



Disparity in Judges' Legal Reasoning on Marriage Dispensation Regarding Minimum Marriage Age: Indonesian Experience

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Abstract. This article identified and analyzed the disparity of judges' legal reasoning in granting a marriage dispensation application in respect to the minimum marriage age in Indonesia. This study indicated that amendment to the Marriage Law which increases the marriageable age of women did not necessarily reduce the number of child marriage. On the other hand, such change increased the number of marriage dispensation applications. The legal reasoning applied by judges in examining such applications varied. This research showed that a judge's ability to interpret the law and the condition of the prospective bride and groom when the application was submitted played an important role in the decision making. The disparity between decisions can affect legal certainty for justice seekers and will be detrimental for law enforcement. To overcome those problems, Indonesia needs regulation which clearly stipulates under what condition the minimum age requirement can be set aside.

Keywords: Marriage dispensation · Judge's legal reasoning · minimum age

1 Introduction

UNICEF in its press release appreciated the amendment of Indonesia's Marriage Law which increases the marriageable age of girls with parental permission from 16 to 19 years old. The objective of such change is to end child marriage as well as ensure gender equality since the law has set the same marriageable age for both women and men. UNICEF in its release stated that child marriage risks the lives of girls as becoming pregnant at a younger age is risky. Moreover, girls who marry under 18 years old are more likely to experience domestic violence [1].

The amendment to Marriage Law is considered as a milestone in the fight against child marriage [1]. However, what was found in reality was different from what was expected. After the amendment, the number of marriage dispensation applications in religious courts in Indonesia has increased significantly. Based on the Supreme Court Activity Implementation Report, there were 13,880 applications for marriage dispensation in 2018 [2] which increased to 24,864 applications in 2019 [3] and to 64,196 applications in 2020 [4].

The granting or refusal of a marriage dispensation application is within the authority of district court judges. In doing so, the judge shall ensure that there are urgency and provable reasons. Based on the elucidation of Article 1 paragraph (2) of the amended law, urgency is a situation where there is no other way to be taken other than getting married. The applicants must show sufficient supporting evidence like a certificate that proves the prospective bride and groom are still under the minimum age according to the provisions of the law and a certificate from a health worker that supports the parents' statement that the marriage is urgent.

While the law has provided explanations regarding urgent reasons and supporting evidence, there are still possibilities for different interpretations by judges based on each judge's knowledge, experience, and way of life. Such disparity becomes a significant problem because legal certainty and fairness are now at stake since the applicants may not be able to predict on whether their applications will be granted or rejected. This is in contrast with the principle of certainty in which it requires similar cases to be treated similarly.

Different verdicts can affect legal certainty and can be considered to have failed to provide justice for the interested parties and also have the potential to cause distrust and lack of respect for the law [5]. The judge's considerations and verdicts in granting or rejecting the marriage dispensation application as a legal product has implications for the lives of the interested parties, especially the prospective bride and groom as well as their family. It is therefore, still questionable whether the judges' decisions on granting or rejecting marriage dispensation are for the best interest of the children.

Based on the serious implications which possibly arise, it is therefore, important to study judges' legal reasoning in examining marriage dispensation applications. This study examines what factors causing disparity between judges' legal reasoning for rejecting or granting marriage dispensation and to what extent the judges can play role in manifesting the objective of the amendment to Marriage Law to end child marriage.

2 Method

This was empirical normative research. The data used were primary data from interviews and secondary data including primary legal materials, secondary legal materials, and tertiary legal materials, which were analyzed qualitatively.

3 Discussion and Analysis

3.1 Things Judges Need to Consider

Under the Indonesian marriage law, boys and girls under 19 years old may get married after granted permission from the relevant District Court or Religious Court (the Court where the underage boy or girls domiciled). In deciding the application, the judge must listen to the opinions of the prospective bride and groom (Article 7 paragraph (3) of the Amended Law) [6]. The term "deviation" according to the elucidation of Article 7 is a condition that requires a marriage dispensation application submitted by one or both parents of the prospective bride and groom to the district court for those who are

not Muslim and to the religious court for those who are Muslim. The elucidation of the article also stipulates that what is meant by “a very urgent situation” is a situation where there is no other choice and a marriage is absolutely necessary.

Regarding the grounds for applying for a marriage dispensation, it must also be accompanied by sufficient evidence. Sufficient supporting evidence includes certificates proving that the prospective bride and groom are still underage according to the statutory provisions, as well as a certificate from a health worker that supports the statement from the applicant showing that the marriage is very urgent.

Based on this description, it can be seen that the Marriage Law basically mandates judges to take into account all the relevant factors and consider several important things before deciding the marriage dispensation application. These things include direct information or opinions from the prospective bride and groom. Thus, even though the applicant is the parent of the prospective bride and groom, in the examination process the bride and groom must still be present and their opinions must be heard.

Another thing that needs to be considered in deciding the marriage dispensation application, in particular as regulated in the Marriage Law, is the applicant’s submitting reason. The judge must consider the urgency of the application and whether the reasons presented by the applicant can be categorized as urgent reasons or not. Furthermore, the evidence submitted to the court regarding the conditions and the urgency of the implementation of the marriage should be considered by the judge. All of those requirements are important so the objective of the amended law to end child marriage can be accomplished.

Azzidin, a judge at Bantul Religious Court, said that in examining a marriage dispensation application, apart from examining the opinions of the parents of the prospective bride and groom, the judge must also directly ask the opinions of the prospective bride and groom regarding the marriage plan. This is intended to ensure that the marriage plan is not a forced marriage but the will of the bride and groom.

Matters to consider in giving legal reasoning to a marriage dispensation application are regulated not only in the Marriage Law, but also under its derivative regulations, namely Supreme Court Regulation Number 5 of 2019 regarding Guidelines for Deciding on Marriage Dispensation Applications. This regulation aims to apply the principles that underlie judges in deciding on marriage dispensation applications. The principles are the best interests of the child, the child’s right to live and grow, the appreciation for the child’s opinion, the respect for human dignity, non-discrimination, gender equality, equality before the law, justice, expediency, and legal certainty.

In addition to complementing these principles, this Supreme Court Regulation aims to standardize the process of deciding on marriage dispensation applications in court. Based on these purposes, important points are then regulated as guidelines that must be considered and implemented by judges in rendering verdicts that hopefully will serve as a common reference and standard.

The first thing that needs to be considered by the judge in examining marriage dispensation applications is whether or not the applicant has fulfilled administrative requirements. The administrative requirements referred to in submitting a marriage dispensation application include: Application letter, a photocopy of ID of both parents/guardians, a

photocopy of family card, a photocopy of ID of the child and/or a copy of child's birth certificate, a photocopy of ID or a copy of birth certificate of the prospective husband/wife; and a photocopy of the child's last education diploma and/or certificate proving that the child is still in school.

The Law mandates judges to pay attention to "the best interests of the child" principle. This principle requires the judge do the following tasks: Thoroughly and carefully examining the applicant's application; Examining the legal standing of the applicant; Exploring the background and grounds for the child's marriage; Exploring information regarding the presence or absence of marital barriers; Exploring information related to the child's understanding and consent for marriage; Paying attention to the age difference between the child and prospective husband/wife; Hearing the statements of the applicant, child, prospective husband/wife, and parents/guardian of the prospective husband/wife; Considering the psychological, sociological, cultural, educational, health, and economic conditions of the child and the parents based on recommendations from psychologists, doctors, professional social workers, social welfare workers, integrated service center, protection of girls and children (P2TP2A) or the Indonesian/Regional Child Protection Commission (KPAI/KPAD); Considering whether there is any element of psychological, physical, sexual, and/or economic coercion; Ensuring the commitment of parents to take responsibility for the economic, social, health, and education of their children.

The Supreme Court Regulation Number 5 of 2019 also explicitly regulates matters that must be considered by judges in granting a marriage dispensation. Article 17 states that judges must consider the following matters: For the protection and the best interests of the child in statutory regulations and written laws in the form of legal values, local wisdom, a sense of justice that exists in society; Conventions and/or international agreements related to child protection; and Instruction of the President of the Republic of Indonesia Number 1 of 1991 regarding the Compilation of Islamic Law [7, 8].

3.2 Disparity Between Judges' Legal Reasoning in Granting or Rejecting Marriage Dispensation Application

It is common for Indonesian court decisions to be different from one another since Indonesia does not recognize the binding force of precedent [8, 9]. However, for the sake of protection of girl's legal rights and efforts to end child marriage, judges must consistently limit the reasons in granting marriage dispensation. This is to anticipate the various reasons for applying for marriage dispensation. There are conservative groups that created movements to promote child marriage as they believe it protects children from the sin of adultery. This group creates public pressure that causes parents to ask for marriage dispensation for their daughters [10]. Referring to the amended law which stipulates urgency and necessity in granting marriage dispensation, the reason of preventing adultery is not among the legitimate reasons.

Based on research conducted by Kurniati, 90% of marriage dispensation applications were granted by judges because the prospective bride was pregnant [11]. This is shown in verdict No. 236/Pdt.P/2021/PA.Btl and verdict No. 194/Pdt.P/2021/PA.Btl. However, the judge's considerations in granting a marriage dispensation for the two verdicts were different, especially with regard to the existence of evidence or statements from doctors explaining that the prospective bride is pregnant.

Furthermore, in another verdict, namely verdict No. 9/Pdt.P/2021/PA.Btl, the judge rejected the dispensation application that was submitted by considering the condition of the prospective bride who was still in junior high school and the judge directed her to finish her studies first. Meanwhile, in different cases, there were judges who granted the marriage dispensation application where the prospective bride and groom just completed their studies at the elementary school level.

Most of the marriage dispensation applications submitted because the prospective bride was already pregnant were granted by the judge, taking into account the benefit and future of the baby to be born. The considerations given are also quite similar from one verdict to another. This is different from verdict Number 133/Pdt.P/2019/PA.Lss in which the judge rejected the application. The judge was in the opinion that child marriage brings more harms than good. Consequently, the couple will not be able to materialize the objectives of marriage to establish a household responsibly. The judge further stated that the applicants were still immature. Stable personal maturity and integrity will be very influential in solving any problems that arise in the face of domestic twists and turns, because married life is like driving an ark in the middle of a vast ocean, the ocean of life seems endless, and the terrain of life often changes suddenly.

Based on the examples above, it can be seen that the considerations used by judges in rendering a verdict on a marriage dispensation application in Indonesia vary. The horizontal disparity between judges' verdicts includes: the disparity between verdicts from the formal legal aspect, the disparity between verdicts from the material legal aspect, and the disparity between verdicts from the philosophical aspect of rendering the verdicts. Meanwhile, the vertical disparity between judges' verdicts includes the disparity between verdicts from the formal legal aspect, material legal aspect, philosophical aspect of rendering verdicts, and the aspect of legal reasoning. The factors that influence the judge's verdicts, according to Loqman in a book entitled *Disparities in Judge Verdicts "Identification and Implications"*, include internal factors, factors in the law itself, interpretation factors, political factors, and social factors [12].

Causes of Disparity Between Marriage Dispensation Verdicts

As described previously, the disparity between judges' verdicts can occur vertically or horizontally and is influenced by internal factors, statutory factors, interpretation factors, political factors, and social factors. Based on the interview the author conducted with one of the judges at Bantul Religious Court, the disparity between the judge's verdicts on marriage dispensation applications was caused by internal judges, statutory regulations, interpretations, and social factors.

The judge's internal factors are also related to the interpretation of the laws and regulations and certain conditions. The educational background, understanding, and ability of judges are very influential in interpreting the regulations into their considerations and verdicts. Gender of the judge also has the potential to provide different considerations and verdicts, depending on how the judge evaluates the urgency of the marriage.

In respect to statutory provisions, the available statutes have provided as much space as possible for judges to assess and determine a particular situation and supporting evidence. This condition opens up the opportunities for legal uncertainty for justice seekers, especially in marriage dispensation application. The assessment of whether

there is legal certainty in the provisions related to marriage dispensation is also in line with research that has been carried out by Vidya Tri Febriana [13]. From the study, Vidya stated that the differences in judges' considerations are differences related to moral justice and social justice which certainly cannot be equated between one party and another because they have different reasons [13]. According to Vidya, the absence of provisions regarding conditions or circumstances such as the kind of dispensation that may be given to the marriage, although many parties have a concern that it can cause uncertainty, the most important thing is to stick to the main rule, namely the benefits for the parties [13].

Laws and regulations should be formulated in such a way to minimize multiple interpretations, including matters which can be categorized as urgent conditions for a marriage as well as supporting evidence that must be included. In addition to providing legal certainty, this is also related to the dignity and purpose of increasing the marriageable age and amending the marriage law, namely to reduce the number of child marriages in Indonesia. If full freedom is given to judges, it is very likely that there will be disparities between one verdict and another and it will be difficult to achieve equal treatment between one party and another although the conditions are similar, as is the adage of the central element of justice, namely "treat like cases alike and different cases differently" [14].

The last factor that also influences the judge's verdict is social factors. Socio-economic conditions, occupations, and educational backgrounds that dominate an area also affect the number of child marriage dispensation applications and judges' considerations in rendering verdicts. As stated by a judge at Bantul Religious Court, compared to other cities/regencies in DIY, Bantul and Gunung Kidul are the districts with the highest rates of child marriage, marriage dispensation applications, and divorce.

According to this judge, this is inseparable from the applicants' socioeconomic conditions, i.e., in general, most of them are from lower middle-class families working as farmers in infertile natural conditions are also reasons why parents support underage marriages— to reduce the burden of the family. Another thing related to these social conditions also affects the circle of the children, as well as public assessment of relationships outside of marriage, premarital pregnancy, and so on. Although giving a marriage permit for a child who is already pregnant does not necessarily solve the problem, this judge mentioned that this is one thing that can be given by the judge to reduce the burden of prospective mothers from public gossip and to allow the baby to be born to have a legal father. In addition, it aims to avoid harm rather than to prioritize benefit, as is the content of *fiqhiyah* rules contained in every verdict of a religious court judge in granting a marriage dispensation.

Solutions

Several things can be done as an effort to minimize the disparity between judges' legal reasoning and verdicts in deciding marriage dispensation application, namely:

1. Setting strict and limited causes for granting marriage dispensation applications. The causes should be very limited to urgent things in which no other alternatives are possible, for instance when the prospective bride is already pregnant. In addition,

judges should require the involvement of experts/professionals in providing recommendations or assessments of prospective brides/grooms. This is for example a letter of recommendation from medical practitioners and psychologists, to assess whether the prospective bride and groom are physically and mentally healthy.

2. Increasing the awareness of judges in understanding the importance of preventing child marriage as an effort to promote gender equality, promoting education for girls, and preventing domestic violence. Judges who have such awareness will more likely be very selective in granting dispensation. The judges need to understand that child marriage impacts their health, their psychological well-being, and the health of their offspring. It may also increase the risks of illnesses.
3. Conducting a course and training for judges to enhance their skills in providing advice to underage children and their parents who seek marriage dispensation. Judges are trained to resolve disputes, not to give advice. However, in a case like this, the role of judges may expand not only as a decision maker but also as marriage, health, or well-being consultant.

4 Conclusion

To conclude, the factors that influence the disparity between judges' considerations are internal factors including the background, knowledge, and ability of judges in interpreting regulations and assessing certain conditions, statutory factors, and social factors. Efforts to minimize verdict disparities and provide legal certainty and justice for justice seekers can be pursued by establishing capacity and ability building for judges in exploring, assessing, and deciding each marriage dispensation application. Although the mandate of the law provides freedom for judges, as the mainstay or spearhead of implementing the law, judges must also be able to provide an objective assessment of the physical, psychological, economic, and educational conditions of children who are about to marry. In order to render verdicts more objectively while also prioritizing the interests of children, judges can involve professionals to provide an assessment of whether or not the prospective bride and groom are ready to enter into a marriage.

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