The first application for marriage dispensation was filed by the husband-and-wife couple Suparman and Sawi. Once all the parties are in their place/position, the judge

begins the proceedings by asking the petitioner. The trial process used mixed language, Indonesian and Javanese smooth and *ngoko*. “*Pados surat nikah lare*” the petitioner replied. “*Mpun lapor teng KUA jare kurang umur?*”. The question and answer of the judge and the applicant were carried out in conjunction with the examination of the administrative files. The dispensation was proposed for putri’s daughter (18 years and 2 months) who would be married to Bayu (19 years old). The judge advised to postpone until the age of 19 because the minimum marriage age limit is 19 years.

*Kurang umur (underage)* is a term that refers to the age at which they have not been allowed to marry according to the regulations. Therefore, it is necessary to apply for a marriage dispensation or by the Panunggalan community called it by the term *tuku umur*. The term *tuku umur* originally refers to the old practice of when the parents of the bride-to-be give a certain amount of money to a certain person so that their child is aged (plus his age / aged) in order to meet the minimum limit of marriage. The next thing to do is to change the date of birth of the bride and groom in the family card or other identity (Dhofir, interview: 2019).

This *tuku umur* practice could still be found until the early 2000s, when the Ministry of Religious Affairs had not introduced the computerization of marriage registration and the population administration system in Indonesia was inadequate. Now, the practice of *tuku umur* in the literal or other mal-administrative sense is no longer possible. “nowadays people should register using a NIK, so it is impossible to forge identity” (Hadjar, interview: 2019). Research conducted by Nurlaelawati stated that in Rangkasbitung, there is still a KUA that records a second marriage only based on the recognition that the person concerned is divorced, although without being accompanied by proof of divorce certificate from the court. This is because there is a personal closeness between KUA employees and the surrounding community so that there is a sense of relief if the request is rejected [7].

In addition to *tuku umur*, practice that may have been carried out before there was a revamping of population administration was the falsification of status for polygamy. “ngaku joko padahal duwe bojo, buat KTP baru di desa lain, tapi dulu kalo sekarang ndak bisa lagi” (Suyanto, interview: 2019). However, the term *tuku umur* is still used by the people of Panunggalan Village to refer to those who apply for marriage dispensation in court. “*putune Pak X kae isih kelas 2 SMA, terus tuku umur ning pengadilan*”.

Law Number 16 of 2019 Article 7 paragraph 2 “in the event of deviations from age as referred to in paragraph (1) parents of the male side and/or the female party can apply for dispensation to the Court on urgent grounds along with supporting evidence”. Although the minimum age allowed to marry is 19 years old, but those who have not reached 19 years old can still get married after there is a marriage dispensation.

The court process of applying for marriage dispensation is specifically regulated in Supreme Court Regulation No. 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications. This regulation was made in response to the ratification of Law Number 16 of 2019 concerning changes to the Marriage Law. This *perma* regulates several matters related to the process of adjudicating applications for marriage dispensation such as the appointment of a single judge, child companions and consideration of the interests of the child [8].

Article 3 states that the guidelines for adjudicating marriage dispensation applications are established with several purposes, including to ensure the implementation of a judicial system that protects the rights of children, the increasing responsibility of parents to prevent child marriage, and to identify the presence or absence of coercion that is the background for the filing of an application for marriage dispensation [9].

Perma No. 5 of 2019 provides for the appointment of a single judge in the examination of an application for marriage dispensation, as well as the removal of witnesses in the trial. The same was also affirmed by the Chairman of the Chamber of Religions, Amran Suadi, “witnesses are indeed not needed in the marriage dispensation”. However, in the proceedings of the marriage dispensation application at PA Purwodadi, two witnesses were present, namely the petitioner’s neighbor who was asked for information about the relationship between the bride and groom and his parents. According to the trial judge, witnesses were needed to substantiate the reasons for the petitioner’s application.

### **3 Verdict of Application for Marriage Dispensation in Purwodadi Religious Court**

#### **3.1 Legal Grounds for Application for Marriage Dispensation**

There were 27 determinations of marriage dispensation applications taken as samples, all of which were submitted by residents of Pulokulon Village, Grobogan. The designation comes from the 2016–2019 range. Of the 27 copies of the marriage dispensation decree obtained by researchers from the PA Purwodadi side, all were granted by the judge. The reasons proposed vary from preventing adultery or unwanted acts from occurring to because the future wife is already pregnant or giving birth. The majority of marriage dispensation applications were submitted because the prospective wife was already pregnant, reaching 63%, 2 of whom had already given birth when the dispensation application was submitted.

Avoiding/preventing the occurrence of acts that violate religious rules is often found in court decisions on applications for marriage dispensation, as the main reason for the applicant. In the case of an application for marriage dispensation with a prospective wife already pregnant or giving birth, the reasons for preventing the act of violating religious rules are also mentioned. Of the 27 copies of the marriage dispensation petition judgment obtained, the reasons for preventing religious violations are most often written. In addition, there is also a ruling that states that the bride-to-be “... Often go together so that... has been pregnant...” or “... is already inseparable even... has been pregnant...” or “... Already in contact like a husband and wife...”. Only one ruling mentions the word “adultery” to refer to sexual intercourse already performed outside of marriage.

Although rarely mentioned in the verdict, the word “adultery” was mentioned literally by the judge in the trial. The word “adultery” was conveyed by the judge when in a position to advise the bride-to-be that what they had done was against religious rules. “... intercourse outside of marriage is adultery, it’s a great sin...”. The judge questioned the responsibility of parents who allow their children to intercourse outside of marriage. At the end of the trial session, the judge reminded the two brides-to-be to repent. “... repent, ask god for mercy, and don’t repeat it again... patiently disik, wait after marriage...”.

As is known, before there was Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974, the age allowed to marry for women was 16 years, while men were 19 years old. Of the determination samples analyzed, 8 of them were applications for marriage dispensation for girls, while 19 determinations were applications for boys. The age range of children proposed for marriage dispensation is 14 and 15 years for girls and 17 and 18 years for boys. While the age range for prospective spouses is 16 to 19 years for prospective wives and 19 to 33 for prospective husbands.

Of the 27 marriage dispensation determinations analyzed, the majority, in the written judgment, the prospective husband was already working with an income of between Rp 1.8 million to Rp 4.5 million per month. The majority of these future husbands work as building coolies, with a percentage of up to 56%.

The work and income of the future husband is one of the considerations presented by the petitioners in the marriage dispensation. This is because article 31 (3) of the Marriage Law states that the husband is the head of the family and the wife is the housewife. The husband's obligations as the head of the household are explained in the Compilation of Islamic Law (KHI) Article 80 paragraph (4) which states that the husband bears (a) living, *kiswah*, and place of residence for the wife, (b) household expenses, maintenance costs and medical expenses for the wife and children, (c) education costs for the child. With this obligation, the husband's work and income are one of the considerations in applying for a marriage dispensation.

### **3.2 Legal Grounds for Application for Marriage Dispensation**

The judges' legal considerations in the determination of marriage dispensations out of the 27 determinations taken as a sample show that religious court judges made positive law and Islamic law the basis for deciding marriage dispensation cases. Article 7 of Law No. 1 of 1974 concerning Marriage is the article that is most often used as a legal basis by judges. Article 7 paragraph (2) specifically regulates the permissibility of marriage dispensation for those who have not reached the minimum age as stipulated in Article 7 paragraph (1). Another legal source that provides room to apply for marriage dispensation for those who reach the minimum age is Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI) Article 15 paragraph (1). KHI is one of the sources of material law used by religious court judges.

In addition to Article 15 paragraph (1), another article of the KHI that is used as the legal basis for judges in deciding marriage dispensation applications is Article 16 paragraph (1) which emphasizes the consent of the bride and groom who are going to get married. In the examination of the application for marriage dispensation, the two brides-to-be were presented at the hearing for questioning. The judge will ensure that the two do not get coercion to marry.

The judiciary has an important role to play in enforcing the law regarding the minimum age limit for marriage. This is because the judge of the court has full power to accept or reject the application for marriage dispensation, as stipulated in Article 7 of the Marriage Law. As a mechanism of social control, the law plays a role in establishing good behavior or deviating from the law and applying legal sanctions for its rulers for the sake of peace and prosperity of society. However, in its application in the judiciary, often

efforts to realize substantial justice are difficult because of the normative-procedural perspective in carrying out legal concretization. As a result, what is produced is legal justice and not social justice [10].

In the legal consideration of the judge for the determination of the application for marriage dispensation in PA Purwodadi, the judge cited the aforementioned articles because it was compatible with the application for marriage dispensation. The legal basis that is taken into consideration provides certainty and legal justice normatively. By law, marriage dispensation is allowed, and legally marriage may be performed by those who have not reached the age of 19. Thus, the determination of the judge in the marriage dispensation decision has fulfilled the rules of *legal justice*.

One of the fundamental problems that needs attention is that in the existing legal system, there is a gap between men and women that puts women in a position of subordinate to men. The rule of law has provided opportunities for inequality to social and political institutions in society, leaving women underpaid or vulnerable to sexual harassment. On the other hand, the separation of public space and private space makes the state and the law in some ways unable to intervene in private space, such as problems in the family. The state, one of which through law, has institutionalized the power of men over women [11].

In the context of the dispensation of marriage and child marriage, male domination occurs not only over women but also children as a vulnerable group. The rule of law that is used as the basis for a judge's decision is very little that reflects the protection of the interests of children or women. Article 6 of the Marriage Law and Article 16 of the KHI which requires the approval of the bride and groom are rarely used as legal considerations by judges. In practice at trial, consent is obtained by asking the two brides-to-be whether they have been compelled to marry or not. To give you an idea, the question was asked by the judge in a courtroom that was also attended by the parents of both parties and also witnesses.

In addition to basing the determination on positive law, religious justice judges also cited jurisprudence arguments as considerations for the establishment of marriage dispensations. From the verdict file that I got there are several Islamic law arguments cited by the judge, namely:

1. Quran Surah An-Nur: 32 which means "Marry those who are alone among you, and those who are worthy of marriage from your sahaya servants who are male and female, if they are poor Allah will enable them with His gift, and Allah is All-Knowing".
2. The Historical Hadith of Imam Bukhari and Muslims which means "From Abdullah bin Mas'ud, that the Messenger of Allah saw said to us: "O youth, whoever of you is able/able to marry, then marry, because indeed the marriage will be more able to subdue the eyes and be able to withstand the wrath of the shah. And whoever is not/has not been able, then let him fast, for indeed the fast is a restraint to him".
3. Kitab *Al-Asbah wa al-Nadzair*: 128 which means: "The policy of the Government (Judges) should always be oriented towards the benefit of the people".
4. Kitab *Al-Fiqhu al-Islami wa adilatuhujuz* VII page 32 which means: "That marriage is obligatory for a person who is worried about falling into adultery without performing a marriage".

5. The Rule of Ushul Fiqh which means: “Resisting damage takes precedence over doing good”.
6. The concept of maqashid sharia is about an effort to maintain honor (*hifz al-hurmah*) and maintain the continuity of human life or offspring (*hifz al-nasl*) rather than not providing a marriage dispensation that will cause an emergency, namely the possibility of a continuous extramarital sexual relationship (*zina*).

Among the six considerations of Islamic law mentioned above, the most frequently cited by judges of religious courts are Kitab Al-Asbah wa al-Nadzoir: 128 “The policy of the Government (Judge) should always be oriented towards the benefit of the people” and Kitab Al-Fiqhu al Islami wa adilatuhu juz VII page 32 which means “That marriage is mandatory for a person who is worried about falling into adultery without performing a marriage”.

Kitab Al-Asbah wa al-Nadzoir: 128 is cited to provide a legal basis that judges in giving decisions should be oriented towards the benefit of the parties. In this case, the benefit in question is an effort to avoid adultery if the marriage dispensation is not granted. Another benefit in question is that there has been a husband-wife-like relationship carried out by the bride and groom which often results in unwanted pregnancies. In considering the verdict on the application for marriage dispensation, the judge also emphasized the importance of marriage as an effort to prevent adultery.

From the establishment of the marriage dispensation, it can be seen that the judge is in a dilemmatic position. On the one hand, the Marriage Law stipulates that the minimum age for marriage is 19 years old. However, on the other hand there is a loophole called marriage dispensation that can be proposed by parents/guardians for children who have not reached the age allowed by the Law to marry. From a legal perspective, religious justice judges also deal with legal pluralism in Indonesia. As is known, Indonesia has more than one legal system that applies positive law, customary law, and Islamic law. Countries with legal pluralism tend to have a system that is pliable and open to the interpretation and negotiation of legal regulations. MB Hooker defines legal pluralism as a state in which two or more laws interact [12].

Theoretically, the law in force in Indonesia is a national law. However, on a practical level, the laws adopted by society are not only national laws. In relation to the age limit of marriage, people in Panunggalan often choose to follow religious law or customary law. Thus the age limit of marriage established in national law, is sometimes not a consideration when getting married. Under these conditions, the laws believed and implemented in society are different from the laws imposed by the state, so legal unification needs to be carried out. However, legal unification is a sensitive issue because there is a mixture of legal issues and political ideologies, especially when it comes to the implementation of religious law [13].

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