



THE LOOSE INTERPRETATION OF DOMINUS LITIS PRINCIPLE IN MARRIAGE DISPENSATION FOR UNDERAGE MARRIAGE IN BANTEN

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Abstrak: Hakim Pengadilan Agama memiliki peran penting untuk menekan kasus perkawinan dini. Hakim dapat mempertimbangkan dispensasi nikah dengan menekankan prinsip *dominus litis*, yaitu hakim sebagai pengendali perkara. Sejak permohonan dispensasi banyak dikabulkan oleh pengadilan agama di Banten, perkawinan dini di Banten mengalami peningkatan secara signifikan. Studi ini menganalisis penerapan "*dominus litis principle*" dan kendalanya dalam pembuktian alasan mendesak dispensasi nikah. Data diperoleh dari hasil observasi dan wawancara dengan hakim, mantan hakim, pengacara dan masyarakat. Penelitian ini menerapkan metode penelitian hukum yuridis-empiris yang berfokus pada penilaian terhadap berbagai fakta dan data dari masyarakat. Hasil analisis menunjukkan bahwa hakim Pengadilan Agama umumnya hanya bertugas mencari kebenaran formil dari keterangan pemohon, anak yang dimohonkan dispensasi, saksi-saksi dari orang dekat pemohon, dan bukti dokumen yang diajukan oleh pemohon. Hakim jarang sekali mendatangkan saksi tambahan dari para ahli dan profesional lain yang berhubungan dengan dunia anak yang bisa menguatkan alat bukti. Hakim memutuskan untuk mengabulkan permohonan dengan alasan menjauhkan anak dari tindak asusila yang bertentangan dengan etika dan moral yang berlaku di tengah masyarakat umum dan mengabaikan peran penting prinsip *dominus litis*.

Kata kunci: Perkawinan dini; dispensasi perkawinan, hakim Pengadilan Agama

Abstract: The judges of Religious Courts play a crucial role in reducing underage marriages. The judges can consider marriage dispensation by emphasizing the principle of *dominus litis*, which can be understood as a case controller. Since the Religious Courts in Banten have granted considerable dispensation appeals, the early-age marriages have increased significantly. This research examines the implementation of the *dominus litis* principle and the difficulties in establishing the grounds for urgent marriage dispensation. The data were collected via observations and interviews with the judges, former judges, lawyers, and societies. This research employs the juridical-empirical research technique, examining several facts and data generated by the public. The study reveals that to approve marriage dispensation, the judges of Religious Courts merely focus on the legal truth from the applicants' statements, the underage marriage candidates, witnesses from applicants' immediate families, and document evidence presented with the application. Judges rarely summon additional witnesses from specialists and professionals focusing on the children's issues, which might strengthen formal legal evidence. The court granted the request to safeguard the children from immoral behavior, contradicting the common public ethics and morals and ignoring a significant principle of *dominus litis*.

Keywords: Underage marriage; marriage dispensation; judges of Religious Court

Introduction

In many countries, underage couples have been permitted to apply for a marriage dispensation. While some countries use executive institutions for marriage dispensation (e.g., the Republic of the Congo, the Dominican Republic, France, and South Africa), others use judicial institutions (e.g., Indonesia). The authority of the judiciary to accept applications for marriage dispensation derives from the independence of the judiciary (freedom of judges/independent judiciary) (Palmer & Mattar, 2016).

The Religious Courts (Pengadilan Agama) is one of the Indonesian Islamic judicial entities with the authority to receive a marriage dispensation application. The Religious Courts have the authority to accept, investigate, adjudicate, and decide marriage and other civil Islamic issues (Jambunanda et al., 2023). The parties' desire determines Islamic civil proceedings. Hence, the judges do not need to involve something beyond their duties and authority. Likewise, the parties are accountable for the trial procedure, the presentation of evidence, and the determination of legal purposes. In a civil case, the judges only assess the parties on the principle of obedience to the law. Judges are not compelled to hear or seek information from parties or witnesses other than the litigants and their witnesses while dealing with cases. Therefore, Islamic civil law judges are assumed to be passive and decide the cases based on the lawsuit and evidence (Manan, 2016).

The influence of the procedural law outlined in the *Wetboek op de Burgerlijke Rechtvordering*, commonly abbreviated as Rv., resulted in the passive judges. The Indonesian judges become passive because Rv. mandates that all stages of the examination must be conducted in writing (*schriftelijke procedure*), and the parties must be represented by a solicitor (*procedure stelling*). This paradigm is no longer applicable in light of the fact that justice seekers want a simple, efficient, and cost-effective justice system (Harahap, 2015). In many countries, including India, which is close to Indonesia, the "legal maxim" in the form of "*dominus litis*" has been implemented, giving judges and public prosecutors the authority to actively seek the truth in the process of proving a lawsuit, as well as the material truth in the cases on trial (Bajjnath, 2022).

As a member of the international community, Indonesia has adopted a legal maxim system known as *dominus litis*. *Dominus* etymologically means owner, and *litis* means a lawsuit. In principle, it means a case controller, directing the law in an investigation process and determining whether or not prosecution can be carried out on a legal case. Judges have an essential role in a trial. They must be active following the applicable adagium, *judicis est judicare secundum allegat iudicare* (a judge decides based on the lawsuit and evidence) (Black, 1991).

Article 4 Paragraph (2) and Article 5 Paragraph (1) of Law No. 48 of 2009 on Judicial Power govern the legal legitimacy of the Indonesian judges' activities. Following this provision, all judges should receive, examine, hear, and resolve every case brought to them. They are required to assist justice seekers and overcome all obstacles and hurdles to achieve a simple, quick, and inexpensive trial. In addition, all judges must investigate, adhere to, and comprehend legal values and a sense of justice in society (Ali, 2010).

The Religious Court judges are governed by Article 56, Paragraph 3 of Article 57, and Paragraph 1 of Article 62 of Law No. 7 of 1989 on Religious Courts. The Religious Court judges should examine and decide the cases even if the legal reason is ambiguous or unclear. The judges are required to do so and are not precluded from attempting a peaceful resolution. Apart from containing the legal basis and reasons, all stipulations and decisions of the Religious Courts are also required to explore unwritten legal sources used as the basis for adjudicating (Manan, 2016).

This stipulation is implemented through the judges' efforts in resolving cases through consensus and mediation. Since there is no clear standard for peaceful dispute resolution, the Supreme Court of the Republic of Indonesia issued Supreme Court Regulation (Peraturan Mahkamah Agung, PERMA) No. 01 of 2008 on Mediation Procedures in Courts. This regulation requires the judges to reconcile litigants during the initial and subsequent trials.

Generally, civil law case settlement schemes in Indonesia are determined using stipulations issued by the Supreme Court of the Republic of Indonesia. The Supreme Court regulation concerning marriage dispensation procedures is Supreme Court Regulation No. 5 of 2019 on Guidelines for Adjudicating Applications for Marriage

Dispensation. Marriage dispensation is a court authorization granted to individuals under the legal age to marry. Article 7 of Marriage Law No. 1 of 1974, as amended by Law No. 16 of 2019, officially states that a man and a woman must be at least 19 years old to be married. A deviation from the stipulation regarding the minimum age for marriage requires the parents to propose a dispensation to the court, accompanied by compelling evidence.

Applicants for a marriage dispensation who are underage must demonstrate compelling circumstances in court. Judges are equipped with Supreme Court Regulation on Guidelines for Adjudicating Applications for Marriage Dispensation as the Marriage Law does not regulate the trial for marriage dispensation. The most critical stipulation in that Supreme Court Regulation is that all cases involving children must consider children's wellbeing.

Considering Article 1 of the Marriage Law No. 16 of 2019, the judge decides on marriage dispensations based on the best interests of children, including the rights to live and grow, respect for the children's opinion, the value of human dignity, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty. Article 12 of the Marriage Law also describes the active role of judges as advisors to applicants (children) and their parents or guardians. The purpose of the judges' counsel is to make them aware of the risks associated with marriage, such as the possibility of children's discontinuing education, the unpreparedness for reproduction, socio-economic problems, psychological impacts, and the potential for domestic violence and disputes.

From this perspective, judges handling the pleading dispensation are required to apply the *dominus litis* principle because they have the authority to accept or reject the marriage dispensation. Meanwhile, there are opportunities and obstacles in applying the *dominus litis* principle in all Indonesian judicial institutions. Yusni's research in the criminal justice system reveals that public prosecutors' application of the *dominus litis* principle complicates criminal cases (Yusni, 2020). Tiar Adi Riyanto conducted additional research on the application of *dominus litis* by prosecutors in the juvenile criminal justice system (Sistem Peradilan Pidana Anak, SPPA) in Indonesia, stating that the application of *dominus litis* in the SPPA has created a possibility for

public prosecutors seeking *restorative justice* via mediation to resolve criminal cases involving children (Riyanto, 2021). The application of *dominus litis* in the administrative justice system (PTUN) has produced progressive judges (Soehartono et al., 2021).

Implementing the *dominus litis* principle in the context of a marriage dispensation proposal is highly pertinent to pursuing children's basic needs. Consideration is given to the fact that judges have full authority, as the marriage dispensation is fundamentally a state administration decision requested by the applicants to hinder a special prohibition (*relaxation legis*), underage marriage. The judges play a significant role in determining a marriage dispensation proposal, approving or rejecting it. Early-age marriage cases can be suppressed if the judges restrict the marriage dispensation requirement (Putrijanti, 2013). Therefore, this study aims to explain the use of the *Dominus Litis* principle by the Religious Court judges in establishing the grounds for marriage dispensation requests to halt the rise of underage marriage, particularly in Banten.

This study focuses on Banten Province, as underage marriages have gradually increased in recent years in the province. In 2019, 6% of couples married before the age of 18. This percentage grew to 6.23% in the following year. This rise has been inevitable as many Religious Court judges grant marriage dispensation in Banten. The Religious Court judges granted 468 or 89% of marriage dispensation applications in Tigaraksa Religious Court (37%), followed by Tangerang City Religious Court (10%), Serang Religious Court (18%), Pandeglang Religious Court (17%), Lebak Religious Court (15%), and Cilegon Religious Court (3%) (Dissemination, 2021).

This study combines empirical and doctrinal legal approaches. The primary data was obtained from interviews and a focused group discussion with legal practitioners and public representatives. The legal documents include statutory regulations and judicial decisions. The data was processed and evaluated in a descriptive-evaluative analysis.

Revisiting the Role of Juvenile Judges in The Child Marriage Practice in Indonesia

Judges in juvenile trials need distinct research, notwithstanding the absence of juvenile judges in civil law proceedings. Judges are

governmental officials who exercise judicial authority following the law. In Indonesia, according to Law No. 11 of 2012 on the Juvenile Criminal Justice System, the designation of juvenile judge is exclusively used in juvenile criminal proceedings. Article 43 of the Juvenile Criminal Justice System Act defines juvenile judges as judges in the court system who have an interest, concern, devotion, and knowledge of children's difficulties and technical courses in juvenile justice.

Aside from this context, judges in all Indonesian judicial institutions are constrained by Law No. 48 of 2009 on Judicial Power. In this law, the word 'judge' refers to judicial entities subordinate to the Supreme Court, such as general court judges, religious court judges, etc. At the first and appellate levels, judges have the power to act as *judex facti* (trying facts). On the other hand, at the cassation level, they act as *judex juris* (examining the law's application). In accordance with Articles 2 and 3 of Law No. 3 of 1997 on the Juvenile Court, the court is the executor of judicial power within the general judiciary, with the responsibility and ability to examine, decide, and settle juvenile criminal matters.

Knowing that there is no juvenile justice body in Indonesia, there are no juvenile justice judges, except for the juvenile judges mentioned in the Juvenile Court Law and the Juvenile Criminal Justice System Act. Article 9 specifies that the appointment of juvenile judges is based on a Supreme Court Decree and the recommendation of the district court heads to the high court heads. To be appointed as a juvenile judge, one must have experience in the regular court system, as well as interest, attention, commitment, and knowledge of children's issues.

Juvenile judges are basically single or panel judges who examine and decide court cases at the first-level trial, appellate, and cassation (Sutatiek, 2011). Referring to the Juvenile Justice System Act, the word "juvenile judge" has not been altered. Only the juvenile court system undergoes a change, known as diversion (Feld, 2019).

Technically, diversion means "transfer". It transfers the resolution of children's cases from the formal legal procedure to an off-court procedure, with or without conditions. Article 1, section (7) of the Juvenile Criminal Justice System Act defines diversion as the transfer of a child's case from a juvenile criminal proceeding to non-juvenile justice. The children (perpetrators) who are 12 years old and have not yet

reached the age of 18, including those who are married, must proceed with diversion at the time of the investigation, prosecution, and trial. The diversion aims to achieve justice in child criminal cases, prevent children from being deprived of their liberty, encourage community participation, and develop a sense of responsibility among youngsters (Wibowo, 2012).

Diversion in juvenile criminal proceedings adheres to the “active judge” notion (Putrijanti, 2013). This off-court approach should also be utilized to safeguard children involved in legal cases. Article 28B Paragraph (2) of the 1945 Constitution expressly declares that the State guarantees every child the right to life, growth, and development and to be safeguarded from violence and discrimination.

In order to defend the rights of children in Indonesia, the legislation mandates that juvenile court judges actively handle child-related cases. Judges in juvenile courts consider public and private law aspects, including marriage dispensation proceedings. The purpose of this rule is to restrict the judge’s competence to grant marriage dispensation requests so that the number of underage marriages can be reduced.

According to 2018 UNICEF data, Indonesia ranked second in ASEAN and seventh in the world in terms of child marriage numbers (Grijns et al., 2018). Moreover, the Indonesian Women’s Coalition study 2019 mentioned that one in eight young Indonesian women married before eighteen. The 2019 Central Bureau Statistic Demography and Health Survey (IDHS) data showed that 25.71% of 20- to 24-year-old women married before eighteen (Grijns et al., 2018). The Ministry of National Development Planning/National Development Planning Agency (Bappenas) data in 2021 stated that child marriage generated state economic losses of approximately 1.7% of the nation’s gross income (GDP). In addition to the economic impact, child marriage can significantly impact future Indonesian human resource quality and competitiveness (Grijns et al., 2018).

The Children’s Rights and Minimum Age for Marriage in Indonesian Law

In general, the legal classification of children in Indonesia follows the West. Children are classified as immature (*minderjarig*) underage

person), underage (*minderjarig heid/inferior*), and under parental supervision (*minderjarige onder voordij*). A person who is not yet an adult and is still considered a child is entitled to protection and fulfillment of their rights (Horii, 2021; Tanzia et al., 2020).

According to Law No. 11 of 2012 on the Juvenile Justice System and Law No. 23 of 2002 on Child Protection, children are defined as everyone under the age of 18, including unborn children. This age restriction applies to the Convention on the Rights of the Child, ratified by Presidential Decree No. 36 of 1999. The age restriction stipulation for children is one of the reasons for the revision of Article 7 of the Marriage Law, restricting that men and women can marry at least at the age of 19. With the publication of Marriage Law No. 16 of 2019 on the amendment of Marriage Law No. 1 of 1974, there is no longer a difference in the minimum age of children in Indonesia.

In the past, designating the minimum age for marriage as a measure of men's and women's differing levels of maturity led to societal inequality. Discrimination exists within the context of the right to build a family, as guaranteed by Article 28 B paragraph (1) of the 1945 Constitution, and within the context of protecting and realizing children's rights, as guaranteed by Article 28 B paragraph (2). In a law state, everyone is treated equally (equality before the law). This is emphasized in Article 28 D, Paragraph 1 of the 1945 Constitution, stating that everyone has the right to recognition, protection, legal certainty, and equal legal treatment.

Law No. 23 of 2002 on Child Protection controls the rights that should be achieved by children, which include the right to live, grow, and develop with respect and dignity and to be safe from violence and discrimination. Children have the right to hold a name that identifies his or her citizenship. Under parental supervision, they also have the right to worship according to their beliefs and think and express themselves in line with their intelligence and age. Another important thing is that children are entitled to health care and social security based on physical, mental, spiritual, and social needs. They have the right to an education that is tailored to their intelligence, skills, and interests, as well as their unique stage of development. They also have the right to be protected against discrimination, economic and sexual exploitation, neglect, cruelty, violence, and other types of maltreatment (Article 4-13 paragraph).

The regulation related to the fulfillment of children's rights in Indonesia follows the Convention on the Rights of the Child, ratified by over 150 United Nations (UN) countries, including Indonesia. The primary principles mentioned in the Convention are as follows: (1) non-discrimination; (2) meeting children's needs; (3) the right to life, growth, and development; and (4) respect for children's perspectives (UNICEF, 2002).

In Indonesian marriage law, the adaptation of the Convention on the Rights of the Child is represented in the revision of the marriage law, elevating the age limit for women to 19 years, similar to men's. The decision to set the minimum age for marriage at 19 years is based on the idea that at this age, both men and women are physically and mentally mature enough to marry. They are expected to understand the purpose of marriage, avoid divorce, and have healthy and high-quality children.

However, the amended marriage law is not stringent and has some exceptions. There is still a possibility of obtaining a court-issued exemption for underage marriage. The Religious Courts' authority to grant marriage dispensation is considered unbiased and possibly offers justice for realizing essential human rights, such as marriage and establishing a family.

Dispensation Rules for Underage Marriages

A marriage dispensation is a marriage license provided by the court to a prospective husband or wife who has not fulfilled the legal requirements for marriage. The marriage could be legally performed by individuals who have attained the minimum age for marriage specified by the legislation. Those who do not, however, must apply to the court for a marriage dispensation in accordance with the law (Darmawan et al., 2022).

Personal maturity is governed by Indonesian marriage law, specifically when a person is deemed eligible for marriage and can take responsibility for themselves and others (their spouses). The minimum age requirement for marriage has resulted from the maturity requirement for being able to marry. In certain sections of Marriage Law No. 1 of 1974, the age requirements for marriage include a minimum age of 19 for men and 16 for women. Parental consent is required for the wedding

if a prospective spouse is under 21. Children younger than 18 and unmarried are subject to parental responsibility. Children under 18 or who have never been married and are not subject to parental authority are governed by a guardian.

Previously, the minimum age for marriage was 19 years for males and 16 years for females. Nonetheless, amended marriage legislation stipulates that prospective husbands and wives must reach 19 to be eligible for marriage. The fundamental purpose of the amendment of Marriage Law No. 1 of 1974 by Law No. 16 of 2019 is to increase the minimum marriage age. Parental consent for prospective spouses under the age of 21 and the position of children under the jurisdiction of their parents or guardians remain in effect for the remaining Articles.

Therefore, according to Article 7 Paragraph (2) of the Marriage Law No. 16 of 2019, a marriage dispensation petition should be requested by either the prospective bride or groom's parents. This rule nullifies the legal effort of a prospective bride and groom who are both underage voluntarily and jointly applying for a marriage dispensation. Article 6 of the Supreme Court Regulation No. 5 of 2019 on Guidelines for Adjudicating Applications for Marriage Dispensation states that the parent is the eligible party to request a dispensation. If the parents are divorced, the application must be submitted by both parents or the parent with legal custody of the child. If one of the parents passes away or if the parent lives in an indefinite location, one of the parents must request the dispensation. Furthermore, if both parents are deceased or their whereabouts are unknown, their parental rights have been terminated. The guardian of the children must apply for dispensation. Legal assistance is required in the absence of the parents or guardians.

Administratively, following Article 5, every application for a marriage dispensation to the court must be accompanied by the following requirements: (a) an application letter; (b) a copy of the applicant's Identity Card (KTP); (c) a copy of Family Card; (d) a copy of Child Identity Card or Childbirth Certificate; (e) a copy of Child Identity Card or Birth Certificate of the prospective husband/wife; and (g) a copy of the child's most recent high school diploma or certificate of school enrolment. Other documents explaining the identification and educational status of the kid and the parent or guardian's identity may be used if the preceding standards cannot be met.

There are differences in the administrative status of children who have their marriage registered at the KUA and those who have not when filing for a marriage dispensation. Marriage dispensation may be requested from the court before the marriage registration at the KUA and/or Civil Registry Office or after KUA rejects their marriage registration. When the marriage application is rejected, the applicants are referred to as children. If the marriage has been registered but refused, the applicants are referred to as a potential husband or wife.

The application for marriage dispensation is submitted to the Court with the following provisions: (1) If there is a religious difference between the parents and the children, the court shall follow the children's religion. If the child and parent are Muslims, the Religious Courts can accept a request for a marriage dispensation. The District Court receives the application for marriage dispensation if the children and their father are not Muslims. If their beliefs differ, the marriage dispensation application is made to the Religious Courts and/or District Courts, depending on the child's religion and belief. (2) If the prospective spouses are underage, the court location should be based on the residency of one of the prospective spouse's parents or guardians.

The court issues a marriage dispensation after meeting with the parents or guardian and prospective spouse. The judges then counsel them during the trial examination, and the judge concludes that compelling reasons allow the dispensation to be granted. Deri Fahrizal Ulum, Child Protection Officer for UNICEF Indonesia, demonstrated that Indonesian courts grant 90% of marriage dispensation requests. The Religious Courts Agency (Badilag) in 2020 revealed that 34,413 applications for marriage dispensation were filed, of which 33,664 were issued (Horii, 2021, p. 45).

The court considered the application's compliance with religious, legal, and sociological legislation in granting the marriage dispensation. The prospective husband, requesting a marriage dispensation, needs a secure job that provides adequate money, and the woman is expected to be mature enough to accomplish housework. Another aspect considered in the trial is that the relationship between the two prospective brides and grooms is already close, and there are indications of possible pre-marital sexual intercourse if the marriage is postponed. In addition, the two prospective brides, referring to Islamic law, are not prohibited

from marrying each other, and both families have consented to the marriage.

The marriage dispensation issued by the court can be used as the legal document for marriage registration at the KUA and/or the Civil Registry Office. The KUA officer can reject a marriage registration application without the marriage dispensation document.

This topic attracted public attention, particularly from the Indonesian Women's Coalition (KPI). Although the overall rate of child marriages decreased from 11.21% in 2018 to 10.82% in 2019, the rate increased in 18 Indonesian provinces. Most of these unexpected practices occurred in Banten and West Java.

Marriage Dispensation and Underage Marriage in Banten

Underage Marriage is one of Indonesia's complex and multifaceted problems (Horii, 2021; Tanziha et al., 2020). Although the government has implemented several initiatives to avoid this practice, the number of early-age marriages continuously increases. This suggests that government policies alone are insufficient to reduce child marriage rates.

According to Presidential Regulation No. 18 of 2020 on the National Medium-Term Development Plan (RPJMN 2020-2024), underage marriage has become a national priority to resolve. The Sustainable Development Goals (SDGs) also target the elimination of underaged marriage. This is clearly stated in the fifth point of the SDGs, dedicated to attaining gender equality and empowering all women and girls. In addition, the government's national strategy for preventing child marriage (Stranas PPA) aims to reduce the underage marriage rate from 11.21% in 2018 to 8.74% by the end of 2024.

The number of child marriages has been decreasing nationwide. Nevertheless, 22 of 34 provinces in Indonesia have greater child marriage rates than the national average. Although the marital rate in Banten province decreased from 95,251 in 2019 to 92,022 in 2020, the number of underage marriages has climbed. In 2020, the underage marriage rate in Banten increased from 6% in 2019 to 6.23% in 2020. The number fell from 6.78% in 2018. Moreover, BPS data from 4 May 2021 revealed that married women aged between 20 and 24 had already married before they were 15 (Dissemination, 2021).

Marriage dispensation is directly correlated with the increase in underage marriage in Banten. As mentioned, the Banten High Religious Court, the first instance Religion Court, granted 468 requests. Dispensation in Banten is motivated by the following factors: (1) unwanted pregnancy, (2) pre-marital sexual intercourse, (3) the community sanction for violating social norms by having a pre-marital intimate relationship, (4) dropping out of school, (5) being financially independent to others (Division of Integration Processing and Statistics Dissemination, 2021). Marriage dispensation applicants use those factors to obtain the court's permission. The fourth issue is the most cited as a tangible cause in requesting marriage dispensation.

The increasing number of underage marriages in Banten province potentially creates new problems in society. These are severe depression in young couples, (2) domestic violence, (3) divorce caused by immaturity, (4) propensity to school dropout, (5) economic difficulties leading to child negligence, (6) the emergence of underage workers, and (7) transmission of HIV disease. The severe depression can lead to domestic violence, which can ultimately culminate in a divorce. This is worrying because, according to the Population and Family Planning Agency of Banten Province, only 5,900 people received reproductive counselling in 2021. Similarly, records compiled by the BPS of Banten Province in 2021 demonstrated that economic hardship influences the rate of school dropouts and the formation of underage laborers (Dissemination, 2021).

The Banten Central Bureau of Statistics has released young population statistics by gender.

Table 1 Statistic of the young population in Banten

Age Groups	0-4	5-9	10-14	15-19
Male	534643	535170	517080	519916
Female	509014	510429	485428	489235
Total	1043657	1045599	1002508	1009151

In Banten, only 68.76% of the population between the ages of 15 and 19 are still in school. The rest either care for the family or drop out of school. Those who are 15 to 19 years old, have not attended school,

and hold a job are 177,991. Meanwhile, the number of people who used to work is 18978, compared to those who have never worked, which is 1,6684. Consequently, there is a sizable underage workforce, as high as 56.75%, according to BPS data from 2021. Their presence accounts for as much as 29.13% of the total employment rate in Banten.

The participation of juveniles in the workforce does not necessarily promote the welfare of society. They have limited skills since they have a low degree in education. Parents occasionally encourage their children to marry because they believe their children already have a stable income and a robust social network. Parents are anxious that the intimate relationship between their unmarried children may grow into immoral acts. During the COVID-19 outbreak, 15 to 19-year-old females remained at home and were frequently visited by their male friends, causing parents to be more anxious. Given that one of them already has a job, a considerable proportion of parents strongly encourage their underage children to marry as soon as possible (Supriyadi & Suriyati, 2022)

Parents think that religious law does not restrict the age of marriage (Tanzilha et al., 2020). The majority of Banten citizens believe that marriage may enhance the life span of both partners. People strongly believe this idea in Banten that the majority share a similar religion. As a way of life, every Muslim adheres to the teachings of QS An-Nuur verse 32, which emphasizes that God will assist those who choose to marry. Despite your poverty, God will provide you with prosperity.

The public is unaware that underage marriage contributes to a 2% increase in the poverty rate in Banten from a total of 857,640 persons in 2021. To prevent underage marriage, the Office of Women's Empowerment and Child Protection and Family Planning (DP3AKB) has conducted outreach in every City/Region in Banten province. Studies show that women who undergo early marriage are more likely to experience violence from their partners (Ma'rifah & Muhaimin, 2019; Ni'ami, 2022). Running a household at a young age often makes couples unable to think maturely. Children's emotions are not yet stable, so they are easily carried away by anger and selfishness. In the end, problems are often not solved by communication and discussion but by violence, both physically and verbally. The risk of violence is higher, especially if the age gap between husband and wife is relatively significant. Some of those who

undergo early marriage tend to drop out of school because, inevitably, they have to fulfill their responsibilities after marriage. Likewise, teenage boys are psychologically not ready to provide for themselves and act as husbands and fathers. Banten people potentially develop if underage marriage can be prevented (Jayasantika, 2021).

The Attitude of Judge Towards Implementing Dominus Litis Principle in Marriage Dispensation

As a signatory to the Convention on the Rights of the Child, Indonesia requires all state institutions, including the court, to act in the child's best interests when dealing with children. Under Law No. 16 of 2019, marriage is only permissible for persons aged 19 years, both male and female. However, the court may give a marriage dispensation in exceptional instances. The procedure of adjudicating the application for a marriage dispensation has not been outlined explicitly in the laws and regulations. Therefore, the judges would only analyze the legal facts as they generally pertain to civil matters. The method for verifying urgent circumstances in child marriage is also not regulated. Thus, courts have diverse ways of hearing the cases. On this basis, the Chief Justice of the Supreme Court issued PERMA No. 5 of 2019 on Guidelines for Adjudicating Marriage Dispensation Applications (Indonesia, 2020).

Supreme Court Regulation No. 5 of 2019 advances the *dominus litis* concept to explicitly adjudicate proposals for marriage dispensation. *First*, judges should apply the principles of the best interests of children, the right to life and development, respect for children's views, respect for human rights and dignity, non-discrimination, gender equality, equality before the law, fairness, benefit, and legal certainty. *Second*, the concept guarantees the establishment of a legal system that defends children's rights. The court needs the petitioner to attend to the children for whom a marriage dispensation is sought. The court might rule the application "failed" and "unacceptable" if it does not comply with the requirements. Judges are required to carefully examine the reasons for the marriage dispensation application to protect children's rights. Aspects to be considered by judges include (1) examining the legal status of the applicants. (2) exploring the background and reasons for early marriage; (3) finding deep information on the children's comprehension and consent to the marriage; and (4) paying attention to the psychological,

sociological, cultural, educational, health, and economic conditions of the children.

Third, the courts increase parental responsibility in the context of avoiding child marriage. Every court is required to give advice and ensure that parents, guardians, and children understand the dangers of child marriage. The judge's counsel is included in the trial conclusion, and if it does not offer suggestions, the ruling is null and invalid. *Fourth*, judges identify whether an application for a marriage dispensation was motivated by coercion or not. During the examination at trial, the judge identified (1) the consent of marriage plan from the child applying the dispensation; (2) the physical and psychological readiness of children to marry and establish a family; and (3) possible psychological, physical, sexual, or economic coercion on children and/or families to marry. Consequently, when examining early marriage dispensation, the judge may hear the child's statement without the presence of the parents, hear the child's statement through a remote audio-visual communication examination at the local court or elsewhere, recommend that a companion for the child, and, if necessary, bring an interpreter or someone who typically communicates with children. *Fifth*, judges consider children's protection and their best interests in laws and regulations, customs conventions in the form of legal principles, local knowledge, and a sense of justice, and international conventions and/or agreements on child protection.

Hierarchically, the Supreme Court Regulation is a statutory regulation under the law. Therefore, Supreme Court Regulation No. 5 of 2019 applies legally and must be obeyed, particularly by the court. The Supreme Court provided this handbook for adjudicating petitions for marriage dispensation to support District and Religious Courts' civil procedural legislation. There are no obstacles to its application to the District Court since the facility houses several juvenile judges. In the meantime, its applicability to the Religious Courts remains problematic due to the absence of juvenile judges.

According to the Research and Development Agency of the Supreme Court, there are 17 juvenile judges in the District Courts of Banten, distributed across the cities of Tangerang (2 judges), Serang (6 judges), Pandeglang (3 judges), and Rangkasbitung (8 judges). Those judges have completed the course of the juvenile criminal justice system

(SPPA) and are often chosen as judges for marriage dispensation in the District Courts. Because Banten Religious Courts does not handle criminal cases, it does not provide SPPA judges. Therefore, civil judges often presided over the trial for the marriage dispensation application (Indonesia, 2020).

Although there is no juvenile judge, the Religious Courts could not refuse the case if it is still in the jurisdiction area of the parents or child whose marriage dispensation is being applied for. In line with Article 10 of the Law on Judicial Authority, Religious Courts are prohibited from refusing to examine, try, and decide on the cases submitted. Based on the adage *Ius Curia Notiv/Curia Notif Jus* (judges are assumed to know all laws). Religious Court judges are considered to know and understand all laws. Religious Court judges have the authority to determine which objective law must be applied (*toepassing*) according to the subject matter of the case concerning the law of the litigating parties in the *konkreto*.

Before trial, Religious Courts always apply the formal and material conditions for submitting a marriage dispensation application (Djalil., 2010; Simangunsong, 2014). In civil procedural law, formal requirements constitute the majority of formal evidence, and an application cannot be accepted if the conditions are not completed. For instance, the application must be proposed by both parents. In the meantime, the material requirements are an important part of the trial's material evidence. They can result in the rejection of the application if they are not met, such as a statement of the child's ability to fulfill marriage obligations and that the child will complete the nine-year study obligation.

Nevertheless, the Religious Court has not complied with the Supreme Court's document requirements (letters of recommendation from a psychologist, doctor/midwife, professional social worker, social welfare worker, integrated service centres for women and children protection (P2TP2A) or the Indonesian/Regional Child Protection Commission (KPAI/KPAD)). In fact, the procedural method before the beginning of judicial examination is crucial to the *discovery-disposition* in the litigation process to provide justice based on valid facts and evidence.

According to the Religious Court judge who heard the case, the applicant's evidence for a marriage dispensation is pursuing formal

truth (*formeel waarheid*). It is forbidden for the court to give more than what is asked in the petition (article 178 HIR/189 paragraph 3 RBG) (Muhajidin, 2012). In general, the Religious Courts judge in the trial of the marriage dispensation application follows three steps: 1) deciding if the event is filed as the basis for the petition, 2) qualifying the event, and 3) establishing the law for which dispensation is being proposed (Syarif, 2020).

The Religious courts in Banten province generally do not always accept marriage dispensation proposals. In 2020, 45 marriage dispensation proposals (9.8%) were denied, and 468 applications were granted (90.2%). Marriage dispensation can only be granted if the legal facts are proven in court. Generally, the Religious Courts within the Banten jurisdiction have granted a marriage dispensation application (*tasbih al-abkam/legal justification*) for various reasons. First, the male for whom a marriage dispensation is proposed has a sufficient income, as evidenced by an income certificate or payslip. Women are expected to perform domestic responsibilities. Furthermore, the families of both parties have mutually agreed to the marriage, as evidenced by direct statements from parents and witnesses.

The judgment taken by the Religious Court judges on marriage dispensation is always based on a dialectic between two potential issues. On the one hand, if the marriage is not performed promptly, there will be potential harm due to a relationship between a male and female that violates society's norms and regulations. On the other hand, there are no legal facts that can ensure life sustainability (*hifz al-nafs*), the continuation of education (*hifz al-aql*), as well as health and safety of future generations (*hifz al-nasl*) (al-Bughā, 2007: 32–35). When two issues occur, one chooses the lesser of the two in order to avoid the greater danger (*Idhā ta'arada maḥsadatān ru'iyā akhaffuhumā bi irtikāb akhaffihimā*) (al-Nadwī, 2009:240).

The Religious Court judges in Banten jurisdiction frequently approve marriage dispensation applications based on urgent evidence. They believe that the damage caused by rejecting a marriage dispensation is likely greater than the damage caused by an early marriage, which is likely to harm the offspring (*al-nasl*) and honor (*al-'ird*) of the two prospective spouses. In marriage dispensation cases, the judges only base their decisions on the established legal facts found during the hearing.

This legal fact was derived from information provided by the parents, the potential spouses, and witnesses who testified in court.

Conclusion

The proposal for underage marriage application is a complicated issue in Banten. The *dominus litis* concept has been explicitly implemented by the Religious Courts as institutions empowered by law to evaluate the urgency of marriage. However, the Religious Courts have not consistently enforced the implementation of Supreme Court Regulation No. 5 of 2019 in marriage dispensation requests. Although there was an increase in marriage dispensation applications submitted in 2020 to all Banten Religious Courts, not all were approved. Forty-five appeals for marriage dispensation were denied (9.8%), while 468 applications were accepted (90.2%). Based on the court-established legal circumstances, the Religious Court judges approved the marriage dispensation if the early marriage was urgent. Considering the facts and evidence provided by the petitioners, the Religious Court judges decide based on the lesser disadvantages between rejecting dispensation or permitting early marriage.

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