



ISLAMIC LAW STUDY AND MARRIAGE LAW ON MARRIAGE DISPENSATION

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Abstract

Marriage dispensation as a legal solution because most of the perpetrators of marriage dispensation are those who do not yet have formal legality to marry, so they then take legal efforts so that the marriage they carry out can be recognized. This study aims to determine the perspective of Islamic law, the Marriage Law and the Compilation of Islamic Law on marriage dispensation. The method used is qualitative with primary data sources from the Marriage Law, the Fiqh Book and the Compilation of Islamic Law while secondary data are books, journals, magazines related to marriage dispensation. The results of this study found that Islamic Law does not specifically regulate marriage dispensation because the majority of scholars only mention balig as a requirement for someone to marry and do not determine the minimum age of marriage, while Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law strictly regulates underage marriage, namely it must go through a court hearing mechanism to obtain permission for marriage dispensation.

Keywords: *Islamic Law, Marriage Law, Marriage Dispensation.*

Abstrak

Dispensasi nikah sebagai solusi hukum karena para pelaku dispensasi nikah kebanyakan mereka yang belum memiliki legalitas formal untuk menikah, sehingga kemudian mengambil ikhtiar hukum agar pernikahan yang dilakukan dapat diakui. Penelitian ini bertujuan mengetahui perspektif hukum Islam, Undang-undang Perkawinan dan Kompilasi Hukum Islam tentang dispensasi nikah. Metode yang digunakan adalah kualitatif dengan sumber data primer dari Undang-Undang Perkawinan, Kitab Fiqh dan Kompilasi Hukum Islam sedangkan data sekunder adalah buku-buku, jurnal, majalah yang terkait dengan dispensasi nikah. Hasil penelitian ini menemukan bahwa Hukum Islam tidak mengatur khusus dispensasi nikah karena mayoritas ulama hanya menyebutkan balig sebagai syarat menikah seseorang dan tidak menentukan minimal usia perkawinan, sedangkan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan dan Kompilasi Hukum Islam mengatur ketat tentang perkawinan di bawah umur, yaitu harus melalui mekanisme sidang pengadilan untuk mendapatkan izin dispensasi perkawinan.

Kata Kunci: Hukum Islam, Undang Undang Perkawinan, Dispensasi Nikah.

A. Introduction

Marriage dispensations can be understood as the exemption from an obligation or prohibition for men and women who do not yet meet the requirements to marry, which involves granting permission by the Religious Court to prospective brides and grooms who are not of legal age as required by law to conduct the marriage.(Wibowo et al., 2022) Marriage dispensation can also be interpreted as a legal leniency granted to prospective brides and grooms who do not meet the legal requirements for marriage under positive law, thus the law grants the court the authority to provide marriage dispensations based on considerations grounded in law and Islamic law.(Herviani et al., 2022)

Dispensation is granted to provide legal certainty for the community in need, regardless of whether it is beneficial or harmful; it is case-specific.(Eka Gifriana et al., 2022) Marriage dispensation exists because it relates to the age limits set by legal regulations and serves as an exception to the minimum age limit for marriage, granted when the established limit is about to be violated. In matters under the jurisdiction of Religious Courts, there are several cases that are closely related to children's rights, including requests for marriage dispensation. A marriage dispensation request is a petition submitted by the petitioner for the court to grant permission to the requested party for them to get married, because there is a requirement that has not been met by the prospective bride or groom, which is the fulfillment of the marriage age limit.(I. S. Kamarusdiana, 2020)

The Marriage Law Number 1 of 1974 has established the foundations that must be fulfilled in marriage. One of them is the provision in article 7 paragraph (1) which states, "Marriage is only permitted if the male party has reached the age of 19 (nineteen) years and the female party has reached the age of 16 (sixteen) years," which was later amended by the provisions of Law Number 16 of 2019 on marriage that the minimum age for marriage is 19 years for both women and men.(Kementrian Sekretariat Negara RI, 2019) Dispensation is an exception to the provisions of legal regulations or laws that are supposed to be applied formally. Marriage dispensation is an exception to the provisions of Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning marriage, which states that the minimum age limit for marriage is 19 years for both women and men.(Nur Falah et al., 2020) The purpose of this writing is to analyze the study of Islamic law and marriage law regarding marriage dispensation.

B. Research Methods

The object of this research is the marriage dispensations examined from the perspective of Islamic law and the Marriage Law. The data sources used consist of two forms: primary data and secondary data.(Indra & Cahyaningrum, 2019) The primary data referred to includes all books, journals, or articles related to the discussion of marriage dispensations. Meanwhile, secondary data consists of supporting data related to the theme either directly or indirectly.

This type of research uses library research. It involves collecting various literature and scientific references in the form of books, journals, and articles. After the data is collected, the author conducts analysis using content analysis and descriptive analysis methods. The literature obtained is then critically and thoroughly analyzed to support propositions and ideas.(Fadli, 2021)

C. Results and Discussion

1. Marriage Dispensation from the Perspective of Islamic Law

Marriage is a ceremony of binding promises celebrated or conducted by two people with the intention of formalizing a marital bond according to religious, legal, and social norms.(Adam, 2020) Marriage, according to Islamic law, is a very strong covenant to obey Allah's commands and to bind oneself between a man and a woman, to legitimize the relationship of husband and wife based on consent and the goodwill of both parties in order to achieve a household life that is Sakinah, mawaddah, and rahmah, which is blessed by Allah. The requirements for marriage in religion, in this case Islamic law, are the presence of a guardian, the presence of two witnesses, a dowry, and a contract. This means that a marriage is considered valid if the conditions and pillars have been fulfilled, not based on the age of the two prospective brides and grooms. However, the age for marriage in Islamic thought is required to have reached maturity.(Puspytasari, 2021b)

Understanding the age limit of marriage can see the meaning contained in the Qur'an surah an-Nur verse 32, namely:

وانكحوا الأيامى منكم والصالحين من عبادكم وإمائكم ان يكونوا فقراء يغنهم الله من فضله والله واسع عليم

And marry those who are among you, and those who are worthy (to marry) of your male slaves and your female slaves. If they are poor, Allah will enable them with His grace. And Allah is Vast and All-Knowing.

The word *al-ayama* in the above verse refers to women, both young and old. This verse also implicitly allows for the marriage of young women. The practice of Islamic law which is a mirror of early marriage can be seen from the marriage carried out by the Prophet (saw) with Siti Aisyah ra. The Prophet married his wife, Siti Aisyah who was still 6 years old and was only collected by the Prophet after he was 9 years old.(Rafid. A, 2020) This aims to ensure that the readiness of the reproductive organs can function optimally or it can be called *puberty*. Islamic law, in this case the Qur'an and hadith, does not specifically explain the minimum age for marriage. However, the general requirements that have been commonly known in marriage are *puberty*, common sense, and have been able to distinguish between good and bad so that they can provide the requirements for marriage.(Assagaf, 2023)

The definition of *puberty* in Islamic law as applied by fiqh scholars is the attainment of an age that makes a person biologically and psychologically ready to carry out marriage, for men who have dreamed of semen and for women who have experienced menstruation.(Puspytasari, 2021a) Scholars differ on the age of puberty, including: First, Imam Malik argues that the age limit for puberty is the growth of hairs around the genitals, while the scholars of the Maliki madzhab argue that the age limit for puberty for women and men is 17 years or 18 years. Second, Abu Hanifah argues that the age of puberty is 18 or 19 years for men and 17 years for women. Third, Imam Shafi'i argues that the perfect age is 15 years.Kamarusdiana Kamarusdiana, "Marriage Dispensation During the Pandemic: After Law Number 16 of 2019 and the Child Protection Law at the Indramayu-West Java Religious Court," SALAM: Syar-I Social and Cultural Journal, 2022, <https://doi.org/10.15408/sjsbs.v9i1.24388>. This difference occurs due to the difference in the environment and culture where they live.

The factors that occur in underage marriage vary including economic factors, arranged marriage, wanting to perpetuate the relationship, or unwanted factors such as due to an accident of pregnancy first. The impact of underage marriage includes: Biological and psychological impacts. Biologically, the organs of a person who has not reached *puberty* are still in the process of maturing so they are not ready to have sex, especially if they are pregnant and give birth. Psychologically, a person who has not reached *puberty* does not understand and is not ready about sex so that it can cause prolonged psychological trauma. In addition, underage marriage has an impact on social and sexual behavior. This phenomenon is related to socio-cultural

factors of society that tend to position women as complements to men only.(Yuli Astuti & Setyoningrum, 2021)

Classical jurisprudence refers to marriage at a young age by the term *nikah al-saghir* or *al-saghirah*, which literally means small. Meanwhile, the new book of jurisprudence mentions it with the term *al-zawaj al-mubakkir* (marriage at a young age), which is the marriage of a man and a woman who have not yet *reached puberty*.(Panigoro, 2023) If the limit of *puberty* is determined by age or number of years, then a marriage of young age is a marriage under the age of 15 according to the majority of jurists, and under 17 or 18 years according to Abu Ḥanifah. The majority of Islamic jurists allow underage marriage, but it is not necessarily permissible to have intercourse (sexual intercourse) because if there is a physical relationship and causes harm to the wife both physically and psychologically, then the law is haram.(Habibah, 2022) This prohibition applies to both underage marriages and adult marriages. According to Ibn Hazm, the marriage of girls who are still under the legal age is allowed, while the marriage of boys who are still under the age is prohibited. The legal experts of the Shafi'i school require that in order to be able to marry a minor boy, there must be a benefit based on the best interests of the child.

Meanwhile, to be able to marry underage girls, several conditions are needed, including: (Sugiri Permana, 2019)

- a) There is no real enmity or hatred between the daughter and her guardian *mujbir*.
- b) There is no real hostility or hatred between the daughter and her future husband.
- c) There is *kafaah* (social equality) between girls and future husbands.
- d) The husband-to-be is able to give a dowry that is decent.
- e) Not being married to a man who disappoints the child later in life

Marriage dispensation according to the great Indonesian dictionary is a permit for exemption from an obligation or prohibition, so dispensation is a leniency for something that is actually not allowed to be done or implemented. The marriage dispensation means the waiver of an age limit in making the bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead. (Nirwana et al., 2022) Marriage dispensation is a dispensation or relief given by the Religious Court to prospective brides who are not old enough to carry out marriage, for men and women who have not reached the age of 19.

Fiqh does not specifically mention the dispensation of marriage and has never applied a minimum age limit for a man or woman to get married. (I. S. Kamarusdiana, 2020) The marriage dispensation in the fiqh approach according to the scholars applies to women who are pregnant first. (Sugiri Permana, 2019) Because Islam does not prohibit the marriage of two people who have had an extramarital relationship (QS. An-Nûr [4]: 24) which means: *"A man who commits adultery does not marry but a woman who commits adultery, or a woman who is polytheistic; and a woman who commits adultery is not married except by an adulterous man or a polytheistic man, and that is forbidden for the believers."*

2. Marriage dispensation in the marriage law

A marriage dispensation application is a case of application submitted by the applicant for the court to grant permission to the person who is applying for a marriage dispensation to be able to hold a marriage, because there are conditions that are not met by the bride-to-be, namely the fulfillment of the marriage age limit.

Law Number 1 of 1974 concerning Marriage strictly regulates underage marriage, which must go through a court hearing mechanism to obtain a marriage dispensation permit. However, the marriage that will take place must have the approval of the two prospective brides to carry out the marriage, and get permission from the parents for couples who have not reached the age of 21. (Nisa' et al., 2022) This is as stated in article 6 articles (1) and (2) of Law Number 1 of 1974. Article 6 paragraph (1): "Marriage must be based on the consent of both prospective brides." Article 6 paragraph (2): "To carry out a marriage, a person who has not reached the age of 21 (twenty-one) years must have the permission of both parents." If permission from both parents is not obtained, then the Court can grant the permission based on the request of the person who will carry out the marriage.

In article 7 of the Marriage Law, paragraph (1) regulates the minimum age limit for carrying out marriage. Article 7 paragraph (1) which reads, *Marriage is only allowed if the man reaches the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years.* (RI, 1974) The article contains principles to ensure the ideal of marriage, namely the principle of voluntariness, family participation, maturity and maturity of the bride-to-be, both physically and mentally. Physical and mental maturity and maturity are very urgent to get married and form a family. The provision of a minimum age limit for marriage contains the intention that the marriage is really carried out

by the prospective bride, both men and women who are mature in their soul and body and can realize the purpose of marriage.(Janur & Nasriah, 2022)

Which provision is then reaffirmed by the Compilation of Islamic Law Article 15 paragraph (1) which explains that in order to achieve benefits in the family and household, marriage may only be carried out by prospective brides who have reached the age limit set in article 7 of Law Number 1 of 1974, namely the prospective husband is at least 19 years old and the prospective wife is at least 16 years old. Then the age limit for marriage in article 7 of the Marriage Law was changed with the presence of Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974. Based on these changes, the marriage age that can be allowed to get married is 19 years old, both for the groom and the bride-to-be.

Article 7 paragraph (1) which reads *that marriage is only allowed when a man and a woman have reached the age of 19 (nineteen) years*.(Kementrian Sekretariat Negara RI, 2019) The Constitutional Court stated that the phrase age 16 years old in Article 7 paragraph 1 of the Marriage Law is contrary to the 1945 Constitution which states that every citizen has an equal position before the law.(Kurniawati, 2021) The Constitutional Court also stated that the difference in the age limit for marriage between men and women in the law creates a discriminatory impression. So it was agreed to increase the age limit for women to 19 years. Thus, the age limit for marriage between a man and a woman is the same, which is 19 years. In addition, according to the Constitutional Court, there is a discontinuity between article 7 paragraph 1 of the Marriage Law and article 1 of the Child Protection Law which states that a child is someone who is not yet 18 years old, including a child who is still in the womb. Thus, anyone who is still under the age of 18 is considered to still be in the category of children. Marriages that are performed under the age limit specified in the Child Protection Act are child marriages.

Other considerations of the Constitutional Court are related to the protection of the rights of children, especially girls, such as the explanation of number 4 letter (d) of Law Number 1 of 1974 concerning Marriage explicitly states that it adheres to the principle that prospective husband and wife must have matured their physical and physical souls to be able to carry out marriage in order to realize the purpose of marriage properly without ending in divorce and having good and healthy offspring. For this reason, marriage between prospective spouses who are minors must be prevented.(Hernawan & Widigdo, 2023) The Constitutional Court stated that child marriage is something that is prohibited. In its ruling, the Constitutional Court ordered

lawmakers to make amendments to Law Number 1 of 1974 concerning Marriage no later than three years, especially regarding the minimum age of marriage for women.(I. S. Kamarusdiana, 2020)

Furthermore, in Article 7 paragraph (2) of the Marriage Law, it is explained that for those who have not reached the minimum age limit but still want to get married, the parents of the underage are required to submit an application for marriage dispensation to the competent Court in order to obtain permission to hold a minor marriage with sufficient evidence and also for very urgent reasons. so that there is no other choice but to marry his child.

In adjudicating the case of a marriage dispensation application, a judge does not necessarily decide the case on his own will and consideration. In handling cases of marriage dispensation applications, a judge has various legal bases for consideration and also guidelines.(Nasaleh, 2023) Permana and Fanani in their book explained that there are several legal considerations that must exist in the determination.

of marriage dispensation after the existence of Law Number 16 of 2019 and PERMA 5 of 2019, namely:

- a) Consideration of the provision of advice by the judge to the Applicant, the Child, the Prospective Husband/Wife and the Parents/Guardians of the Prospective Husband/Wife to understand the risks of marriage, which are related to: the possibility of the termination of the child's education, the sustainability of the child in taking the compulsory education for 12 years, the child's reproductive organs are not ready; economic, social and psychological impacts on children; and the potential for disputes and domestic violence. (Article 12 of PERMA Number 5 of 2019).
- b) Consideration of that the judge has heard the testimony of the child who is requested for Marriage Dispensation; prospective husband/wife who is requested for Marriage Dispensation; parents/guardians of children who are applying for Marriage Dispensation; and parents/guardians of the prospective husband/wife. (Article 13 of PERMA Number 5 of 2019).
- c) Consideration of the child submitted in the application to know and approve the marriage plan; consideration of the psychological condition, health and readiness of the child to carry out marriage and build a family life; and consideration of whether or not there is psychological, physical, sexual or economic coercion on children and/or families to marry or marry children. (Article 14 of PERMA Number 5 of 2019).
- d) Considerations about the protection and best interests of children as stipulated in laws and regulations and laws are not written in the form of

legal values, local wisdom, and a sense of justice that lives in society; and international conventions and/or agreements related to child protection. (Article 17 of PERMA Number 5 of 2019).

- e) Consideration of the very urgent reason that there is no other option and is very forced to take place of the marriage and consideration of the reason is accompanied by sufficient evidence, namely a certificate proving that the age of the bride is still under the provisions of the law and a certificate from a health worker that supports the parents' statement that the marriage is very urgent to be carried out. (Article 7 paragraph (2) of Law Number 16 of 2019 and its explanation).
- f) Consideration of the marriage of the applicant's child with the prospective husband/wife, there is no relationship that prevents marriage, both blood and milk, and is not in the marriage of another person and there are no other obstacles either related to the terms and harmony of marriage or administrative conditions, except only that the prospective bride has not reached the age of 19 years. (Articles 6, 7 and 8 of Law Number 1 of 1974 which have been amended by Law Number 16 of 2019 concerning Marriage).
- g) Considerations on the analysis of the Applicant's evidence and its evidentiary strength.
- h) Consideration of the formulation of legal facts based on the statements of the Applicant, the Applicant's children, the prospective husband/wife and parents/guardians of the prospective husband/wife, evidence of letters and witness statements that are in accordance with each other.
- i) Legal considerations on maslahat and madlarat as well as the provisions of Islamic law or fiqh regarding the regulation of the age of marriage and marriage dispensation.
- j) Legal considerations on one by one petitum (demands) of marriage dispensation applications whether they are granted in full, partially granted and partially rejected or rejected in whole.

3. Comparative Analysis Between Islamic Law and Marriage Law

Marriage dispensation is a form of legal policy that gives permission to a person to marry even though they have not reached the minimum age as stipulated in the regulations. In a comparative analysis between Islamic law and the Marriage Law in Indonesia, there are common points as well as fundamental differences regarding the provisions and purposes of marriage dispensation. In the perspective of Islamic law, marriage is not strictly

determined by age limits, but rather is emphasized on a person's physical and mental ability or readiness (puberty and *rusyd*). Therefore, as long as the bride-to-be has reached a certain maturity and can carry out household responsibilities, then marriage is allowed. In fact, in certain conditions such as preventing adultery or because of pregnancy out of wedlock, marriage can be considered a solution that is in accordance with the principle of benefit.

Meanwhile, in the Marriage Law in Indonesia, especially after changes through Law No. 16 of 2019, the minimum age of marriage is set at 19 years for both men and women. However, article 7 paragraph (2) provides room for marriage dispensation if there is an urgent reason approved by the court. In practice, the reason for this dispensation is generally attributed to pregnancy, social pressure, or moral reasons. This is where an important distinction lies: if in Islamic law age flexibility is based more on the individual's abilities and social context, in Indonesian positive law, dispensation is a legal exception that is strictly regulated by judicial procedures.

In terms of goals, both actually have the same moral foundation, namely maintaining honor and preventing social damage. However, national law places more emphasis on aspects of child protection and healthy family building, taking into account the psychological, educational, and social risks of early marriage. Therefore, it can be concluded that although Islamic law and the Marriage Law both open the possibility of marriage dispensation, the approach and standards used are different. Islamic law is more contextual and normative, while state law is administrative and protective of children's rights.

D. Conclusion

Marriage dispensation is a solution to overcome the existence of early marriage through the permit procedure to the Religious Court to obtain court permission. Islamic law in the opinion of scholars does not recognize the term marriage dispensation because the criteria for marriage are if a person has reached puberty and has common sense, while Law Number 1 of 1974 concerning marriage and the Compilation of Islamic Law has determined that if a person wants to marry under the age of 19, he must apply for a marriage dispensation to get permission from the Religious Court.

A comparative analysis between Islamic law and the Marriage Law in Indonesia, there is a common point as well as fundamental differences regarding the provisions and objectives of the marriage dispensation. In terms of goals, both actually have the same moral foundation, namely maintaining honor and preventing social damage. However, national law places more emphasis on

aspects of child protection and healthy family building, taking into account the psychological, educational, and social risks of early marriage.

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