

# MARRIAGE DISPENSATION IN INDONESIA ON THE PERSPECTIVE OF *MAQĀṢID AL-USRAH*

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**Abstract:** Currently, the number of early marriage or underage marriage in Indonesia has increased sharply. In 2020, there are approximately 34,000 applications for marriage dispensation to the courts.. Of that number, 97% of the requests were granted. This means that almost all applicants for marriage dispensation are granted by the courts. Therefore, to measure whether the dispensation of the underage marriage has met the standart of *maslahah* for the perpetrator or not, it will be analyzed using the theory of *maqāṣid al-usrah*. The results of the research state that: (1) the motives for conducting underage marriage are due to economic factor, government policy to close schools during the Covid-19 pandemic, the rise of glorification of marriage on social media, and incidents of pregnancy out of wedlock; (2) giving dispensation by the courts to the applicants to continue conducting underage marriage is legally valid as *fiqh al-munākahāt fiqh* (Islamic jurisprudence on marriage), but it can turn into *ḥarām* if the potential of harm is greater than the benefit for the bride and groom.

**Keywords:** early marriage, marriage dispensation, maturity, *maqāṣid al-usrah*

**Abstrak:** Saat ini, angka pernikahan dini atau pernikahan di bawah umur di Indonesia mengalami peningkatan tajam. Di tahun 2020, ada sekitar 34.000 permohonan dispensasi kepada pengadilan. Dari jumlah itu sebanyak 97% permohonan dikabulkan. Ini artinya hampir semua pemohon dispensasi nikah dikabulkan oleh pengadilan. Oleh sebab itu, untuk menakar apakah dispensasi pernikahan di bawah umur sudah memenuhi standar maslahah bagi pelaku atau belum, maka akan dianalisis menggunakan teori *maqāṣid al-usrah*. Hasil

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penelitian menyebutkan bahwa: (1) motifasi melangsungkan pernikahan di bawah umur adalah karena faktor ekonomi; Kebijakan pemerintah untuk melakukan penutupan sekolah selama masa pandemic covid-19; maraknya glorifikasi perkawinan di media social; dan terjadinya insiden hamil di luar nikah; (2) pemberian dispensasi oleh pengadilan kepada para pemohon untuk tetap melangsungkan pernikahan di bawah umur adalah sah secara hukum fikih munakahat, akan tetapi bisa berubah menjadi haram jika potensi bahayanya lebih besar dari manfaatnya bagi mempelai berdua.

**Kata Kunci:** pernikahan dini, dispensasi nikah, dewasa, *maqāṣid al-usrah*

## Introduction

Underage marriage is an ever-present global problem which tends to show an increasing trend in line with the increasing world population. The bigger the population of a country has, the higher the potential for underage marriage occurs. This phenomenon is supported by the expanding and unlimited human interaction through a very easy and transparent access. Modernity tools also change the human mindset to do things that previously could not be realized. According to experts, one of the causes of the explosion of the early marriage is an increasingly difficult economic factor,<sup>1</sup> especially the impact of the Covid-19 pandemic that has hit all corners of the country.

In a research conducted by the United Nations Population Fund predicts that underage marriage will increase by 13 million cases and will continue to increase due to COVID-19.<sup>2</sup> In Indonesia, the number of underage marriage also follows the

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<sup>1</sup> Annabel Erulkar, "Adolescence Lost: The Realities of Child Marriage", within "*Journal of Adolescent Health*", Vol. 52, No. 01 (2013), 654. See also Tahera Ahmed, "Child Marriage: A Discussion Paper", within "*Journal of Families Issues*", Vol. 35, No. 1 (2015), 10.

<sup>2</sup> Carmody, Padraig, McCann, Gerard (eds.), *COVID-19 in the Global South: Impacts and Responses* (Great Britain: Bristol University Press, 2020), 118-120.

world trend, increasing in the midst of a wobbling economy. Indications of this phenomenon can be seen in several districts and big cities where the underage marriage has increased from 200 % to 400 %. Based on data from the Ministry of Women's Empowerment and Child Protection, it is also stated that the number of underage marriage has reached 24,000 / year during the pandemic. Meanwhile, according to the records of the Directorate General of Religious Courts, there were 34,000 applications for marriage dispensation from January to June 2020.<sup>3</sup>

In fact, the Indonesian government has taken many steps to reduce the rate of early marriage. Among them are through statutory regulations such as Law Number 1 of 1974. This law specifically regulates marriage, regarding the age limit of marriage and dispensation of marriage. This law proves that the State is present in solving social, economic, and cultural problems that are happening in society. This is because the issue of underage marriage does not only concern to individuals and actors, but also concerns to the opportunity to get proper education, human reproductive health, adequate nutrition for children, and the fulfillment of family economic needs.

Furthermore, to support the implementation of the Law Number 7 of 1974 and to protect the rights of parties who are prone to become objects of coercion and violence, the government has made legal regulations as stipulated in article 288 of the Criminal Code. This article regulates that a man who has sexual intercourse with an underage woman in a legal marriage, if he causes injury, he can be punished. The wound referred to in this article is the wound resulting from sexual intercourse.

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<sup>3</sup> Elga Andina, "Meningkatnya Angka Perkawinan Anak Saat Pandemi Covid-19", within "*Pusat Penelitian Badan Keahlian DPR RI*", Vol. XIII, No. 4 (2021), 14-15. In this research, Elga Andina explained about the underage marriage during the COVID-19 pandemic and the policies made by the Indonesian government in dealing with this phenomenon. According to Elga, the most dominant causes of the underage marriage are the lack of child activity and the weak parental supervision in supervising their children, resulting in promiscuity and pregnancy.

The Indonesian government's efforts to suppress the rate of the underage marriage do not stop at the Law Number 1 of 1974 alone, because this law is considered to still leave several problems that are deemed not fulfilling expectations of justice for both parties. Therefore, based on the decision of the Constitutional Court Number 22/PUU-XV/2017, the government has made improvements to the Law Number 1 of 1974 with the Marriage Law Number 16 of 2019. In this law, the minimum age of marriage for man and woman is 19 years old.

The government's effort to make changes and improvements to the Law Number 1 of 1974 into the Marriage Law Number 16 of 2019 is a right step. This new law should ideally be the answer and reduce the spike, not to say to abolish, the number of underage marriage in Indonesia. However, in fact, the implementation of this law has not been maximally implemented. At least, this can be seen from the data of the Directorate General of Religious Courts that 97 % of the 34,000 applications for marriage dispensation, from January to June 2020, have been granted by the court. The question is, if almost all applications for marriage dispensation are granted, then, what about the effectiveness of the rule which says that the age of marriage for both man and woman is 19 years.<sup>4</sup>

Departing from a fact about the high increase in the number of underage marriage and the increasing number of applications for marriage dispensation, particularly during the Covid-19 pandemic, this research focuses on this theme in the perspective of *maqāsid al-usrah* theory. This research also measures the effectiveness and *maslahah* (benefit) of the court's decision that grant permission to applications for dispensation of underage marriage. Effectiveness and *maslahah* are broken down through the features in *maqāsid al-usrah* (the purpose of Islamic law in forming a family). In fact, the research related to underage marriage has often been conducted by either national or international researchers. Most of the researches view more from the health and education aspect of children. This research,

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<sup>4</sup> <https://ayobandung.com/read/2020/10/21/143754/pandemi-corona-bikin-anak-di-bawah-18-tahun-banyak-menikah>.

however, does not only explore the causes of the underage marriage but also measures the Indonesian government's policy on the underage marriage dispensation under the perspective of *maqāṣid al-usrah*.

### **Concept of *Maqāṣid al-Usrah* in Islamic Law**

In general, the theory of *maqāṣid shari'ah* aims to realize as much benefit as possible and to avoid the greatest possibility of danger to human life. So, the key word in the study of *maqāṣid shari'ah* is "*maṣlaḥah*". *Maqāṣid* scholars such as 'Izz al-Dīn Ibn' Abd al-Salām interprets *maṣlaḥah* as "bringing all forms of benefit or rejecting all destructive possibilities".<sup>5</sup> Al-Shāṭibī said: "*maṣlaḥah* is anything that aims to strengthen the continuity and perfect human life in accordance with common sense". According to him, the objectives of *shari'ah* include five basic principles, namely: protecting religion (*hifẓ al-dīn*), protecting the soul (*hifẓ al-nafs*), protecting reason (*hifẓ al-'aql*), protecting human sustainability (*hifẓ al-nasl*), protecting property (*hifẓ al-māl*)

Specifically, Ibn 'Āshūr raises the typology of *maqāṣid shari'ah* into three, namely *maqāṣid al-'āmmah* (general purpose), *maqāṣid al-khāṣṣah* (special purpose), and *maqāṣid al-juz'iy* (partial purpose). First, *maqāṣid al-'āmmah* is a goal that is explored through the complexity of the building of Islamic law by adding new values to the realm of *darūriyyah* (primary needs) and *hājiyyah* (secondary needs) such as "justice" and "freedom".<sup>6</sup> Ibn 'Āshūr (w. 1393 H/1973 AD) defines *al-maqāṣid al-'āmmah* by keeping God's commandments, seeking *maṣlaḥah* and rejecting danger (*jalb al-maṣāliḥ wa dar-u 'al-mafāsid*), building equality among fellow humans, respecting the applicable law, and encouraging the creation of human development. In line with the opinion of Ibn 'Āshūr, 'Allāl al-Fāsī said:

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<sup>5</sup> Abd al-Wahhāb Ibn 'Alī al-Subkī, *al-Ashbāḥ wa al-Naẓā'ir*, Vol. I, ed. 'Abd Mawjūd (Beirut: Dār al-Kutub al-'Ilmiyyah, 1991), 12.

<sup>6</sup> Jasser Auda, *Maqāṣid al-Shari'ah as philosophy of Islamic Law, A Systems Approach* (London: Washington: IIIT, 2008), 5.

"The highest objective of Islamic law is to maintain the sustainability and peace of the ecosystem in the universe, so that the life in it is maintained. This will not be achieved except through; (1) human wisdom as caliph on earth; (2) encouraging people to do right based on morality and integrity; (3) always taking a step forward; (4) safeguarding natural resources; (5) and dooing planning for the good of all".<sup>7</sup>

The second is *maqāṣid al-khāṣṣah* (special purpose). This *maqāṣid* is explored through certain discussions in Islamic law, such as the welfare of children in family law, taking preventive measures in the area of criminal law, and preventing the monopoly of certain people or groups in transaction law.<sup>8</sup> According to Ibn 'Āshūr, the examples of specific areas to be reached by *maqāṣid al-khāṣṣah* are: (1) the aim of *shāri'* or *shariāh* maker in determining a provision law relating to the family; (2) the purpose of *shāri'* in determining a legal provision relating to assets; (3) the purpose of *shāri'* in term of transaction law, its relevance to workers and job opportunities; (4) the purpose of *shāri'* in term of trial and testimony; (5) the purpose of *shāri'* which is related to the command of *sadaqah*; and (6) the intention of *shāri'* in establishing a legal provision relating to punishment for the perpetrator of a criminal act.<sup>9</sup>

The third is *maqāṣid al-juz'iy* (partial goals). *Maqāṣid* which relates to the purposes or wisdom behind the stipulation of a law or 'Allāl al-Fāsī interprets it as "*al-asrār allatī waḍa'ahā al-shāri'* *'inda kulli ḥukmin min aḥkāmihā*" (secrets that exist in every legal provision),<sup>10</sup> such as finding the truth as the wisdom from an order to bring witnesses in court, giving *rukhsyah*

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<sup>7</sup> Ahmad al-Raysūnī, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law* (London: The International Institute of Islamic Thought, 2005), xxiii.

<sup>8</sup> Jasser Auda, "Maqāṣidī Approach to Contemporary Application of the Shari'ah", within *Intellectual Discourse*, Vol. 19, No. 1 (IIUM Press: 2011), 197.

<sup>9</sup> Ahmad al-Raysūnī, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*, xxiii.

<sup>10</sup> 'Allāl al-Fāsī, *Maqāṣid al-Shari'ah al-Islāmiyyah* (Rabat: Maktabah al-Wahdah al-'Arabiyyah, t.th..), 7.

(relief) is the wisdom from being able to cancel fasting for the sick, feeding the poor as the wisdom from the prohibition of storing sacrificial meat.<sup>11</sup>

In this research, the classification of *maqāṣid al-shari'ah* used in solving the problem of marriage compensation is *maqāṣid al-khāṣṣah* (special purpose) in which consists of *maqāṣid al-usrah*. Ibn 'Ashūr explains *maqāṣid al-usrah* by making several indicators that serve as benchmarks for achievement and conformity between fact and theory. In this case, whether or not the dispensation of marriage by a judge can be justified based on the indicators in *maqāṣid al-khāṣṣah*. Among the indicators arranged by Ibn 'Āshūr are as follows:<sup>12</sup>

The first is "the sacred bond between two people in a household". This indicator is translated in the form of how to realizing marriage, prohibiting intimate relation outside the bond of marriage, practicing polygamy with various strict conditions, avoiding adultery, preventing fight, maintaining the respect of partners, prohibiting being alone in a quiet place with another woman, and preventing the form of temptation by dressing that covers the nakedness with a veil as a complement. And all of these are the responsibility of the bride and groom.<sup>13</sup>

The second is "realizing the reproductive function". Realizing offspring is a way of how marriage is able to maintain the population through the reproductive system. The purpose of this marriage is based on the fact that all living creatures maintain their population by having offspring. In ensuring the process of having dignified offspring, *shari'ah* regulates the marriage regulations in such a way. Among them are the obligation to marry opposite sex (man and woman), the prohibition of a husband to release sperm outside without the wife's permission on with the purpose of not having children, the

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<sup>11</sup> Jasser Auda, *Maqāṣid al-Shari'ah as Philosophy of Islamic Law A Systems Approach*, 5.

<sup>12</sup> Muḥammad al-Ṭāhir Ibn 'Āshūr, *Maqāṣid al-Shari'ah al-Islāmiyyah*, ed. Muḥammad al-Ṭāhir al-Misāwī (Tunisia: Dār al-Nafāis li al-Nashr wa al-Tawzī', 2001)

<sup>13</sup> Ibid.

prohibition of celibacy, prohibiting women from having sexual intercourse via anus and lesbian, prohibiting burying their live baby girl, the prohibition of having abortion, prohibiting a woman from damaging her uterine organ to make it infertile intentionally, and so on.<sup>14</sup>

The third is “realizing love and peace in the family”. This indicator is very important because peace in human heart is a basic requirement needed in fostering a complete family. This goal can be achieved by building a family through intensive communication, paying attention to the needs of sexuality, maintaining noble values in the family, treating a partner (either husband or wife) properly so as not to hurt both partners, behaving in a civilized and humane manner between one another.

The fourth is “respecting diversity in the family”. As stated in *al-Qur'ān* chapter *al-Tahrim* verse 6: “O you who believe, Protect yourselves and your families from a fire, whose fuel is people and stones. Over it are angels, fierce and powerful. They never disobey God in anything He commands them, and they carry out whatever they are commanded”. The substance of this verse is that the responsibility of a husband to his wife and children is the key to obtain welfare and safety of the world and the hereafter. This responsibility can be in the form of teaching, practicing, setting an example, and inviting family members to carry out religious teachings as a whole based on the provisions of *al-Qur'ān* and *al-Sunnah*.

The fifth is “meeting the financial needs of the family”. This fifth feature is very important for families, because how many families fail and fall apart because they do not have the ability to meet financial needs. Included in this feature are the payment of a dowry by the husband, caring for children, providing for children and wives, breastfeeding, having mutual inheritance rights, providing support for divorced woman, providing support for child care, providing support for women who breastfeed their children, providing support to women who are divorced, stipulating *waqf* intended for family members, law

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<sup>14</sup> Ibid.

regarding asset trust. In essence, the explanation of this feature is how a husband and a wife always try hard how they are able to meet their financial needs as one of the benchmarks for meeting family needs.<sup>15</sup>

### **Limit of Marriage Age in *Fiqh al-Munākahāt* (Islamic Jurisprudence of Marriage)**

In Islam, marriage is a very sacred bond to form a family and carrying it out is a kind of worship. Therefore, marriage must be carried out in accordance with the legal provisions from *al-Qur'ān* and *al-Sunnah*. In *fiqh al-munākahāt* (Islamic jurisprudence of marriage), a marriage is considered valid if it meets the conditions and the pillars of marriage. Among the legal requirements of marriage is the age limit for man and woman where both parties must be mature. This is very logical because to form a complete household, material sufficiency alone is not enough. There are other conditions that are very dominant in solving various problems that arise in life together, namely maturity and wisdom.

The requirements for *baligh* are related to aspects of age and maturity. Muslim scholars explain that the sign of *ba>ligh* is when someone has dreamed of releasing semen for a man (has reached the age of 15) and has had menstruation for a girl (has reached the age of 9).<sup>16</sup> Imam Abu Hanifah argues that the criteria for a mature man is the discharge of semen or when he is 18 years old. And for woman, when she is menstruating or is 17 years old.<sup>17</sup> And according to Imam Hanbali, the adult limit for a man is the discharge of semen whether in sleep, awake, through dreams, having sex and he is 15 years old. As for woman, it is when she is menstruating and pregnant.<sup>18</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> Jalāluddin al-Mahallī dan Jalāluddin al Suyūtī, *Tafsīr al Qur'ān al Karīm*, Vol. I (Beirut: Dār al-Fikr, 1998), 98.

<sup>17</sup> Abu 'Abdillah Muhammad bin Aḥmad al Qurṭubī, al-Jāmi' li al-Aḥkām al-Qur'ān, Vol. V, (Beirut: Dār al Fikr, t.th.), 37.

<sup>18</sup> 'Abdurrahmān al Jazī'ī, *Kitāb al-Fikih 'Alā al-Madzāhib al-Arba'ah*, Vol. II (Libanon: Dār al Fikr, t.th), 350-352.

The Convention on the Rights of the Children has defined that a child is every human under 18 years of age.<sup>19</sup> Meanwhile, those under 18 years of age is still to be considered in term of reproductive health and education. This provision is also a minimum limit to protect children from exploitation in marriage.<sup>20</sup> The results of this convention have been ratified by the government of Indonesia through the Presidential Decree Number 36 of 1990.<sup>21</sup> This means that a marriage performed by a person who is not yet 18 years old for both man and woman is classified as early marriage. In this case, Islam views that a person has not met the requirements to get married.

Indeed, Islam is a religion that rejects the practice of early marriage. Moreover, if this is related to the principle of goodness and benefit for both partners, the concept of early marriage or underage marriage will surely enlighten Islamic law which highly upholds human dignity. The majority of contemporary Muslim scholars also share the same view, that marriage is only considered valid when the bride and groom have been adult. According to them, one of the criteria of adult is when a person has been 19 years old. This opinion was attributed to the age of Sayyidah 'Aishah when she was married by the Prophet. At that time, she was 19 years old.<sup>22</sup> Although this opinion contradicts

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<sup>19</sup> Julia Sloth-Nielsen and Ton Liefaard (eds.), *The United Nations Convention on the Rights of the Child: Taking Stock After 25 Years and Looking Ahead* (Leiden: Brill, 2016), iii. See also John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (United Kingdom: OUP Oxford, 2019), 117.

<sup>20</sup> Jamaluddin Mohammad, *Panduan Upaya Memenuhi Kebutuhan Argumentasi Keagamaan dalam Perlindungan Hak Anak Perempuan dari Perkawinan Usia Anak-Anak* (Jakarta: Rumah Kitab, 2016), 8.

<sup>21</sup> The Presidential Decree Number 36 of 1990 is about the ratification of the Convention on the Rights of the Child. This convention regulates several basic principles of children, namely the principle of non-discrimination, the principle of the best interest for children, the principle of the right to life, sustainability and development and the principle of respect for children's opinions.

<sup>22</sup> A hadith expert from India who was born in 1924 AD, Maulana Habibur Rahman Siddiqui Al-Kandahlawi argues that Rasulullah SAW married to 'Aishah RA when 'Aishah RA was 19 years old. Some arguments that show this are: (1) the history that shows the difference age between 'Aishah RA and her

the opinion of the mainstream Muslim scholars, it does not make sense for the Prophet to do something that is contrary to nature and violates aspects of human psychology in general.

In a book entitled “al-*Iṣābah fī Tamyīz al-ṣahābah*”, Ibn Hajar al-Athqalani, as followed by many al-Azhar Muslim scholar, said that *Sayyidah* ‘Aishah was married by the Prophet SAW when she was 19 years old.<sup>23</sup> He argued that *Sayyidah* ‘Aishah, before the proposal of Rasulullah, had been proposed by Muṭīm bin ‘Addi for her son Jubair bin Muṭīm. It is just not known when Muṭīm submitted an application to Abu Bakr. However, it seems that he proposed it before Muhammad’s apostolate. This is based on the calculation that *Sayyidah* ‘Aishah was born in the year 4 *bi’tah*, and Rasulullah proposed to *Sayyidah* ‘Aishah in 10 years after Jubair bin Muṭīm has proposed before.

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older sister Asma is about 10 years. Meanwhile, Asma died at the age of 100 years old in 73 Hijriyah (narrated by Ibn Kathir and Ibn Hajar). This means that Asma was born in the 27<sup>th</sup> before the Hijrah and ‘Aishah was born in the 17<sup>th</sup> before the Hijrah. Meanwhile, historians agree that the marriage of Rasulullah SAW to ‘Aishah RA took place around the the 2<sup>nd</sup> after Hijrah. This means that ‘Aishah RA was married by Prophet Muhammad at the age of 19 years old. (2) Siti ‘Aisyah RA. said: “I am a young girl (*jariyah* in Arabic)” when chapter *al-Qamar* was revealed (Sahih Bukhari). The term “young girl” (*jariyah*), is the one between the age of 6-13 years old. If chapter *al-Qamar* was revealed in the 8<sup>th</sup> year before *Hijriyah*, it means the age of ‘Aishah RA. when was married is between 16-23 years old. (3) Based on “*Sīrah al-Nabawiyah*” (Ibn Hisyam, 1/245-262.), the secret *da’wah* which was carried out by the Prophet was for about 3 years and until the number of Muslims numbered 40 people. History records, ‘Aishah RA. is the 19<sup>th</sup> person to accept Islam. This means that he converted to Islam at the time when the *da’wah* was delivered in a secret manner. (4) In a narration ‘Aisha RA. said; “I was not yet *bāligh* when my father embraced Islam ...”. This means when Abu Bakar RA. converted to Islam, ‘Aishah RA. had already been born. Based on the historical records, Abu Bakar RA. converted to Islam in the 1<sup>st</sup> year of the prophethood period (the 10<sup>th</sup> year before *hijrah*). And if, at that time, ‘Aishah RA. was 7-8 years old, so, when she was married to the Prophet Muḥammad, ‘Aishah RA. had been 19-20 years old. See Ibn Hajar al-Athqalānī, *al-*Iṣābah fī Tamyīz al-ṣahābah**, Vol. VII (Cairo: Maktabah Ibn Taimiyah, 1411 H/1991 AD), 316.

<sup>23</sup> Ibn Hajar al-Athqalānī, *al-*Iṣābah fī Tamyīz al-ṣahābah**, vol. VII, (Kairo: Maktabah Ibn Taimiyah, 1411 H / 1991 AD), 316.

It means that when Prophet Muhammad (PBUH) married, *Sayyidah* 'Aishah was 19 years old and not 9 years old, as is the opinion of the most mainstream Muslim scholars. Although both narrations are derived from the hadith which are both authentic, however, the aspects of feasibility, propriety, and prophetic rationality are more towards the opinion of Ibn Hajar al-Athqalani, namely *Sayyidah* 'Aishah was married by Prophet Muhammad when he was 19 years old. As a comparison between the age limit of marriage in Indonesia and Islamic countries in the world, this research shows the age limit of marriage according to data made by Tahir Mahmood in his book entitled "Personal Law in Islamic Countries, History, Text, and Comparative Analysis",<sup>24</sup> as follows:

**Table 1**  
**The Limit of the Age of Marriage**  
**for Man and Woman in Muslim Countries**

No	Negara	Laki-Laki	Perempuan
1.	Aljazair	21	18
2.	Bangladesh	21	18
3.	Mesir	18	16
4.	Indonesia	19	19
5.	Irak	18	18
6.	Yordania	16	15
7.	Lebanon	18	17
8.	Libia	18	16
9.	Malaysia	18	16
10	Maroko	18	15
11	Yaman Utara	15	15
12	Pakistan	18	16
13	Somalia	18	18
14	Yaman Selatan	18	16
15	Syria	18	17

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<sup>24</sup> Tahir Mahmood, *Personal Law in Islamic Countries, History, Text, and Comparative Analysis* (New Delhi: Academy of Law and Religion, 1987), 270.

16	Tunisia	19	17
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From the table above, Indonesia is a country with the majority of the populations are Muslim and has the highest age limit for marriage compared to other Islamic countries. For man, only Tunisia has the same standard as Indonesia. Meanwhile, Bangladesh ranks first for male age, namely 21 years or two digits above Indonesia. As for the age of woman, Indonesia is a country that has the oldest standard of age, or an average of one to three years above other Islamic countries. Of the 16 Muslim countries, North Yemen has the lowest standard of marriage age for both man and woman, which is 15 years old.

### **Limits of Marriage Age in Indonesia: from Law Number 1 of 1974 towards Marriage Law Number 16 of 2019**

One of the very important things in marriage is the age factor of the bride and groom. This factor is important because it becomes a measure of whether a person has maturity or not. Maturity referred to here is a person's ability to face, respond to, and to solve the problems they face in married life. Therefore, in both religion and government regulations, a person who wants to get their marriage must be adult. The maturity requirement is also a preventive step to save a marriage from failure in building a life together in a family.<sup>25</sup>

In the Marriage Law Number 1 of 1974 and Presidential Instruction Number 1 of 1991 concerning the implementation of the Islamic Law Compilation (KHI), the age limit for a person to be married is when he has been adult. Maturity, as a condition

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<sup>25</sup> In the Big Indonesian Dictionary, biologically, adulthood is interpreted as puberty, until the age of marriage, no longer a child. Meanwhile, from a legal perspective, adulthood means when a person is 17 years of age or older or is married. There are three types of maturity, namely: (1) Biological maturity. This is a maturity that will surely come to every normal person as the intake of food and nutrients enters the body, it will gradually grow to be bigger and get older; (2) Psychological maturity, is a person's maturity that is characterized by psychological maturity, able to control emotions, has the ability to optimize his potential, is able to interact with others, and is responsible; (3) Sociological maturity, is a condition in which a person has established life, material adequacy, can meet social needs, has his own social class, and is able to take a certain role in society.

for allowing a person to marry, is clearly regulated in Article 6 paragraph 2 which states: "To carry out a marriage, a person who has not reached the age of 21 years old must obtain parental consent". Article 7 paragraph (1) of the marriage law stipulates that: Marriage is only permitted if the male has reached the age of 19 and the female has reached the age of 16.

Furthermore, the limit of adult age is also regulated in the Compilation of Islamic Law in article 15 paragraph (1), namely: "For the benefit of the family and household, marriage may only be carried out by the prospective brides who have reached the age as stipulated in article 7 of Law Number 1 of 1974. , that is, the future husband is at least 19 years old and the future wife is at least 16 years old. Article 15 paragraph (2): "For a prospective bride who has not reached the age of 21 years, she must obtain a permit as regulated in article 6 paragraph (2), (3), (4) and (5) Law Number 1 of 1974.

Along with the development of civilization, mindset, science and technology, the requirements for "maturity" in marriage have received serious attention from experts of marriage law. This is because it departs from the fact that there are often great disputes in the family that lead to divorce. One of the fundamental causes is because they are not mature enough to face household problems. Therefore, the government needs to take preventive measures to avoid getting bigger dangers in the future. Based on the decision of the Constitutional Court Number 22/PUU-XV/2017, changes and improvements were made to Law Number 1 of 1974 concerning marriage. On September 16, 2019, a new rule was made as contained in the Marriage Law Number 16 of 2019. This law is an amendment to Law Number 1 of 1974 as mandated by the Constitutional Court.

In the Marriage Law Number 16 of 2019, the minimum age of marriage for man and woman is 19 years. This provision is different from the previous one, as stated in Law Number 1 of 1974, the minimum age of marriage for man to marry is 19 years and for woman is 16 years. With the issuance of the Marriage Law Number 16 of 2019, the government will formulate a national policy on the prevention of child marriage as a follow-

up, among others by conducting a "stop child marriage" campaign. Child marriage must be prevented from the village level. What about the bride and groom who are not yet 19 years old, but still want to get married? The Marriage Law Number 16 of 2019 provides an opening through the provision of dispensation by the court with strong reasons, as written in article 7 paragraph 3.

The Marriage Law Number 16 of 2019 as a complement to Law Number 1 of 1974 is officially effective since 15 October 2019. Some important points regarding the age of marriage are: (1) Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years years (article 1 paragraph 1); (2) 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 may request dispensation to the Court with some urgent reasons accompanied by sufficient supporting evidences (article 1 paragraph 2); (3) Given the dispensation by the Religious Court as referred to in paragraph (2), it is obligatory to listen to the opinions of the two prospective brides who are getting married.<sup>26</sup>

## **Motivations and Numbers of Couples Applying for Marriage Dispensation**

Currently, the number of early marriage or underage marriage in Indonesia has increased sharply.<sup>27</sup> Even more astonishingly, in the midst of the Covid-19 pandemic, the rate of early marriage or underage marriage is increasingly showing a high trend, especially in several districts. In fact, the increase is between 200 % and 400 %. Based on data from the Ministry of Women's Empowerment and Child Protection, the rate of early marriage or underage marriage increased to 24,000/year during the pandemic. Meanwhile, according to records from the Directorate General of Religious Courts, 34,000 applications for

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<sup>26</sup> The Attachment of Law Number 16 of 2019

<sup>27</sup> Suhariyati Suhariyati, Joni Haryanto and Ririn Probawati, "Trends of Early Marriage in Developing Countries: A Systematic Review", within "Jurnal Ners", Vol. 14, No. 3 (2019), 277.

dispensation were submitted from January to June 2020 or as many as 97 % of the requests were granted. The 60 % of the applicant for marriage dispensation are children under 18 years old.<sup>28</sup>

In addition, the Supreme Court Working Group also acknowledged that there had been a sharp increase in child marriage. They noted that the data submitted by the Ministry of Women's Empowerment and Child Protection was based on facts. In 2018, the number of child marriage in Indonesia reached 193,000 cases. This was said by the Secretary of the Women's and Children's Working Group of the Supreme Court, Edy Wibowo, at the integrity pact of the Joint Movement to Prevent Child Marriage. He said that out of the 193,000 child marriage that occurred in Indonesia, it was due to economic factor and the support of families who did not understand the issue of child marriage at an early age. He added that of the 193,000 child marriages that took place in Indonesia, only 14,000 applied for dispensation to the court. They are as many as 13,000 cases who submitted to the religious court and 1,000 to the district court.

From the data above, West Java is one of the provinces with the highest number of underage marriage in Indonesia. This information is based on data from the National Planning and Development Agency for 2020. The practice of underage marriage continues to flourish, even though the government has revised the minimum age for marriage in Indonesia to 19 years through Law Number 19 of 2019. In addition, there are regulations that stipulate that deviation from the minimum age in marriage can only be applied for dispensation to the court. In fact, this regulation has not been able to suppress the practice of underage marriage in Indonesia and dispensation to court is increasing.<sup>29</sup>

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<sup>28</sup> <https://ayobandung.com/read/2020/10/21/143754/pandemi-corona-bikin-anak-di-bawah-18-tahun-banyak-menikah>

<sup>29</sup> <https://www.unpad.ac.id/2020/07/pernikahan-dini-di-indonesia-meningkat-di-masa-pandemi/>

From the high number of underage marriage, West Java is one of the provinces with the highest number of underage marriage in Indonesia based on data from the National Planning and Development Agency for 2020. In addition, cases of child marriage that occurred in almost other districts also experienced quite high spike. In fact, there are several districts that achieved an increase from 200 % to 300 % as happened in several districts in Central Java.

In Jepara Regency, there are 234 cases of underage marriage. In Kendal Regency, in January-December 2019 there were 125 cases of marriage dispensation and in 2020, from January to July 2020, the number had reached 179 cases, or doubled. Furthermore, in Rembang Regency in 2019, there were 70 cases and in 2020, in just 6 months, it had increased to 150 cases. In Demak Regency, there were 157 cases in 2020 in just 6 months, while in August-December 2019 there were still 63 cases (5 months). In Blora Regency, in July-December 2019, there were 100 cases of dispensation of marriage, but in January-July 2020, this figure jumped to 203 cases.<sup>30</sup>

As in several provinces in Indonesia, East Java is also one of the contributors to the high number of underage marriage and application for marriage dispensation. The first sequence is Malang City with 1481 cases, Jember Regency with 1169 cases, Banyuwangi Regency with 868 cases, Lumajang Regency with 866 cases, Pasuruan Regency with 700 cases, Probolinggo Regency with 635 cases, and Bojonegoro Regency with 550 cases. These data are based on data on applications for marriage dispensation at the Religious Courts in several districts and cities in East Java between January-October 2020.<sup>31</sup>

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<sup>30</sup> Data taken from the page of some Religious Courts such as Kendal Regency, Rembang Regency, Demak Regency and Blora Regency. The four regencies in Central Java are districts that have had a spike in the number of applications for marriage dispensation.

<sup>31</sup> Data was taken from the website of the Religious Courts of Malang City, Jember Regency, Banyuwangi Regency, Lumajang Regency, Pasuruan Regency, Probolinggo Regency, Bojonegoro Regency in the period between January-October 2020.

The motivations for perpetrators of child marriage and application for marriage dispensation are quite diverse. The first is the economic factor. This factor has become very dominant, especially when the people find difficult to revive the economy due to the Covid-18 pandemic. Many businesses have gone out, workers in factories and companies have been laid off, access to economic activities is hampered are the factors that have brought economic conditions to a difficult point. Government regulations and policies that are more focused on handling the Covid-19 pandemic have made the economic situation even worse. At least, this economic factor has been directly felt by some parents. They think that by marrying off their children can ease the burden on the family, even though they also know that the marriage could create new problems.

This is also emphasized by an expert of civil law from the Faculty of Law, Padjadjaran University, Susilowati Suparto, who said that the increase in the number of early marriage during the Covid-19 pandemic is suspected by many factors. One of the most dominant factors is economic problem.<sup>32</sup> The loss of livelihood has an impact on the difficult economic condition of the family. By marrying off their children, parents think that this can lighten the burden of family life a little. And this kind of view usually comes from families or parents who have a middle and lower educational background and economic level. This assumption is, of course, not necessarily true, but research shows that the level of education and the difficult economic condition of the family trigger them to marry off their underage children.<sup>33</sup>

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<sup>32</sup> Economy is the factor that has the most potential to trigger underage marriage. And this happens in almost all countries, including India and other Asian countries. See Nitu Kumari, *Rights of the Girl Child in India: Struggle for Existence and Well-Being* (New Delhi: Sage Publications, 2020), 93.

<sup>33</sup> Susilowati's analysis was presented in the theme of the Webinar entitled "Marriage Dispensation during the Covid-19 Pandemic: Challenges to Efforts to Minimize Child Marriage in Indonesia" which was held at the Faculty of Law, Padjadjaran University on Friday, 3 July 2020.

Based on data from the United Nations, current condition, where the whole world is hit by the Covid-19 pandemic, will affect people in various sectors ranging from health, economy, to social. The United Nations predicts that more than 66 million are at risk of experiencing extreme poverty due to the COVID-19 pandemic. As a result, the rate of child marriage has the potential to increase in difficult economic situation. Here, many parents will marry off their children, so that they are released from the economic burden of the family.<sup>34</sup> In line with that, the United Nations Population Fund (UNFPA) predicts that child marriage will increase by 13 million cases globally over the next 10 years due to COVID-19.<sup>35</sup> More specifically, UNFPA estimates that around 47 million women in 114 low and middle income countries have the potential to lose access to contraceptives. The loss of access could lead to 7 million unwanted pregnancies if locked down for six months.<sup>36</sup>

The second motivation is the government's policy through the Ministry of Education and Culture of the Republic of Indonesia to close schools during the Covid-19 pandemic and the implementation of online learning from home.<sup>37</sup> This condition can lead to an increase in number of underage marriage. By studying at home, it causes teenagers to have the

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<sup>34</sup> [https://www.wvi.org/sites/default/files/2020-07/Out%20of%20Time\\_Covid19%20Aftershocks%20-%20FINAL.pdf](https://www.wvi.org/sites/default/files/2020-07/Out%20of%20Time_Covid19%20Aftershocks%20-%20FINAL.pdf)

<sup>35</sup> Carmody, Padraig, McCann, Gerard (eds.), *COVID-19 in the Global South: Impacts and Responses* (Great Britain: Bristol University Press, 2020), 118-120.

<sup>36</sup> [https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19\\_impact\\_brief\\_for\\_UNFPA\\_24\\_April\\_2020\\_1.pdf](https://www.unfpa.org/sites/default/files/resource-pdf/COVID-19_impact_brief_for_UNFPA_24_April_2020_1.pdf)

<sup>37</sup> During the Covid-19 pandemic, the government, in this case the Minister of Education and Culture (Mendikbud), Nadiem Anwar Makarim, together with the Minister of Home Affairs, Muhammad Tito Karnavian, issued various policies and initiatives to deal with learning constraints during the Covid-19 pandemic. In addition, schools are given the flexibility to choose a curriculum that suits the learning needs of students during a pandemic, as stipulated in the Decree of the Minister of Education and Culture regarding curricula during an emergency. In addition, the government also provided free quota, provided Single Tuition assistance (UKT) for 410 thousand students, and provided internet quota subsidies for students, teachers, and lecturers for four months (September to December 2020).

freedom to mingle in their surroundings. The easier access to information also makes the social networks of young people wider, so that communication between them is increasingly out of control. This happens when parents' supervision of their children is very weak.

The third motivation is the rampant of the glorification of marriage on social media, such as the principle that marriage is worship, marriage is full of happiness, and marriage is a way to save you from adultery which is strictly prohibited by religion and so on. Such glorification will greatly affect the mindset of young people to be encouraged to marry, so that their sexual desires are achieved. Moreover, if the glorification is carried out by public figures, it has a very easy influence to the mindset of the young people. Actually, there are many ways to avoid getting caught up in the glorification of marriage. One of them is maximizing the role of parents in educating their children. However, this role often fails due to many factors such as economy, education, access to information and others.

The fourth motivation is the incidence of pregnancy outside of marriage, the strong influence of customs and religions, and the lack of access to reproductive health information. Meanwhile, there are many cases with psychological, social, emergency, and social reasons, forcing the court to grant marriage dispensation requests. Nearly 90 % of applications for marriage dispensation are granted by judges. Of the 90%, among them are as the result of pregnancy outside of marriage. This makes Indonesia often stay in the ranks of the countries with the highest rate of early marriage in the world. Actually, the legal considerations of a judge in handling cases of marriage dispensation have been clearly regulated in the Supreme Court Regulation Number 5 of 2019 and also the Marriage Law Number 16 of 2019. However, for urgent or emergency reasons, considering the protection and best interests of the child in statutory regulations, several unwritten legal provisions in the form of legal values, local wisdom, and a sense of justice that live in the community often make a judge have to improvise.

## **Provisions for the Submission of Marriage Dispensation in the Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019**

The number of cases of child marriage and the number of applications for marriage dispensation show an increasing graph. At least, this phenomenon is one of the reasons for the law of the Supreme Court to make several provisions to serve as guidelines for judges in deciding cases for submitting marriage dispensation. For the sake of smooth running of the judiciary, the Chief Justice of the Supreme Court of the Republic of Indonesia stipulates Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning guidelines for adjudicating applications for dispensation of marriage. This Supreme Court Regulation was enacted on November 20, 2019 and promulgated on November 21, 2019 to be known and enforced for all levels of society.<sup>38</sup>

The objectives of establishing guideline for judging applications for marriage dispensation are: (1) to apply the principles referred to in article 2, namely the principle of the best interest of the child, the principle of the right to life and development of children, the principle of respect for children's opinion, the principle of respect for human dignity and non-discrimination, gender equality, the principle of equality before the law, the principle of justice, the principle of benefit and the principle of legal certainty; (2) to ensure the implementation of a judicial system that protects children's rights; (3) to increase the responsibility of parents in the context of preventing child marriage; (4) to identify the presence or absence of coercion behind the submission of applications for dispensation of marriage; and (5) to standardize the process for adjudicating applications for dispensation of marriage in court.<sup>39</sup>

Furthermore, dispensation of marriage is the granting of permission to marry by the court to a prospective husband/wife who is not yet 19 years old to enter into a marriage with the

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<sup>38</sup> The Attachment to the Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019

<sup>39</sup> Ibid.

following administrative requirements: (1) A letter of application from the child concerned or the applicant's parents; (2) Photocopy of Identity Card or *KTP* of both parents/guardians; (3) Photocopy of Family Card; (4) Photocopy of Child Identity Card and/or child's birth certificate; (5) Photocopy of Child Identity Card and/or birth certificate of the prospective husband/wife; and (6) Photocopy of the child's latest education certificate and/or still school certificate from the child's school. If these requirements cannot be met, other documents that explain the identity and educational status of the child and the identity of the parents/guardians can be used (article 5 paragraph (2) of the Supreme Court Regulation Number 5 of 2019.<sup>40</sup>

Regarding who may submit applications for dispensation of marriage, here are some provisions, namely: (1) the applicant's parents; (2) If the parents are divorced, it is still the second parent or one of the parents who has custody of the child based on a court decision; (3) If one parent dies or the address is unknown, the marriage dispensation shall be submitted by one of the parents; (4) Child guardian if both parents die or have their power revoked or where their whereabouts are not known; (5) The power of the parent/guardian if the parent/guardian is absent.<sup>41</sup>

As for the provisions concerning where the application for dispensation of marriage can be filed and who is the judge who has the authority to judge, here are some provisions of the Supreme Court Regulation: (1) The court is in accordance with the religion of the child if there is a religious difference between the child and the parent; (2) The same court is in accordance with the domicile of one of the parents/guardians of the prospective husband or wife if the prospective husband and wife are below the limit of the marriage age; (3) Judges who already have a Chief Justice Decree as a Child Judge, participate in training and/or technical guidance on Women Dealing with the Law or are certified in the Juvenile Criminal Justice System or

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid

have experience in adjudicating application for Marriage Dispensation; (4) If there is no Judge as mentioned above, then each Judge can hear the request for Marriage Dispensation.

In order to obtain a correct and wise decision, there are several points that must be considered by a judge who is deciding a case for a marriage dispensation application, including: (1) Hearing the statement of a child without the present of parents; (2) Hearing the child's statement through a remote audio-visual communication examination at the local court or at another place; (3) Suggesting that the child be accompanied by a companion; (4) Requesting recommendations from psychologists or doctors/midwives, professional social workers, social welfare workers, the Integrated Service Center for the Protection of Women and Children (P2TP2A), the Indonesian/Regional Child Protection Commission (KPAI/KPAD); and (5) Presenting a translator/person who usually communicates with children, if needed.<sup>42</sup>

### **Consequences of Underage Marriage**

Based on data released by The United Nations Children's Fund (UNICEF) in 2013, Indonesia is the country with the seventh highest rate of child marriage in the world. This figure is certainly very worrying because it is vulnerable to the threat of household disharmony if the number continues to increase.<sup>43</sup> This figure is corroborated by the results of the 2015 National Socio-Economic Survey. In this survey, it was found that as many as 1 in 4 girls under the age of 18 years old have ever been married. Then, in 2017, as many as 2 out of 5 girls aged 10-17 years had married. This figure shows that Indonesia still needs to pay more attention to cases of early marriage. In general, early marriage is influenced by several factors. The factors that are often associated with this condition are economic factors, lack of education, customary factors, the influence of the mass media, and certain conditions such as pregnancy outside of marriage.

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<sup>42</sup> Ibid.

<sup>43</sup> <https://yoursay.suara.com/lifestyle/2019/12/16/141627/bahaya-pernikahan-usia-dini-mulai-dari-gangguan-fisik-hingga-mental?page=all>

Some of the negative consequences of underage marriage are as follows:<sup>44</sup>

The first is the tardiness in education and self-development. In fact, it is the responsibility of parents to prevent early marriage and is obligated to provide proper education for their children. This is expressly stated in Article 26 of the Child Protection Law "parents are obligated and are responsible to prevent child marriage". However, what happened was just the opposite. Parents think that children who do underage marriage can be the savior of their families. They do not realize that what they are doing can actually hinder their education and self-development.<sup>45</sup>

In addition, children who do not do underage marriage, they can have a greater opportunity to pursue education, career, develop their potential, interest, talent, and ability. However, early marriage forces them to drop out of school and does not have opportunity to develop their potential. Their time is so spent dealing with family problems and needs that they have lost the opportunity to develop their potential and talent. These facts often make children lose their future or at least lose the opportunity to reach a higher education level.<sup>46</sup>

The second is to trigger domestic violence. Based on data released by the Ministry of Women Empowerment and Child Protection, between January-November 2020, there were 5,573 cases. Of these, 3,419 were domestic violence. Among the reasons is because generally a teenager has unstable emotion and low control power. This instability can make a married couple quarrel with each other, and even violence can occur. Among the factors in the occurrence of domestic violence are factors of immaturity, psychology, economics, finance, life demand and others. To handle it, socialization and a special

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<sup>44</sup> Fadlyana, Eddy dan Shinta Larasati, "Pernikahan Usia Dini dan Permasalahannya", within "Sari Pediatri", vol. 11, No. 2.136-140.

<sup>45</sup> <https://www.popmama.com/life/relationship/syafira-akhtari/viralaisha-weddings-ketahui-5-dampak-buruk-pernikahan-dini/5>

<sup>46</sup> Shamnaz Arifin Mim, "Effects of Child Marriage on Girls" Education and Empowerment", within "Journal of Education and Learning", Vol. 11, No. 1 (2017), 10.

approach are needed to the community, especially the youth community as prospective father and mother.

The third is sexual and reproductive health. One of the vulnerable and sensitive things is sexual and reproductive health. Reproductive health in children can cause death to mother and fetus during the childbirth process. It is because at a young age between 12-20 years, the human reproductive organs are still in the development stage. Therefore, the possibility of death to mother and fetus during the childbirth process is very large. In addition, the health of babies born can be very poor due to parents' ignorance of caring for their children and inability to meet medical and economic needs

The fourth is psychological health. Of the many cases that occur, early marriage often affects mental health, starting from emotionally unstable, unable to take self-care, having to play the role of parents, financial problems in the family, and so on. These pressures will cause stress, depression, and even lead to suicide. Therefore, mental health needs to be maintained by avoiding early marriage. Actually mental health problems can happen to anyone. However, early marriage has consequences that ultimately impact the mental health of children.<sup>47</sup>

### **Analysis of *Maqāṣid al-Usrah* on the Marriage Dispensation in Indonesia**

Based on the data in the sub-chapter "number of couples applying for marriage dispensation", currently, the rate of early marriage in Indonesia has increased sharply. Even in some districts, this figure has increased, ranging from 200 % to 300 %. Data from the Ministry of Women Empowerment and Child Protection also states that there are 24,000 underage marriages every year, especially during the pandemic. Of that number, there were 34,000 applications for dispensation that were submitted between January and June 2020, and as many as 97% of the applications were granted. 60 % of who apply for marriage dispensation are children under 18 years of age.

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<sup>47</sup> <https://www.beautynesia.id/berita-wedding/5-risiko-pernikahan-di-usia-muda-ini-yang-harus-kamu-antisipasi/b-159745>

The data above is national data for 2020. Meanwhile, the Supreme Court Working Group also acknowledges that there has been a sharp increase in child marriage. They noted that in 2018, the number of child marriages in Indonesia reached 193,000 cases. Of that number, around 14,000 have applied for dispensation to the court and 13,000 have submitted to the religious court and 1,000 to the district court.

The rise of underage marriage inevitably results in an increase in application for marriage dispensation. Of the many who applied for dispensation of marriage, almost all were granted by the court for several reasons. In the perspective of *fiqh al-munakahāt* (Islamic law on marriage), underage marriage is legal, because it has fulfilled the conditions and pillars of marriage. However, this cannot stand alone because it also has to look at other aspects, namely how much benefit or loss is incurred for the bride and groom, children, and family.

In term of considering which is more dominant between benefit and loss for the spouses, children, and family, the Indonesian Ulama Council (MUI) strongly agrees with the presence of Marriage Law Number 16 of 2019. MUI sees that 19 years of age for the bride and groom are mature age, fulfills the principles of justice and transparency for both parties. The MUI has come to the conclusion that marriage that occurs before the age of 19 years old, even though they are legal because they have met the conditions and pillars of marriage, are *harām* or prohibited because the danger to both parties, the child, and the family is much greater. Deputy Secretary General of MUI, Muhammad Ziyad stated: "The legal status of marriage at an early age or under 19 years of age is legal as long as the conditions and pillars of marriage are fulfilled, but it becomes *harām* if it causes harm,"

In Islam, according to Ziyad, there is no minimum age for marriage. The terms or conditions of marriage for woman and man are only measured based on the maturity of the two brides. However, he explained that one of the purposes of marriage, according to Islam, is to achieve the benefit of the family and society, and including security guarantee during pregnancy.

Therefore, the requirements for the age of marriage then refer to the provisions stipulated in the Marriage Law Number 16 of 2019, which states that the minimum age of marriage for woman and man is 19 years, has fulfilled the benefit for both parties. Because by limiting the age of marriage, it means preventing potential conflict in the household and preventing the achievement of the goal of marriage according to Islam. In addition, limiting the age of marriage also aims to prepare the prospective bride and groom to have psychological maturity because they are closely related to the continuity of the household.

In the theory of Islamic law there is a *fiqhīyyah* rule (legal maxim) “*dar'u al-mafāṣid muqaddam 'alā jalb al-maṣāliḥ*” (avoiding harm must take precedence over taking advantage). This *fiqhīyyah* principle further strengthens the opinion of the Indonesian Ulama Council which comes to the conclusion that underage marriage is *ḥarām* if the potential of harm is greater than the benefit, even though jurisprudence textually says it is valid. In contemporary *fiqh*, the orientation for the achievement of *maṣlahah* on *mu'amalah* issues takes precedence over just textual normative rules. It is so because Islamic law is, indeed, how to provide the greatest benefit for humans. In this regard Ibn Qayyim said:

“*Shari'ah* law is a rule that rests on wisdom and the spirit to achieve public welfare for life in the world and the hereafter. *Shari'ah* law must contain the values of justice, wisdom and goodness. Therefore, all legal rules that replace justice with injustice, affection with enmity, public benefit with corruption, wisdom with nonsense, then the rule of law cannot be categorized as *shari'ah* rule, even though it is justified based on an appropriate interpretation procedure”.<sup>48</sup>

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<sup>48</sup> Al-Shams al-Dīn Ibn al-Qayyīm, *I'lām al-Muwāqqi'iñ*, Vol. 1, ed. Ṭāhā 'Abd al-Ra'ūf Sa'ad (Beirut: Dār al-Jīl, 1973), 113, 333. See also Yūsuf Ahmād Muhammād al-Badāwī, *Maqāṣid al-Shari'ah 'inda Ibn Taymiyyah* (t.t.: Dār al-Nafā'is, 1999), 5.

On the perspective of the principle of "realizing love and peace in the family" contained in *maqāṣid al-usrah*, legalizing underage marriage can violate the purpose of marriage itself, namely how to create affection and peace in the family. Based on the data in the sub-chapter "the legal consequences of early marriage", the brides' immature age causes a person to be emotionally unstable. This instability can make a couple bicker, trigger violence, even to divorce. Among the factors in the occurrence of domestic violence are factors of immaturity, psychology, economics, finance, life demands and others. Thus, the goal of marriage to realize this feature cannot be achieved optimally.

The second feature in *maqāṣid al-usrah* is "to realize offspring". Realizing offspring is a way how marriage is able to maintain the population through the reproductive system. Based on the data above, the result of underage marriage can cause "sexual and reproductive health" to be disturbed. This is not only dangerous for the father and mother, but also for the health of the child. Cases of death in fetal mothers during childbirth reinforce that the dispensation of underage marriages needs to be examined further. Because giving permission to marry only based on formalistic normative reasons of the existing law without considering the greater danger to the perpetrators will make the institution of marriage very ineffective.

In fact, the procedure for submitting marriage dispensation has been clearly stipulated by the government in the Supreme Court Regulation Number 5 of 2019. This regulation also provides space for both parties, especially judges, to improvise and interpret in order to find the right decision based on existing facts. However, complainants often manipulate data requested by courts. As a result, the decision became less effective.

Apart from that, several motivations for the occurrence of underage marriage include: (1) economic factors; (2) Government policy through the Ministry of Education and Culture of the Republic of Indonesia to close schools during the

Covid-19 pandemic: (3) glorification of marriage on social media; and (4) the incidence of pregnancy out of wedlock needs to be reviewed. Based on the researcher's analysis, of the four motives above, only the fourth condition needs serious attention. That means, giving dispensation by a judge to the applicant even though it is procedurally valid, as in the Supreme Court Regulation Number 5 of 2019, however, cannot just be justified without seeing the greater danger to the petitioner, children, and family.

## Conclusion

First, the high rate of early marriage in Indonesia is caused by several factors, including economic factor; the government policy to close schools during the Covid-19 pandemic, so that they can more freely interact with their communities, the rampant glorification of marriage on social media which is usually driven by public figures, and incidents of pregnancy outside of marriage.

Second, the provision of compensation by the court to the applicants to continue to carry out a minor marriage is legally lawful in Islamic jurisprudence on marriage (*fīqh al-munākahāt*), but it can turn into *ḥarām* if the potential of harm is greater than the benefit for the bride and groom. Meanwhile, based on several features in *maqāṣid al-usrah*, the provision of dispensation to get underage marriages does not fulfill the *maṣlaḥah* aspect except in certain cases which are very urgent, such as pregnancy outside of marriage for victims of rape.

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