



## **Judges' Considerations in Granting Marriage Dispensation Licenses in Ngawi, Indonesia: Islamic Family Law Perspective**

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### **Abstract**

After being amended, the Marriage Law requires that there be exigent circumstances to obtain marriage dispensation from the court. However, in this case, the Law does not explain in detail the criteria that are considered urgent so the judge as someone who knows the law (*Ius Curia Novit*) is in charge of interpreting it with *ijtihad*. The purpose of this study is to find out the judge's *ijtihad* in interpreting Article 7 paragraph 2 of the Marriage Law No. 16 of 2019 and to find out the method used by judges in deciding marriage dispensation cases. The approach used to analyze this problem is an empirical juridical approach. The juridical approach is used to review the articles of legislation governing marriage dispensation, namely Law No. 1 of 1974. Then an empirical approach is used to uncover the urgency of the marriage dispensation case according to the trial judge. The result of his research is that judges interpret urgent situations with systematic interpretation, namely by linking legal rules and norms both religion and state based on the theory of legal interpretation. Furthermore, in deciding cases of marriage dispensation, judges use the Islamic legal study method of *Istihsan* by moving from *Kulliyah* to *Juz'iyah*.

**Keywords:** *Ijtihad*, judge, marriage dispensation, Islam family law

## Abstrak

Setelah diamandemen, UU Perkawinan mensyaratkan adanya keadaan mendesak untuk memperoleh dispensasi nikah dari pengadilan. Namun dalam hal ini Undang-Undang tidak menjelaskan secara rinci kriteria-kriteria yang dianggap mendesak sehingga hakim sebagai orang yang mengetahui hukum (*Ius Curia Novit*) bertugas menafsirkannya dengan ijtihad. Tujuan penelitian ini adalah untuk mengetahui ijtihad hakim dalam menafsirkan Pasal 7 Ayat 2 UU Perkawinan Nomor 16 Tahun 2019 dan mengetahui metode yang digunakan hakim dalam memutus perkara dispensasi nikah. Pendekatan yang digunakan untuk menganalisis permasalahan ini adalah pendekatan yuridis empiris. Pendekatan yuridis digunakan untuk mengkaji pasal-pasal peraturan perundang-undangan yang mengatur tentang dispensasi perkawinan yaitu Undang-undang Nomor 1 Tahun 1974. Kemudian digunakan pendekatan empiris untuk mengungkap urgensi perkara dispensasi perkawinan menurut hakim pengadilan. Hasil penelitiannya hakim menafsirkan situasi yang mendesak dengan penafsiran yang sistematis, yaitu dengan mengaitkan kaidah dan norma hukum baik agama maupun negara berdasarkan teori penafsiran hukum. Selanjutnya dalam memutus perkara dispensasi nikah, hakim menggunakan metode kajian hukum Islam Istihsan dengan berpindah dari Kulliyah ke Juz'iyah.

**Kata Kunci:** *Ijtihad, Hakim, dispensasi nikah, hukum keluarga Islam*

## Introduction

The position of women in the scope of Indonesian marriage law is no longer discriminated against after the 1974 Marriage Law was revised in 2019. The revision was based on the decision of the Constitutional Court Number 22/PUU-XV/2017 based on the applicant who filed a Judicial Review. The argument built is that Article 7 paragraph (1) of Law Number 1 Year 1974 contains discrimination between men and women regarding the minimum age of marriage. In addition, the article also contradicts the Child Protection Law. Based on the argument of the petition, the Constitutional Court accepted and granted the petition.<sup>1</sup> The *Erga Omnes* nature of

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<sup>1</sup> Andi Miswar, et.al., "Qur'anic Narratives of Women's Competencies and The Consequences of Islamic Law on Their Involvement in Society," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 7, No. 3 (2023). Roykhatun Nikmah, "Dialektika Status Wanita Dalam Pembaharuan Hukum Keluarga Di Indonesia," *Jurnal Buana Gender* 5, no. 1 (2020).

the Constitutional Court's decision means that its validity is not only for the applicant but also binding for all citizens of the Republic of Indonesia.<sup>2</sup> Thus, this became the basis for changing the minimum age of marriage for women from 16 to 19 years and was approved by President Joko Widodo on October 14, 2019.<sup>3</sup>

The minimum age of marriage that has been equalized between men and women has two impacts, namely positive and negative impacts. The positive impact is that the status of women and men before the law becomes equal (Equality Before the Law) and there is no longer a contradiction between the Marriage Law and the Child Protection Law. Meanwhile, the negative impact is that the application for marriage dispensation is high.<sup>4</sup>

The surge in marriage dispensation cases is due to Article 7 paragraph (2) of Law No. 16/2019 which still provides an opportunity for candidates who do not meet the minimum age requirement for marriage to apply for marriage dispensation with "very urgent reasons" and supporting data.<sup>5</sup> Based on the data, the majority of reasons for applying for marriage dispensation were due to pregnancy (31%), 16% due to having had sexual intercourse, risk of having sexual intercourse (4%), mutual love (25%), fear of risk of violating religious norms (21%), and violation of social values (8%).<sup>6</sup>

The various reasons for the application for marriage dispensation mentioned above make the author in this case interested in examining which are the criteria for very urgent circumstances referred to in Article 7 paragraph (2) of the Marriage Law.<sup>7</sup> However, because the Marriage Law, including regulations governing the civil sector, does not clearly outline the criteria for urgent circumstances, in this case, it is a judge who makes *ijtihad* to interpret it. This is because, in the principles of civil procedural law, judges are passive.<sup>8</sup> This means that the judge waits for the entry of a case and the judge plays an active role in conducting an *ijtihad* to find a law if the

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<sup>2</sup> M. Agus Maulidi, "Menyoal Kekuatan Eksekutorial Putusan Final Dan Mengikat Mahkamah Konstitusi," *Jurnal Konstitusi* 6, no. 2 (2019).

<sup>3</sup> Nikmah, "Dialektika Status Wanita Dalam Pembaharuan Hukum Keluarga Di Indonesia."

<sup>4</sup> Erfaniah zuhriah, et al, Dispenku Android Based Application: Assisting Religious Court Judges in Deciding for Marriage Dispensation, *Jurnal Ihkam: Jurnal Hukum dan Pranata Sosial*, 18 (2), 2023, p. 521.

<sup>5</sup> Yani Ahmad, "Emergency Reasons in The Application of Marriage Dispensation," *Journal of Comprehensive Science* 1, no. 3 (2022).

<sup>6</sup> AIPJ, "Analisis Putusan Dispensasi Kawin Di Indonesia," *Aipj.or.Id* (blog), 2022, <https://aipj.or.id/pages/publication/analisis-putusan-dispensasi-kawin-di-indonesia>.

<sup>7</sup> Anwar Hafidzi, et, al, Sirri Marriage Celebration And Its Impact On Social Change In Banjarese Community, South Kalimantan, *Al- Ahkam: Jurnal Pemikiran Dan Hukum Islam* 32 No 2 (2022), p. 159.

<sup>8</sup> Muhamad Nuh, *Peran Aktif Hakim Dalam Perkara Perdata* (Jakarta: Prenada Media Grup, 2011).

case has entered, including parsing an unclear law by conducting *ijtihad* or legal discovery (*Recht Vinding*).<sup>9</sup>

The method used in this research uses empirical normative legal research methods. With primary data sources, namely the decision of the judge of the Ngawi Religious Court, direct interviews with judges, Law Number 1 of 1974 and its amendments, and Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Marriage Dispensation Applications, secondary data sources are relevant books and journals. The approach in this research is a case approach, which examines and analyzes "emergency reasons" as a consideration for judges in granting marriage dispensation applications. The data that has been collected is then analyzed using the Miles and Huberman model, namely reducing data, presenting data, and drawing conclusions.

### **Changes to Marriage Dispensation Minimum Age for Marriage**

Marriage is one of the most important stages in one's life. For this reason, marriage must be carefully prepared, starting from mental, economic, and so on. There is a term underage marriage that appears in society which has a bad connotation. Underage marriage is considered a marriage that is carried out too early and without careful preparation.<sup>10</sup> Marriage Dispensation is the granting of permission to marry by the court for prospective husbands and prospective wives who have not met the minimum age at which marriage is permitted. In applying to the court, Law Number 16 of 2019 provides conditions in the form of the existence of very urgent reasons and sufficient supporting evidence and this is a novelty because it is not contained in Law Number 1 of 1974.<sup>11</sup> Not without reason, this restriction aims to provide readiness and maturity to be responsible after marriage.<sup>12</sup> The Marriage Law after the amendment provides conditions but does not explain in detail what is meant by urgent reasons. Thus, the court judge as someone who is considered to know all the laws (*ius curia novit*) determines the urgency based on the results of his *ijtihad*.<sup>13</sup>

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<sup>9</sup> Kemenkumham, "Penemuan Hukum Oleh Hakim," *Kemenkumham* (blog), 2022, [https://ditjenpp.kemenkumham.go.id/index.php?option=com\\_content&view=article&id=849:penemuan-hukum-oleh-hakim-rechtvinding&catid=108&itemid=161](https://ditjenpp.kemenkumham.go.id/index.php?option=com_content&view=article&id=849:penemuan-hukum-oleh-hakim-rechtvinding&catid=108&itemid=161).

<sup>10</sup> Suaib Abdullah, et.al., "Polemic and Existence Marriage Dispensation given Marriage Law," *Estudiante Law Journal* 1, no. 3 (2019), p. 726–40.

<sup>11</sup> Muhammad Fauzudin Faiz, et.al., "Underage Widows and Widowers before the Law: Problem, Contestation and Legal Certainty in Marriage Dispensation," *JURIS (Jurnal Ilmiah Syariah)* 22, no. 2 (2023), p. 223.

<sup>12</sup> Syufa'at, "Marriage Dispensation in Underage Marriage: A Case Study at the Purwokerto Religious Court," *Al-Manāhij: Jurnal Kajian Hukum Islam* 16, no. 1 (2022), p. 91–102.

<sup>13</sup> DPR RI, "Undang-Undang Nomor 1 Tahun 1974 Jo Undang-Undang Nomor 16 Tahun 2019 Tentang Perkawinan" (2019), p. 1.

In addition to the novelty described above, the Supreme Court, in response to the amendment of the Marriage Law, especially regarding the minimum age article and the marriage dispensation article, issued PERMA Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Cases. This regulation applies to marriage dispensation cases filed under Article 7 paragraph (2) of the Marriage Law.<sup>14</sup> The PERMA provides principles that must be used as the basis for judges in adjudicating marriage dispensation cases, which include consideration of the best interests of the child, the right to life and development of the child, respect for the child's opinion, respect for human dignity, non-discrimination, gender equality, equality before the law, justice, expediency, and legal certainty.<sup>15</sup>

The purpose of the issuance of PERMA No 05 of 2019 is none other than to ensure the implementation of a justice system that protects children's rights. The guidelines for adjudicating marriage dispensation cases can increase parental responsibility to prevent child marriage and identify whether or not there is coercion behind the submission of a marriage dispensation application.<sup>16</sup> In filing, it must be based on absolute competence and relative competence.<sup>17</sup> Therefore, an application for marriage dispensation is submitted to the court based on the religion of the child entering into marriage and the domicile of the applicant. If the applicant's child is Muslim, the application is submitted to the Religious Court and if the child is non-Muslim, the application is submitted to the District Court in the jurisdiction where the applicant resides.<sup>18</sup>

It should be understood that increasing the minimum age of marriage in this case provides hope for a decrease in the number of child marriages. Even so, this restriction still provides a gap for people who do experience urgent circumstances as in paragraph (2) which regulates that there are exceptions to the minimum age of marriage by submitting to the Religious Court accompanied by clear evidence.<sup>19</sup>

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<sup>14</sup> Zezen Zainul Ali and Mega Puspita, *Pembaharuan Hukum Keluarga Di Asia Tenggara: Dari Negara Mayoritas Sampai Minoritas Muslim* (Yogyakarta: Jejak Pustaka, 2023).

<sup>15</sup> Mahkamah Agung, "Peraturan Mahkamah Agung (PERMA) Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Perkara Dispensasi Perkawinan," Nomor 5 Tahun 2019 (2019).

<sup>16</sup> Mahkamah Agung, "Peraturan Mahkamah Agung (PERMA) Nomor 5 Tahun 2019.

<sup>17</sup> Rudi Mayandra, Regulation Of Marriage Dispensation Against Marriage Of Children Under The Age Of Post Decision Of The Constitutional Court Number 22/ Puu-Xv / 2017, *Syariah: Jurnal Hukum dan Pemikiran* 20, No. 2 (2020), p. 197.

<sup>18</sup> Zezen Zainul Ali, "Marriage Brokers: The Rational Action in the Practice of Delegation of Marriage Administration in Central Lampung," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 17, no. 1 (2024).

<sup>19</sup> Mahkamah Syar'iyah Pidie, "Konkretisasi Alasan Mendesak Dan Bukti Cukup Dalam Memberikan Dispensasi Perkawinan Bagi Anak Oleh Hakim," *Ms-Blangpidie.Go.Id* (blog), 2021, <https://www.ms-blangpidie.go.id/148-uncategorised/artikel/720-konkretisasi-alasan-mendesak-dan-bukti-cukup-dalam-memberikan-dispensasi-perkawinan-bagi-anak-oleh-hakim>.

What is meant in an emergency is a situation where it is not possible to choose another option. So, it is necessary to carry out these conditions. So, in the context of marriage dispensation in an emergency and there are no other options, it must be granted. Judges as justice makers need to interpret the law.<sup>20</sup>

As a result of the increase in the minimum age of marriage, it has a significant impact on the number of applications for dispensation of marriage in almost all Religious Courts throughout Indonesia. In the Ngawi Religious Court to date, there have been 788 cases.<sup>21</sup> Not only that, other Religious Courts also experienced a significant increase. In the Semarang Religious High Court, to be precise, in October 2019, requests for marriage dispensation reached 355 cases and increased 286.2% to 1,371 cases as of November 2019.<sup>22</sup> Then at the Wonosari Religious Court in 2018 there were 77 applications, in 2019 it increased to 108, and in 2020 it increased significantly, namely 231 applications for marriage dispensation.<sup>23</sup> The data above is at least representative of how the revision of the Marriage Law regarding the increase in the minimum age of marriage has had a very significant impact on the high number of marriage dispensation applications in Religious Courts throughout Indonesia.

### **Dispensation for Marriage at the Ngawi Religious Court**

After the amendment of Law No. 7/1989 to Law No. 3/ 2006 which is the basis of the authority of the Religious Courts in exercising Judicial Power. In this article, there are duties and authorities of the Religious Courts, namely examining, deciding, and resolving cases at the first level between people who are Muslims.<sup>24</sup> As well as the Ngawi Religious Court which is an agency that has these duties and authorities. The Ngawi Religious Court was established on January 19, 1882, through the ratification of state sheet number 152 on January 19, 1882.<sup>25</sup> The Ngawi Religious Court handles a fairly large area, which can be seen in the following table:

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<sup>20</sup> E Utrecht, *Pengantar Dalam Hukum Indoensia* (Jakarta: Ichtiar Vanhoven, 1983).

<sup>21</sup> PA Ngawi, "Sistem Informasi Penelurusan Perkara," *Sistem Informasi Penelurusan Perkara PA NGawi* (blog), 2021.

<sup>22</sup> PA Boyolali, "Pasca Naiknya Batas Umur Perempuan Menikah, Perkara Permohonan Dispensasi Kawin Pada Pengadilan Agama Se Jawa Tengah Naik 286,2% Pada November 2019," *Pa-Boyolali.Go.Id* (blog), November 2, 2019.

<sup>23</sup> Harianjogja.com, "Angka Pernikahan Dini Di Gunungkidul Kembali Meningkat," *Harianjogja.Com* (blog), January 14, 2019, <https://jogjapolitan.harianjogja.com/read/2019/01/14/513/964870/angka-pernikahan-dini-di-gunungkidul-kembali-meningkat>.

<sup>24</sup> PA Ngawi, "Tugas Pokok Dan Fungsi," *Pa-Ngawi.Go.Id* (blog), March 23, 2021, <http://web.pa-ngawi.go.id/en/tentang-pengadilan/tupoksi>.

<sup>25</sup> Pristiwiyanto, "Staatsblad 1882 Nomor:152 Tonggak Sejarah Berdirinya Pengadilan Agama," *Jurnal Fikroh* 8, no. 1 (14).

**Table 1: Region of Ngawi Regency**

Ngawi Population Distribution	Demographics of Ngawi Regency 2019		
	Number of sub- districts	Number of Villages	Total Population
	19	217	913,533

Source: Ngawi Regency Central Bureau of Statistics 2019.<sup>26</sup>

Based on the table above, it is known that Ngawi Regency itself has a population that is arguably not dense, this is due to the geographical conditions which are still dominated by forests so the majority of people still live in rural areas.<sup>27</sup> Due to these conditions, people still hold rural culture, which has an impact on the high number of marriages at a young age, this will be directly proportional to the number of applications for dispensation of marriage. This is reinforced by research conducted by Mariyatul Qibtiyah where the results of her research show that rural communities marry at a younger age than urban communities. This is also driven by the unaffordable cost of education so rural communities choose not to continue school and prefer to marry even though they are still relatively young.<sup>28</sup>

Handayani's research results show that there are at least several factors that cause a woman to marry at a young age, namely: (1) Women with low education have at least a 23% chance of marrying at a young age compared to women with higher education, (2) a poor environment has a 21% risk of early marriage compared to conducive environmental conditions, (3) women who have parents who do not work have a 74% chance of marrying early than women who have parents who have a fixed income.<sup>29</sup> So this will certainly have an impact on the number of underage marriages and the high number of requests for marriage dispensations, especially at the Ngawi Religious Court.

<sup>26</sup> BPS Ngawi, "Jumlah Desa Dan Jarak Ibukota Kabupaten Ngawi," *Ngawikab.Bps.Go.Id* (blog), 2021, <https://ngawikab.bps.go.id/indicator/153/184/1/jumlah-desa-dan-jarak-dari-ibukota-kecamatan-ke-ibukota-kabupaten-di-kabupaten-ngawi.html>.

<sup>27</sup> Kholifatun Nur Mustofa, "Adjudicating Underage Marriages At Religious Courts: A Progressive Collaboration between Judiciary and Health Authority," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 16, no. 2 (2023), p. 342.

<sup>28</sup> Mariyatul Qibtiyah, "Faktor Yang Mempengaruhi Perkawinan Muda Perempuan," *Jurnal Biometrika Dan Kependudukan* 3, no. 1 (2014).

<sup>29</sup> Eka Yuli Handayani, "Faktor-Faktor Yang Berhubungan Dengan Pernikahan Usia Dini Pada Remaja Putri Di Kecamatan Tambusai Utara Kabupaten Rokan Hulu," *Jurnal Maternity and Neotanal* 1, no. 5 (2014).

The application for dispensation of marriage at the Ngawi Religious Court has increased every year, this increase is due to the change in the minimum age limit for marriage from 16 years for women and 19 years for men to 19 years for both women and men.<sup>30</sup> However, the increase in applications for dispensation has increased significantly again after the pandemic. The details can be seen in the table below:

**Table 2: Number of Marriage Dispensation Cases in Ngawi**

Case	Years		
	2018	2019	2020
Marriage Dispensation	47	65 ( <sup>^</sup> 138%)	( <sup>^</sup> 310%)

Source: Ngawi Religious Court Data

The table above shows an increase in marriage dispensation applications each year. In 2018-2019 (before the revision of the Marriage Law), marriage dispensation applications were not so high and did not exceed 100 applications.<sup>31</sup> Meanwhile, in 2020 (after the revision of the Marriage Law plus the pandemic) applications for dispensation of marriage increased very significantly, reaching 310% of cases in 2019. This shows that there are various reasons for the applicant to apply for marriage dispensation in the Religious Courts. Meanwhile, the reasons used in the application for marriage dispensation are mostly due to pregnancy, having had sexual intercourse, long dating, and avoiding adultery.<sup>32</sup> Meanwhile, the fairly rare reasons are the reasons for supporting family life, being abandoned by boarding school students, and fear of being taken. However, there is also a very emergency reason, namely couples who have carried out applications even though they are not officially married but are allowed to sleep together.<sup>33</sup>

<sup>30</sup> Edy Setyawan et al., "Legal Age for Marriage: SDGs and Maslahah Perspectives in Legal Policy Change in Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 22, (2023), p. 183–98. Nina Nurmila and Wiwin Windiana, "Understanding the Complexities of Child Marriage and Promoting Education to Prevent Child Marriage in Indramayu, West Java," *Ulumuna: Journal of Islamic Studies* 27, No. 2 (2023).

<sup>31</sup> Interview with Hidayat Mursito, Junior Registrar of Lawsuits, Ngawi, East Java, March 4, 2021.

<sup>32</sup> Akh Syamsul Muniri, "Child Marriage in Indonesia: Are Parents' Protection and Responsibilities Involved?," *De Jure: Jurnal Hukum Dan Syar'iah* 15, no. 2 (2023), p. 301–13. Nasaiy Aziz, et.al., "Child Marriage in Kabang, South Yala, Thailand: Islamic Family Law Perspective," *El-USrah: Jurnal Hukum Keluarga* 6, no. 2 (2023).

<sup>33</sup> Interview with Shobirin, Judge, Ngawi Religious Court, East Java, March 15, 2021.



The pregnancy factor is the most widely used reason for applying for dispensation of marriage.<sup>34</sup> This is in line with the research of Sonny et al. which explains that pregnancy is the main factor in applying for dispensation of marriage, which is then followed by economic/poverty factors, parents' concerns about their children, and the breakup of schools.<sup>35</sup> This reason is also in line with the majority of marriage dispensation applications at the Malang Religious Court filed because of unwanted pregnancy (out of wedlock) due to dating.<sup>36</sup>

The measure of urgency in marriage dispensation cases related to parents' concerns about their children's close relationship with their boyfriends, according to Chairul, must be considered as to what their concerns are. Have the two of them been dating, going everywhere, have they spent the night, have they kissed, held hands, and groped? If this has been done then the request should be granted. In addition, the economic factor of both spouses is one of the things that is considered because it concerns post-marriage household life.<sup>37</sup> Marriage dispensation can also be a solution to the minimum age limit for marriage for emergency / urgent reasons so that when there is an emergency, it can take convenience and the evil must be eliminated.<sup>38</sup>

In the Ngawi Religious Court, there is a marriage dispensation case Number 178/Pdt.P/2020/PA.Ngw which was submitted on Wednesday, September 23, 2020, by Applicant I, A, 57 years old, a trader, while Applicant II (wife of Applicant I), 43 years old, a farmer. The applicant would like to marry off her daughter, a woman of 18 years and 5 months with her prospective husband, a man of 24 years, a businessman, earning Rp.5,000,000 (five million rupiah) per month. Previously, the application had been submitted to the local Religious Affairs Office (KUA) to register the marriage. However, it was rejected because the bride-to-be was only 18 years and five months old, while the other requirements were to fulfill the conditions for marriage according to Islamic law. The reason for the proposal was that the bride and groom had been in a loving relationship for approximately 1 year and their relationship was already worrying if they did not get married immediately.

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<sup>34</sup> Ahmad Rusyaid Idris, et.al., "Contemporary Islamic Law in Indonesia: The Fulfillment of Child Custody Rights in Divorce Cases Caused by Early Marriage," *MILRev: Metro Islamic Law Review* 3, no. 1 (April 4, 2024): 1.

<sup>35</sup> Sonny Dewi Judiasih, Susilowati Suparto Dajaan, and Bambang Daru Nugroho, "Kontradiksi Antara Dispensasi Kawin Dengan Upaya Meminimalisir Perkawinan Bawah Umur Di Indonesia," *ACTA DIURNAL: Jurnal Ilmu Hukum Kenotariatan* 3, no. 2 (20).

<sup>36</sup> Anita, Ahmad Subekti, and Dwi Ari Kurniawati, "Pandangan Hakim Terhadap Dispensasi Pernikahan Anak Di Bawah Umur (Studi Kasus Di Pengadilan Agama Kota Malang)," *Hikmatina, Jurnal Ilmiah Hukum Keluarga* 2, no. 1 (2020).

<sup>37</sup> Interview with Chairul Anwar, Judge, Ngawi Religious Court, East Java, March 15, 2021.

<sup>38</sup> Interview with Shobirin, Judge, Ngawi Religious Court, East Java, March 15, 2021.

In this application for dispensation of marriage, the first is to understand that the applicant has legal standing to apply after getting a refusal from the KUA Kendal Ngawi Regency because the two prospective brides have not met the minimum age of marriage. During the trial process, it was found that the applicant's child and her husband-to-be had committed adultery but were not pregnant. On this basis, the judge was concerned that if the marriage was not granted, they would commit adultery again because their relationship had gone so far that it could bring damage, both to the children of the applicants and their future husband and their respective families.<sup>39</sup> Thus, in such circumstances rejecting damage must take precedence over attracting benefit.

The purpose of rejecting damage should be prioritized in this case to provide legal protection and legal certainty for the applicant's child and the child who will be born in the future. Because the children of the applicants and the prospective husband have been so distantly related, their juridical rights are entitled to be protected. The panel of judges used the rules of *ushul fiqh*:

المفاسد لى لب المصالح

"Rejecting harm should take precedence over obtaining benefits"<sup>40</sup>

Based on the above considerations, the panel of judges concluded that the petitioners' request had been proven and should be granted. Therefore, the panel of judges in this case decided to grant dispensation to the applicant's child to marry her prospective husband at the KUA of Kendal District, Ngawi Regency.<sup>41</sup>

### Judges' Analysis of the Interpretation of Emergency Reasons for Marriage

The above marriage dispensation application explains that emergencies are a factor in granting dispensation.<sup>42</sup> In the facts found, the application for dispensation to marry because it is pregnant needs to be addressed wisely, even though it can also

<sup>39</sup> A. Jamil, Cut Aja Sela Nirmala, and Inge Maulidina Putri, "Diskresi Hakim Dalam Memutuskan Perkara Dispensasi Kawin Di Pengadilan Agama Sukadana," *Syakhshiyah Jurnal Hukum Keluarga Islam* 3, no. 1 (2023), p. 121.

<sup>40</sup> Abdul Karim Zaidan, *Al-Wajiz Fi Syarhi al-Qawaid al-Fiqhiyyah Fi Asy-Syariah al-Islamiyah. Diterjemahkan Oleh Muhyiddin Mas Rida. Al-Wajiz 100 Kaidah Fikih Dalam Kehidupan Sehari-Hari* (Jakarta: Pustaka al-Kautsar, 2000).

<sup>41</sup> PA Ngawi, "Putusan Pengadilan Agama Ngawi Nomor 178/Pdt.P/2020/PA.Ngw" (PA Ngawi, 2020), <https://putusan3.mahkamahagung.go.id/pengadilan/profil/pengadilan/pa-ngawi.html>, Accessed February 24, 2021.

<sup>42</sup> Wisono Mulyadi and Anjar Sri Ciptorukmi Nugraheni, "Akibat Hukum Penetapan Dispensasi Perkawinan Anak Di Bawah Umur (Studi Kasus Di Pengadilan Agama Pacitan)," *Jurnal Privat Law* 5, no. 2 (2017).

be granted. One of them is to prevent disgrace from the family itself (*hifz al ird*) and to save the fate of the prospective mother and child in the womb (*hifz al nasl*)<sup>43</sup> and maintain the objectives of sharia (*maqashid al-syari'ah*).<sup>44</sup> So, if the refusal of marriage dispensation is based on being pregnant, then the loss or impact of harm will be even greater for both the prospective mother, the child in the womb, and even the extended family.

Mughniatul Ilma in her research explains that emergencies in the application for dispensation of marriage for conditions that have experienced pregnancy outside of marriage will have the greatest legal impact on both the applicants, girls, and children who are still in the womb. Meanwhile, other reasons such as fears, customary pressure, and economy are still anticipated because they are still at the level of parental roles and responsibilities.<sup>45</sup> In addition, pregnancy outside of what is expected is one of the urgent reasons for judges to be able to grant marriage compensation on the grounds of taking into account the interests of the child in the womb.<sup>46</sup> In addition, the judges (Chairil Anwar and Shobirin) stated that some applications for dispensation of marriage were also submitted because they were worried. After all, the man and woman had been in a marriage for a long time and were worried about committing reprehensible acts, both social and religious norms, and some prospective wives lived in the prospective husband's house even though the two were only engaged.

The emergency reasons and considerations of the judges in granting permission for dispensation of marriage as described above, if analyzed, it is found that the judges of the Ngawi Religious Court in granting dispensation of marriage use a systematic interpretation, namely by linking the rules and legal norms of both religion and the state based on the theory of legal interpretation.<sup>47</sup> This means that the rules and other rules are interrelated and cannot be separated. As in interpreting Article 7 paragraph (2) of the Marriage Law regarding emergencies, the judge relates

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<sup>43</sup> Nur Lailatul Musyafaah, et.al., "Peran Keluarga Yang Terpapar Covid-19 Dalam Memperkuat Ketahanan Keluarga Perspektif Maqasid al-Shari'ah," *Legitima: Jurnal Hukum Keluarga Islam* 5, no. 01 (2023), p. 251–67.

<sup>44</sup> Amir Sahidin and Imam Kamaludin, "An Examination of Maqashid Al-Shari'ah between Textual and Contextual Reasoning (Descriptive Analysis Study)," *Istinbath: Jurnal Hukum* 20, no. 2 (2023).

<sup>45</sup> Ilma Mughniatul, "Regulasi Dispensasi Dalam Penguatan Aturan Batas Usia Kawin Bagi Anak Pasca Lahirnya UU No. 16 Tahun 2019," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 2, no. 2 (2020).

<sup>46</sup> Judiasih, Dajaan, and Nugroho, "Kontradiksi Antara Dispensasi Kawin Dengan Upaya Meminimalisir Perkawinan Bawah Umur Di Indonesia."

<sup>47</sup> Muhammad Ishom, "The Loose Interpretation of Dominus Litis Principle in Marriage Dispensation for Underage Marriage in Banten," *AHKAM: Jurnal Ilmu Syariah* 23, no. 2 (2023).

it to Supreme Court Regulation (PERMA) number 5 of 2019 concerning Guidelines for Submission of Marriage Dispensation Applications.

In addition, judges in deciding emergencies also need to be supported by valid evidence. Then the judge's consideration is correlated with Article 1 paragraph (2) of Law number 23/2002 which has been revised into Law number 35/2014 concerning child protection.<sup>48</sup> This law, especially Article 16, explains that every child has the right to protection. The reason for the emergency is also in Article 8, which states that the prospective bride and groom are not required to have any impediments based on Sharia. In connection with PERMA number 5/2019 in an emergency must see and consider clear evidence such as the reason for pregnancy, followed by a certificate from a doctor stating that there is a pregnancy. So that there is no obstacle for both of them, as in Article 8 of the Compilation of Islamic Law, the marriage can be carried out.

The judge's consideration above correlates with Article 1 paragraph (2) of Law No. 23/2002 which has been revised into Law No. 35/2014 on Child Protection. In this law, in particular, Article 16 explains that every child has the right to protection. The reason for the emergency is also in Article 8 which states that the prospective bride and groom are not required to have no impediments based on sharia. About PERMA number 5/2019 in emergencies, one must see and consider clear evidence such as the reason for pregnancy. Must be followed by proof of a certificate from a doctor. stating that pregnancy has occurred. So that there are no obstacles for both, as in Article 8 of the Compilation of Islamic Law, marriage can be carried out.

A judge, in deciding a case/application, must look at the purpose of making the regulation itself. The revision of the minimum age limit for marriage was made to minimize child marriage so that the application for marriage dispensation must indeed be based on an emergency basis, not just granting it without any clear reason and the judge must refer to the spirit of preventing child marriage.<sup>49</sup> Based on this, in the case of marriage dispensation at the Ngawi Religious Court, the emergency reasons due to pregnancy are basically following efforts to reduce the number of child marriages and provide protection for children, and if not granted, it will provide harm to the mother, prospective child, and family.<sup>50</sup>

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<sup>48</sup> M Anwar Nawawi et al., "Harmonization of Islam and Human Rights: Judges' Legal Arguments in Rejecting Child Marriage Dispensation in Sukadana, Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 1 (2022), p. 117–34.

<sup>49</sup> Edy Sutrisno, "A Female Leaders in the Perspective of Islamic Law and Legal Regulations," *MILRev : Metro Islamic Law Review* 2, no. 1 (2023), p. 27.

<sup>50</sup> Lilik Andar Yuni, "Analysis of The Emergency Reasons in The Application of Marriage Dispensation at The Tenggarong Religious Court," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021), p. 976.

Finally, apart from what has been mentioned previously, the judge's consideration in granting a marriage dispensation permit must be based on four reasons, namely (1) If the application is for a man, he must be economically established / working, while if the application is for a woman, she must be accustomed to doing household chores; (2) the blessing and approval of both parents to marry them; (3) the relationship between the two is close, if not married it will damage the order of life; (4) there are no obstacles regarding sharia law.<sup>51</sup>

As is known, the minimum age of marriage is regulated in Indonesia not based on the provisions of Islamic law because Islam itself does not limit the age of marriage, either in the Qur'an or Sunnah, and that means there is no dispensation to marry according to Islam. In Islam, this allows for early marriage. This is illustrated in the Qur'an al-Thalaq verse 4, which discusses the *'iddah* period of a woman, who may or may not have passed her period. If checked, someone who has not menstruated means that they are married at a young age and have not reached puberty. The same can also be seen in an-Nur verse 32, where there is the word "*al-Ayama*", which indicates that the woman is either young or old. Apart from what is stated in the text, the possibility of early marriage is also found in practice. This can be traced through the marriage of the Prophet and Aisha, who was then aged between 6 to 9 years old.<sup>52</sup>

Parliamentarians set the minimum age for marriage in the Marriage Law only for our benefit. This is supported by the statements of Nurhidayah and Chairul, as judges, who argue that marriage at an early age has a negative impact, namely fragility (prone to divorce).<sup>53</sup> Although Islamic family law explains that although divorce is legal, God views it negatively. Divorce is considered a last resort when mediation is not possible.<sup>54</sup> From a psychological and health perspective, it also does not favor marriage.<sup>55</sup> Therefore, the minimum age for marriage in Indonesia is regulated in Article 7 Paragraph 1 of the Marriage Law with the consideration that 19 years old is an age that is considered mature in mind and body (in this case, as a

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<sup>51</sup> Taufiqur Rohman, et. al., "Preventing Violations of Religious and Social Norms: Judicial Interpretation of 'Urgent Reasons' in Marriage Dispensation at the Wonosari Religious Court, Indonesia," *JIL: Journal of Islamic Law* 4, no. 2 (2023), p. 218–36.

<sup>52</sup> Sugiri Permana, *Dispensasi Kawin Dalam Hukum Keluarga Di Indonesia* (Surabaya: Pustaka Saga, 2019).

<sup>53</sup> Interview with Nurhidayah, Judge, Ngawi Religious Court, East Java, July 15, 2022.

<sup>54</sup> Durotun Nafisah et al., "Comparative Analysis of Islamic Family Law and Normative Law: Examining the Causes of Divorce in Purwokerto, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (2024).

<sup>55</sup> Hasyim Sofyan Lahilote, et. al., "Judge's Dilemma in Marriage Dispensation in the Religious Court," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 22, no. 1 (2022), p. 52–60.

general law). Therefore, the age limit is *Istihsan* (something that lawmakers consider good).

As explained earlier, the law provides conditions but does not explain in detail the meaning of an urgent situation. Judges perform *ijtihad* in every case they face, including in marriage dispensation cases. One method of *ijtihad* in law that is often used in emergencies is *Istihsan*.<sup>56</sup> The term *Istihsan*, is defined as the mujtahid's transfer from the law of *kully* (general) to *juz'i* (exceptions) because of the arguments that make a mujtahid choose to move.<sup>57</sup> *Istihsan* considers the most appropriate argument used to determine the law of an event, and the argument used by the mujtahid to move from the general law to the law of exceptions is the argument on which *Istihsan* relies.<sup>58</sup>

In this case, the general law is Article 7 paragraph (1). The Marriage Law states that "marriage is only permitted when a man and a woman have reached the age of 19 (nineteen) years". Meanwhile, the exception law is Article 7 paragraph (2) of the Marriage Law, "in the event of a deviation from the age provisions as referred to in paragraph (1), male parents and/or female parents may request dispensation from the court on very urgent grounds, accompanied by sufficient supporting evidence." Law Number 16 of 2019 concerning Marriage.

In the case of marriage dispensation No. 178/Pdt.P/2020/PA. Ngw, the children of the applicants and their spouses had committed adultery even though they were not pregnant, the judge here granted the marriage dispensation case based on denying the possibility of them committing adultery again. The judge, in this case, did not apply *Istihsan* (the Marriage Law) as he had moved from the established general provision (that marriage is only permitted if a man and a woman have reached the age of 19) to an exception law (the age requirement can be suspended by granting marriage dispensation). The transfer made by the judge was a form of *Istihsan* to the case due to an emergency.

The judge as a *mujtahid* in making the transfer considered that the condition of the applicant's child and her prospective husband had committed adultery, and this was a prohibited act from the perspective of religious law. The granting of marriage dispensation was useful in providing legal protection for the applicant's children. Therefore, drawing benefits by reaching the minimum age for marriage under the Marriage Law, in this case, was deferred to prevent greater harm. In summary, the pressing factor that caused the judge to shift from general law to exception while the

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<sup>56</sup> Jamaluddin Bin Hashim and Su'udin Aziz, "Review of the Marriage Age Limit Policy in Indonesia Through the Saad Al-Dzari'ah Principles," *Indonesian Journal of Islamic Law* 6, no. 2 (2023), p. 18–36.

<sup>57</sup> Muhammad Nur Harisudin, "Urf Sebagai Sumber Hukum Islam (Fiqh) Nusantara," *Al-Fikra: Jurnal Ilmiah Keislaman* 20, no. 1 (2016).

<sup>58</sup> Achmad Yasin, *Ilmu Ushul Fiqh* (Surabaya: UIN Sunan Ampel, 2014).

law was a religious factor, other factors such as economics and education were not given much heed due to their anticipatory nature.

The judge in deciding this case was not solely based on his passions and frame of mind but used the basics, such as the facts of urgency contained in the trial, then in his decision determined the basis of consideration in the form of *fiqh* rules related to refusing compensation,<sup>59</sup> which must take precedence over attracting profits.<sup>60</sup> The actions taken by the judges here have met the standards of the use of *Istihsan*, as stated by Imam as-Syatibi, who argued that *Istihsan* is not solely based on logic and passion but is based on stronger arguments. One of the arguments that causes a mujtahid to turn from a general argument to a specific argument is based on the rules relating to the removal of hardship.<sup>61</sup>

## Conclusion

The judge in interpreting the law regarding the urgency criteria connects it with PERMA Number 5 of 2019 which regulates the principles that must be used as the basis for judges in deciding marriage dispensation cases. This method is a systematic method of interpretation, meaning that the judge interprets by linking one article with another article or other laws and regulations. The factor of having committed adultery with their partner even though they are not pregnant is just as urgent as for those who are already pregnant. This can be seen in the judge's decision in case number 178/Pdt.P/2020/PA.Ngw. The judge here granted the marriage dispensation case on the grounds of rejecting the possibility of them committing adultery again. Due to the emergency, the judge considered it better to grant than to refuse by using the rules of ushul fiqh as the basis. The judge's return from Article 7 paragraph 1 (*Juz'i*) to Article 7 paragraph 2 (*Kulli'*) is a form of *Istihsan* from the case *a quo*.

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<sup>59</sup> Syaikhu, et al, The Maqashid Sharia Construction on Inheritance In Dayak Ngaju Customs Within The Tumbang Anoi Agreement, *El-Mashlahah* 13 No. 2 (2023), p. 198.

<sup>60</sup> Hasyim Sofyan Lahilote et, al, Judge's Dilemma In Marriage Dispensation In The Religious Court, *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 22, No. 1 (2022), p. 58.

<sup>61</sup> Mustamam, "Istihsan Sebagai Suatu Metode Istinbath Hukum," *Jurnal Ilmiah Penegakan Hukum* 2, no. 2 (2015), p. 15.

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## Interviews

- Interview with Shobirin, Judge, Ngawi Religious Court, East Java, March 15, 2021.
- Interview with Chairul Anwar, Judge, Ngawi Religious Court, East Java, March 15, 2021.
- Interview with Hidayat Mursito, Junior Registrar of Lawsuits, Ngawi, East Java, March 4, 2021.