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## The Judge's Consideration In Granting The Application For Marriage Dispensation After The Enactment Of Law No. 16 2019

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### ABSTRACT

This research aims to: (1) Discuss how the Law affects the increase of marriage dispensation in the Gorontalo Religious Court. (2) to find out what is the basis of the judge to grant the application for marriage dispensation after the enactment of Law No. 16 of 2019. This study uses a type of empirical juridical research with a qualitative descriptive approach with the method of collecting interview data of Gorontalo Religious Court Judges and analyzing marriage dispensation data in 2019 and 2020 Gorontalo Religious Court. While the method of processing data researchers through the stage of data examination, classification, analysis and conclusions. The results of the study that the Revision of Law No. 16 of 2019 to Marriage Law No. 1 of 1974 greatly influenced the increase in marriage dispensation cases in the Gorontalo Religious Court. Because of people's ignorance about the change in the Law and because of the many extramarital relationships that cause pregnancy.

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## 1. Introduction

Marriage is an important moment in human life, as a social creature or zoopoliticoon man definitely needs the role of others in his life. Basically, in every human being has attached an instinct to live together and establish relationships with others. This relationship can be maintained through marital bonds. Marriage is both a social contract and a sacred contract. In this agreement there is the essence of the fusion of two people who are bound to each other in a married relationship, where women and men both have rights and obligations in a family.<sup>1</sup>

The definition of marriage according to the Marriage Act is the inner birth bond between a woman and a man as a husband and wife with the aim of forming a happy and eternal family based on the supreme divinity.<sup>2</sup>

Basically the marriage involves both sides of the family, but the dominant determining its role in determining the direction and purpose of the marriage is the married couple. Home life is very dynamic. No family walks straight as they wish, without a wave of ever-changing problems. A family's ability to live a household is determined by the maturity of its husband and wife.<sup>3</sup>

In recent years, there have been many early marriages. Early marriage is an underage gift carried out by a couple, who in one of the brides has not met the age limit of marriage.

In Indonesia, there is a marriage dispensation. Namely the granting of rights to a person to marry even though his age has not reached the age of marriage due to certain things. The marriage must be based on the consent of both brides-to-be. Moreover, a prospective husband who has not reached the age of 19 years, or the future wife has not reached 16 years, must get marriage dispensation from the Religious Court. Marriage dispensation applications for those who have not reached 19 years old for prospective wives submitted by both male and female parents to the Religious Court where they live.<sup>4</sup>

Emotional, biological and psychological maturity of the bride and groom is one of the principles used by the Marriage Act, because marriage has a very noble and sacred purpose that is to form a sakinah family and get a sholeh and sholehah offspring. Marriages that take place at a very young age or under the age are feared to produce less good offspring. Because the result is not only undercooked seeds but because of the lack of knowledge of prospective brides about how to care for children or commonly called parenting science so that children will grow and develop with less maximal parenting. Therefore, marriages that are not in accordance with the minimum age requirement

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<sup>1</sup>Thahir Maloko, *Dinamika Hukum dalam Perkawinan* (Cet. I; Makassar: Alauddin University Press, 2012), hal. 12

<sup>2</sup>Undang-undang Nomor 1 Tahun 1974

<sup>3</sup>Andi Syamsu Alam "*Usia Ideal Memenuhi Usia Perkawinan*" (Jakarta:Kencana Mas Publishi House, 2010), 16-17s

<sup>4</sup>Mohd Idris Ramulyo, "*Hukum Perkawinan Islam*", (Bandung: CVPustaka Setia, 20013) 183

should be minimized as little as possible to prevent the occurrence of these concerns.<sup>5</sup>

To achieve the lofty ideals of marriage, the bride-to-be must mature inner birth before marriage. Physical and mental maturity is expected to achieve the goal of marriage well, so that it can have healthy offspring. The age at which marriage can affect the quality of life of the marriage itself, so it is necessary to set a minimum age limit for marriage. In addition, psychological maturity is also needed in marriage so that maturity in the family is needed to achieve happiness, peace and tranquility.<sup>6</sup>

The reasons for child marriage are still very young include the economy, education and belief in customs. Stabbing undoubtedly violates the rights of children, namely the right to life, and they cannot continue their education or studies. Compared to women who are old enough, early marriage also puts girls at risk of death during childbirth. Another effect of early marriage on girls is that it will cause many problems, such as psychological effects (anxiety, depression, even suicidal thoughts). The end impact is a lack of knowledge about sex such as awareness of infectious diseases.<sup>7</sup>

Table of applications for the granting of marriage licenses to children who are not old enough in the Gorontalo Religious Court:

Table 1.  
Marriage Dispensation application  
case

THE CASE OF APPLYING FOR A MARRIAGE LICENSE					
YEAR	NUMBER OF THINGS	THINGS THAT ARE IN KABUL	THINGS THAT ARE REVOKED	THINGS THAT ARE REJECTED	THINGS THAT FALL
2017	99	91	2	3	3
2018	97	97	0	0	0
2019	71	66	5	0	0
2020	189	184	0	0	5

Data Source: *Application for Marriage License in Gorontalo Religious Court*

From the table above shows that in 2017 had 99 marriage dispensation applications including 91 granted cases, cases that were revoked amounted to 2 cases, cases that were rejected and cases that fell each amounted to 3 cases. In 2018 the number of marriage dispensation applications only dropped by 2 cases from the previous year, with 97 cases and all were filed by religious courts. In 2019 the number of application cases decreased

<sup>5</sup> Rahmat Hakim, *Hukum Perkawinan Islam*, (Bandung: Pustaka Setia, 2014),144

<sup>6</sup> Arso Sosroatmodjo dan A. Wasit Aulawi, *Hukum Perkawinan di Indonesia* (Jakarta: Bulan Bintang, 2012), hal.23

<sup>7</sup>Jawaami, Arfian Jamul, "Ini Kata Pengamat Penyebab Tingginya Angka Pernikahan Dini" (17 April 2018) <https://www.ayobandung.com/read/2018/04/17/31546/ini-katapengamat-penyebab-tingginya-angka-pernikahan-dini>, diakses 1 Maret 2021

by 71 cases, which were granted amounting to 66 cases with revoked cases amounting to 5 cases. In the following year, 2020, the case of marriage dispensation application experienced a very large increase, namely with the number of cases reaching 189 with cases granted amounting to 184 cases and cases that fell amounted to 5 things. Thus, the case of marriage dispensation applications from 2017-2019 decreased but experienced a drastic increase in 2020.

## **2. Method**

The types of research used are empirical legal research which includes legal identification (unwritten) and research on the effectiveness of law. Empirical legal methods are used to describe the qualitative picture of the Granting of Marriage Licenses by the Gorontalo Religious Court and the factors on which the gorontalo religious court is based in granting marriage licenses.

## **3. Analysis or Discussion**

### **3.1 Judge's Consideration in Granting Marriage Dispensation Application After Enactment of Law No. 16 of 2019**

The Gorontalo Religious Court in 2020 received 189 marriage dispensation cases. According to researchers from the determination data and the results of interviews with the Gorontalo Religious Court Judge that the factor behind underage marriage is the reason of getting pregnant out of wedlock due to excessive relationships with their lovers, while the candidates are eligible for an age to hold a marriage.

The judge's efforts in deciding the case, applying the rule of law to the event based on certain methods, so that the basis of consideration of the event is carried out in a relevant manner by law, so that the results obtained from the case process can be accepted and accounted for in legal science and society. The application for marriage dispensation submitted in the Religious Court received is the wish of the applicant who expects legal certainty over the marriage that will be carried out. Of course, hatrus sees written evidence or witness evidence or testimony from the applicant. In accordance with the statement delivered by Mr. Djufri Bobihu Sag., SH as a Judge of the Gorontalo Religious Court can be concluded that the judge's consideration in granting the marriage dispensation application is:

1. Pregnant before marriage so it should be urgent to hold a wedding
2. Due to parental pressure
3. In terms of the body has shown maturity, has matured in the material or has a fixed income.

In the opinion of the researchers, the judge's consideration is classified into two, namely legal considerations and community justice considerations.

First, the legal consideration in question is when the Judge strikes down the determination must be in accordance with the propositions and the evidence provided according to the Undand Law is as follows:

a. Proof of letter, including:

1) Photocopy of birth certificate on behalf of the applicant's child issued by the village head/ village.

2) A notice of refusal to hold a marriage issued by the Office of Religious Affairs.

b. Witness evidence. The usual witness evidence presented in the trial is both parents. Since this is a matter of marriage dispensation, the existence of witnesses only comes if needed.

In his consideration, the Judge also used the study of Islamic fiqh, which is the consideration of goodness and rejecting damage in society and efforts to prevent harm. In the view of the judge, the madharatnya is feared if not immediately married will add to the sin and there is a marriage under the hands that will mess up the legal rights of children born according to the Law.

Second, the consideration of community justice. Often, marriage is often considered an alternative solution to the social problems that will occur, such as marrying off a pregnant child first to cover up embarrassment. Of the many marriage dispensation applications, the average Judge granted the marriage dispensation application because of pregnancy out of wedlock, considering that women who are pregnant without a husband will be insulted and ostracized in the community.

Regarding the source of the law used by judges in rejecting or accepting marriage dispensation cases, of course, there are two main sources of Islamic law, namely <sup>8</sup>:

- Compilation of Islamic Law
- Marriage Law No. 1 of 1974
- Law No. 16 of 2019
- Supreme Court Regulation (PERMA) Number 5 of 2019

The legal source is clear there is a Compilation of Islamic Law, Article 7, but the many used are ijtihad the law itself because of the advice of events in the field if already pregnant inevitably have to clean the law. If you are pregnant, you will inevitably have to be in *kabulkan*. However, if not, for example, both parties are often at the same time, so it must be married immediately which if not married is worried about things that are prohibited". The Qur'an and Hadith.

Factors that influence the basis of the judge's consideration in granting the dispensation of the age of marriage are that the judge is not bound by a positive law. Judges are given the opportunity to make legal discoveries on the grounds that if the Act sets certain matters for a particular event, it is limited to a particular event. The prohibition on

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<sup>8</sup> Opinion of Gorontalo Religious Court Judge Mr. Hasan Dzakaria S.Ag., S.H. On October 1st Day at 08:49 Am

underage marriage is explicitly not found in the Marriage Act. Although the age limit of marriage requirements has been set, but at the level of practice the level of the judging is flexible. That is, if kasuistis is very urgent or an emergency to avoid damage / mafsadah must take precedence to maintain the good / maslahah then both brides-to-be must be married immediately.

Judges are not only racing on the Law because if the judge uses a methodological approach in the study of Islamic Law (fiqh) regarding the application of the age of marriage, it is necessary to consider maslahat mursalah (method of ijihad in Islamic Law based on general benefit).

The judge put forward the concept of maslahat murshalah which is the prtimabngan of goodness and reject damage in society and efforts to prevent harm. Maslahat mushalah is an essential and general problem, in the sense that by granting the dispensation of the age of marriage to children who are not old enough to perform marriage can be accepted by common sense that it actually brings benefits to both the bride and groom's family and avoids mudharat from sins committed by young couples outside of marriage. Which is considered common sense as a true maslahah has been in line with the purpose and purpose of syara' (building a complete household) in establishing every law, which is to realize the benefit of mankind. Which is considered common sense as an essential maslahah and has been in line with the purpose of syara' in establishing the law is not contrary to the existing shura of syara', both in the form of nash Qur'an and sunnah, nor ijma' ualama before. Maslahah mursalah is practiced in conditions that require in this case the judge does not dispensation the age of marriage, which if the maslahat is not resolved in this way, then the people are in the narrowness of life, with the meaning that it must be taken to prevent the people from difficulties in the distribution of biological passions so as to avoid the trap of perverted acts outside the marriage fence.

Researchers concluded that the legal source to accept or reject the marriage dispensation case is the Qur'an and Hadith, Compilation of Islamic Law, and Marriage Law No. 1 of 1974 and changes to Law No. 16 of 2019, as well as Supreme Court Regulation No. 5 of 2019.

As for some considerations and foundations in providing marriage dipensasi, namely <sup>9</sup>:

### **3.1. Law No. 1 of 1974**

In Article 1 of this Law states that, marriage is an inner birth bond between a man and a woman as a husband and wife with the aim of forming a family, a happy and eternal household based on the supreme divinity.

According to this article the nature of marriage is clear that the bond of inner birth must exist in every marriage. The bond of birth and mind is the foundation in forming

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<sup>9</sup> Opinion of Gorontalo Religious Court Judge Mr. Hasan Dzakaria S.Ag., S.H. On October 01 at 08:55 Am

and building a happy and eternal family. So that if there is a man and a woman who are ready to hold a wedding, then it must be immediately married so that the two people can build a household and avoid adultery.

In this Law explained that if there is a deviation to the age provision, then the parents of the man or the parents of the woman can request dispensation to the court on the grounds of urgency and with sufficient supporting evidence. With evidence and compelling reasons such as pregnancy, the Judge can grant the dispensation.. ensation..

### **3.2. Law No. 16 of 2019 Article 7 verse 1**

To reach the age of adult marriage, the marriage age limit is determined as stated in Law No. 16 of 2019 Article 7 Verse 1 which states that, marriage is only allowed if the man and woman have reached the age of 19 years. If the bride-to-be who wants to carry out the marriage is not sufficient in the law, then orantua one of the brides-to-be submits a case of request for marriage dispensation to the Religious Court in order to marry them, as stated in Law No. 1 of 1974, Article 7 Verse (2) which reads: "in the case of deviation from Verse (1) of this article may request dispensation to the Court or other officials, Appointed by male and female parents".

In the determination, the panel of judges granted the petitioner's application, which is to grant marriage dispensation to the applicant to marry off his child. With the consideration that it will grant a greater madharat if the two brides-to-be are not married. The determination of the Panel of Judges is appropriate, because it does not deviate from the provisions of Law No. 1 of 1974 which does not discuss specifically about marriage dispensation.

### **3.3. Supreme Court Regulation No. 5 of 2019**

In the event that marriage has been determined that marriage is only permitted for those who have met the age requirements, for those who have qualified the age of marriage, then marriage can be carried out as it should be. However, for those who do not meet the age requirement, then marriage can be carried out if the court has granted marriage dispensation in accordance with the laws and regulations.

In order to conduct the process of adjudicating marriage dispensation applications has not been regulated expressly and detailed in the laws and regulations and for the smooth implementation of the judiciary, the chief justice of the Republic of Indonesia stipulates the Regulation of the Supreme Court of the Republic of Indonesia No. 5 of 2019 on guidelines for adjudicating marriage dispensation applications. Perma is set on November 20, 2019 and is enacted on November 21, 2019 to be known and applied to all levels of society.

The purpose of the guidelines for adjudicating marriage dispensation applications is to:

1. Applying the principles as referred to by Article 2, namely the principle of best interest for the child, the principle of the right to life and growth of children, the principle of appreciation for the opinion of children, the principle of respect for dignity and human dignity, the principle of non-discrimination, gender equality, the principle of equality before the law, the principle of justice, the principle of expediency and the principle of legal certainty;
2. Ensure the implementation of a judicial system that protects the rights of children;
3. Increase parental responsibility in order to prevent child marriage;
4. Identifying the or absence of coercion behind the application for marriage dispensation; and Realizing the standardization of the process of adjudicating marriage dispensation applications in court.

### 3.4. Compilation of Islamic Law

Compilation of Islamic Law that implicitly does not give birth to marrying someone who has had an unannical relationship, let alone cursing pregnancy. This is in Article 53 which reads:

- (1) A pregnant woman out of wedlock, may be married to the man who impregnated her.
- (2) Marriage with a pregnant woman referred to in paragraph (1) can be carried out without waiting for the birth of her child first.

In Fiqh or Islamic Law there is no minimum limit to the age of marriage to be used as a condition for carrying out marriage. Jumhur or the majority of scholars say baha wali or parents can marry off their daughters at any age. In its history, the Prophet S.A.W himself married Siti Aisyah at the age of 6 years and lived together at the age of 9 years.

“In accordance with the rules that state where there is maslahat that is where Islamic Law is located. So, if we look at the perspective of the Judge's examination, when there is the benefit of early marriage. Where when they are not married, it will cause mudharat that will certainly free them. Of course the assembly said it would accept the application." Which is made the basis for granting the case of Marriage Dispensation is the rule that reads: "where there is maslahat, there is the law of God. Because not all the problems of his legal life are not clearly written in the Qur'an and hadith. Islam lays down general principles and basic rules that mujtahids can make to develop Islamic Law and solve new problems through ijtihad. The at-thufi view of maslahat seems to be based on the concept of maqasid at-tasri which says that Islamic law is conditioned to realize and maintain the maslahat of mankind. This concept has been acknowledged by scholars and therefore they accumulate a fairly popular rule, "where there is

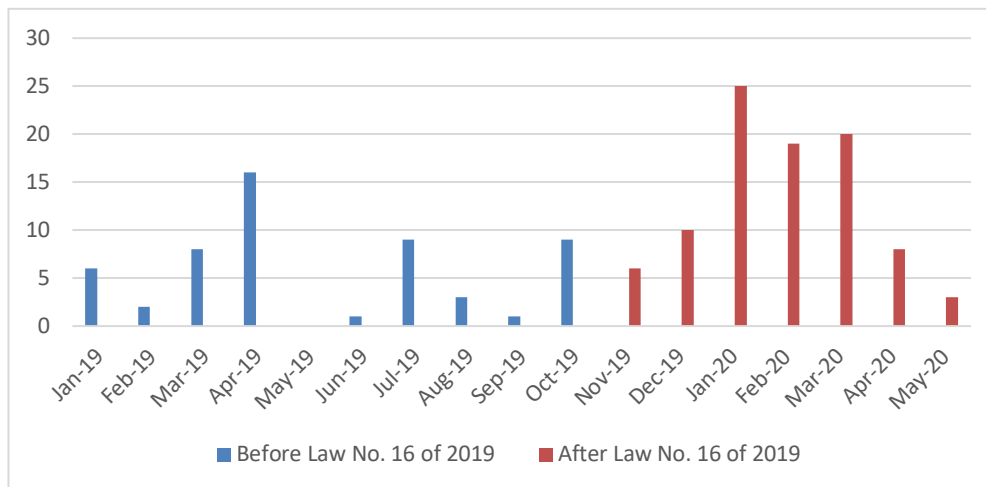


maslahat" there is a law of God. Because by granting the marriage of the petitioner, there is a maslahat in it, which if not in *kabulkan*, is feared of a greater *mudharat*.<sup>10</sup>

One of them is because there has been a pregnancy before pregnancy. On the other hand, because the two brides often walk together, so it can be reprimanded from the community, for fear that if not married then there will be *mudharat* that will occur later in the day. Taking from the rules of *fiqhiyah dar'u al-mafasid muqaddamun 'ala jalbi al-mushalih* which means preventing damage first rather than seeking benefits. Because most if it has been an accident, if not immediately married the woman, *kasian* status of his child, because the benefit returns to the child and woman, it is if it is pregnant. If we are not pregnant, if for example we are not in *kabulkan*. It could be that they without marriage dispensation will be *betel* marriage which is also actually breaking the positive law. So, the benefit is there. If not in *kabulkan* will marry *betel* or even commit adultery. So, we finally got it." From the two opinions of the judge, researchers can conclude that the basis of the judge in granting marriage dispensation after the enactment of Law No. 16 of 2019 "where there is a *maslahat* there is the law of God". And that means preventing damage first rather than seeking harm. There are many considerations of judges in granting marriage dispensation. Because the *gorontalo* religious court that applied for marriage dispensation most who are already pregnant out of wedlock. So, because of the already pre-existing circumstances, if not married there is *mudharat* on women and prospective children who are born. Fear of social sanctions in the community, in the event of the birth of a child without a father.<sup>11</sup>

As per the judge's explanation hereby described as in the table below :

Number of marriage dispensation cases after the enactment of Law No. 16 of 2019



<sup>10</sup> Pendapat Hakim Pengadilan Agama Gorontalo Bapak Hasan Dzakaria S.Ag.,S.H Pada Hari Tanggal 01 Oktober Pukul 08.57 Wita

<sup>11</sup> Opinion of Gorontalo Religious Court Judge Mr. Hasan Dzakaria S.Ag., S.H. On October 1st Day at 08:58 Am

From the data above can be seen the difference in the increase in marriage dispensation before and after the enactment of Law No. 16 of 2019. In 2019 before the enactment of the Law, the low marriage license rate in the Gorontalo Religious Court was only 71 cases in 2019 and after the Law was enacted the marriage dispensation case increased to 189 cases.

#### 4. Conclusion

The Judge's consideration to grant the marriage dispensation application is that the Judge uses the study of Islamic fiqh, namely the consideration of goodness and rejecting damage in society and efforts to prevent harm. In addition, in terms of accepting and rejecting the case of marriage dispensation judges using legal sources: Compilation of Islamic Law, Law No. 1 of 1974, Law No. 16 of 2019, and Supreme Supreme Court Regulation (PERMA) Number 5 of 2019.

#### 5. Recommendations

##### 1. To parents

You need to pay more attention to the child's relationship. Because, the negligence of parents leads to uncontrolled behavior and things that violate religious sharia, such as getting pregnant outside of marriage..

##### 2. To the government

Based on research that has been done, there is less socialization from the government to the public regarding the revision of Law No. 16 of 2019, that the marriage age limit has been raised to 19 years for men and women. So, there is a need for institutions for socialization so that there is no misunderstanding about the age limit of marriage..

##### 3. To the community

There needs to be legal awareness so that the public still meets the law set by the government, that the age limit for male and female marriage is 19 years. These rules are made for the common good and avoid things that are forbidden by Allah Swt.

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