

# Some Judges' Considerations in Deciding Marriage Dispensation Cases

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## ABSTRACT

*There are many reasons behind the occurrence of early marriages in Rembang, including the factor of being pregnant first with the background of uncontrolled social relations, so that the parents of both parties agreed and submitted a request for dispensation to the Rembang Religious Court to be able to get a decision from the Judge allowing them to marry in Rembang. Age that does not yet meet the applicable laws in Indonesia. This research was carried out using sampling, analysis, primary, secondary and tertiary data techniques where the research was carried out by interviewing, reviewing, collecting data, and searching for data related to the problem, which was made into a theory in this writing. And also this research was obtained from a study (Library research) or Normative. From the collected data it was analyzed using the Empirical method. So the resulting research shows that basically early marriages are carried out because there are things that parents feel require them to marry their children at an age that does not meet the provisions of the law. There are many factors behind the existence of early marriage in Rembang, which according to researchers, all of these reasons lead to undesirable things, if a person is not immediately married.*

## INTRODUCTION

Marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a *sakinah, mawaddah wa rahmah* family that is blessed by Allah Almighty. "Inner and outer bond" means that the close relationship between husband and wife is not only from the outward physical aspect but also the inner emotional bond.

The marriage bond is prescribed by religion not only to justify biological relations (sex), or not only to obtain offspring, but more than that, namely to build a happy family full of love, calm the soul and end with the attainment of inner and outer happiness.. So that the various goals of marriage can be realized, the state has an interest in regulating a regulation regarding marriage, then Law Number 1 of 1974 concerning marriage was born and followed by various technical regulations below it (Ali Imaron, 2015).

Marriage is also something that applies to every creature and absolutely occurs in the lives of jinn, animals and plants. As for humans, Allah does not allow them to run wild and indulge in lust as happens to animals. However, God has laid down rules that provide rules, safeguarding human honor and glory.

Namely a sharia marriage which turns the relationship between a man and a woman into a sacred relationship based on willingness, handover, as well as tenderness and affection between the two. So

that with such a marriage, sexual desire will be channeled properly, and can maintain the continuity of offspring so that it can protect the honor of women from inappropriate behavior.

The law of marriage is the earliest law known to humans, which was marked by the marriage of Adam and his wife, Eve. Then, by experiencing changes here and there, the marriage law was implemented by the children and grandchildren of Adam and Eve continuously *from* the past until now. The marriage laws that have developed to date are the preservation (follow-up) and development of the laws that God introduced to previous generations of humans. That is why marriage law is a law that is always actual and necessary for humans (Mardani, 2011).

Rasulullah SAW strongly encouraged his people to get married, even people who were not happy with marriage were considered not to be in his people. And explained in a hadith. Rasulullah SAW said: "*Indeed, I fast, break the fast, pray, sleep, and marry women. Whoever hates (does not carry out) marriage means he is not my ummah.*" (Ali Imraon, 2015).

This hadith makes it clear that Islam prescribes marriage as a form of worship. A marriage is not just to justify a biological relationship, or not just to produce offspring, but more than that, namely to build a happy family full of love, calm the soul and end with the attainment of inner and outer happiness.

Marriages entered into by parties who are not old enough or are still children, known as early marriages, have pros and cons in society. Reality shows that early marriage is still common and often occurs in Indonesian society, especially in rural areas. Various reasons were put forward by perpetrators of early marriage, including economic factors, environmental influences or local customs, not being able to refuse a proposal from the groom because they were worried that it would not be *successful* (no one would apply again because they had previously rejected the proposal), the child was considered capable of *performing a gawe* (carrying out marriages). Daily work), fear of children falling into adultery, and so on.

Marriage law opens up opportunities for early marriage through the court's marriage permit process. Whether a marriage permit or what is better known as a marriage dispensation is permitted or not really depends on the condition of the applicant, one or both of the prospective bride and groom and the considerations of the judges who hear the case in the Religious Court. *Munakahat* jurisprudence normatively allows early marriage. However, the aspects of benefit and harm must be considered so that early marriage can bear *sakinah, mawaddah wa rahmah* fruit.

This is in accordance with the words of the Prophet Muhammad SAW from Ibn Mas'ud *radhiyallahu'anhu* who told a hadith (I once heard the Prophet Muhammad SAW say "*O young men, whoever among you is able, should marry, because marriage will be more subduing eyesight and will protect your private parts better. And whoever is not yet able, should fast, because fasting will actually be a shield for you*" (narrated by Jama'ah) (Ibn Hajar Asqolani, 1378 H). This hadith explains the Prophet's command for young people who are able to get married as soon as possible, and if you are not able to get married then fast first (restrain your desires), because one of the benefits of marriage is that it can save society from the threat of moral decadence.

The Shari'ah only emphasizes that young people who are able to marry are encouraged to marry. So it is permissible to marry young boys or young girls. However, the age set by marriage law in Indonesia is a minimum of 16 years for women and 19 years for men. Is the age determined by law applicable or appropriate for every couple in Indonesia? Many facts have been found that many people marry early. They are safe in navigating domestic life and do not experience significant obstacles.

M. Fauzil Adhim seems to completely agree regarding early marriage. This can be seen from his presentation material which shows the benefits gained by couples who marry when they are teenagers. And there are also objections to groups that are against early marriage. In his presentation, Fauzil Adzim also took sources from western scientists who had conducted research on couples who had married at a young age. It turns out, from the research results obtained, it was concluded that couples who married at a young age were happier than couples who married at an old age. This is because couples who marry at a young age still have a lot of positive emotions and are full of principles so they can maintain them (Muhammad Fauzil Adhim, 2002).

## RESEARCH METHODS

The research method is to explain technically the methods used in research (Sedarmayanti & Syarifuddin Hidayat, 2002). With this, the author uses empirical writing methods with a socio-cultural juridical approach, etc (Khoirul Wahyudi, 2016). The location of this research was carried out at the Rembang Religious Court, by studying documents and interviews, and Decision Number 0047/Pdt.P/2016/PA.Rbg regarding the issue of marriage dispensation.

## RESULTS AND DISCUSSION

It was explained in the previous explanation that the Marriage Law regulates the age limit for a person to enter into marriage, namely for men aged 19 (nineteen) years and women aged 16 (sixteen) years, however, in the provisions of the Law there are deviations. Regarding the marriage age provisions that can be requested by both the parents of the man and the woman to submit a request for dispensation to the court or other official. Such as determination Number 0047/Pdt.P/2016/PA.Rbg, the chronology of the case can be described as follows.

In this case, the person who applied for marriage dispensation at the Rembang Religious Court was the man's parents. The request for marriage dispensation was submitted because the prospective groom had not yet reached the requirements for marriage, namely 19 years, while the prospective groom had had sexual relations outside of marriage, resulting in pregnancy for the woman he was dating.

The gestational age has reached 1.5 months or 6 weeks. In order for the baby born in the future to be a legitimate child, both parents of the man and woman agree to marry by applying for a marriage dispensation. In this case, the request for dispensation was made by the child's parents at the Rembang Religious Court

Based on the decision of the Rembang Religious Court, the judge granted the petition and decided to give a marriage dispensation permit to the applicant's child to marry the applicant's child's future wife. And also ordered the Religious Affairs Office (KUA) of Rembang District, Rembang District to marry the applicant's child to his future wife.

Several things that were taken into consideration by the Panel of Judges at the Rembang Religious Court in granting the marriage dispensation request include:

1. Future husband and future wife
2. The applicant's son as future husband stated that he really loved his future wife and did not want to be separated;
3. There is readiness to become a husband and has worked so he is able to support his wife.
4. The prospective wife loves and does not want to be separated from her future husband because she is already 1.5 months pregnant;
5. The prospective wife will marry on the basis of mutual consent and without coercion.

Apart from these considerations, the judge also considered that the Petitioner's child and his future wife had had intimate relations so that his future wife was already 1.5 months pregnant and their relationship was so close that their parents were worried that if they did not get married immediately there would be a prolonged violation of religious law and cause harm.. Meanwhile, avoiding harm (damage) is preferred over attracting benefit (goodness) in accordance with the hadith narrated by Bukhori which means "*O young people, whoever among you can afford the expenses of marriage, indeed marriage can subdue the eyes and calm the passions. And whoever is unable to afford it, should fast, because fasting is a restraint for him.*"

Even though the applicant's child is less than 19 years old, namely 18 years and 6 months old, the panel of judges is of the opinion that because he is already working and has his own income, he is biologically mature enough and if he marries he can provide for his wife so that it will not affect his wife's health or health. The child she gave birth to. Based on these considerations, the judge at the Rembang Religious Court granted the applicant's parents' request for marriage dispensation and stated that the applicant's child could enter into marriage with his future wife.

The data from this interview is basically to complement the results of research regarding the dispensation for marriage for minors in the case of Determination Number 0047/Pdt.P/2016/PA.Rbg which is related to the causes of early marriage, the legal basis for judges deciding on dispensation cases, considerations judge's considerations and child protection. Therefore, the author conducted interviews with related parties as follows:

Dr. Sutiyo MH, Judge of the Rembang Religious Court,

Many cases of applications for marriage dispensation have been submitted to the Rembang Religious Court, one of which is the case of Determination Number 0047/Pdt.P/2016/PA.Rbg. Various reasons for requests for marriage dispensation are submitted by interested parties, including: the child who is going to get married has expressed the desire to settle down with all the consequences or is ready physically and mentally, feels that he has not violated religious law because he has reached puberty, has been proposed to or is engaged and is worried. If you fall into actions that are prohibited by religion, parents are ready to support them morally or materially and so on.

Another reason was also found because both the male and female prospective brides were not old enough as stated in Article 7 of the Marriage Law. In general, applications for marriage dispensation are due to the woman having previously become pregnant out of wedlock.

There are also requests for marriage dispensation that are submitted because parents are worried about their children's intimate relationships, so to avoid unwanted things that are prohibited by religion, parents take the initiative to marry their children even though they are not old enough. Most of the requests for marriage dispensation were granted by the judges.

The existence of a marriage dispensation in the Marriage Law, when viewed from the perspective of child protection law, he revealed that the issue of marriage dispensations for minors has received widespread public attention and controversy, and this does not seem to touch the material aspects of marriage (violations in marriage such as violations age, violation of requirements), but places more emphasis on the aspect of deprivation of human rights, especially children's rights to freedom.

Marriage at the age of children, seen from the aspect of child protection, is considered an unlawful act, because this act is considered a deprivation of the child's rights. In fact, marriage at the age of children will have a criminal impact if it contains elements of discrimination, economic and sexual exploitation, neglect, cruelty, violence and abuse, injustice and other wrongful treatment, which must be proven in accordance with applicable laws and regulations.

In Islamic law and customary law there are no provisions regarding age limits for marriage. As soon as someone enters puberty, he is actually ready to get married. The age of puberty is related to the fulfillment of the biological duties of a husband and wife. Likewise, in customary law there is no age limit for marriage.

Usually, according to customary law, a person's maturity is measured by physical signs. If a girl is menstruating (menstruating), her breasts are protruding, meaning she is an adult. For men, the size is seen from changes in voice, body posture and whether they have released semen or whether they have sexual desire.

In line with the development of human life, a problem arises in society, namely pregnancy before marriage. To cover the shame and so that the unborn child has a father, parents immediately marry their child to the man who impregnated her. However, the problem is what if one of the parties is not old enough to enter into marriage as required by the marriage law as in the case of Determination Number 0047/Pdt.P/2016/PA.Rbg.

Based on the above, the author is interested in researching and analyzing the marriage dispensation in the case of Determination Number 0047/Pdt.P/2016/PA.Rbg according to Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (KHI), with problems What are the considerations taken by the judge at the Rembang Religious Court to grant the marriage dispensation request?

This age limit for marriage is reaffirmed by the Compilation of Islamic Law (KHI) in Article 15 paragraph (1), namely "*for the benefit of the family and household, marriage may only be carried out by prospective brides and grooms who have reached the age specified in Article 7 of Law Number 1 year 1974, namely a potential husband at least 19 years old and prospective isreti must be at least 16 years old.*"

Article 7 of Law Number 1 of 1974 concerning Marriage in paragraph (1) reads "*Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years*".

When there is a deviation from Article 7 paragraph (1), then what is used is Article 7 paragraph (2) which reads. "*In the event of a deviation from paragraph (1) of this article, you can ask for dispensation from the court or other official appointed by both the parents of the man and the woman.*"



Underage marriages can be prevented and annulled. Article 60 of the KHI and also Articles 13 to 28 of the Marriage Law state that prevention of marriage can be carried out if the prospective husband or prospective wife does not fulfill the requirements for carrying out a marriage according to Islamic law and legislation. Meanwhile, among the conditions for marriage according to Islamic law is that the prospective bride and groom have reached puberty, are mentally and physically healthy.

Article 60 of the Compilation of Islamic Law concerning prevention of marriage in paragraphs (1) and (2) reads:

- 1) *"Marriage prevention aims to avoid marriages that are prohibited by Islamic law and statutory regulations.*
- 2) *Prevention can be carried out if the prospective husband or prospective wife who is about to enter into marriage does not fulfill the requirements for carrying out a marriage according to Islamic law and statutory regulations."*

KHI Article 15 paragraph (2) reads *"for prospective brides and grooms who are not yet 21 (twenty one) years old, they must obtain permission as regulated in article 6 paragraphs (2), (3), (4), and (5) of Law no. 1 of 1974.* Age 21 (twenty one) years here is related to child care. In KHI Article 98 paragraph (1) reads *"The age limit for a child who is able to stand alone or be an adult is 21 (twenty one) years, as long as the child is not physically or mentally handicapped or has never been married."* This means that as long as the child is not yet 21 years old, he cannot be said to be an adult and needs representation in legal actions inside and outside the court.

The representatives referred to are the parents, as stated in Article 98 Paragraph (2), and also the actions of the child. The article reads *"The parents represent the child regarding all legal actions inside and outside the court"*. If the parents are unable then refer to Article 98 Paragraph (3) which states *"The Religious Court can appoint one of the closest relatives who is able to fulfill these obligations if both parents are unable"*.

Apart from that, there are six principles or principles of marriage which are implied by Law Number 1 of 1974, including the principle of maturity of the prospective bride and groom. This means that every prospective husband and prospective wife who wish to enter into a marriage contract must be truly physically and psychologically mature.

The wisdom of enforcing marriage is to promote offspring, maintain one's lineage (status), save society from moral decadence, as a medium for forming an ideal household and educating children, freeing society from various diseases, and obtaining mental and spiritual peace. Marriage is natural and can be achieved at the age where the prospective bride and groom have perfected their minds and are ready to carry out the reproductive process.

The wisdom of marriage here is more oriented towards the realization of physical and spiritual well-being for the perpetrators and as a medium for continuing offspring or continuity of lineage. Marriage will become increasingly clear and its existence is very important when viewed from a legal aspect. Marriage is seen as a legal act (*rechtsfeit*), namely the actions and behavior of the legal subject which have legal consequences, because the law has the power to bind the legal subject or because the legal subject is bound by the power of the law.

Marriage here is not only seen as a form of worship, but marriage is also a legal act that has various legal consequences. This is where the importance of marriage is regulated in statutory regulations to protect society. To address community concerns.

Basically, child protection aims to ensure the fulfillment of two things, namely children's rights and children's welfare. Whatever actions are carried out by parents or parties involved with the child, they must pay attention to these two goals. The best interests of the child must come first. The parties involved with the marriage dispensation must pay serious attention to children's rights and also the welfare of children both physically and mentally, both physically and psychologically.

In this case, children's rights are the various basic needs that children should obtain to ensure survival, growth and development and protection from all forms of abuse, exploitation and neglect of children, including civil, economic, social and cultural rights.

Parents play an important role in realizing child protection and child welfare. Even though the Marriage Law has set the minimum age for marriage for men at 19 years and for women at 16 years, parents may not immediately permit or approve of the marriage.

Parents must be able to think clearly and wisely in making decisions regarding marriage for their children. Parents are obliged to prevent a marriage from taking place if they feel that the marriage will

actually result in negative things for the prospective bride and groom. Parents bear full responsibility for all the negative consequences of their children's marriage.

According to the author, marriage to minors should be avoided in order to guarantee the rights of children. However, because the condition is already pregnant and to avoid undesirable things, a dispensation as a last alternative can be submitted to the religious court by considering what is best for the child.

Underage marriage by a couple who has not met the marriage age limit is essentially a marriage carried out by someone at the age of a child, this is as confirmed in Article 1 paragraph (1) of Law No. 23 of 2002 concerning Child Protection which states that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb.

The problem of marriage of underage children is an issue that always surfaces along with the emergence of various factors behind it. One of the factors is pregnancy out of wedlock, so the path often taken by parents is to apply for a marriage dispensation through the religious court.

These reasons to some extent influence the attitude of judges in court or other appointed officials in making decisions to grant marriage dispensations to the parties. Meanwhile, every child who is not yet 18 years old must receive protection for their children's rights and welfare as mandated by the child protection law.

Based on the results of interviews with Mr. Dr. Sutiyo MH, that the factors that led to the granting of requests for marriage dispensation for minors by religious court judges were more due to the condition of the woman being pregnant out of wedlock. Apart from that, Mr. Sutiyo further emphasized that the judge's conscience and kindness can be a factor in granting marriage dispensation for children in cases of children being pregnant out of wedlock.

In the case of Determination Number 0047/Pdt.P/2016/PA.Rbg, the judge granted the request for a marriage dispensation based on the hadith rule that avoiding harm (damage) takes priority over attracting benefit (goodness). This means that here the judge made this decision to avoid greater damage that would be caused in the future.

According to the author, juridically, the judge was right to grant the marriage dispensation request because the legal basis as a basis for making this decision was in accordance with the Marriage Law which allows a minor to enter into a marriage by applying for a marriage dispensation (Article 7 paragraph (2)).

Even though the law determines the age of marriage at 16 years for women and 18 years for men, on the other hand, religious courts are legally given the authority to dispense marriage as a solution to overcome greater damage. However, here the religious courts do not make it easy for minors to marry.

In the case of marriage dispensation resulting from a woman becoming pregnant out of wedlock, in conditions like this the author is of the opinion that marriage dispensation is the only way that must be taken as a form of protection and prevention against the greater harm (damage) that it will cause. This also includes the granting of the request in the case of Determination Number 0047/Pdt.P/2016/PA.Rbg, as a protection for the child who will be born as well as the psychological condition of both the bride and groom and the family as a whole.

Likewise, the age limit for marriage in Article 7 paragraph (1) of Law Number 1 of 1974 concerning Marriage states that marriage is only permitted if the man is 19 (nineteen) years old and the woman is 16 (sixteen) years old. However, at the same time, Article 7 paragraph (1) of Law Number 1 of 1974 concerning Marriage also allows someone to apply for a marriage dispensation.

In this case, the author believes that there is a contradiction between the child protection law and the marriage law regarding the marriage of underage children. For this reason, the existence of contradictions in the articles of the two laws requires deep accuracy for a judge in finding a common ground in resolving marriage dispensations for minors, especially for cases of pregnancy out of wedlock.

Seeing this, in essence the child protection law can still be used as material in deciding cases related to the age of marriage, but Law Number 1 of 1974 concerning Marriage is still the main basis and as a derivative of it, namely the Compilation of Islamic Law.

And it also cannot rule out the possibility of a marriage dispensation which also has a juridical basis in legislation. It should also be noted that the marriage dispensation is a special rule, while the

child protection law, specifically Article 26 paragraph (1) letter c, which prohibits marriage for a child who has not reached the age of eighteen is a general rule.

However, this age limit for marriage is reaffirmed by the Compilation of Islamic Law (KHI) in Article 15 paragraph (1), namely "for the benefit of the family and household, marriage may only be carried out by prospective brides and grooms who have reached the age specified in Article 7 of Law Number 1 in 1974, namely a potential husband at least 19 years old and prospective isreti must be at least 16 years old." And Article 7 of Law Number 1 of 1974 concerning Marriage in paragraph (1) reads "Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years". When there is a deviation from Article 7 paragraph (1), then what is used is Article 7 paragraph (2) which reads. "In the event of a deviation from paragraph (1) of this article, you can ask for dispensation from the court or other official appointed by both the parents of the man and the woman."

## CONCLUSION

Based on the analysis provided, several conclusions can be drawn. Firstly, Law Number 1 of 1974 regarding Marriage, specifically Article 7 paragraph (2), offers a legal avenue for parents to marry off their children at a young age and serves as a reference point for judges when deciding on marriage dispensation cases. Secondly, in 2016, Rembang witnessed 52 cases of early marriages, with the primary reason being pregnancy, as indicated by data from the Rembang Religious Court. Thirdly, the marriage dispensation for minors, such as in Determination Case Number 0047/Pdt.P/2016/PA.Rbg, is typically granted by religious courts to address issues like adultery, pressure, and establishing legal authority for the child born from such unions. Fourthly, the data from the Rembang Religious Court between 2012 and 2015 showed only one instance of divorce stemming from early marriage, suggesting both positive and negative effects, though prevention remains crucial despite the opportunities provided by Article 7 paragraph (2). Finally, it is imperative for the government and society to collaborate in curbing the prevalence of early marriages, recognizing the need for a concerted effort in this regard.

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