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**Muhammad Ishom**

Greetings from the Editorial Team of **AHKAM : Jurnal Ilmu Syariah** Research Publication! Thank you very much for prese the evaluation of **AHKAM : Jurnal Ilmu Syariah's** Review Board.

Here by we confirm the provisional acceptance of your paper titled **"The Loose Interpretation of Dominus Litis Pr Dispensation for Underage Marriage in Banten"** to be published in our Journal - **AHKAM: Jurnal Ilmu Syariah** – (SCOP **No. 2, 2023**. Now your manuscript has been accepted for publication and it will be proceeding to copy-editing and produ

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***Dominus Litis Principle and Provement Legal Urgency of Marriage Dispensation: An Analysis of Child Marriage Practice in Banten***

Muhammad Ishom

**Abstraksi**

*Hakim Pengadilan Agama memiliki peran penting untuk menekan angka kasus perkawinan dini. Dengan menerapkan prinsip "Dominus litis principle" dalam pembuktian alasan medesak, hakim dapat menerima atau menolak dispensasi nikah yang dimohonkan oleh orang tua/wali pasangan calon suami-istri di bawah umur. Faktanya kasus perkawinan dini di Banten mengalami peningkatan sebab permohonan dispensasi kawin kepada Pengadilan Agama banyak dikabulkan. Studi ini menganalisis penerapan "Dominus litis principle" dan kendalanya dalam pembuktian alasan mendesak dispensasi nikah sehingga mengakibatkan peningkatan angka kasus perkawinan dini di Banten. Data diperoleh dari hasil observasi dan wawancara dengan menerapkan metode penelitian hukum yuridis-empiris. Dari hasil analisa diketahui 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. Dari hasil pembuktian formil itu hakim biasanya melakukan pertimbangan antara mengabulkan atau menolak permohonan dengan cara mengambil resiko yang lebih ringan di antara dua resiko (akhaff al-dharurain). Disebabkan umumnya permohonan dispensasi dilatarbelakangi alasan anak sudah melakukan hubungan layaknya suami-istri maka hakim memutuskan untuk mengabulkan permohonan mengikuti kemaslahatan masyarakat setempat.*

**Kata Kunci: Perkawinan Dini, Dispensasi Nikah, Hakim Peradilan Agama**

**Pendahuluan**

Ketentuan permohonan dispensasi nikah untuk calon pasangan di bawah umur telah dipraktikkan di banyak negara di dunia. Ada dispensasi yang diajukan kepada lembaga eksekutif seperti Republik Congo, Republik Dominica, Prancis, dan Afrika Selatan, ada juga permohonan yang diajukan kepada lembaga peradilan, seperti Indonesia. Kewenangan lembaga peradilan menerima permohonan dispensasi nikah didasari pertimbangan independensi kekuasaan kehakiman (*freedom of judge/independent judiciary*).

Pengadilan Agama (PA) merupakan salah satu lembaga yudikatif sebagai tujuan permohonan dispensasi nikah bagi komunitas Muslim Indonesia. PA memiliki kewenangan absolute untuk menerima, memeriksa, mengadili dan menyelesaikan perkara perkawinan dan perdata Islam lainnya. Perkara perdata Islam merupakan

kehendak para pihak sehingga hakim tak perlu mencampuri urusan mereka. Begitu pula proses persidangan, pengajuan bukti-bukti, dan penentuan obyek hukum adalah menjadi urusan para pihak. Hakim perdata hanya mengawasi agar peraturan hukum dilaksanakan para pihak. Dalam memutuskan perkara hakim tidak diharuskan mendengarkan dan meminta keterangan pihak luar selain para pihak yang berperkara dan saksi-saksi yang diajukan mereka. Oleh sebab itu timbul asumsi hakim yang menangani kasus perdata Islam bersifat pasif dan berlaku pameo *judicis est judicare secundum allegat iudicare* (hakim memutus berdasarkan gugatan dan bukti-bukti).

Menurut M. Yahya Harahap hakim pasif di Indonesia lahir akibat dari pengaruh hukum acara yang diatur di dalam *Wetboek op de Burgerlijke Rechtvordering*, yang biasa disingkat dengan sebutan Rv. Hakim bersifat pasif karena Rv menetapkan semua tahap pemeriksaan harus dilakukan secara tertulis (*schriftelijke procedur*) dan para pihak di dalam beracara harus didampingi oleh penasehat hukum (*procedure stelling*). Paradigma ini sudah tidak relevan lagi dengan tuntutan jaman dan keinginan masyarakat pencari keadilan yang menginginkan lahirnya sistem peradilan yang sederhana, cepat, dan biaya ringan. Di banyak negara, seperti India yang tidak jauh dari Indonesia, telah diterapkan "legal maxim" berupa "*Dominus litis*" yang memberikan kewenangan kepada hakim dan penuntut umum secara aktif mencari kebenaran dalam proses pembuktian gugatan atau permohonan, dan kebenaran hukum materiil tentang perkara yang disidangkan.

Sebagai bagian dari masyarakat global, bangsa Indonesia telah mengadopsi sistem legal maxim berupa *dominus litis*. secara etimologi, *dominus* berarti pemilik dan *litis* yang berarti perkara. Dalam konteks persidangan, hakim memiliki peran penting sehingga ia harus aktif sesuai pameo yang berlaku *judicis est judicare secundum allegat iudicare* (hakim memutus berdasarkan gugatan dan bukti-bukti).

Legitimasi yuridis keaktifan hakim di Indonesia diatur pada pasal 4 ayat (2) dan pasal 5 ayat (1) Undang-undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman. Sesuai ketentuan ini semua hakim diugasi untuk menerima, memeriksa, mengadili, serta menyelesaikan setiap perkara yang diajukan kepadanya dan berkewajiban membantu pencari keadilan serta mengatasi segala hambatan dan rintangan untuk dapat tercapai peradilan yang sederhana, cepat, dan biaya ringan. Selain itu semua hakim wajib menggali, mengikuti, dan memahami nilai-nilai hukum dan rasa keadilan yang hidup dalam masyarakat.

Adapun hakim PA diatur pada pasal 56, pasal 57 ayat (3) dan pasal 62 ayat (1) Undang-undang No.7 Tahun 1989 tentang Peradilan Agama. Hakim PA tidak boleh menolak untuk memeriksa dan memutus perkara yang diajukan dengan dalih bahwa hukum tidak atau kurang jelas, melainkan ia wajib memeriksa dan memutuskannya, serta tidak menutup kemungkinan berusaha menyelesaikan perkara dengan damai. Segala penetapan dan putusan PA, selain harus memuat alasan-alasan dan dasarnya juga dituntut menggali sumber hukum tak tertulis yang dijadikan dasar untuk mengadili.

Ketentuan ini diimplementasikan dalam bentuk usaha hakim PA menyelesaikan perkara secara konsensus dan mediasi. Hanya saja dikarenakan tidak ada ketentuan standar penyelesaian sengketa secara damai maka Mahkamah Agung RI menerbitkan Peraturan Mahkamah Agung (PERMA) No. 01 Tahun 2008 tentang Prosedur Mediasi di Pengadilan. Berdasarkan regulasi ini hakim PA harus mendamikan para pihak yang berperkara tidak terbatas pada siding pertama saja tetapi juga pada persidangan selanjutnya.

Skema penyelesaian perkara perdata di Indonesia pada umumnya ditetapkan dengan menggunakan peraturan perundang-undangan yang dikeluarkan Mahkamah Agung RI. Contoh selain PERMA tentang prosedur mediasi ialah PERMA No 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin. Dispensasi kawin merupakan pemberian ijin oleh pengadilan kepada pria dan wanita yang berusia di bawah umur yang ditentukan untuk melangsungkan perkawinan. Di dalam pasal 7 Undang-undang No. 1 Tahun 1974 sebagaimana diubah dengan Undang-undang no 16 Tahun 2019 tentang Perkawinan, bahwa perkawinan hanya diizinkan apabila pria dan wanita berusia minimal 19 tahun. Jika terjadi penyimpangan terhadap ketentuan batas usia perkawinan maka orang tua pria dan/atau orang tua wanita itu dapat meminta dispensasi kepada pengadilan dengan alasan sangat mendesak disertai bukti-bukti pendukung yang cukup.

Pembuktian alasan mendesak permohonan dispensasi nikah pria dan wanita di bawah umur harus dilakukan di pengadilan. Hanya saja Undang-undang Perkawinan tidak mengatur persidangan permohonan dispensasi nikah, sehingga kemudian dibuat PERMA tentang Pedoman Mengadili Permohonan Dispensasi Perkawinan untuk para hakim. Ketentuan pokok Pedoman mengadili permohonan dispensasi perkawinan ialah bahwa semua tindakan mengenai anak harus dilakukan demi kepentingan terbaik bagi anak.

Pada pasal 1 disebutkan bahwa hakim mengadili dispensasi nikah berdasarkan asas kepentingan terbaik bagi anak, hak hidup dan tumbuh kembang anak, penghargaan atas pendapat anak, penghargaan atas harkat dan martabat manusia, non-diskriminasi, kesetaraan gender, persamaan di depan hukum, keadilan, kemanfaatan, dan kepastian hukum. Pada pasal 12 juga terdeskripsikan peran aktif hakim dalam wujud memberikan nasehat kepada pemohon, anak, calon suami/istri, dan orang tua /wali calon suami dan istri. Nasehat hakim bertujuan supaya mereka memahami risiko perkawinan yang terkait dengan kemungkinan berhentinya pendidikan anak, belum siapnya reproduksi anak, dampak ekonomi, sosial dan psikologis bagi anak, serta potensi kekerasan dan perselisihan dalam rumah tangga.

Dari sudut pandang ini hakim yang menangani permohonan dispensasi seharusnya menerapkan asas *dominus litis* sebab diterima dan tidaknya dispensasi nikah menjadi kewenangannya. Meskipun ada peluang dan tantangan dalam penerapan asas *dominus litis* di semua lembaga peradilan di Indonesia. Dalam sistem peradilan pidana, riset dari Muhammad Yusni (2020), "*The Problematics of the Implementation of the Dominus Litis*", menyebut penerapan asas *dominus litis* oleh jaksa penuntut umum menimbulkan berperkara pidana di pengadilan rumit dan berbelit-belit. Riset lain penerapan *dominus litis* oleh jaksa dalam sistem peradilan pidana anak (SPPA) dilakukan Tiar Adi Riyanto (2021), "Fungsionalisasi Prinsip Dominus Litis Dalam Penegakan Hukum Pidana di Indonesia". Dalam risetnya penerapan *dominus litis* dalam SPPA justru menjadi celah bagi penuntut umum untuk mengupayakan *restorative justice* melalui mediasi untuk menyelesaikan kasus pidana anak. Sedangkan penerapan "*dominus litis*" dalam sistem peradilan administrasi (PTUN) telah melahirkan hakim-hakim yang berpikir progresif, seperti dilaporkan Soehartono, Kukuh Tejomurti, Arsyad Aldyan dan Rachma Indriyani (2021) "*The Establishing Paradigm of Dominus Litis Principle in Indonesian Administrative Justice*" (2021: 42-55).

Penerapan asas *dominus litis* dalam perkara permohonan dispensasi nikah sangat relevan untuk mengupayakan pemenuhan hak terbaik anak. Pertimbangannya hakim adalah pemilik perkara karena hakekatnya dispensasi nikah adalah keputusan

administrasi negara yang dimohonkan oleh pemohon untuk menembus larangan yang khusus (*relaxation legis*), yakni perkawinan dini. Dikabulkan dan tidaknya ijin permohonan dispensasi nikah untuk pemenuhan hak-hak anak sangat ditentukan peran aktif hakim. Jika dispensasi nikah diperketat hakim maka kasus perkawinan dini dapat ditekan. Oleh sebab itu, rumusan masalah dalam studi ini adalah bagaimana penerapan "Dominus litis principle" oleh hakim dalam pembuktian alasan mendesak permohonan dispensasi nikah? untuk menekan peningkatan angka kasus perkawinan dini, khususnya di Banten.

Banten dipilih sebagai objek studi ini karena angka perkawinan dini mengalami peningkatan. Pada tahun 2019 kasus perkawinan dini tercatat 6 % dan bertambah pada tahun 2020 menjadi 6,23 %. Penambahan kasus ini berkaitan erat dengan dispensasi nikah yang dikabulkan permohonannya oleh hakim-hakim PA di wilayah Banten. Sebanyak 468 (89%) permohonan dispensasi perkawinan yang dikabulkan PA di masing-masing Kabupaten/Kota. Pengabulan permohonan terbanyak di PA Tigaraksa Tangerang 37 %; PA Kota Tangerang 10 %; PA Serang sebanyak 18 %; PA Pandeglang 17 %; PA Lebak 15 %; serta PA Cilegon sebanyak 3 %.

## **Metode**

Studi ini menggunakan metode hukum yuridis-empiris. Ialah dengan cara menganalisis pemberlakuan atau implementasi ketentuan hukum normatif secara in action pada setiap peristiwa hukum tertentu yang terjadi di dalam masyarakat. Sumber datanya diperoleh dari dokumen hukum tertulis berupa peraturan perundang-undangan dan putusan hakim serta data hukum *in action* yang bersumber dari praktisi hukum dan masyarakat melalui wawancara dan focus group discussion (FGD). Data yang terkumpul diolah dan dianalisis secara ilmiah dalam bentuk paparan deskriptif-evaluatif.

## **Pembahasan**

### **Hakim Sidang Anak, Pemenuhan Hak Anak, dan Dispensasi Nikah**

#### **1. Hakim Sidang Anak**

Sesuai fokus studi ini, hakim persidangan anak perlu kajian tersendiri walaupun dalam perkara perdata tidak ada sebutan hakim anak. Hakim adalah pejabat Negara yang melakukan kekuasaan kehakiman yang diatur dalam undang-undang. Di Indonesia sebutan hakim anak hanya diberlakukan dalam perkara pidana anak sesuai Undang-undang no. 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak. Hakim anak sesuai pasal 43 Undang-undang Sistem Peradilan Pidana Anak adalah hakim dalam lingkungan peradilan yang mempunyai minat, perhatian, dedikasi, dan memahami masalah anak, serta telah mengikuti pelatihan teknis tentang peradilan anak.

Di luar konteks itu hakim di semua lembaga peradilan di Indonesia pada prinsipnya terikat ketentuan Undang-undang Kekuasaan Kehakiman. Di dalam Undang-undang no 48 Tahun 2009 tentang Kekuasaan Kehakiman, istilah hakim melekat pada badan-badan peradilan di bawah Mahkamah Agung, seperti hakim peradilan umum, hakim peradilan agama, dan sebagainya. Hakim di tingkat pertama dan banding memiliki kewenangan *judex facti* (memeriksa fakta) sedangkan di tingkat kasasi hakim



berwenang sebagai *judex juris* (memeriksa penerapan hukum). Sementara pengadilan anak --berdasarkan pasal 2 dan 3 Undang-undang No 3 Tahun 1997 tentang Pengadilan Anak- merupakan pelaksana kekuasaan kehakiman yang berada di lingkungan peradilan umum yang bertugas dan berwenang memeriksa, memutus, dan menyelesaikan perkara pidana anak.

Dikarenakan tidak ada badan peradilan anak maka tidak ditemukan hakim peradilan anak di Indonesia, terkecuali hakim anak yang dimaksudkan dalam Undang-undang Pengadilan Anak dan Undang-undang Sistem Peradilan Pidana Anak. Disebutkan di dalam pasal 9, bahwa hakim anak ditetapkan berdasarkan Surat Keputusan Mahkamah Agung atas usul Ketua Pengadilan Negeri yang bersangkutan melalui Ketua Pengadilan Tinggi. Syarat untuk ditetapkan menjadi hakim anak harus telah berpengalaman menjadi hakim di lingkungan peradilan umum, serta mempunyai minat, perhatian, dedikasi, dan memahami masalah anak.

Hakim anak pada dasarnya merupakan hakim tunggal atau hakim majelis yang memeriksa dan memutus perkara anak, baik di tingkat pertama, tingkat banding maupun kasasi. Istilah hakim anak yang disebut di dalam Undang-undang Pengadilan Anak ini tidak berubah dengan diterbitkannya Undang-undang Sistem Peradilan Anak. Perubahan hanya terjadi dalam system sidang perkara anak, yang disebut diversifikasi.

Secara bahasa diversifikasi berarti “pengalihan” dan secara istilah ialah pengalihan penyelesaian perkara anak dari proses peradilan formal ke proses di luar peradilan dengan syarat atau tanpa syarat. Dalam pasal 1 angka (7) Undang-undang Sistem Peradilan Pidana Anak, diversifikasi didefinisikan sebagai pengalihan penyelesaian perkara anak dari proses pidana anak ke proses di luar pidana anak. Seorang anak (pelaku) yang sudah berumur 12 (dua belas) tahun dan belum mencapai umur 18 (delapan belas) tahun, termasuk mereka yang sudah kawin di bawah umur, pada saat diproses baik di tingkat penyidikan, penuntutan dan pada saat anak diperiksa di pengadilan umum, maka di setiap tingkatan pemeriksaan tersebut wajib dilakukan diversifikasi. Secara umum proses diversifikasi ini dilakukan dengan tujuan mencapai perdamaian dalam kasus pidana anak, menghindari anak dari perampasan kemerdekaan, mendorong masyarakat untuk berpartisipasi dan menanamkan rasa tanggungjawab kepada anak.

Diversifikasi dalam perkara pidana anak sejalan dengan asas aktif hakim dalam persidangan. Proses di luar persidangan ini seharusnya juga dapat diterapkan dalam perkara anak lainnya di luar kasus pidana untuk tujuan memberikan perlindungan kepada anak yang berhadapan dengan hukum. Perlindungan hak anak telah secara tegas dinyatakan dalam pasal 28B ayat (2) Undang-undang Dasar Tahun 1945 hasil amandemen, bahwa Negara menjamin setiap anak berhak atas kelangsungan hidup, tumbuh dan berkembang serta berhak atas perlindungan dari kekerasan dan diskriminasi.

Jadi, hakim sidang anak secara perundang-undangan dituntut bersikap aktif di dalam menyidangkan perkara anak untuk pemenuhan hak terbaik bagi anak di Indonesia. Hakim sidang anak bersikap aktif tidak hanya dalam perkara pidana saja tetapi juga perkara perdata, seperti perkara dispensasi nikah atau dispensasi kawin. Tujuannya supaya hakim tidak mudah mengabulkan permohonan dispensasi nikah sehingga mampu menekan angka perkawinan anak di Indonesia.

Data UNICEF (2018) menyebut Indonesia menduduki peringkat ke-2 se-ASEAN dan urutan ke-7 negara-negara dunia dalam kasus perkawinan anak. Sementara dalam laporan Koalisi Perempuan Indonesia (2019) dijelaskan bahwa 1 dari 8 remaja putri Indonesia sudah melakukan perkawinan sebelum usia 18 tahun. Temuan ini diperkuat dengan data survey Demografi dan Kesehatan Indonesia (SDKI) BPS tahun 2019 yang menunjukkan presentase perempuan berusia 20-24 tahun yang sudah pernah menikah di bawah usia 18 tahun sebanyak 25,71 %.

Berdasarkan data Bappenas (2021), perkawinan anak membawa dampak ekonomi yang menyebabkan kerugian ekonomi Negara sekitar 1.7 % dari Pendapatan Kotor Negara (PDB). Selain dampak ekonomi, perkawinan anak dapat membawa implikasi besar terhadap pembangunan, khususnya kualitas dan daya saing sumber daya manusia Indonesia di masa mendatang.

## 2. Pemenuhan Hak Anak

Secara umum kategori anak dalam hukum yang berlaku di Indonesia lebih banyak mengadopsi hukum Barat. Anak diartikan sebagai orang yang belum dewasa (*minderjarig/person under age*); orang yang berada di bawah umur atau keadaan di bawah umur (*minderjarig heid/inferiority*); serta orang yang berada di bawah pengawasan wali (*minderjarige under voordij*). Seorang yang belum dewasa dan masih berstatus anak wajib mendapatkan perlindungan dan pemenuhan hak-haknya.

Di dalam Undang-undang No. 11 Tahun 2012 Sistem Peradilan Anak dan Undang-undang No. 23 Tahun 2002 tentang Perlindungan Anak disebutkan bahwa anak adalah orang yang belum berusia 18 tahun, termasuk yang masih berada di dalam kandungan ibunya. Batasan usia anak ini mengacu kepada *Convention on the Rights of the Child* (Konvensi Hak Anak) yang telah diratifikasi melalui Keputusan Presiden RI No. 36 Tahun 1999. Disebut di dalamnya bahwa anak merupakan orang yang berusia di bawah 18 tahun.

Ketentuan batas usia anak ini menjadi salah satu pertimbangan revisi pasal 7 Undang-undang Perkawinan sehingga pria dan wanita yang diijinkan melangsungkan perkawinan adalah mereka yang sudah berusia 19 tahun. Dengan diterbitkannya Undang-undang No 16 Tahun 2019 tentang revisi Undang-undang No. 1 Tahun 1974 tentang Perkawinan ini menjadi sudah tidak ada lagi perbedaan batas usia anak di Indonesia.

Sebelum masa sekarang, pengaturan batas usia kawin sebagai penanda kedewasaan yang berbeda antara lelaki dan perempuan telah melahirkan diskriminasi sosial. Diskriminasi tidak saja dalam konteks pelaksanaan hak untuk membentuk keluarga sebagaimana dijamin di dalam pasal 28 B ayat (1) UUD 1945, melainkan juga menimbulkan diskriminasi terhadap perlindungan dan pemenuhan hak anak yang dijamin di dalam pasal 28 B ayat (2) UUD 1945. Padahal prinsip yang berlaku di dalam Negara hukum adalah adanya persamaan semua warga Negara di hadapan hukum (*uquality before the law*). Hal ini dipertegas di dalam pasal 28 D ayat (1) UUD 1945, bahwa setiap orang berhak atas pengakuan, jaminan, perlindungan, dan kepastian hukum yang adil serta perlakuan yang sama di hadapan hukum.

Di Indonesia terdapat Undang-undang No. 23 Tahun 2002 tentang Perlindungan yang mengatur pemenuhan hak anak, yang meliputi;

- (1) Setiap anak berhak untuk dapat hidup, tumbuh dan berkembang dan berpartisipasi secara wajar sesuai dengan harkat dan martabat kemanusiaan serta mendapat perlindungan dari kekerasan dan diskriminasi (Pasal 4);
- (2) Setiap anak berhak atas suatu nama sebagai identitas diri dan status kewarganegaraannya (pasal 5);
- (3) Setiap anak berhak untuk beribadah menurut agamanya berpikir dan berekspresi sesuai dengan tingkat kecerdasan dan usianya dalam bimbingan orang tua (pasal 6);
- (4) Setiap anak berhak untuk mengetahui orang tuanya, dibesarkan dan diasuh oleh orang tuanya sendiri (Pasal 7 ayat 1);
- (5) Dikarenakan suatu sebab orang tua tidak dapat menjamin tumbuh kembang anak atau anak dalam keadaan terlantar maka seorang anak berhak diasuh atau diangkat sebagai anak asuh atau anak angkat oleh orang lain (pasal 7 ayat 2);
- (6) Setiap anak berhak memperoleh pelayanan kesehatan dan jaminan sosial sesuai kebutuhan fisik, mental sprritual, dan sosial (pasal 8);
- (7) Setiap anak berhak memperoleh pendidikan dan pengajaran dalam rangka pengembangan pribadinya dan sesuai tingkat kecerdasannya sesuai dengan bakat dan minatnya (pasal 9);
- (8) Setiap anak selama dalam pengasuhan orang tua wali atau pihak manapun yang bertanggungjawab atas pengasuhan berhak mendapat perlindungan dari perlakuan diskriminasi, perlakuan eksploitasi baik ekonomi maupun seksual, penelantaran, kekejaman, kekerasan dan penganiayaan, ketidakadilan dan perlakuan salah lainnya (pasal 13 ayat 1).

Pengaturan tentang pemenuhan hak anak di Indonesia ini sudah sesuai dengan Konvensi Hak Anak yang sudah diratifikasi oleh lebih dari 150 anggota Perserikatan Bangsa-Bangsa (PBB), termasuk Indonesia sendiri. Prinsip-prinsip umum yang diatur di dalam Konvensi Hak Anak, ialah; (1) non-diskriminatif; (2) kepentingan terbaik untuk anak; (3) hak hidup, kelangsungan hidup dan perkembangan anak; dan (4) penghargaan terhadap pendapat anak.

Dalam hukum perkawinan di Indonesia adaptasi Konvensi Hak Anak diwujudkan dalam revisi Undang-undang Perkawinan, yaitu dengan menaikkan batas usia kawin bagi perempuan dan disamakan dengan batas usia kawin laki-laki menjadi 19 tahun. Penetapan batas usia kawin 19 tahun dilandasi pertimbangan bahwa laki-laki dan perempuan pada usia 19 tahun telah matang jiwa raganya untuk dapat melangsungkan pernikahan. Mereka diharapkan dapat mewujudkan tujuan perkawinan secara maksimal, menghindari terjadinya perceraian serta mendapatkan keturunan yang sehat dan berkualitas.

Walaupun begitu aturan revisi Undang-undang perkawinan itu tidak kaku dan tetap memberikan pengecualian dalam hal terjadi penyimpangan. Perkawinan di bawah umur masih dimungkinkan dengan cara terlebih dulu mendapatkan dispensasi nikah dari pengadilan. Pemberian kewenangan pengadilan untuk memberikan dispensasi nikah karena kekuasaan kehakiman dipandang tidak memihak dan dapat memberikan

jaminan keadilan pemenuhan hak-hak dasar manusia, seperti menikah dan berumah tangga.

### 3. Dispensasi Nikah

Dispensasi nikah atau kawin merupakan pemberian ijin kawin oleh pengadilan kepada calon suami/istri yang belum memenuhi syarat untuk melangsungkan perkawinan. Bagi mereka yang telah memenuhi syarat usia perkawinan maka dapat dilangsungkan perkawinan sebagaimana mestinya, akan tetapi bagi mereka yang belum memenuhi persyaratan itu terlebih dahulu harus mengajukan permohonan dispensasi nikah ke pengadilan sesuai peraturan perundang-undangan.

Hukum perkawinan di Indonesia menentukan parameter kedewasaan yaitu ketika seseorang dianggap layak untuk melangsungkan perkawinan dan dapat bertanggungjawab untuk dirinya dan orang lain. Parameter kedewasaan berupa cakap menikah ini telah melahirkan aturan batas minimal usia perkawinan. Di dalam sebagian isi Undang-undang Perkawinan No. 1 Tahun 1974 diatur ketentuan usia kawin sebagai berikut:

- a. Ijin orang tua bagi orang yang akan melangsungkan perkawinan apabila belum mencapai umur 21 tahun (pasal 6 ayat 2);
- b. Umur minimal untuk diijinkan melangsungkan perkawinan, yaitu pria 19 tahun dan wanita 16 tahun (pasal 7 ayat 1)
- c. Anak yang belum mencapai umur 18 tahun dan belum pernah kawin, berada di dalam kekuasaan orang tua (pasal 47 ayat 1)
- d. Anak yang belum mencapai umur 18 tahun atau belum pernah kawin, yang tidak berada di bawah kekuasaan orang tuanya, berada di bawah kekuasaan wali (pasal 50 ayat 1)

Jika sebelumnya umur minimal diijinkan menikah bagi pria 19 tahun dan wanita 16 tahun maka di dalam Undang-undang perkawinan yang sudah direvisi terdapat aturan bahwa perkawinan dibolehkan bagi calon suami dan calon istri yang telah mencapai usia 19 (Sembilan belas) tahun. Fokus utama Undang-undang no. 16 tahun 2019 tentang perubahan atas Undang-undang no. 1 Tahun 1974 tentang perkawinan adalah revisi materi pasal 7 ayat (1) tentang batas usia minimal perkawinan. Adapun pasal-pasal lainnya yaitu ijin orang tua bagi calon suami dan istri yang belum mencapai umur 21 tahun dan kedudukan anak di dalam kekuasaan orang tua maupun wali masih tetap berlaku.

Dengan pertimbangan ini, pihak yang mengajukan permohonan dispensasi nikah kepada pengadilan berdasarkan pasal 7 ayat (2) Undang-undang Perkawinan adalah orang tua calon suami atau orang tua calon istri. Ketentuan ini menganulir upaya hukum pengajuan permohonan dispensasi nikah kepada pengadilan secara *volunteir* maupun bersama-sama oleh calon mempelai yang belum cukup umur, baik laki-laki maupun perempuan. Penjelasan ini kemudian dijabarkan di dalam pasal 6 Peraturan Mahkamah Agung Republik Indonesia (PMA RI) Nomor 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Perkawinan, yaitu:

- (1) Pihak yang berhak mengajukan permohonan dispensasi adalah Orang tua

- (2) Dalam hal orang tua telah bercerai permohonan tetap diajukan kedua orang tua atau salah satu orang tua yang memiliki kuasa asuh terhadap anak berdasarkan putusan pengadilan.
- (3) Dalam hal salah satu orang tua telah meninggal dunia atau tidak diketahui keberadaannya permohonan dispensasi diajukan salah satu orang tua.
- (4) Dalam hal kedua orang tua telah meninggal dunia atau dicabut kekuasaannya atau tidak diketahui keberadaannya, permohonan dispensasi diajukan wali anak
- (5) Kuasa hukum dari orang tua/wali apabila berhalangan

Secara administrative sesuai pasal 5 setiap permohonan dispensasi nikah kepada pengadilan harus dilengkapi persyaratan yang meliputi: (a) surat permohonan; (b) fotokopi Kartu Tanda Penduduk (KTP) pemohon; (c) fotokopi Kartu Keluarga; (d) Fotokopi (KTP) atau Kartu Identitas Anak atau Akta Kelahiran Anak; (e) fotokopi Kartu Keluarga; (f) Fotokopi (KTP) atau Kartu Identitas Anak atau Akta Kelahiran calon suami/calon istri; (g) Fotokopi ijazah pendidikan terakhir anak dan/atau surat keterangan masih sekolah dari sekolah anak. Jika persyaratan tersebut di atas tidak dapat dipenuhi maka dapat digunakan dokumen lainnya yang menjelaskan tentang identitas dan status pendidikan anak dan identitas orang tua atau wali.

Dispensasi nikah dapat diajukan kepada pengadilan sebelum dilakukan pendaftaran pencatatan nikah di Kantor Urusan Agama (KUA) dan/atau Kantor Catatan Sipil atau setelah dinyatakan ditolak pada saat pendaftaran pencatatan nikah di KUA dan/atau Kantor Catatan Sipil. Permohonan dispensasi nikah antara sebelum dan sesudah dilakukan pendaftaran nikah di KUA dan/atau Kantor Catatan Sipil secara administratif berpengaruh terhadap penyebutan anak yang dimintakan permohonan dispensasi nikah. Apabila belum didaftarkan pencatatan perkawinan maka ia disebut anak, akan tetapi jika sudah didaftarkan dan ditolak pencatatan perkawinannya disebut calon suami/istri.

Permohonan dispensasi nikah diajukan kepada pengadilan yang berwenang dengan ketentuan, yaitu: (1) pengadilan sesuai dengan agama anak apabila terdapat perbedaan agama antara anak dan orang tua. Jika anak dan orang tua beragama Islam maka permohonan dispensasi diajukan kepada PA. Jika anak dan orang tua beragama non-Islam maka permohonan dispensasi diajukan kepada PN. Apabila di antara mereka terjadi perbedaan keyakinan maka permohonan dispensasi diajukan kepada PA dan/atau PN menyesuaikan agama dan kepercayaan anak. (2) Pengadilan yang sama sesuai domisili salah satu orang tua/wali calon suami atau isteri apabila calon suami dan isteri berusia di bawah batas usia perkawinan.

Pengadilan memberikan dispensasi nikah dengan suatu penetapan setelah menghadirkan pemohon, anak atau calon suami/istri yang dimintakan permohonan dispensasi dan menasehati mereka selama pemeriksaan di persidangan serta hakim berkeyakinan bahwa terdapat hal-hal yang memungkinkan memberikan dispensasi. Hanya saja faktanya, sesuai data yang disampaikan Deri Fahrizal Ulum, *Child Protection Officer UNICEF Indonesia*, menunjukkan 90 % permohonan dispensasi nikah dikabulkan oleh pengadilan di Indonesia. Hal ini diperkuat data yang dihimpun dari Badan Peradilan Agama Mahkamah Agung (Badilag) tahun 2020, bahwa permohonan dispensasi kawin yang masuk sebanyak 34.413 perkara dan sebanyak 33.664 diantaranya dikabulkan oleh pengadilan.

Di antara pertimbangan yang dikemukakan oleh pengadilan dalam mengabulkan permohonan dispensasi kawin adalah karena permohonan sudah memenuhi pertimbangan hukum agama, yuridis dan sosiologis. Di antara pertimbangan itu ialah:

- a. Anak yang dimohonkan dispensasi nikah, jika laki-laki telah memiliki pekerjaan dengan penghasilan yang cukup dan jika perempuan telah terbiasa melakukan tugas kerumahtanggaan;
- b. Keluarga kedua belah pihak telah sama-sama menyetujui berlangsungnya pernikahan;
- c. Kedua calon mempelai tidak ada halangan melangsungkan perkawinan menurut hukum agama;
- d. Berdasarkan fakta hukum di persidangan, hubungan kedua calon mempelai sudah sedemikian erat, dan sudah ada indikasi jika tidak segera dinikahkan akan melakukan hubungan seksual pra-nikah yang dapat merusak tatanan kehidupan sosial yang baik.

Jika pengadilan sudah mengabulkan permohonan maka penetapan dispensasi nikah ini dapat dijadikan dokumen hukum untuk melakukan pendaftaran pencatatan nikah di Kantor Urusan Agama (KUA) dan/atau Kantor Catatan Sipil. Pegawai pencatat perkawinan tidak boleh menolak pencatatan perkawinan mereka yang masih di bawah umur sebab sudah ada penetapan dispensasi nikah yang berlaku formil berupa penetapan sidang pengadilan.

Kondisi ini telah menjadi sorotan public, diantaranya oleh Koalisi Perempuan Indonesia (KPI), yang menilai persoalan dispensasi nikah semakin mengukuhkan terjadinya praktik perkawinan anak di bawah umur secara massif di Indonesia. Walaupun tren angka perkawinan anak mengalami penurunan secara nasional dari 11,21 % (2018) menjadi 10,82 % (2019), namun angka perkawinan anak di 18 provinsi di Indonesia justru mengalami peningkatan kasus. Di antaranya terjadi di Jawa Barat dan Banten.

## **B. Dispensasi Nikah dan Perkawinan Anak di Banten**

Perkawinan anak masih sering terjadi di tengah masyarakat dan termasuk salah satu persoalan yang pelik di Indonesia, kompleks serta multi dimensi. Padahal banyak kebijakan yang telah telah dikeluarkan pemerintah. Hal ini menunjukkan bahwa kebijakan saja tidak cukup untuk menekan laju perkawinan anak.

Secara nasional, perkawinan anak telah menjadi prioritas kebijakan pembangunan nasional di Indonesia yang tertuang di dalam Peraturan Presiden (Perpres) Nomor 18 Tahun 2020 tentang Rencana Pembangunan Jangka Menengah Nasional (RPJMN 2020-2024). Sustainable Development Goals (SDGs) yang ingin diwujudkan pemerintah juga memprioritaskan pencegahan perkawinan anak masuk ke dalam tujuan ke-5 usaha mencapai kesetaraan gender dan memberdayakan semua perempuan dan anak perempuan. Di samping itu di dalam strategi nasional pencegahan perkawinan anak (Stranas PPA), pemerintah menargetkan angka penurunan angka perkawinan anak dari 11,21 % (2018) menjadi 8,74 persen pada akhir tahun 2024.

Tren angka perkawinan anak mengalami penurunan secara nasional akan tetapi ada sekitar 22 dari 34 provinsi di Indonesia memiliki angka perkawinan anak yang lebih

tinggi dari rata-rata nasional. Satu diantaranya provinsi Banten yang mencatatkan penurunan angka perkawinan 92.022 kasus (2020) dari angka 95.251 kasus (2019), akan tetapi di sisi lain angka perkawinan di bawah umur justru meningkat. Pada tahun 2020 perkawinan di bawah umur di Banten mencapai 6,23 % dibandingkan tahun 2019 yang mencapai 6 %; sekalipun menurun jika dibandingkan pada tahun 2018 yang mencapai 6,78 %. Bahkan dalam data BPS per 4 Mei 2021, ditemukan proporsi perempuan umur 20-24 tahun yang berstatus kawin atau berstatus hidup bersama sebelum umur 15 tahun.

Peningkatan kasus perkawinan anak di Banten sangat terkait dengan permohonan dispensasi nikah. Pada tahun 2020, merujuk data yang terhimpun dalam pangkalan data Pengadilan Tinggi Agama Banten, disebutkan ada 468 permohonan dispensasi perkawinan yang dikabulkan pengadilan agama. Permohonan dispensasi nikah terbanyak dikabulkan di PA Tigaraksa 37 %; PA Tangerang Kota 10 %; PA Serang sebanyak 18 %; PA Pandeglang 17 %; PA Lebak 15 %; serta PA Cilegon sebanyak 3 %.

Permohonana dispensasi nikah kepada PA di seluruh provinsi Banten dilatarbelakangi faktor-faktor tertentu, yaitu: (1) anak hamil di luar nikah; (2) anak telah melakukan hubungan layaknya suami-istri; (3) anak ditangkap masyarakat karena ketahuan berdua-duaan dengan pasangannya yang bukan mahram; (4) anak putus sekolah dan sudah dapat membiayai hidupnya sendiri serta sudah memiliki pasangan yang siap dinikahi.

Faktor-faktor itu dijadikan alasan mendesak pengajuan dan pertimbangan hakim mengabulkan permohonan dispensasi nikah. Di antara empat faktor itu, alasan yang terakhir lebih banyak dijadikan alasan konkrit mengajukan permohonan dispensasi kepada PA. Jika hakim PA telah mengabulkan dan menerbitkan keputusan dispensasi nikah dan pemohon kemudian menjadikannya sebagai kelengkapan dokumen permohonan pencatatan perkawinan anak di tiap-tiap Kantor Urusan Agama (KUA Kecamatan, maka sudah tidak ada alasan lagi bagi Pegawai Pencatat Nikah untuk menolaknya.

Peningkatan angka perkawinan di bawah umur yang terjadi di provinsi Banten berpotensi melahirkan persoalan baru di tengah masyarakat, yaitu: (1) dapat menimbulkan depresi berat bagi pasangan muda; (2) terjadinya kekerasan di dalam rumah tangga; (3) perceraian yang terjadi karena pemikiran yang belum matang; (4) rawan putus sekolah; (5) kesulitan ekonomi yang dapat menyebabkan penelantaran anak; (6) muncul pekerja di bawah umur; dan (7) dapat menyebabkan penularan penyakit HIV.

Depresi berat dapat menimbulkan kekerasan dalam rumah tangga hingga berujung perceraian, di mana hal itu menjadi perhatian karena berdasarkan sumber Badan Kependudukan dan Keluarga Berencana Provinsi Banten tahun 2021 tercatat hanya 5900 orang yang memperoleh penyuluhan reproduksi. Demikian pula halnya rawan putus sekolah karena kesulitan ekonomi dan potensi munculnya pekerja di bawah umur, dampaknya sudah dapat diidentifikasi dari data yang dikeluarkan Badan Pusat Statistik (BPS) Provinsi Banten pada tahun 2021.

BPS Provinsi Banten melansir jumlah penduduk di bawah umur berdasarkan jenis kelamin sebagai berikut:

<b>Kelompok Usia</b>	<b>Laki-laki</b>	<b>Perempuan</b>	<b>Jumlah</b>
0-4	534643	509014	1043657

5-9	535170	510429	1045599
10-14	517080	485428	1002508
15-19	519916	489235	1009151

Khusus penduduk kelompok umur 15-19 tahun di Banten tercatat yang masih sekolah 630630 dan sisanya mengurus rumah tangga atau putus sekolah: Artinya hanya 68.76% dari kelompok umur ini yang masih sekolah.

Adapun mereka yang sudah tidak sekolah dari kelompok umur 15-19 tahun di Banten terdapat 177991 orang yang bekerja, 18978 orang yang pernah bekerja, dan 116684 yang tidak pernah bekerja. Jadi, terdapat angkatan kerja di bawah umur yang cukup besar, sebanyak 56.75%, dan keberadaan mereka sesuai data BPS tahun 2021 turut menyumbang sebanyak 29.13 % dari total angka kerja di Banten.

Kontribusi pekerja di bawah umur tidak otomatis mendongkrak kesejahteraan masyarakat. Skill mereka rendah karena mereka merupakan kelompok muda yang putus sekolah. Orang tua terkadang mendorong mereka untuk segera menikah karena dianggap mereka sudah memiliki penghasilan dan mempunyai hubungan dengan teman dekat. Orang tua mengkhawatirkan pergaulan intim anak-anaknya mengarah ke hubungan layaknya suami-istri, padahal mereka belum menikah. Apalagi di saat pandemic Covid-19, kelompok usia umur 15-19 tahun golongan perempuan lebih banyak tinggal di rumah dan sering didatangi pasangannya, di mana hal itu lebih dikhawatirkan oleh orang tua. Akibatnya tidak sedikit anak di bawah umur yang disarankan untuk menikah di usia muda oleh orang tuanya, dengan pertimbangan salah satu mereka sudah memiliki pekerjaan.

Para orang tua beranggapan bahwa hukum agama tidak membatasi usia perkawinan sehingga tidak memperlumahkan perkawinan di bawah umur. Bahkan umumnya masyarakat Banten beranggapan bahwa pernikahan dapat meningkatkan taraf hidup lelaki dan perempuan yang melangsungkan perkawinan. Anggapan ini tumbuh sesuai dengan kepercayaan dan agama yang dianut oleh mayoritas masyarakat Banten. Sebagai pandangan hidup tiap-tiap muslim meyakini apa yang diajarkan di dalam QS. An-Nuur ayat 32 (*dan kawinkanlah orang-orang yang sendirian di antara kamu, dan orang-orang yang layak berkawin dari hamba-hamba sahayamu yang laki-laki dan hamba sahayamu yang perempuan. Jika kalian miskin Allah akan memampukan kalian dengan karunia-Nya*).

Tanpa disadari masyarakat bahwa faktanya kasus perkawinan anak juga memberi dampak peningkatan angka kemiskinan di Banten sebanyak 2 % dari total 857.640 orang pada tahun 2021. Untuk penanggulangan dan pencegahan perkawinan di bawah umur Dinas Pemberdayaan Perempuan dan Perlindungan Anak dan Keluarga Berencana ((DP3AKB) tiap-tiap Kota/Kabupaten se provinsi Banten sudah melakukan penyuluhan kepada masyarakat. Hanya saja kondisi Covid-19 menyebabkan mobilitas para petugas lapangan dibatasi dengan kebijakan Pemberlakuan Pembatasan Kegiatan Masyarakat (PPKM).

### **C. Implementasi *Dominus Litis Principle* pada Permohonan Dispensasi Nikah**

Indonesia sebagai negara pihak dalam *Convention on the Rights of the Child* mengatur semua tindakan mengenai anak yang dilakukan oleh lembaga-lembaga Negara, termasuk peradilan, dilaksanakan demi kepentingan terbaik bagi anak. Dalam Undang-undang No. 16 Tahun 2019, perkawinan hanya diizinkan untuk mereka yang



sudah memenuhi usia perkawinan 19 tahun baik laki-laki maupun perempuan, namun dalam keadaan tertentu peradilan dapat memberikan dispensasi nikah. Proses mengadili permohonan dispensasi nikah belum diatur secara tegas dan rinci dalam peraturan perundang-undangan sehingga para hakim yang menyidangkan perkara ini hanya mempertimbangkan fakta hukum selayaknya perkara perdata secara umum. Pembuktian alasan mendesak dalam permohonan dispensasi nikah juga tidak diatur prosesnya sehingga para hakim berbeda-beda cara dalam menyidangnya. Atas dasar ini Ketua Mahkamah Agung mengeluarkan PERMA No. 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin.

Secara substantif PERMA No. 5 Tahun 2019 mengedepankan prinsip *dominus litis principle* sesuai tujuan mengadili permohonan dispensasi kawin, yaitu:

*Pertama*, Menerapkan asas kepentingan terbaik bagi anak, hak hidup dan tumbuh kembang anak, penghargaan atas pendapat anak, penghargaan atas hak dan martabat manusia, non-diskriminasi, kesetaraan gender, persamaan di depan hukum, keadilan, kemanfaatan dan kepastian hukum;

*Kedua*, Menjamin pelaksanaan system persidangan yang melindungi hak anak. Hakim mewajibkan pemohon menghadirkan anak yang dimintakan permohonan dispensasi kawin. Jika tidak dituruti hakim dapat menyatakan “gugur” dan “tidak dapat diterima” permohonan itu. Untuk memastikan perlindungan hak anak, hakim wajib meneliti secara cermat alasan permohonan dispensasi kawin yang meliputi: (1) memeriksa kedudukan hukum pemohon; (2) menggali latar belakang dan alasan perkawinan anak; (3) menggali informasi pemahaman dan persetujuan anak yang dikawinkan, dan (4) Memperhatikan kondisi psikologis, sosiologis, budaya, pendidikan, kesehatan, ekonomi anak dan orang tua, berdasarkan rekomendasi dari psikolog, dokter/bidan, pekerja sosial profesional, tenaga kesejahteraan sosial, pusat pelayanan terpadu perlindungan perempuan dan anak (P2TP2A) atau Komisi Perlindungan Anak Indonesia/Daerah (KPAI/KPAD);

*Ketiga*, Meningkatkan tanggungjawab orang tua dalam rangka pencegahan perkawinan anak. Hakim dalam setiap persidangan wajib memberikan nasehat dan memastikan orang tua, wali, serta anak supaya memahami resiko perkawinan di bawah umur. Nasihat yang disampaikan oleh Hakim dipertimbangkan dalam penetapan dan apabila tidak memberikan nasihat mengakibatkan penetapan “batal demi hukum”;

*Keempat*, Mengidentifikasi ada atau tidaknya paksaan yang melatarbelakangi pengajuan permohonan dispensasi kawin. Dalam pemeriksaan di persidangan, hakim mengidentifikasi: (1) Anak yang diajukan dalam permohonan mengetahui dan menyetujui rencana perkawinan; (2) Kondisi psikologis, kesehatan dan kesiapan anak untuk melangsungkan perkawinan dan membangun kehidupan rumah tangga; dan (3) Paksaan psikis, fisik, seksual atau ekonomi terhadap anak dan/atau keluarga untuk kawin atau mengawinkan anak. Oleh karenanya dalam memeriksa anak yang dimohonkan dispensasi kawin hakim dapat mendengar keterangan anak tanpa kehadiran orang tua; mendengar keterangan anak melalui pemeriksaan komunikasi audio visual jarak jauh di pengadilan setempat atau di tempat lain; menyarankan agar anak didampingi Pendamping; dan jika dibutuhkan hakim dapat menghadirkan penerjemah atau orang yang biasa berkomunikasi dengan anak.

*Kelima*, Mempertimbangkan perlindungan dan kepentingan terbaik anak dalam peraturan perundang-undangan dan hukum tidak tertulis dalam bentuk nilai-nilai

hukum, kearifan lokal dan rasa keadilan yang hidup dalam masyarakat; serta konvensi dan/atau perjanjian internasional terkait perlindungan anak.

Secara hierarkhi, kedudukan Peraturan Mahkamah Agung adalah sebagai peraturan perundang-undangan di bawah undang-undang, sehingga PERMA No. 5 Tahun 2019 berlaku formal dan wajib dipatuhi terutama oleh lembaga peradilan. Pedoman Mengadili Permohonan Dispensasi Kawin ini dikeluarkan Mahkamah Agung untuk melengkapi hukum acara perdata, baik untuk PN maupun PA. Penerapannya pada PN tidak ada kendala sebab hakim anak di lembaga itu jumlahnya banyak. Sedangkan penerapannya pada PA masih mengalami kendala karena tidak memiliki hakim anak.

Sesuai data Badan Litbang MA (2020) hakim anak di Peradilan Umum seluruh Banten berjumlah 17 orang yang tersebar di Tangerang (2 hakim), Serang (6 hakim), Pandeglang (3 hakim), dan Rangkasbitung (8 hakim). Mereka adalah para hakim yang telah lulus mengikuti pendidikan system peradilan pidana anak (SPPA) yang juga sering ditunjuk sebagai hakim perkara permohonan dispensasi kawin di PN. Sedangkan PA se-Banten yang tidak menangani perkara pidana maka tidak memiliki hakim SPPA, sehingga sidang permohonan dispensasi kawin dipimpin hakim perdata secara umumnya.

Walaupun tidak ada hakim anak akan tetapi PA yang yurisdiksinya meliputi tempat tinggal orang tua dan/atau anak yang dimohonkan dispensasi nikahnya tidak boleh menolak perkara. Sesuai Pasal 10 Undang-undang Kekuasaan Kehakiman, PA dilarang menolak untuk memeriksa, mengadili, dan memutus perkara yang diajukan. Berdasarkan adagium *Ius Curia Notiv/Curia Notif Jus*, hakim PA dianggap mengetahui dan memahami segala hukum. Hakim PA berwenang menentukan hukum objektif mana yang harus diterapkan (*toepassing*) sesuai materi pokok perkara yang menyangkut hukum pihak-pihak yang berperkara dalam *konkreto*.

Sebelum perkara disidangkan hakim PA selalu menerapkan persyaratan pengajuan permohonan dispensasi nikah, yang meliputi persyaratan formil dan materiil. Persyaratan formil menjadi bagian pokok pembuktian formil dalam hukum acara perdata dan mengakibatkan permohonan tidak dapat diterima ketika persyaratan tidak terpenuhi, seperti permohonan harus diajukan oleh kedua orang tua. Sedangkan persyaratan materiil merupakan bagian penting pembuktian materiil dalam persidangan dan dapat mengakibatkan permohonan ditolak jika tidak terpenuhi, seperti surat pernyataan kesanggupan menjalankan kewajiban pernikahan dari anak yang dimohonkan dispensasi nikahnya dan pernyataan akan menuntaskan kewajiban belajar 9 (sembilan) tahun.

Hanya saja umumnya PA belum seutuhnya memasukkan persyaratan materiil sesuai PERMA berupa surat rekomendasi dari psikolog, dokter/bidan, pekerja sosial profesional, tenaga kesejahteraan sosial, pusat pelayanan terpadu perlindungan perempuan dan anak (P2TP2A) atau Komisi Perlindungan Anak Indonesia/Daerah (KPAI/KPAD). Padahal cara prosuderal sebelum pemeriksaan peradilan dimulai ini menjadi bagian *discovery-disposition* yang sangat penting dalam proses litigasi untuk memberikan keadilan berdasarkan fakta-fakta dan bukti-bukti yang sah.

Pendapat hakim PA yang menyidangkan perkara, bahwa pembuktian alasan mendesaknya permohonan dispensasi nikah adalah untuk mencari kebenaran formil (*formeel waarheid*). Hakim hanya mengabulkan permohonan yang diajukan dan dilarang mengabulkan lebih dari yang dimintakan dalam petitum (pasal 178 HIR/189 ayat (3) RBG). Hakim PA dalam persidangan permohonan dispensasi pada prinsipnya

melakukan tiga tindakan secara bertahap, yaitu: men-*konstantir* dengan melihat benar tidaknya peristiwa yang diajukan sebagai dasar permohonan, men-*kualifiris* peristiwa, dan men-*konstituir* berupa menentukan hukum peristiwa dan kejadian yang dimohonkan.

Hakim PA di provinsi Banten pada prinsipnya tidak selalu mengabulkan permohonan dispensasi nikah. Pada tahun 2020 terdapat 45 permohonan dispensasi nikah (9,8%) yang ditolak dan 468 permohonan yang diterima (90,2%). Dispensasi nikah hanya dapat diberikan jika berdasarkan fakta hukum yang terbukti di persidangan setelah dipertimbangkan berbagai aspek, baik yuridis, sosiologis, psikologis dan hukum Islam, perkawinan dini itu sangat mendesak untuk dilangsungkan.

Secara umum hakim PA di wilayah yurisdiksi Banten mengabulkan permohonan dispensasi nikah karena pertimbangan (*tasbih al-ahkam/legal reason*) berdasarkan pembuktian fakta hukum sebagai berikut:

- a. Anak yang dimohonkan dispensasi nikah, jika laki-laki memiliki pekerjaan dengan penghasilan yang cukup dan jika perempuan telah terbiasa melakukan tugas kerumahtanggaan. Pembuktiannya dilakukan dengan meminta keterangan anak dan surat keterangan pendapatan dan gaji dari tempatnya bekerja;
- b. Keluarga kedua belah pihak sudah sama-sama menyetujui berlangsungnya pernikahan yang dibuktikan dari keterangan langsung orang tua dan saksi;
- c. Berdasarkan fakta hukum di persidangan, hubungan kedua calon mempelai sudah sedemikian erat, sudah ada indikasi jika tidak segera dinikahkan akan melakukan tindakan yang bertentangan dengan norma agama dan kesusilaan, sehingga dapat merusak tatanan sosial yang baik;
- d. Kedua calon mempelai tidak ada halangan dan larangan nikah secara hukum Islam.

Penetapan yang dilakukan hakim PA atas perkara permohonan dispensasi selalu dihadapkan dialektika pertimbangan di antara dua kemadaratan yang mungkin terjadi. Di satu sisi berdasarkan fakta hukum yang terbukti di dalam persidangan, jika pernikahan tidak segera dilangsungkan maka akan terjadi kerusakan akibat hubungan terlarang yang bertentangan dengan praturan perundang-undangan dan hukum yang berlaku di masyarakat (*living law*). Sedangkan di sisi lain tidak ditemukan fakta hukum yang dapat menjamin kelangsungan hidup (*hifzd al-nafs*), keberlanjutan pendidikan (*hifzd al-aql*), kesehatan dan keselamatan keturunan (*hifzd al-nasl*). Dari pembuktian alasan mendesak permohonan dispensasi ini, hakim PA memutuskan perkara dengan pertimbangan sesuai kaidah hukum Islam, yaitu: *Izda ta'aradh mafsadatan ru'iy a'zdamuha bi irtikab akhaffahuma* (Apabila saling berhadapan dua kemadaratan maka hindarilah yang paling besar risikonya dengan memilih kemadaratan yang terkecil di antara keduanya).

Majelis hakim PA di wilayah hukum Banten seringkali menerima permohonan dispensasi nikah berdasarkan pembuktian alasan mendesak karena memandang bahwa kemadaratan yang terjadi jika dispensasi nikah ditolak lebih besar dibandingkan kemadaratan yang terjadi akibat perkawinan dini, di mana besar kemungkinan akan rusak keturunan (*al-nasl*) serta kehormatan (*al-'rdh*) kedua calon mempelai itu. Pertimbangan hukum yang dikemukakan oleh Majelis Hakim dalam penetapan permohonan dispensasi nikah dirumuskan berdasarkan fakta hukum yang terbukti

dalam persidangan. Fakta hukum ini didapat berdasarkan keterangan dari orang tua, kedua calon mempelai, dan saksi-saksi yang dihadirkan ke hadapan sidang.

## Penutup

Permohonan dispensasi untuk pernikahan anak merupakan persoalan yang kompleks terjadi di Banten. PA sebagai lembaga yang diberikan kewenangan oleh undang-undang untuk menilai mendesak atau tidaknya pernikahan itu untuk dilangsungkan pada prinsipnya secara formil sudah menerapkan prinsip *dominus litis principle*. Walaupun implementasi PERMA No. 5 Tahun 2019 belum diterapkan secara konsisten oleh hakim PA yang menyidangkan permohonan dispensasi nikah. Permohonan dispensasi nikah yang diajukan kepada PA di wilayah yurisdiksi se provinsi Banten tidak semuanya dikabulkan walaupun terjadi kenaikan jumlah dispensasi nikah yang ditetapkan pada 2020. Terdapat 45 permohonan dispensasi nikah (9,8%) yang ditolak dan 468 permohonan yang diterima (90,2%) . Hakim PA mengabulkan dispensasi nikah jika perkawinan dini itu sangat mendesak untuk dilangsungkan berdasarkan fakta hukum yang terbukti di persidangan. Hakim PA pada prinsipnya mendialektikan pertimbangan di antara dua kemadaratan yang lebih ringan di antara akibat menolak dispensasi dengan mengizinkan perkawinan dini, berdasarkan keterangan dan alat bukti yang diajukan pemohon.

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## ***Naskah Hasil Revisi Berdasarkan Masukan Reviewer***

### ***The Loose Interpretation of Dominus Litis Principal in Marriage Dispensation for Underage Marriage in Banten***

Muhammad Ishom

#### **Abstract**

The judges of Religious Courts play a key role in reducing the prevalence of underage marriage. The court may grant or refuse a marriage dispensation sought by the parents or guardians of an underage couple by emphasizing the principle of *Dominus litis principle* in critical legal proof. Since a considerable number of dispensation appeals have been granted by the Religious Courts in Banten, the number of early-age marriages has hit the roof. This research examines the implementation of the *Dominus litis principle* and the difficulties in establishing the grounds for the urgent dispensation of marriage, which have led to a rise in the number of early-age marriage in Banten. The data were collected via observations and interviews with the judges, former judge, lawyers and Bantenese in general. This research employs the juridical-empirical research technique which focus on examining several facts and data generating from the societies, especially those who involve in this topic research. The finding of the study reveals that to approve marriage dispensation, the judges of Religious Court merely assess and verify the legal truth from the applicant's statement, the underage marriage candidate, witnesses from the applicant's immediate family, and documentation proof presented with the application. Judges rarely summon additional witnesses from specialists and professionals that focus on the children's issues which might strengthen legal-formal evidence and provide the judges with the optimal choice between the two undesirable options. The court decides to grant the request in order to safeguard the children from immoral behaviours that contradict the common public ethics and morals and ignores a significant principle of *dominus litis* which will lead the court to evaluate which alternative is likely appropriate for the future of the children.

**Keyword: Underage Marriage, Marriage Dispensation, Judges of Religious Court**

#### **Introduction**

In many countries around the world, underage couple have been permitted to apply for a marriage dispensation. While some applications submit to executive institutions (e.g., Republic of the Congo, the Dominican Republic, France, and South Africa), others send it to 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) (Vernon Valentine Palmer, Mohamed Y. Mattar · 2016: 230-231).

The Religious Courts (Pengadilan Agama, PA) is one of the Indonesian Muslims' judicial entities that has an authority to receive a marriage dispensation application. PA has the authority to accept, investigate, adjudicate, and decide marriage and other civil Islamic issues. Islamic Civil proceedings are determined by the parties' desire. Hence, the judges are not necessary to involve on their business. Likewise, the parties are accountable for the trial procedure, the presentation of evidence, and the determination of legal purposes. Civil law judges monitor just the parties' compliance with the law. Judges are not compelled to hear or seek information from parties or witnesses other than the litigants and their witnesses while considering cases. Therefore, it is assumed that Islamic civil law judges are passive and use *the iudicis est iudicare secundum allegat iudicare* concept (the judge decides based on the lawsuit and evidence) (Abdul Manan, 2005: 15-18)

According to M. Yahya Harahap (2015), the influence of the procedural law outlined in the *Wetboek op de Burgerlijke Rechtsvordering*, commonly abbreviated as Rv., resulted in the passive judges in Indonesia. The 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 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. (M. Yahya Harahap, 2015: 46-47). In many countries, including India, which is close to Indonesia, the "legal maxim" in the form of "Dominus litis" has been implemented, which gives judges and public prosecutors the authority to actively seek the truth in the process of proving a lawsuit, as well as the material truth about the case that is being tried (Rai Bahadur Lala Baijnath, 2016: 3-7).

As a member of the international community, Indonesia has adopted a legal maxim system known as *dominus litis*. *Dominus* means owner etymologically, and *litis* means lawsuit. The judge has an important role in the context of the trial, so it must be active in accordance with the applicable pomeo, *judicis est iudicare secundum allegat iudicare* (the judge decides based on the lawsuit and evidence) (Henry Campbell Black, 1991: 727).

Article 4 paragraph (2) and Article 5 paragraph (1) of Law No. 48 of 2009 pertaining to Judicial Power govern the legal legitimacy of the activities of judges in Indonesia. In accordance with 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 in order to achieve a simple, quick, and inexpensive trial. In addition, all judges must investigate, adhere to, and comprehend the societal legal values and sense of justice.

The judges of PA are governed by Article 56, Article 57 Paragraph 3, and Article 62 Paragraph 1 of the Law No. 7 of 1989 pertaining to Religious Courts. The PA judge should examine and decide the cases even if the reason of the law is ambiguous or unclear. He/she is required to do so, and he/she is not precluded from attempting a peaceful resolution. All stipulations and decisions of the PA, apart from containing the reasons and legal basis, they are also required to explore unwritten legal sources that are used as the basis for adjudicating (Abdul Manan, 2005: 17-18).

This stipulation is implemented through the judges of PA efforts in resolving cases through consensus and mediation. Since there is no clear standard for the peaceful resolution of disputes, the Supreme Court of the Republic of Indonesia issued Supreme Court Regulation (Peraturan Mahkamah Agung, PERMA) No. 01 of 2008 regarding Mediation Procedures in Courts. This regulation requires the judges of PA to reconcile litigants not only during the initial trial, but also in subsequent trials.

In general, civil law case settlement schemes in Indonesia are determined by using stipulation issued by the Supreme Court of the Republic of Indonesia. An example of another PERMA about mediation procedures is PERMA No. 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. Marriage dispensation is the authorization of court for individuals under the legal age to marry. Article 7 of Law No. 1 of 1974, as amended by Law No. 16 of 2019, concerning Marriage officially states that a man and a woman must be at least 19 years old to be married. If there is a deviation from the stipulation regarding the minimum age for marriage, the parents of the man and/or the parents of the woman may propose the court for a dispensation, accompanied by compelling evidence.

Applicants for a marriage dispensation who are underage must demonstrate compelling circumstances in court. Knowing that the Marriage Law does not regulate the trial of applications for marriage dispensation; therefore, judges are equipped with a PERMA on Guidelines for Adjudicating Applications for Marriage Dispensation. The most important stipulation of the guidelines for adjudicating applications for marriage dispensation is that all actions involving children must concern children wellbeing.

Regarding the Article 1, the judge decides marriage dispensations based on the best interests of the child, including the right to live and to grow, to respect for the children's opinion, to value for human dignity, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty. Article 12 also describes the active role of judges as advisors to applicants (children), and the parents or guardians of prospective spouses. The purpose of the judge's counsel is to make them aware of the risks associated with marriage, such as the possibility that children's education will be discontinued, the unpreparedness for child reproduction, the socio-economic problem, psychological impact, and the potential for violence and domestic disputes.

From this perspective, the judge handling the pleading dispensation are required to apply the *dominus litis* principle because he has 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. According to research from Muhammad Yusni titled the Problematics of the Implementation of the *Dominus Litis* (2020), in the criminal justice system, the application of the *dominus litis* principle by public prosecutors makes criminal cases in court complicated and convoluted. 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, titled "Functionalization of the *Dominus Litis* Principle in the Enforcement of Criminal Law in Indonesia" (Tiar Adi Riyanto, 2021). According to his research, the application of *dominus litis* in the SPPA has created a possibility for public prosecutors seeking *restorative justice* via mediation to resolve child criminal cases. According to Suhartono, Kukuh Tejomurti, Arsad Aldyan, and Rachma Indriyani's 2021 article, "The Establishing Paradigm of *Dominus Litis* Principle in Indonesian Administrative Justice," the application of *dominus litis* in the administrative justice system (PTUN) has produced judges who think progressively (2021:42-55).

The implementation of the *dominus litis* principle in the context of a marriage dispensation proposal is highly pertinent to the pursuit of the basic need of children. Consideration is given to the fact that the judge has full authority because the marriage dispensation is fundamentally a state administration decision requested by the applicant in order to hinder a special prohibition (*relaxation legis*), that is underage marriage. The judge plays a significant role in determining the proposal of marriage dispensation, whether it is approved or rejected. The case of early-age marriage can be suppressed if the judge tightens the marriage dispensation requirement. Therefore, the formulation of the problem in this study is how to use the *Dominus Litis Principle* by the judge in establishing the grounds for requesting a marriage dispensation in order to stop the rise of underage marriage, particularly in Banten.

This study focuses on Banten because the frequency of underage marriages has gradually increased in recent years. In 2019, 6 percent of couples married before the age of 18 and grew to 6.23 percent in the following year. The rise of this case is inevitably related to the marriage dispensation given by the judges of PA in Banten. The judges of PA granted 468 (89 percent) for marriage dispensation that consist of PA Tigaraksa Tangerang (37%) followed by PA Tangerang City (10%), PA Serang (18%), PA Pandeglang (17%), PA Lebak (15%), and PA Cilegon (3%).(Division of Integration Processing and Statistics Dissemination BPS-Statistics of Banten Province, 2021: 150-160)

This study employed a juridical-empirical approach by studying the legislation or execution of normative legal provisions in every legal event occurred in society. The data sources included written legal documents in the form of statutory regulations and judicial decisions, as well as legal data in action from interviews and focus groups discussion (FGD) with legal practitioners and the public. The data was processed and evaluated in a descriptive-evaluative analysis.

## **Result and Discussion**

### **Revisiting the Role of Juvenile Judge in The Child Marriage Practice in Indonesia**

According to the objective of this study, 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 in accordance with the law. In Indonesia, according to Law No. 11 of 2012 governing 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, as well as technical course in juvenile justice.

Aside from this context, judges in all Indonesian judicial institutions are constrained by the regulation of the Law on Judicial Power. In Law No. 48 of 2009 pertaining to Judicial Power, 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*, whereas at the cassation level, they can act as *judex juris* (examine the application of the law). In accordance with Articles 2 and 3 of Law No. 3 of 1997 pertaining to the Juvenile Court, the juvenile court is the executor of judicial power within the general judiciary, with the responsibility and ability to study, decide, and settle juvenile criminal matters.

Knowing that there is no juvenile justice body in Indonesia, there are no juvenile justice judges in Indonesia, with the exception of 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 suggestion of the head of the relevant district court via the head of the

high court. To be appointed as a juvenile judge, one must have experience as a judge 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 in the first level at the trial, appellate, and supreme court levels. With the passage of the Juvenile Justice System Act, the word "juvenile judge" as used in this Juvenile Court Law has not altered. Only the juvenile court system undergoes change, known as diversion.

Technically, diversion means "transfer." In terms of language, it is the transfer of the resolution of children's cases from the formal legal procedure to an out-of-court process, with or without conditions. Article 1 number (7) of the Juvenile Criminal Justice System Act defines diversion as the transfer of a child's case from a juvenile criminal proceeding to outside of juvenile justice. The children (perpetrators) who are 12 (twelve) years old and has not yet reached the age of 18 (eighteen) years, including those who have married underage, at the time of processing of the investigation, prosecution, and the time the child is examined in court general, diversion must be carried out at each level of the examination. In general, the purpose of this diversion process is to achieve peace in child criminal cases, prevent children from being deprived of their liberty, encourage community participation, and develop a sense of responsibility in youngsters.

Diversion in juvenile criminal proceedings adheres to the notion of the "active judge" in the proceeding. In order to safeguard children who are in dispute with the law, this out-of-court approach should also be utilised when children face legal concerns. Article 28B paragraph (2) of the 1945 Constitution now expressly declares that the State guarantees every child the right to life, growth, and development, as well as the right 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 problems. Judges in juvenile courts are concerned in aspects of both public and private law, including marriage dispensation proceedings and marital dispensations. The purpose of this rule is to restrict the judge's ability 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 (Mies Grijns, et. all, 2018: 8-12 ). Moreover, the study by the Indonesian Women's Coalition in 2019 mentioned that 1 in 8 Indonesian young women married before the age of 18. The BPS Demography and Health Survey (IDHS) 2019 data showed that as many as 25.71 percent of 20- to 24-year-old women married before the age of 18 (Mies Grijns, et. all, 2018: 8-12). Bappenas 2021 stated that the economic impact of 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 have significant ramifications for future human resource quality and competitiveness in Indonesia (Mies Grijns, et. all, 2018: 8-12).

### **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*/person underage), underage (*minderjarig heid*/inferiority), and under parental supervision (*minderjarige ondervoordij*). A person who is not yet an adult and is still considered a child is entitled to protection and fulfilment of their rights (Sylvianti Angraini, 2020: 8; Hoko Horii, 2021: 17).

According to Law No. 11 of 2012, the Juvenile Justice System, and Law No. 23 of 2002 about 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, which was ratified by Presidential Decree No. RI. 36 of 1999, which also defines children as anyone under the age of 18.

The stipulation of age restriction for children is one of the reasons to revise Article 7 of the Marriage Law so that men and women may marry at the age of 19 years old. With the publication of Law No. 16 of 2019 on the reform of Law No. 1 of 1974 pertaining to Marriage, 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 not only within the context of the right to build a family, as guaranteed by Article 28 B paragraph (1) of the 1945 Constitution, but also within the context of the protection and realisation of children's rights, as guaranteed by Article 28 B paragraph (2). In a legal state, everyone is treated equally before the law (equality before the law). This is emphasised in Article 28 D, paragraph 1 of the 1945 Constitution, which states that everyone has the right to recognition, protection, legal certainty, and equal legal treatment.

The existence of law No. 23 of 2002 concerning the protection of children controls the rights that should be achieved by children, which include:

- (1) Every child has the right to live, grow, and develop with respect and dignity, and to be safe from violence and discrimination (Article 4).
- (2) Every child has the right to hold a name that identifies his or her citizenship (article 5).
- (3) Every child has the right, under parental supervision, to worship according to their beliefs and to think and express themselves in line with their intelligence and age. (Article 6);
- (4) Every child has the right to know his or her biological parents and to be raised and cared for by them. (Article 7 paragraph 1);
- (5) If the parents are unable to secure the kid's growth and development or if the child is in a condition of abandonment, the child has the right to be fostered or adopted (article 7, paragraph 2);
- (6) Every kid is entitled to health care and social security based on his or her physical, mental, spiritual, and social needs. (Article 8);
- (7) Every kid has the right to an education that is tailored to his or her intelligence, skills, and interests, as well as his or her unique stage of development. (Article 9);
- (8) Every child in the care of their parents, guardians, or other responsible party has the right to be protected against discrimination, economic and sexual exploitation, neglect, cruelty, violence, and other types of maltreatment. (Article 13 paragraph 1).

The regulation related to the fulfilment children's right in Indonesia is in accordance with 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 on the Rights of the Child are as follows: (1) non-discrimination; (2) doing all possible to meet children's needs; (3) the right to life, growth, and development; and (4) respect for children's perspectives (UNICEF Staff, 2008: 5).

In Indonesian marriage law, the adaptation of the Convention on the Rights of the Child is represented in the revision of the Marriage Law, which elevates the age limit for women to 19 years, putting it in line with the age limit for men. 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.

The amended marriage law, however, is not stringent and contains exceptions for some matters. There is still possibility obtaining a court-issued exemption for underage marriage. The authority of court to grant marriage dispensation due to judicial power is viewed as unbiased and could be able to offer justice for the realisation of essential human rights, such as marriage and establishing a family.

#### **Dispensation Rules for Underage Marriages**

A marriage dispensation is a marriage licence 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 for 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.

Marriage law in Indonesia regulates the standard of a personal maturity, specifically when he or she is judged eligible for marriage and capable of taking responsibility for oneself and others (their spouses). The maturity criterion of being able to marry has spawned the minimum age requirement for marriage. In some sections of the Marriage Law No. 1 of 1974, the requirements regarding marriage age are as follows:

- a. Parental permission is required for the wedding if a potential spouse is younger than 21 years old. (Article 6 paragraph 2);
- b. The minimum age of marriage is 19 for men and 16 for women as according to the law. (Article 7 paragraph 1).
- c. Children under the age of 18 and have never been married are subject to parental responsibility. (Article 47 paragraph 1)

- d. Children under the age of 18 or have never been married and who are not under the jurisdiction of their parents are controlled by a guardian. (Article 50 paragraph 1)

Previously, the minimum age for marriage was 19 years for males and 16 years for women. Nonetheless, amended marriage legislation stipulates that both prospective husbands and prospective wives must achieve the age of 19 (nineteen) years to be eligible for marriage. The principal purpose of Law No. 16 of 2019 regarding amendments to Law No. 1 of 1974 dealing to marriage is a reform of Article 7 paragraph (1) regarding the minimum marital age. Parental consent for possible 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, the person who proposes the court for a marriage dispensation according to Article 7 paragraph (2) of the Marriage Law should be either the parents of the future husband or the future bride. 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 Regulation of the Supreme Court of the Republic of Indonesia (PMA RI) Number 5 of 2019 on Guidelines for Adjudicating Applications for Marriage Dispensation provides the following explanation:

- (1) A parent is eligible party to request a dispensation.
- (2) In the case that the parents are divorced, the application must be submitted by both parents or by the parent who has legal custody of the child.
- (3) If one of the parents has been passed away or if the parent lives in indefinite location, one of the parents must make a request for dispensation.
- (4) In the event when both parents are deceased, their parental rights have been terminated, or their whereabouts are unknown, the application for dispensation must be submitted by the guardian of the children.
- (5) In the absence of the parents or guardians, they must provide legal assistance.

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

There are administrative status differences between children who have registered for marriage at the KUA and those who have not when filing for a marriage dispensation. Marriage dispensation may be requested to the court before the marriage registration at the KUA and/or Civil Registry Office, or after being denied at the time of marriage registration at KUA. If the marriage registration has not been registered, the applicant is referred to as a child, but if it has been registered but refused, applicant is referred to as a potential husband or wife.

The application for marriage dispensation is submitted to the official courtroom 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, PA 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 there is a disagreement in their beliefs, the application for marriage dispensation is made to the PA and/or PN hinging on the child's religion and belief (2) If the prospective spouses are underage, the court 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 there are compelling reasons that allow the dispensation to be granted. While Deri Fahrizal Ulum, Child Protection Officer for UNICEF Indonesia demonstrated that 90% of marriage dispensation requests are granted by Indonesian courts, the Religious Courts of the Supreme Court (Badilag) in 2020 revealed that 34,413 applications for marriage dispensation were filed, of which 33,664 were issued (Hoko Horii, 2021: 45-50).

The court considered the application's compliance with religious, legal, and sociological legislation in granting the marriage dispensation. Among these components are:

- a. The prospective husband who is requesting a marriage dispensation has already a secure job that provides adequate money, and the woman is expected mature enough to accomplish housework.
- b. The family of both couples have consented to the marriage.
- c. The two prospective brides are not prevented from marrying according to religious law.
- d. Based on the trial's legal facts, the relationship between the two prospective brides and grooms is already close, and there are signs that if they do not get married soon, they would engage in premarital sexual relations that will disrupt the social order (sumbernya hasil FGD waktu riset).

The decision of this marriage dispensation may be used as a legal document to register marriage registration at the KUA and/or the Civil Registry Office when the court has approved the application. The officer of the marriage registration may not deny the marriage registration of people who are still underage knowing that a formal marriage dispensation application has been issued by the court.

This topic took the attention of the public, particularly by the Indonesian Women's Coalition (KPI), issuing marriage dispensation that has validated the cases of child marriage in Indonesia. Although the overall rate of child marriages decreased from 11.21 percent in 2018 to 10.82 percent in 2019, the rate increased in 18 Indonesian provinces. Most of these incidents occurred in Banten and West Java.

## **B. Marriage Dispensation and Underage Marriage in Banten**

Underage Marriage is one of Indonesia's complex and multifaceted problems (Sylvianti Angraini, 2020: 4; Hoko Horii, 2021: 25-27). Although the government has implemented several initiatives to avoid this practice, the number of early-age marriages is continuously increasing. This suggests that government policies alone are insufficient to reduce child marriage rates.

According to Presidential Regulation (Perpres) No. 18 of 2020 About the National Medium-Term Development Plan (RPJMN 2020-2024), underage marriage has become a national priority for Indonesia's national development plans. The Sustainable Development Goals (SDGs) that the government aspires to achieve are also a concern to cope with underage marriage. It is clearly stated in the fifth point of the SDGs, which is 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 percent in 2018 to 8.74 percent 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 number of weddings in the province of Banten 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 percent in 2019 to 6.23 percent in 2020 even though it fell from 6.78 percent in 2018. Moreover, BPS data from 4 May 2021 revealed that the percentage of 20- to 24-year-old married women have already got married before 15 years old (Division of Integration Processing and Statistics Dissemination BPS-Statistics of Banten Province, 2021: 154-160).

Marriage dispensation is directly correlated with the increase in underage marriage in Banten. The Banten High Court of Religion, the Religion Court, granted 468 requests for marriage dispensation in 2020, Tigaraksa PA granted 37 percent of marriage dispensation petitions, followed by PA Serang at up to 18 percent, PA Pandeglang at 17 percent, PA Lebak at 15 percent, PA Tangerang City at 10 percent, and PA Cilegon at up to 3 percent (Division of Integration Processing and Statistics Dissemination BPS-Statistics of Banten Province, 2021: 157)

Applications for marriage dispensation in Banten are motivated by the following factors: (1) unwanted pregnancy; (2) a relationship like a husband and a wife; (3) the community sanction for violating social norms by having intimate relationship with a non-blood relative partner. (4) dropping out of school, (5) being financially independent by having a partner who have already definite job. ( Division of Integration Processing and Statistics Dissemination BPS-Statistics of Banten Province, 2021: 164-176)

Those factors are utilized by the applicant as a strong reason to obtain the judge's consideration for a marriage dispensation. The fourth issue is the most often cited as a tangible cause for requesting an exception from the PA. If the PA court has authorized and issued a marriage dispensation, and if the

applicant can provide all documents needed for the registration application to the KUA district (*Kecamatan*), then the Marriage Officer has no reason to reject it.

The increasing number of underage marriages in Banten province has the potential to create new problems in society, such as (1) severe depression for young couples; (2) domestic violence; (3) divorce due to immature thinking; (4) propensity to drop out of school; (5) economic difficulties that can lead to failure to look after a child; (6) the emergence of underage workers; and (7) transmission of HIV disease.

Severe depression can lead to domestic violence, which can ultimately culminate in a divorce. This is deeply worrying because, according to the Population and Family Planning Agency of Banten Province (*Division of Integration Processing and Statistics Dissemination BPS-Statistics of Banten Province, 2021: 118-125*), 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.

BPS Banten Province announced the following underage population categorized by gender:

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

In Banten, only 68.76 percent of the population between the ages of 15 and 19 are still in school. The rest of them are either caring for the family or dropping out. Those who are 15 to 19 years old and have not attended school and hold the job are 177,991. Meanwhile, people who used to work are 18978, compared to those who have never worked are 1,6684. Consequently, there is a sizable underage workforce, as high as 56.75 percent, and according to BPS data from 2021, their presence accounts for as much as 29.13 percent of the total employment rate in Banten.

Participation of juveniles in the workforce does not necessarily promote the welfare of society. They are less skilful due to the fact that they have low degree in education. Occasionally, parents encourage their children to marry because they believe they already have a stable income and a robust social network. Parents are anxious that the intimate relationship between their unmarried children may grow into an immoral relationship. During the Covid-19 outbreak, 15- to 19-year-old females remained at home and were frequently visited by their partners, 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.

Parents think that religious law does not restrict the age of marriage, so that underage marriage poses no difficulty (*Sylvianti Angraini, 2020: 6-7*). The majority of Banten citizens believe that marriage may enhance the level of life for both partners. This idea is strongly believed by people in Banten that majority share similar religion. As a manner of life, every Muslim adheres to the teachings of the QS. An-Nuur verse 32 that states;

*...and marry those who are single among you, as well as those who are eligible for marriage among your male and female slaves. If you are impoverished, Allah will provide for you with His wealth (QS. An-Nuur verse 32).*

The public is unaware that underage marriage contributes to a 2 percent increase in the poverty rate in Banten from a total of 857,640 persons in 2021. For the prevention of 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. However, the Covid-19 condition has limited the mobility of staff officers with the policy of Implementation of Restrictions on Community Activities (PPKM).



## The Attitude of Judge in Implementing Dominus Litis Principle for Marriage Dispensation proposal

As a signatory to the Convention on the Rights of the Child, Indonesia requires all state institutions, including the court, to act in the best interests of the child when dealing with children (Muhammad Ishom, . Under Law No. 16 of 2019, marriage is only permissible for persons who have reached the age of 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 officially and specifically outlined in the laws and regulations; therefore, the judges considering this case would only analyse the legal facts as they pertain to civil matters generally. In the application for a marriage dispensation, the method for showing urgent circumstances is also not regulated. Thus, courts have diverse ways of hearing it. On this basis, the Chief Justice of the Supreme Court issued PERMA No. 5 of 2019 about Guidelines for Adjudicating Marriage Dispensation Applications ([Mahkamah Agung RI, 2020: 3-8](#)).

The substance of PERMA No. 5 of 2019 advances the *dominus litis* concept for the purpose of adjudicating proposal for marriage dispensation, explicitly. *First*, it applies the principles of the best interests of children, the right to life and children development, respecting for the views of children, respecting for human rights and dignity, non-discrimination, gender equality, equality before the law, fairness, benefit, and legal certainty. *Second*, it guarantees the establishment of a legal system that defends the rights of children. The court needs the petitioner to attend the children for whom a marriage dispensation is being sought. The court might rule the application "failed" and "unacceptable" if it is not complied with. To ensure the protection of children's rights, the judge is required to carefully examine the reasons for the marriage dispensation application, which includes: (1) examining the legal position of the applicant; (2) exploring the background and reasons for underage marriage; (3) finding deep information on the children's comprehending and consent to the marriage; and (4) paying attention to the psychological, sociological, cultural, educational, health, and economic conditions of the children. *Third*, increasing 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 into the conclusion, and if it does not offer suggestion, the ruling is null and invalid. *Fourth*, identifying 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 who was submitted in the application (2) psychological conditions, health, and readiness of children to marry and establish a family; and (3) psychological, physical, sexual, or economic coercion on children and/or families to marry or give in children in marriage. Consequently, when examining a child for whom a marriage dispensation is being applied, the judge may hear the child's statement without the presence of the parents; hearing the child's statement through a remote audio-visual communication examination at the local court or elsewhere; recommending that the child be accompanied by a companion; and, if necessary, bringing an interpreter or someone who typically communicates with children. *Fifth*, it considers the protection and best interests of children 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 pertaining to child protection.

Hierarchically, the Supreme Court Regulation has the status of a statutory regulation under the law. Therefore, PERMA 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 both PN and PA 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 PA remains problematic due to the absence of a juvenile judge.

According to the MA Research and Development Agency (2020), there are 17 juvenile judges in the General Courts of Banten, who are 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 PN. In Banten, PA that does not handle criminal cases does not provide SPPA judges. Therefore, the trial for the marriage dispensation application is often presided over by civil judges.

Although there is no juvenile judge, the PA 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 accordance with Article 10 of the Law on Judicial Authority, the PA is prohibited from refusing to examine, try, and decide on the cases submitted. Based on the adage *Ius Curia Notiv/Curia Notif Jus*, PA judges are considered to know and understand all laws. The PA judge has the authority to determine which objective law must be

applied (toeassing) according to the subject matter of the case concerning the law of the litigating parties in the *konkreto*.

Prior to trial, the PA always applies the formal and material conditions for the submission of a marriage dispensation application (Basiq Djail, 2006: 209; Rani Simangunsong, 2014: 30). 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 and can result in the rejection of the application if they are not met, such as a statement of the child's ability to fulfil his marriage obligations and a statement that he will complete his nine-year study obligation.

Nevertheless, in general, PA has not complied with PERMA's documentation requirements (letters of recommendation from psychologists, doctors/midwives, professional social workers, social welfare workers, 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 a very important part of the *discovery-disposition* in the litigation process to provide justice based on valid facts and evidence.

According to the PA judge who heard the case, the evidence of the applicant for a marriage dispensation is the pursuit of 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). In general, the PA judge in the trial of the dispensation application follows three steps in stages: deciding if the event is filed as the basis for the petition, qualifying the event, and establishing the law of the event and incident for which dispensation is being proposed.

PA courts in Banten province, in general, do not always accept marriage dispensation proposals. In 2020, 45 dispensations of marriage proposals (9.8 percent) were denied out of 468 applications received (90.2 percent). Marriage dispensation can only be granted if the legal facts proven in court. After considering various aspects, including juridical, sociological, psychological, and Islamic law, the early marriage is very urgent to take place.

In general, PA courts in the Banten jurisdiction have approved a marriage dispensation application (*tasbih al-ahkam/legal justification*) based on the following legal circumstances:

- a. The male for whom a marriage dispensation is proposed has an adequate salary. On the other hand, for women, they are used to doing home duties. Proof is provided by requesting information from the applicant as well as a certificate of income or payslip from his employment.
- b. The families of both parties have mutually agreed to the marriage as evidenced by direct statements from parents and witnesses.
- c. Based on the trial's legal facts, the relationship between the two prospective brides and grooms is already so close. Therefore, if they are not married immediately, they would expectedly violate religious norms, and threatening the social order in the end.
- d. The two prospective brides have no obstacles and prohibitions on marriage according to Islamic law.

The judgement taken by the PA judge on a dispensation application is always based on a dialectic between two potential accidents. On the one hand, if the marriage is not performed promptly, there will be harm due to illegal relationships that violate the norms and regulations of the society, as established by the trial's legal findings (*living law*). On the other hand, there are no legal realities that can ensure the life (*hif al-nafs*), continuation of education (*hifz al-aql*), health, and safety of future generations (*hifz al-nasl*). (Mustafa Dib al-Bugha, 2007: 32-35) When confronted with two accidents, one chooses the lesser of the two in order to avoid the greater danger (*Izda ta'aradh mafsadatan ru'iy akhaffahuma bi irtikab akhaffahuma*). (Ali Ahmad al-Nadwi, 2009: 204)

The judges of PA in the Banten jurisdiction frequently approve marriage dispensation applications based on urgent evidence. They believe that the damage caused by denying a marriage dispensation is likely greater than the damage caused by an early marriage, which is likely to wound the offspring (*al-nasl*) and honour (*al-'ardh*) of the two prospective brides. The legal factors presented by the judges in deciding the application for a marriage dispensation are based on the courtroom-established legal facts. 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 problem in Banten. The *dominus litis* concept has been explicitly implemented by PA as an institution empowered by law to evaluate the urgency or unurgency of a marriage. However, the implementation of PERMA No. 5 of 2019 has not been consistently enforced by courts in PA who considers requests for marriage dispensation. Although there was an increase in the number of marriage dispensations slated for 2020, not all marriage dispensation applications filed to the PA in the province of Banten were approved. Forty-five appeals for marriage dispensation were denied (9.8 percent) while 468 applications were accepted (90.2 percent). Based on the court-established legal circumstances, the PA judge approved the marriage dispensation if the early marriage was very urgent. Considering the facts and evidence provided by the petitioner, the judge in the PA determines between two lesser disadvantages coming from rejecting dispensation or permitting early marriage.

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## **Naskah Finsih**

### ***The Loose Interpretation of Dominus Litis Principal in Marriage Dispensation for Underage Marriage in Banten***

Muhammad Ishom

#### **Abstract**

*The judges of Religious Courts play a crucial role in reducing the number of underage marriages. The judges can consider marriage dispensation by emphasizing the principle of Dominus litis principle. Since a considerable number of dispensation appeals have been granted by the Religious Courts in Banten, the number of early-age marriages has increased significantly. This research examines the implementation of the Dominus litis principle and the difficulties in establishing the grounds for the urgent dispensation of marriage. The data were collected via observations and interviews with the judges, former judges, lawyers, and societies in general. This research employs the juridical-empirical research technique focusing on examining several facts and data generated from the public. The study reveals that to approve marriage dispensation, the judges of Religious Court merely focus on the legal truth from the applicant's statement, the underage marriage candidate, witnesses from the applicant's immediate family, and documentation proof presented with the application. Judges rarely summon additional witnesses from specialists and professionals focusing on the children's issues which might strengthen legal-formal evidence. The court grant the request to safeguard the children from immoral behaviours that contradict the common public ethics and morals and ignores a significant principle of dominus litis.*

*Hakim Pengadilan Agama memiliki peran penting untuk menekan angka kasus perkawinan dini. Hakim dapat mempertimbangkan dispensasi nikah dengan menekankan prinsip Dominus Litis. 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 secara umum. 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.*

**Keyword: Underage Marriage, Marriage Dispensation, Judges of Religious Court**

#### **Introduction**

In many countries around the world, underage couple have been permitted to apply for a marriage dispensation. While some applications submit to executive institutions (e.g., Republic of the Congo, the Dominican Republic, France, and South Africa), others send it to 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, PA) is one of the Indonesian Muslims' judicial entities that has an authority to receive a marriage dispensation application. PA has the authority to accept, investigate, adjudicate, and decide marriage and other civil Islamic issues. Islamic Civil proceedings are determined by the parties' desire. Hence, the judges are not necessary to involve on their business. Likewise, the parties are accountable for the trial procedure, the presentation of evidence, and the determination of legal purposes. Civil law judges monitor just the parties' compliance with the law. Judges are not compelled to hear or seek information from parties or witnesses other than the litigants and their witnesses while considering cases. Therefore, it is assumed that Islamic civil law judges are passive and use *the iudicis est iudicare secundum allegat iudicare* concept (the judge decides based on the lawsuit and evidence) (Abdul Manan, 2016).

The influence of the procedural law outlined in the *Wetboek op de Burgerlijke Rechtsvordering*, commonly abbreviated as Rv., resulted in the passive judges in Indonesia. The 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 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 (M. Yahya Harahap, 2015). In many countries, including India, which is close to Indonesia, the "legal maxim" in the form of "Dominus litis" has been implemented, which gives judges and public prosecutors the authority to actively seek the truth in the process of proving a lawsuit, as well as the material truth about the case that is being tried (Rai Bahadur Lala Baijnath, 2022).

As a member of the international community, Indonesia has adopted a legal maxim system known as *dominus litis*. *Dominus* means owner etymologically, and *litis* means lawsuit. The judge has an important role in the context of the trial, so it must be active in accordance with the applicable pomeo, *iudicis est iudicare secundum allegat iudicare* (the judge decides based on the lawsuit and evidence) (Henry Campbell Black, 1991).

Article 4 paragraph (2) and Article 5 paragraph (1) of Law No. 48 of 2009 pertaining to Judicial Power govern the legal legitimacy of the activities of judges in Indonesia. In accordance with 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 in order to achieve a simple, quick, and inexpensive trial. In addition, all judges must investigate, adhere to, and comprehend the societal legal values and sense of justice (Achmad Ali, 2010).

The judges of PA are governed by Article 56, Article 57 Paragraph 3, and Article 62 Paragraph 1 of the Law No. 7 of 1989 pertaining to Religious Courts. The PA judge should examine and decide the cases even if the reason of the law is ambiguous or unclear. He/she is required to do so, and he/she is not precluded from attempting a peaceful resolution. All stipulations and decisions of the PA, apart from containing the reasons and legal basis, they are also required to explore unwritten legal sources that are used as the basis for adjudicating (Abdul Manan, 2016).

This stipulation is implemented through the judges of PA efforts in resolving cases through consensus and mediation. Since there is no clear standard for the peaceful resolution of disputes, the Supreme Court of the Republic of Indonesia issued Supreme Court Regulation (Peraturan Mahkamah Agung, PERMA) No. 01 of 2008 regarding Mediation Procedures in Courts. This regulation requires the judges of PA to reconcile litigants not only during the initial trial, but also in subsequent trials.

In general, civil law case settlement schemes in Indonesia are determined by using stipulation issued by the Supreme Court of the Republic of Indonesia. An example of another PERMA about mediation procedures is PERMA No. 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. Marriage dispensation is the authorization of court for individuals under the legal age to marry. Article 7 of Law No. 1 of 1974, as amended by Law No. 16 of 2019, concerning Marriage officially states that a man and a woman must be at least 19 years old to be married. If there is a deviation from the stipulation regarding the minimum age for marriage, the parents of the man and/or the parents of the woman may propose the court for a dispensation, accompanied by compelling evidence.

Applicants for a marriage dispensation who are underage must demonstrate compelling circumstances in court. Knowing that the Marriage Law does not regulate the trial of applications for marriage dispensation; therefore, judges are equipped with a PERMA on Guidelines for Adjudicating Applications for Marriage Dispensation. The most important stipulation of the guidelines for

adjudicating applications for marriage dispensation is that all actions involving children must concern children wellbeing.

Regarding the Article 1, the judge decides marriage dispensations based on the best interests of the child, including the right to live and to grow, to respect for the children's opinion, to value for human dignity, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty. Article 12 also describes the active role of judges as advisors to applicants (children), and the parents or guardians of prospective spouses. The purpose of the judge's counsel is to make them aware of the risks associated with marriage, such as the possibility that children's education will be discontinued, the unpreparedness for child reproduction, the socio-economic problem, psychological impact, and the potential for violence and domestic disputes.

From this perspective, the judge handling the pleading dispensation are required to apply the *dominus litis* principle because he has 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. According to research from Yusni titled the Problematics of the Implementation of the *Dominus Litis*, in the criminal justice system, the application of the *dominus litis* principle by public prosecutors makes criminal cases in court complicated and convoluted (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 child criminal cases (Adi Riyanto, 2021). The application of *dominus litis* in the administrative justice system (PTUN) has produced judges who think progressively (Soehartono et al., 2021).

The implementation of the *dominus litis* principle in the context of a marriage dispensation proposal is highly pertinent to the pursuit of the basic need of children. Consideration is given to the fact that the judge has full authority because the marriage dispensation is fundamentally a state administration decision requested by the applicant in order to hinder a special prohibition (*relaxation legis*), that is underage marriage. The judge plays a significant role in determining the proposal of marriage dispensation, whether it is approved or rejected. The case of early-age marriage can be suppressed if the judge tightens the marriage dispensation requirement (Aju Putrijanti, 2013). Therefore, the formulation of the problem in this study is how to use the *Dominus Litis Principle* by the judge in establishing the grounds for requesting a marriage dispensation in order to stop the rise of underage marriage, particularly in Banten.

This study focuses on Banten because the frequency of underage marriages has gradually increased in recent years. In 2019, 6 percent of couples married before the age of 18 and grew to 6.23 percent in the following year. The rise of this case is inevitably related to the marriage dispensation given by the judges of PA in Banten. The judges of PA granted 468 (89 percent) for marriage dispensation that consist of PA Tigaraksa Tangerang (37%) followed by PA Tangerang City (10%), PA Serang (18%), PA Pandeglang (17%), PA Lebak (15%), and PA Cilegon (3%) (Division of Integration Processing and Statistics Dissemination, 2021).

This study employed a juridical-empirical approach by studying the legislation or execution of normative legal provisions in every legal event occurred in society. The data sources included written legal documents in the form of statutory regulations and judicial decisions, as well as legal data in action from interviews and focus groups discussion (FGD) with legal practitioners and the public. The data was processed and evaluated in a descriptive-evaluative analysis.

### **Revisiting the Role of Juvenile Judge in The Child Marriage Practice in Indonesia**

According to the objective of this study, 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 in accordance with the law. In Indonesia, according to Law No. 11 of 2012 governing 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, as well as technical course in juvenile justice.

Aside from this context, judges in all Indonesian judicial institutions are constrained by the regulation of the Law on Judicial Power. In Law No. 48 of 2009 pertaining to Judicial Power, 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*, whereas at the cassation level, they can act as *judex juris* (examine the application of the law). In accordance with

Articles 2 and 3 of Law No. 3 of 1997 pertaining to the Juvenile Court, the juvenile court is the executor of judicial power within the general judiciary, with the responsibility and ability to study, decide, and settle juvenile criminal matters.

Knowing that there is no juvenile justice body in Indonesia, there are no juvenile justice judges in Indonesia, with the exception of 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 suggestion of the head of the relevant district court via the head of the high court. To be appointed as a juvenile judge, one must have experience as a judge 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 in the first level at the trial, appellate, and supreme court levels (Sri Sutatiek, 2011). With the passage of the Juvenile Justice System Act, the word "juvenile judge" as used in this Juvenile Court Law has not altered. Only the juvenile court system undergoes change, known as diversion (Barry C. Feld, 2019).

Technically, diversion means "transfer." In terms of language, it is the transfer of the resolution of children's cases from the formal legal procedure to an out-of-court process, with or without conditions. Article 1 number (7) of the Juvenile Criminal Justice System Act defines diversion as the transfer of a child's case from a juvenile criminal proceeding to outside of juvenile justice. The children (perpetrators) who are 12 (twelve) years old and has not yet reached the age of 18 (eighteen) years, including those who have married underage, at the time of processing of the investigation, prosecution, and the time the child is examined in court general, diversion must be carried out at each level of the examination. In general, the purpose of this diversion process is to achieve peace in child criminal cases, prevent children from being deprived of their liberty, encourage community participation, and develop a sense of responsibility in youngsters (Antonius Priyadi S. Wibowo, 2012).

Diversion in juvenile criminal proceedings adheres to the notion of the "active judge" in the proceeding (Aju Putrijanti, 2013). In order to safeguard children who are in dispute with the law, this out-of-court approach should also be utilised when children face legal concerns. Article 28B paragraph (2) of the 1945 Constitution now expressly declares that the State guarantees every child the right to life, growth, and development, as well as the right 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 problems. Judges in juvenile courts are concerned in aspects of both public and private law, including marriage dispensation proceedings and marital dispensations. The purpose of this rule is to restrict the judge's ability 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 (Mies Grijns et al., 2018). Moreover, the study by the Indonesian Women's Coalition in 2019 mentioned that 1 in 8 Indonesian young women married before the age of 18. The BPS Demography and Health Survey (IDHS) 2019 data showed that as many as 25.71 percent of 20- to 24-year-old women married before the age of 18 (Mies Grijns et al., 2018). Bappenas 2021 stated that the economic impact of 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 have significant ramifications for future human resource quality and competitiveness in Indonesia (Mies 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*/person underage), underage (*minderjarig heid/inferiority*), and under parental supervision (*minderjarige ondervoordij*). A person who is not yet an adult and is still considered a child is entitled to protection and fulfilment of their rights (Horii, 2021; Ikeu Tanziha et al., 2020).

According to Law No. 11 of 2012, the Juvenile Justice System, and Law No. 23 of 2002 about 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, which was ratified by Presidential Decree No. RI. 36 of 1999, which also defines children as anyone under the age of 18.

The stipulation of age restriction for children is one of the reasons to revise Article 7 of the Marriage Law so that men and women may marry at the age of 19 years old. With the publication of Law No. 16 of 2019 on the reform of Law No. 1 of 1974 pertaining to Marriage, 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 not only within the context of the right to build a family, as guaranteed by Article 28 B paragraph (1) of the 1945 Constitution, but also within the context of the protection and realisation of children's rights, as guaranteed by Article 28 B paragraph (2). In a legal state, everyone is treated equally before the law (equality before the law). This is emphasised in Article 28 D, paragraph 1 of the 1945 Constitution, which states that everyone has the right to recognition, protection, legal certainty, and equal legal treatment.

The existence of law No. 23 of 2002 concerning the protection of children 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. They also have the right, under parental supervision, to worship according to their beliefs and to think and express themselves in line with their intelligence and age. Others important thing is children entitled to health care and social security based on his or her physical, mental, spiritual, and social needs. They have the right to an education that is tailored to his or her intelligence, skills, and interests, as well as his or her 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 fulfilment children's right in Indonesia is in accordance with 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 on the Rights of the Child are as follows: (1) non-discrimination; (2) doing all possible to meet 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, which elevates the age limit for women to 19 years, putting it in line with the age limit for men. 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.

The amended marriage law, however, is not stringent and contains exceptions for some matters. There is still possibility obtaining a court-issued exemption for underage marriage. The authority of court to grant marriage dispensation due to judicial power is viewed as unbiased and could be able to offer justice for the realisation of essential human rights, such as marriage and establishing a family.

### **Dispensation Rules for Underage Marriages**

A marriage dispensation is a marriage licence 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 for 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 Darmawan et al., 2022).

Personal maturity is governed by Indonesian marriage law, specifically when a person is deemed eligible for marriage and able to take responsibility for oneself 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 the Marriage Law No. 1 of 1974, the age requirements for marriage include a minimum age of 19 for men and 16 for women. If a prospective spouse is under 21 years old, parental consent is required for the wedding. Children younger than 18 years old and unmarried are subject to parental responsibility. Children under the age of 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 women. Nonetheless, amended marriage legislation stipulates that both prospective husbands and prospective wives must achieve the age of 19 (nineteen) years to be eligible for marriage. The principal purpose of Law No. 16 of 2019 regarding amendments to Law No. 1 of 1974 dealing to marriage is a reform of Article 7 paragraph (1) regarding the minimum marital age. Parental consent for possible 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, the person who proposes the court for a marriage dispensation according to Article 7 paragraph (2) of the Marriage Law should be either the parents of the future husband or the future bride.

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 Regulation of the Supreme Court of the Republic of Indonesia (PMA RI) Number 5 of 2019 on Guidelines for Adjudicating Applications for Marriage Dispensation states that parent is eligible party to request a dispensation. In the case that the parents are divorced, the application must be submitted by both parents or by the parent who has legal custody of the child. If one of the parents has been passed away or if the parent lives in indefinite location, one of the parents must make a request for dispensation. Furthermore, in the event when both parents are deceased, their parental rights have been terminated, or their whereabouts are unknown, the application for dispensation must be submitted by the guardian of the children. Legal assistance is required in the absence of the parents or guardians.

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

There are administrative status differences between children who have registered for marriage at the KUA and those who have not when filing for a marriage dispensation. Marriage dispensation may be requested to the court before the marriage registration at the KUA and/or Civil Registry Office, or after being denied at the time of marriage registration at KUA. If the marriage registration has not been registered, the applicant is referred to as a child, but if it has been registered but refused, applicant is referred to as a potential husband or wife.

The application for marriage dispensation is submitted to the official courtroom 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, PA 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 there is a disagreement in their beliefs, the application for marriage dispensation is made to the PA and/or PN hinging on the child's religion and belief (2) If the prospective spouses are underage, the court 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 there are compelling reasons that allow the dispensation to be granted. While Deri Fahrizal Ulum, Child Protection Officer for UNICEF Indonesia demonstrated that 90% of marriage dispensation requests are granted by Indonesian courts, the Religious Courts of the Supreme Court (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 who is requesting a marriage dispensation has already a secure job that provides adequate money, and the woman is expected mature enough to accomplish housework. Based on the trial's legal facts, the relationship between the two prospective brides and grooms is already close, and there are signs that if they do not get married soon, they would engage in premarital sexual relations that will disrupt the social order. In addition, the two prospective brides are not prevented from marrying according to religious law and the family of both couples have consented to the marriage

The decision of this marriage dispensation may be used as a legal document to register marriage registration at the KUA and/or the Civil Registry Office when the court has approved the application. The officer of the marriage registration may not deny the marriage registration of people who are still underage knowing that a formal marriage dispensation application has been issued by the court.

This topic took the attention of the public, particularly by the Indonesian Women's Coalition (KPI), issuing marriage dispensation that has validated the cases of child marriage in Indonesia. Although the overall rate of child marriages decreased from 11.21 percent in 2018 to 10.82 percent in 2019, the rate increased in 18 Indonesian provinces. Most of these incidents 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; Ikeu Tanziaha et al., 2020). Although the government has implemented several initiatives to avoid this practice, the number of early-age marriages is continuously increasing. This suggests that government policies alone are insufficient to reduce child marriage rates.

According to Presidential Regulation (Perpres) No. 18 of 2020 About the National Medium-Term Development Plan (RPJMN 2020-2024), underage marriage has become a national priority for Indonesia's national development plans. The Sustainable Development Goals (SDGs) that the government aspires to achieve are also a concern to cope with underage marriage. It is clearly stated in the fifth point of the SDGs, which is 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 percent in 2018 to 8.74 percent 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 number of weddings in the province of Banten 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 percent in 2019 to 6.23 percent in 2020 even though it fell from 6.78 percent in 2018. Moreover, BPS data from 4 May 2021 revealed that the percentage of 20- to 24-year-old married women have already got married before 15 years old (Division of Integration Processing and Statistics Dissemination, 2021).

Marriage dispensation is directly correlated with the increase in underage marriage in Banten. The Banten High Court of Religion, the Religion Court, granted 468 requests for marriage dispensation in 2020, Tigaraksa PA granted 37 percent of marriage dispensation petitions, followed by PA Serang at up to 18 percent, PA Pandeglang at 17 percent, PA Lebak at 15 percent, PA Tangerang City at 10 percent, and PA Cilegon at up to 3 percent (Division of Integration Processing and Statistics Dissemination, 2021).

Dispensation in Banten are motivated by the following factors: (1) unwanted pregnancy; (2) a relationship like a husband and a wife; (3) the community sanction for violating social norms by having intimate relationship with a non-blood relative partner. (4) dropping out of school, (5) being financially independent by having a partner who have already definite job (Division of Integration Processing and Statistics Dissemination, 2021).

Those factors are utilized by the applicant as a strong reason to obtain the judge's consideration for a marriage dispensation. The fourth issue is the most often cited as a tangible cause for requesting an exception from the PA. If the PA court has authorized and issued a marriage dispensation, and if the applicant can provide all documents needed for the registration application to the KUA district (*Kecamatan*), then the Marriage Officer has no reason to reject it.

The increasing number of underage marriages in Banten province has the potential to create new problems in society, such as (1) severe depression for young couples; (2) domestic violence; (3) divorce due to immature thinking; (4) propensity to drop out of school; (5) economic difficulties that can lead to failure to look after a child; (6) the emergence of underage workers; and (7) transmission of HIV disease.

Severe depression can lead to domestic violence, which can ultimately culminate in a divorce. This is deeply 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 (Division of Integration Processing and Statistics Dissemination, 2021).

The Banten Province Central Bureau of Statistics has released the following breakdown of the young population by gender.

Table 1 Statistic about 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 percent of the population between the ages of 15 and 19 are still in school. The rest of them are either caring for the family or dropping out. Those who are 15 to 19 years old and have not attended school and hold the job are 177,991. Meanwhile, people who used to work are 18978, compared to those who have never worked are 1,6684. Consequently, there is a sizable underage workforce, as high as 56.75 percent, and according to BPS data from 2021, their presence accounts for as much as 29.13 percent of the total employment rate in Banten.

Participation of juveniles in the workforce does not necessarily promote the welfare of society. They are less skilful due to the fact that they have low degree in education. Occasionally, parents encourage their children to marry because they believe they already have a stable income and a robust social network. Parents are anxious that the intimate relationship between their unmarried children may grow into an immoral relationship. During the Covid-19 outbreak, 15- to 19-year-old females remained at home and were frequently visited by their partners, 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 & Siti Suriyati, 2022 p. 274-275).

Parents think that religious law does not restrict the age of marriage, so that underage marriage poses no difficulty (Ikeu Tanziha et al., 2020). The majority of Banten citizens believe that marriage may enhance the level of life for both partners. This idea is strongly believed by people in Banten that majority share similar religion. As a way of life, every Muslim adheres to the teachings of QS An-Nuur verse 32, which emphasises 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 percent increase in the poverty rate in Banten from a total of 857,640 persons in 2021. For the prevention of 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. However, the Covid-19 condition has limited the mobility of staff officers with the policy of Implementation of Restrictions on Community Activities (PPKM) (Yadi Jayasantika, 2021).

### **The Attitude of Judge in Implementing Dominus Litis Principle for Marriage Dispensation proposal**

As a signatory to the Convention on the Rights of the Child, Indonesia requires all state institutions, including the court, to act in the best interests of the child when dealing with children. Under Law No. 16 of 2019, marriage is only permissible for persons who have reached the age of 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 officially and specifically outlined in the laws and regulations; therefore, the judges considering this case would only analyse the legal facts as they pertain to civil matters generally. In the application for a marriage dispensation, the method for showing urgent circumstances is also not regulated. Thus, courts have diverse ways of hearing it. On this basis, the Chief Justice of the Supreme Court issued PERMA No. 5 of 2019 about Guidelines for Adjudicating Marriage Dispensation Applications (Mahkamah Agung Republik Indonesia, 2020).

The substance of PERMA No. 5 of 2019 advances the *dominus litis* concept for the purpose of adjudicating proposal for marriage dispensation, explicitly. *First*, it applies the principles of the best interests of children, the right to life and children development, respecting for the views of children, respecting for human rights and dignity, non-discrimination, gender equality, equality before the law, fairness, benefit, and legal certainty. *Second*, it guarantees the establishment of a legal system that defends the rights of children. The court needs the petitioner to attend the children for whom a marriage dispensation is being sought. The court might rule the application "failed" and "unacceptable" if it is not complied with. To ensure the protection of children's rights, the judge is required to carefully examine the reasons for the marriage dispensation application, which includes: (1) examining the legal position of the applicant; (2) exploring the background and reasons for underage marriage; (3) finding deep information on the children's comprehending and consent to the marriage; and (4) paying attention to the psychological, sociological, cultural, educational, health, and economic conditions of the children. *Third*, increasing 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 into the conclusion, and if it does not offer suggestion, the ruling is null and invalid. *Fourth*, identifying 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 who was submitted in the application (2) psychological conditions, health, and readiness of children to marry and establish a family; and (3) psychological, physical, sexual, or economic coercion

on children and/or families to marry or give in children in marriage. Consequently, when examining a child for whom a marriage dispensation is being applied, the judge may hear the child's statement without the presence of the parents; hearing the child's statement through a remote audio-visual communication examination at the local court or elsewhere; recommending that the child be accompanied by a companion; and, if necessary, bringing an interpreter or someone who typically communicates with children. *Fifth*, it considers the protection and best interests of children 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 pertaining to child protection.

Hierarchically, the Supreme Court Regulation has the status of a statutory regulation under the law. Therefore, PERMA 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 both PN and PA 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 PA remains problematic due to the absence of a juvenile judge.

According to the MA Research and Development Agency, there are 17 juvenile judges in the General Courts of Banten, who are 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 PN. In Banten, PA that does not handle criminal cases does not provide SPPA judges. Therefore, the trial for the marriage dispensation application is often presided over by civil judges (Mahkamah Agung Republik Indonesia, 2020).

Although there is no juvenile judge, the PA 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 accordance with Article 10 of the Law on Judicial Authority, the PA is prohibited from refusing to examine, try, and decide on the cases submitted. Based on the adage *Ius Curia Notiv/Curia Notif Jus*, PA judges are considered to know and understand all laws. The PA judge has 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*.

Prior to trial, the PA always applies the formal and material conditions for the submission of a marriage dispensation application (A. Basiq Djalil, 2010; Rani Simangunsong, 2014). In civil procedural law, formal requirements constitute the majority of formal evidence, and an application cannot be accepted if the condition 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 and can result in the rejection of the application if they are not met, such as a statement of the child's ability to fulfil his marriage obligations and a statement that he will complete his nine-year study obligation.

Nevertheless, in general, PA has not complied with PERMA's documentation requirements (letters of recommendation from psychologists, doctors/midwives, professional social workers, social welfare workers, 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 a very important part of the *discovery-disposition* in the litigation process to provide justice based on valid facts and evidence.

According to the PA judge who heard the case, the evidence of the applicant for a marriage dispensation is the pursuit of 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). In general, the PA judge in the trial of the dispensation application follows three steps in stages: deciding if the event is filed as the basis for the petition, qualifying the event, and establishing the law of the event and incident for which dispensation is being proposed.

PA courts in Banten province, in general, do not always accept marriage dispensation proposal. In 2020, 45 dispensation of marriage proposal (9.8 percent) were denied out of 468 applications received (90.2 percent). Marriage dispensation can only be granted if the legal facts proven in court. After considering various aspects, including juridical, sociological, psychological, and Islamic law, the early marriage is very urgent to take place.

Generally speaking, PA courts within the Banten jurisdiction have granted a marriage dispensation application (*tasbih al-ahkam/legal justification*) for a variety of 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, families of both parties have mutually agreed to the marriage as evidenced by direct statements from parents and witnesses. Based on the trial's legal facts, the relationship between the two prospective brides and grooms is already so close. Therefore, if they are not married immediately, they would expectedly violate religious norms, and threatening the social order in the end. The two prospective brides are expected to have no obstacles and prohibitions on marriage according to Islamic law.

The judgement taken by the PA judge on a dispensation application is always based on a dialectic between two potential accidents. On the one hand, if the marriage is not performed promptly, there will be harm due to illegal relationship that violate the norms and regulations of the society, as established by the trial's legal findings (living law). On the other hand, there are no legal realities that can ensure the life (*hif al-nafs*), continuation of education (*hifz al-aql*), health, and safety of future generations (*hifz al-nasl*) (Mustafa Dib al-Bugha, 2007 p. 32-35). When confronted with two accidents, one chooses the lesser of the two in order to avoid the greater danger (*Izda ta'aradh mafsadatan ru'iy akhaffahuma bi irtikab akhaffahuma*) (Ali Ahmad al-Nadwi, 2009 p. 240).

The judges of PA in the Banten jurisdiction frequently approves marriage dispensation applications based on urgent evidence. They believe that the damage caused by denying a marriage dispensation is likely greater than the damage caused by an early marriage, which is likely to wound the offspring (*al-nasl*) and honour (*al-'ardh*) of the two prospective brides. The legal factors presented by the judges in deciding the application for a marriage dispensation are based on the courtroom-established legal facts. 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 problem in Banten. The *dominus litis* concept has been explicitly implemented by PA as an institution empowered by law to evaluate the urgency or unurgency of a marriage. However, the implementation of PERMA No. 5 of 2019 has not been consistently enforced by courts in PA who considers requests for marriage dispensation. Although there was an increase in the number of marriage dispensations slated for 2020, not all marriage dispensation applications filed to the PA in the province of Banten were approved. Forty-five appeals for marriage dispensation were denied (9.8 percent) while 468 applications were accepted (90.2 percent). Based on the court-established legal circumstances, the PA judge approved the marriage dispensation if the early marriage was very urgent. Considering the facts and evidence provided by the petitioner, the judge in the PA determines between two lesser disadvantages coming from rejecting dispensation or permitting early marriage.

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