

JURIDICAL ANALYSIS TOWARDS THE DISPENSATION OF CHILD MARRIAGE

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ABSTRACT: *Underage marriage is regulated in article 7 paragraph (2) of Law Number (No). 1 of 1974 about Marriage, this authority is given to the Religious Court to issue a dispensation for marriage. This study aims to analyze the conditions for dispensation to marriage as well as to analyze the judgments of the Parepare Religious Court in giving dispensation to marriage in Decision under the Decision Number 26/Pdt.P/2020/PA.Pare. This study use a normative approach then analyzed with descriptive qualitative. The result of this study is to show the conditions for dispensation to marriage in accordance with the provisions of Law Number (No).1 of 1974 concerning about Marriage as well as judges' considerations which emphasize the best for the children, but didn't explain in detail of the legal provisions which used to interpret the ideal age limit for women to marry.*

I. INTRODUCTION

Every human who is born, on the process of the way to adulthood usually wants to begin the family life. This willingness is his nature as a social creatures. They will look for a partner from their group and their heart's. And the way to legalize this commitment is through marriage.

Through marriage between a man and a woman, a family life is started. Family is an important element in the life of society and state. Start from the family, children are born who are expected to become the next generation of the nation. Therefore, Article 28B of the 1945 Constitution of the Republic of Indonesia (Undang-Undang Dasar Negara Republik Indonesia 1945) states that:

"Everyone has the right to form a family and continue their offspring through a legal marriage"

Based on Article 1 of Law Number (No). 1 of 1974 concerning Marriage which has been amended by Law Number (No). 16 of 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage, the meaning of marriage is the physical and spiritual bond between a man and a woman. as husband and wife to form a happy and eternal family based on One God.

Marriage is not only limited to a physical relationship between human and human, but also a spiritual relationship between human and their creators. Muslim believe that marriage is not only a continuation of the generation of mankind on this earth, but also completes half of the religion according to the commandments of Allah and the Sunnah of His Prophet, thus creating marriage a sacred bond. In Article 2 of the Compilation of Islamic Law (KHI) it is stated that:

"Marriage according to Islamic law, which is a very strong contract or *mitsaaqanholiidhan* to obey Allah and practicing as it is worship."

In Article 7 Paragraph (1) of Law Number (No) .16 of 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage (Undang-Undang Perkawinan), a minimum age limit for a prospective partner to be able to marry, is that both men and women are 19 years old. This age limit is considered of matured in mind and physically to be able to get a married. This age limitation as purpose so that the prospective spouse can realize the goal of marriage properly without ending by divorce.

In Article 7 Paragraph (2) of Law Number (No) 16 of 2019 concerning Amendments to Law Number (No).1 of 1974 about Marriage, it is regulated that in the situation of deviation from the age limit provisions, dispensation may be asked to conduct a marriage to the Religious Court. This is a problem in the marriage preparation, because one of the other way of the law only allows marriage if it is reached the age limit of 19 years old, but on the other hand, the law also implements the marriage dispensation for potential partners under 19 years old.

According to Indonesia dictionary (Kamus Besar Bahasa Indonesia), dispensation is an exception to the rules due to special consideration / exemption from an obligation or prohibition. Through dispensation of marriage, underage marriages is recognized in point of the law regarding their marital status. In addition, by granting dispensation of marriage to prospective spouse, Article 7 Paragraph (1) of Law Number (No). 16 of 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage does not apply to prospective spouse who is being submission for dispensation of marriage.

After the ratification of Law Number (No). 16 of 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage, it was recorded that from 23 October 2019 to 25 February 2020 there were 38 cases of dispensation of marriage in Parepare Religious Court. Where in October 2019 there were 3 cases, in November 2019 there were 8 cases, in December 2019 there were 2 cases, in January 2020 there were 17 cases and in February there were 8 cases of marriage dispensation. Based on these data, it is known that the phenomenon of underage marriage is still high in Parepare City.

Legal certainty is one of the elements in law enforcement. The suitability between the case and the rules practice must be prioritized by each judge to achieve the legal certainty. However, in the determination of Number 26 / Pdt.P / 2020 / PA.Pare there is a incongruity between the prevailing laws, regulations and the judge's consideration in giving dispensation, where in one of his consideration the judge used the old laws and regulations which actually changed and promulgated on October 15, 2019. Even though Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage does not abolish Law Number 1 of 1974 concerning Marriage, but because the amended article is used by the judge in practicing the dispensation submission, the judge must consider the amendment article.

Based on the description above, the author is interested in conducting research on marriage dispensation as explain in the Juridical Analysis of the Provision of Child Marriage Dispensation under the Age (Study Determination Number 26 / Pdt.P / 2020 / PA.Pare)

II. LITERATURE REVIEW

2.1. A General Overview of Children

In the prevailing laws and regulations in Indonesia the definition of child are the definition of children in Article 1 of Law Number (No).35 of 2014 concerning Amendments to Law Number (No). 23 of 2002 concerning Child Protection, states that:

"A child is someone who is not 18 (eighteen) years old, including children who are still in the womb".

According to Article 98 Paragraph (1) the Compilation of Islamic Law (Kompilasi Hukum Islam) determines that:

"The age limit for children who are able to stand alone or mature is 21 years, as long as the child is not physically or mentally disabled or never been married".

According to Article 1 of the Regulation of the Supreme Court of the Republic of Indonesia (Peraturan Mahkamah Agung Republik Indonesia) Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, the children definition is :

"A person who isn't 19 years old or has never been married according to statutory regulations."

According to the Convention on the Rights of the Child, the children definition is:

"Everyone under 18 years of age, unless under the law applicable to children which is determined that the adulthood is earlier."

2.2. Overview of Marriage Dispensation

1) Definition of Marriage Dispensation

Based on literature dispensation of marriage consists of 2 vocabularies, which are dispensation and marriage. According to the Indonesia dictionary, dispensation is an exception to the rules due to special consideration / exemption from an obligation or prohibition. Meanwhile, marriage is to form a family with the opposite gender, have a husband / wife or get married.

In Article 1 of the Supreme Court Regulation (PERMA) Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, it is stated that:

"Marriage dispensation is the granting of permission to marry a prospective husband / wife who is not yet 19 years old to marry."

2) Implementation of Marriage Dispensation

Based on the marriage requirements that apply in Indonesia according to Law Number (No). 16 of 2019 concerning Amendments to Law Number (No) 1 of 1974 concerning Marriage, it relates to the age of the prospective bride who is getting married. Article 7 Paragraph (1) of the Marriage Law states that:

"Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years."

Article 7 Paragraph (2) states that:

"In the event of deviation from the age requirement as referred to in paragraph (1), the parents of the male and / or the parents of the female party can request dispensation to the Court on very urgent reason follow by enough supporting evidence."

In adjudicating cases for dispensation of marriage, the Religious Courts consider of two harm, which are the harm that occurs due to underage marriage and the harm that will occur if the dispensation of marriage is rejected. Therefore, in adjudicating cases of dispensation of marriage, judges adhere to the principles best interests of the child, the right to live and develop children, appreciation for children's opinions, respect for human dignity, non-discrimination, gender equality, equality before the law, justice, benefits, and legal certainty.

2.3. Legal Basis of Marriage Dispensation

Law Number (No). 16 of 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage Article 7 Paragraph (2) states that:

"In the case of deviation from the age requirement as referred to in paragraph (1), the parents of the male and / or the parents of the female party can request dispensation to the Court on very urgent reason follow by enough supporting evidence."

Compilation of Islamic Law Article 15 Paragraph (1) states that:

"For the benefit of the family and household, marriage can only be done by the prospective spouse who has reached the minimum age in Article 7 of Law Number 1 Year 1974, which is the prospective husband is at least 19 years old and the prospective wife is at least 16 years old."

III. METHOD/ APPROACH

To answer the problems in this study, the authors used a normative approach. The normative approach is an approach method that is carried out by studying and analyzing legislation and literatures which relate to the problem that will be researched. The data that has been collected then analyzed using a qualitative prescriptive analysis method, which is a method of analysis that provides an assessment of the object of the study, whether it is true or false, or what should be according to law. This analysis aims to provide an overview or formulate problems in accordance with existing facts. Then the results of the data analysis are processed deductively, which is processing from general to specific to provide a clear understanding of the research results.

IV. RESULTS AND DISCUSSION

4.1. To analysis of the Conditions for Granting Dispensation of Marriage to Minors in Case Number 26 / Pdt.P / 2020 / PA.Pare

The implementation of marriage must meet the requirements. In general, the requirements regarding marriage are regulated in Law Number (No). 16 of 2019 concerning Amendments to Law Number (No).1 of 1974 concerning Marriage, which is

"Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years."

The determination of the age limit of 19 years as one of the conditions for marriage is based on the principle that marriage aims to form a happy and eternal family. To achieve this goal, marriage must be based on the physical and psychological readiness of the two prospective brides. Therefore, the age of 19 is considered as mature for marriage. In the general explanation of Law Number 1 (No). of 1974 concerning Marriage, the principles or principles of marriage are stated, which are:

1. The goal of marriage is to form a happy and long lasting family. For this reason, husband and wife need to help and complement each other, so that everyone of them can develop his personality to help and achieve the good spiritual and material.
2. A marriage is legal if it is carried out according to the law of each religion and belief, and besides that each marriage must be recorded according to the prevailing laws and regulations.
3. Adhere to the principle of monogamy. Only if the person concerned wishes, because the law and religion of the person concerned allows it, a husband can have more than one wife. However, a marriage between a husband and more than one wife, even if it is willingness by the parties concerned, can only be carried out if certain condition is met and it is decided by the court.
4. Adhere to the principle that a prospective husband and wife should mature in physically and mind in order to be able to carry out a marriage, so that they can realize the goal of marriage well without ending in divorce and having good and healthy offspring. For this reason, it must be prevented from marriages between prospective husband and wife who are still minors.

5. Since the purpose of marriage is to form a happy, eternal and prosperous family, the law adopts the principle of making divorce difficult. To allow a divorce to occur, there must be certain reasons and must be done in front of a court hearing.
6. The rights and position of the wife are balanced with the rights and positions of the husbands both in household life and in the community, so that everything in the family can be negotiate and decide together.

Although the age limit for marriage is established, in another way the law also allows deviations from this condition by requesting dispensation to the court. In Article 1 of the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, it is stated that:

"Marriage dispensation is the granting of permission to marry a prospective husband / wife who is not yet 19 years old to marry."

To achieve legal certainty, benefit and justice, the provision of dispensation for marriage to minors must meet the requirements. These conditions can be divided into two, namely material requirements and formal requirements.

Material requirements are requirements related to the content or substance of an appointment. The requirements that need to be fulfilled are:

1. Application for dispensation of marriage is a very urgent matter, this must be supported by evidence that explains the condition of the child as in Article 7 Paragraph (2) of Law Number (No). 16 of 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage.
2. The judge must provide advice to the applicant, children, prospective husband / wife and parents / guardians of the prospective husband / wife in order to understand the risks of underage marriage.
3. The judge must listen to the statements of the applicant, the children, the prospective husband / wife and the parents / guardians of the prospective husband / wife, as well as witnesses and consider in the determination.

Formal requirements are requirements related to filing procedures, the trial process up to the appointment of a judge. The requirements that must be fulfilled are:

1. There is a deviation from the predetermined age limit for marriage. This is evidenced by the existence of a marriage refusal letter from the Office of Religious Affairs (KUA).
2. Applications for dispensation of marriage are filed by the parents of the man and / or the parents of the woman.
3. Applications for dispensation of marriage for Muslims are submitted to the Religious Court and those who are not Muslims are submitted to the District Court. If there is a religious difference between the child and the parent / guardian, then the application for dispensation of marriage is submitted to the court according to the religion of the child.
4. An application for dispensation is submitted to a court whose jurisdiction includes the residence of one of the parents / guardians of the prospective bride.
5. The applicant is obliged to present the child who is submitted for dispensation of marriage, the prospective husband / wife, and the parents / guardians of the prospective husband / wife at the first, second or third trial. The attendance of the parties do not have to be on the same trial day.

4.2. Analysis of Judges' Considerations in Providing Marriage Dispensation to child marriage in Case Number 26 / Pdt.P / 2020 / PA.Pare

In adjudicating cases of marriage dispensation submitted, the main consideration for judges in granting dispensation is as stated in the results of the interview with Mrs. Dra. Hj. Hadira, one of the judges in Parepare Religious Court (interview 7 July 2020), which is:

"Marriage dispensation is granted because the law provides dispensation with the provision of age limits for marriage for very urgent reasons. The urgent reasons depend on the applicants submitted, whether the applicant's child is pregnant, always go out together and / or could not be separated again. Apart from that, consideration of the benefit of the child is also the main consideration for the judge."

Determination of Number 26 / Pdt.P / 2020 / PA.Pare is a matter of marriage dispensation application submitted by the applicant to Parepare Religious Court. In this case, the applicant is the parent of the bride who is 15 years old. The applicant plans to have a marriage between the applicant's child and her prospective husband and has met the requirements to perform the marriage both in accordance with Islamic law and applicable laws and regulations, unless the age requirements for both brides have not reached 19 years as stated in Marriage Law, so that the local Office of Religious Affairs refuses them to marry based on a Letter of Rejection of Marriage in writing Number B-23 / Kua.21.16.02/Pw.00/01/2020, dated January 20, 2020. Candidate the bride is ready to be a housewife as well as a good wife then the groom are ready to be the head of the household. Both brides and grooms want to get married under the reason of their own willingness without coercion and pressure from any party. The bride and groom aren't mahram, milk siblings and there is no prohibition to perform marriages between them according to Islamic law

“The prospective bride who is the child of the applicant has an intense relationship with the prospective groom and has been dating for approximately 1 year, even as husband-wife relation which affected in the prospective bride being pregnant 3 months. The prospective groom works as a canvas car driver with an income of around Rp. 2,100,000 (two million and one hundred thousand rupiah) every month.”

To settle the case for the dispensation submitted, Parepare Religious Court gave a determination take to consider the existing legal facts, including the statements of the applicant, the petitioner's child witnesses and evidence. As for the consideration of the judge in determining Number 26 / Pdt.P / 2020 / PA.Pare as follows:

1. Considering, whereas the purposes and objectives of the applicant's petition are described in the sitting case.
2. Considering, whereas on the trial day, the applicant came to attend the trial, then the judge gives directions and advice so that the applicant wants to suspend his willingness to let his child be married until the child of the applicant reaches 19 years old for marriage, but the applicant remains in his submission for court to provide the dispensation to let this child get married, concerning the applicant's child is 3 months pregnant.
3. Considering, that furthermore the first consideration of the applicant's capacity in this case, which turns out to be based on evidence P-6 which states that there is a direct relationship between the prospective bride and the applicant as a child and biological mother, then formally the applicant has fulfilled the requirements and as legal standing in this case.
4. Considering, that the main purpose and content of this petition is that the applicant's willingness to apply for a dispensation to marry his daughter who is still not mature enough to fulfill the requirements for an Islamic marriage with her future husband, however the marriage plan for them has been rejected by the local District Office of Religious Affairs (Kantor Urusan Agama Kecamatan setempat) because the applicant's child is not mature enough to get married.
5. Considering, that furthermore to confirm his arguments as in his application letter, the applicant has submitted the written evidence consisting of original ghoib statement (asli keterangan ghoib) (P-3), original Doctor's Statement (P-7), original rejection letter (P-8) and authenticity letter statement of commitment of parents also some matched copies and original, with enough postmarked. The letters are marked P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8 & P-9.
6. Considering, that although marriage dispensation is the inevitability that given by law, in another meaning as a maslahat instrument in order to achieve a good goal, in its application it must still refer to legal principles which do not merely refer to certain normative provisions.
7. Considering, that based on Article 7 Paragraph (2) of Law Number 1 of 1974 it is stated that "In the case of deviations from paragraph (1) of this article, dispensation may be requested from the court or other official appointed by both male and female parents.
8. Considering, that because the law does not explicitly regulate the exemption limit for the age of minors to marry who can be granted dispensation, by only mentioning that "deviation from this provision can be requested for dispensation to marry the Religious Court", the judge needs to provide reason for the provision which further considered.
9. Considering, that therefore to uphold religion, get the offspring and to prevent immorality which will have an even greater impact requires mental and psychological maturity and not just physical maturity, and at the age of the prospective bride is now over 15 years old, sufficient to be considered mature and capable of realizing the stated objectives of the marriage mentioned above, especially in terms of reproduction, the applicant's child is now 3 months pregnant.
10. Considering, that by observing the condition of the applicant's child who is so closely related to the prospective groom, the relationship has even been so far that the applicant's child has experienced a 3-month pregnancy as a result of the relationship between the two prospective brides that married by accident, therefore the court states that pending, then rejecting the request for dispensation of marriage, will have a bad impact not only on the two prospective brides that very close and in love with each other, however will cause problems that have a bigger social impact in the future, so that by looking at these conditions the judge states that reject the broken should be prioritized rather than concerning only for the benefit. This is in accordance with Qaidah Fiqhiyah which is taken as the judge's opinion, which is rejecting mafsadat (damage) must be prioritized than focusing to the benefit.
11. Considering, that therefore, based on the considerations stated above, the petition points 1 and 2 of the petition of the applicant because it is considered legally grounded, must be granted.
12. Considering, that based on Article 89 Paragraph (1) of Law Number 7 of 1989 and Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 and Second Amendment of Law Number 50 of 2009 the court fee is borne by the applicant.
13. Based on the considerations described above, the judge determined that the applicant's petition was granted and gave dispensation to the applicant's child to marry her prospective husband.

V. DISCUSSION

Based on the description above, the provision of dispensation to marriage can be implemented if it meets the material and formal requirements.

Based on the determination of marriage dispensation case Number 26 / Pdt.P / 2020 / PA.Pare, the authors observed that the results of the judge's interpretation of the sentence "urgent reasons" were due to the prospective bride that being pregnant.

The customs of the Indonesian, specially the Bugis-Makassar Customary, consider a woman who is pregnant without a marriage bond is a disgrace in society. Therefore, in prevent the disgrace the shame in society, marriage is an alternative solution. Pregnancy outside of marriage is the juvenile delinquency that against the religious and moral norms. Parents' concern about their daughter who is pregnant and the status of the baby in her womb are strong reasons for the applicant to apply for marriage dispensation in court. It is hoped that a marriage that is carried out by a pregnant woman can provide a legal and clear status to the child, so that the child has a position and lineage with her father. It is different if the woman doesn't have a marriage and the child she is carrying is born outside of marriage, then the child only has a family relationship with her mother as in Article 100 of the Compilation of Islamic Law (Kompilasi Hukum Islam), it is stated that:

"Children born outside of marriage only have a family relationship with their mother and their mother's family".

The stigma of society in the form of being labeled "illegitimate children" against children born outside of the bond of marriage does not only affect the psychology of the child, but also the mother and her family. To avoid this, marriage must be done. In Islamic law, the marriage of a pregnant woman is regulated in Article 53 of the Islamic Law Compilation (KHI), are:

1. A woman who is getting pregnant out of married can be married to a man who did that act to her.
2. Marriages with pregnant women mentioned in paragraph (1) can be carried out without waiting for the birth of their child first.
3. By taking place when a woman is pregnant, there is no need to marry after the child is born.

The results of this interpretation then uses as the basis or reference for the judge in granting dispensation to marriage in the form of establishment. In addition, applications for dispensation of marriage must also be completed with enough support of evidence to support the statement of the applicant before the court. Like a doctor's certificate which proves that the child's condition is urgent (pregnant), so there is no choice but to grant the applicant's request. This is because refusing mafsadat (damage) that is bigger in the future is more prioritized by the judge than to get the benefits.

Judges in the trial must provide advice to the applicant, children, prospective husband / wife and parents / guardians of the prospective husband / wife in order to understand the risks of marriage related to the possibility of ending the education for children, the continuity of children in taking 12 years of compulsory education, unprepared reproductive organs, also the aspects of economic, social and psychological for children, as well as potential conflict and domestic violence. Apart of giving advice, the judge must also listen to the statement of the applicant, children, prospective husband / wife and parents / guardians of the prospective husband / wife to obtain evidence that there is no coercion from any party to commit this marriage. In the case that the judge does not implement the provisions as stated, so it is cancelled for the law.

Since the marriage dispensation is not a legal product that can be given just like that, then in judging the marriage dispensation application, the judge must pay attention to all the benefits and harms due to the acceptance and rejection of the marriage dispensation application.

Determination Number 26 / Pdt.P / 2020 / PA.Pare is a case of submitting the dispensation for marriage registered at the secretariat of the Parepare Religious Court dated February 4, 2020, right after the amendment of Law Number (No). 1 of 1974 concerning Marriage to Law Number (No). 16 of the Year 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage. Although this case tried after the amendment to the Marriage Law, in its application in court, the judge still used the form of Law Number (No). 1 of 1974 concerning Marriage. This can be observed in the judge consideration. Where in his consideration, the judge still uses Article 7 Paragraph (2) of No 1 of 1974 concerning Marriage, which is "In case of deviations from paragraph (1) of this article, dispensation may be submitted from the court or other official appointed by the parents of the man and woman side. Meanwhile, Article 7 Paragraph (2) of Law Number 16 Year 2019 concerning Amendments to Law Number 1 Year 1974 concerning Marriage, changes and additions to the sentence, which is "In the event of a deviation from the age requirement as referred to in paragraph (1) the parents of the man and / or the parents of the woman can ask for dispensation to the court with very urgent reasons accompanied by enough supporting evidence". In further consideration, the judge considers that because the law isn't strictly regulate the exemption limit for the age of minors for marriage who can be granted dispensation, by only mentioning that "deviations from this provision can be requested for dispensation of marriage to the Religious Court", the judge needs to provide reason. against these provisions which are further

considered. According to the author, if the judge uses Article 7 Paragraph (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, the judge can see that the law regulate everyone also be granted dispensation. The dispensation is given specifically for the applicant's child whose condition is in an urgent condition. it means that this dispensation must be given. In further consideration, the judge didn't explain in detail the provisions of the ideal age limit used in adjudicating applications for dispensation of marriage. What are the provisions of Islamic law or applicable statutory provisions. The judge only said that "... moreover, the prospective bride is now approximately 15 years old and has almost reached the ideal age limit for a prospective bride to marry.

The author observes that apart from still using the article before the amendment, it seems that the judges have also not been based on the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation which was declared on November 21, 2019 in adjudicating requests for dispensation of marriage by applicants. However, in adjudicating dispensation applications, the judge places great importance on the best interests of the child, which is considering the harm that occurs as a result of underage marriage and the harm that will occur if the dispensation of marriage is rejected. Therefore, in examining a case for a marriage dispensation application, a judge must study the applicant's petition detail and carefully, examine the legal position of the applicant, explore the background and reasons for child marriage, explore information regarding whether or not there are marital obstacles, finding information related to the child's understanding and consent to married, taking into account the age difference between the child and the prospective husband / wife, listening the statement of the applicant, the child, the prospective husband / wife, and the parents / guardian of the prospective husband / wife, taking into account the psychological, sociological, cultural, educational, health, economic conditions of the child and person parents, consider whether or not there is an element of psychological, physical, sexual and / or economic coercion, as well as ensuring the commitment of parents to take responsibility related to economic, social, health and educational problems of children.

In the determination of Number 26 / Pdt.P / 2020 / PA.Pare, the judge granted the request for dispensation of the marriage applicant's by considering the facts that the relationship between the prospective bride and the groom has been very close and both of them have had a relationship like a husband and wife that caused her to be 3 months pregnant. The judge considers that if the dispensation is rejected due to the condition of the child who is pregnant, it is feared that the child will choose to be unregistered married. Although based on religious law the marriage is legal, in state law the marital status is not valid. In addition, marriage under hand will harm both the woman and the child. If the husband does not carry out his obligations as the head of the family, then the wife can't sue before the law, the husband and wife aren't bound by a legal marriage relationship. Seeing this condition, the judge considered that postponing or rejecting the applicant's marriage dispensation request would create bigger problems in the future. Therefore, the judges say that rejecting the damage should be prioritized than focusing to the benefit.

Another way of giving attention to the protection and best interests of the child being applied for dispensation, the judge also considers the protection of the child who will be born. In positive law of Indonesia, the position of the child is based on the marital status of both parents. If the marital status of both parents is valid, then the status of the child born is also valid. According to the Civil Code and Islamic law, children born outside the bond of marriage (children born illegally) and children born under marriage (legal children) have a different position. Children born out of married do not have a civil relationship with their father but only their mother, as stated in Article 43 Paragraph (1) of Law Number (No). 1 Year 1974 concerning Marriage, which is:

"Children born outside of marriage only have civil relations with their mother and their mother's family."

However, in the Civil Code, there is a provision that the child can be considered as a legitimate child after being recognized and legalized as a child. As a result of the acknowledgment and legalization, rights and obligations arise between the child and the parents. In contrast to these provisions, Islamic law does not consider child that born outside the marriage is as legitimate Children even though they have received recognition and approval from their parents, resulting in the absence of lineage, no inheritance from one another, and no guardian. (in marriage) with his father and his father's family but only to his mother and his mother's family.

According to Article 26 Paragraph (1) letter a of Law Number (No). 35 of 2014 concerning Amendments to Law Number (No). 23 of 2002 concerning Child Protection and the latest amendment to Law Number (No). 17 of 2016 concerning the establishment of Government Regulations in Lieu of Law Number (No). 1 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law jo. Article 3 of the Convention on the Rights of the Child, that granting dispensation to marriage by a judge is relevant to this article, which is by considering the protection and best interests of the child.

VI. CONCLUSION

The conditions for dispensing marriage to the children are divided into two, which are the material requirements and the formal requirements. The material requirements consist of Application for dispensation of marriage is a very urgent matter, this must be supported by evidence that explains the condition of the child as in Article 7 Paragraph (2) of Law Number (No).16 of 2019 concerning Amendments to Law Number (No) 1 of 1974 concerning Marriage. The judge must provide advice to the applicant, children, prospective husband / wife and parents / guardians of the prospective husband / wife in order to understand the risks of underage marriage. And the judge must listen to the statements of the applicant, the children, the prospective husband / wife and the parents / guardians of the prospective husband / wife, as well as witnesses and consider in the determination. The formal requirements that must be fulfilled are there is a deviation from the predetermined age limit for marriage. This is proved by the existence of a marriage refusal letter from the local Office of Religious Affairs, applications for dispensation of marriage are filed by the parents of the man and / or the parents of the woman, applications for dispensation of marriage for Muslims are submitted to the Religious Court and those who are not Muslim are submitted to the District Court. If there is a religious difference between the child and the parent / guardian, then the application for dispensation of marriage is submitted to the court according to the religion of the child, an application for dispensation is submitted to a court whose jurisdiction includes the residence of one of the parents / guardians of the prospective bride, the applicant is obliged to present the child who is requested for dispensation for marriage, the prospective husband / wife, and the parents / guardians of the prospective husband / wife at the first, second or third trial. The attendance of the parties doesn't have to be on the same trial day.

The judge's consideration in determining the request for dispensation of marriage Number 26 / Pdt.P / 2020 / PA.Pare focuses on the best interests of the child. However, in adjudicating applications for dispensation of marriage, the judge still refers to Law Number (No).1 of 1974 concerning Marriage as in Article 7 Paragraph (2) which should have changed to Law Number (No).16 of 2019 concerning Amendments to Law Number (No). 1 of 1974 concerning Marriage, and it does not explain in detail the legal provisions used to interpret the ideal limit for women to marry. Considering that the Marriage Law had amendments, is Article 7 and that the Supreme Court issued dispensation of marriage, so the judge must follow the prevailing laws and regulations.

REFERENCES

- [1] Ahyuni Yunus, 2020. *Hukum Perkawinan dan Itsbat Nikah*. Humanities Genius, Makassar.
- [2] Mardani, 2011. *Hukum Perkawinan Islam di Dunia Islam Modern*. Graha Ilmu, Yogyakarta.
- [3] Mardi Candra, 2018. *Aspek Perlindungan Anak Indonesia: Analisis tentang Perkawinan di Bawah Umur*. Kencana, Jakarta.
- [4] Mukti Arto, 2004. *Praktek Perkara Perdata pada Pengadilan Agama*. Pustaka Pelajar, Yogyakarta.
- [5] Soerjono Soekanto, 1986. *Pengantar Penelitian Hukum*. UI Press, Jakarta.
- [6] Soerjono Soekanto, Sri Mamudji, 2001. *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*. Rajawali Pers, Jakarta.
- [7] Subekti, 2001. *Pokok-Pokok Hukum Perdata*. Intermesa, Jakarta.
- [8] Titik T.T, 2008. *Hukum Perdata dalam Sistem Hukum Nasional*. Kencana, Jakarta.
- [9] Zainuddin Ali, 2011. *Metode Penelitian Hukum*. Sinar Grafika, Jakarta.

Legislation

- [10] Law Number 1 of 1974 Concerning Marriage
- [11] Law Number 39 of 1999 concerning Human Rights.
- [12] Law Number 3 of 2006 concerning Amendment to Law Number (No). 7 of 1989 concerning the Religious Courts.
- [13] Law Number 48 of 2009 concerning Judicial Power.
- [14] Law Number 35 of 2014 concerning Amendment to Law Number (No). 23 of 2002 concerning Child Protection.
- [15] Law Number 16 Year 2019 Concerning Amendment to Law Number (No).1 Year 1974 Concerning Marriage.
- [16] Presidential Instruction Number 1 of 1991 concerning Dissemination of Compilation of Islamic Law.
- [17] Regulation of the Supreme Court of the Republic of Indonesia (PERMA RI) Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation.