

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

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

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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 judicis est judicare 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, *judicis est judicare 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 (*minderjarigheid/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 Tanziha 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 (*hifzd al-aql*), health, and safety of future generations (*hifzd 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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