

## SEEKING JUSTICE IN ISLAMIC LEGAL PLURALISM: The Dispute of Child Best Interests in Marriage Dispensation in Indonesia

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### Abstract

*The principle of the best interests of children must be the main consideration in adjudicating applications for marriage dispensation. However, its implementation becomes problematic when faced with provisions on the ability to grant marriage dispensations for urgent reasons. This article examines how the best interests of children are implemented in legal applications for marriage dispensation in religious court. It employs a socio-legal approach with a *maqāṣid al-syar'ah cum-mubadalah* perspective. This article proposes that the principle of the best interests of children is yet considered by judges effectively in deciding the cases. This does not reflect the protection of the child's life, heredity, intellect, property, and religion, and does not consider the unique experiences of women both biologically and socially. Judges have a biased perspective in measuring the meaning of maturity and readiness of girls to marry, ignoring children's rights in education and reproductive health, and subordinate women in the spiritual realm.*



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[Prinsip kepentingan terbaik bagi anak harus menjadi pertimbangan utama dalam mengadili permohonan dispensasi nikah. Namun, implementasinya menjadi problematik ketika dihadapkan pada ketentuan tentang dapat dikabulkannya dispensasi kawin karena alasan-alasan yang mendesak. Artikel ini mengkaji bagaimana kepentingan terbaik bagi anak diimplementasikan dalam permohonan dispensasi nikah di pengadilan agama. Artikel ini menggunakan pendekatan sosio-legal dengan perspektif *maqāṣid al-syarī'ah cum-mubadalah*. Artikel ini berargumen bahwa prinsip kepentingan terbaik bagi anak belum dipertimbangkan oleh hakim secara efektif dalam memutuskan perkara. Hal ini tidak mencerminkan perlindungan terhadap jiwa, keturunan, akal, harta, dan agama anak, serta tidak mempertimbangkan pengalaman unik perempuan baik secara biologis maupun sosial. Hakim memiliki cara pandang yang bias dalam mengukur makna kedewasaan dan kesiapan anak perempuan untuk menikah, mengabaikan hak-hak anak dalam pendidikan dan kesehatan reproduksi, serta mensubordinasikan perempuan dalam ranah spiritual.]

**Keywords:** *Child Protection, Best Interest of Child, Marriage Dispensation, Maqāṣid al-Syarī'ah cum-Mubadalah*

## Introduction

In Indonesia, child marriage cases are alarming, especially after the issuance of Law No. 16/2019, which raised the age restriction of marriage for women to 19 years old. The regulation is to prevent child marriage and protect the rights of children and women.<sup>1</sup> However, the number of child marriages through the mechanism of marriage dispensation is getting higher. It is suspected as an opportunity to legalize child marriage.<sup>2</sup> Based on data from religious courts on the number of applications for dispensation of marriage, in 2021 there were sixty five thousand and in

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<sup>1</sup> Edy Setyawan et al., "Legal Age for Marriage: SDGs and Maslahah Perspectives in Legal Policy Change in Indonesia," *Al-Manabij: Jurnal Kajian Hukum Islam* 17, no. 2 (2023): 183–197.

<sup>2</sup> Melinda Rahmawati and Heni Ani Nuraeni, "Peran Dispensasi Kawin dalam Peningkatan Angka Pernikahan Dini di Wilayah Kotamadya Jakarta Barat," *Al-Istinbath: Jurnal Hukum Islam* 6, no. 1 (2021): 1–14.

2022 fifty five thousand cases.<sup>3</sup>

The Religious Courts in East Java recorded the highest number of marriage dispensations in 2022. This number is spread across all regions, including Kediri, in which a relatively high number of marriage dispensation cases occurred. In Tulungagung Religious Court, for example, there were 529 marriage dispensation cases in 2020, 550 cases in 2021, and 373 cases in 2022.<sup>4</sup> Nganjuk Religious Court in 2020 there were 418 cases, in 2021 there were 346 cases, and in 2022 there were 265 cases.<sup>5</sup> The Blitar Religious Court in 2020 had 626 cases, in 2021 it decreased to 576 cases, and in 2022 there were 489 cases.<sup>6</sup> Meanwhile, the Kediri District Religious Court in 2021 had 620 cases, and in 2022 there were 569 cases.<sup>7</sup>

The high rate of marriage dispensation in addition to the internal factors of the applicant (such as religious, economic, social, cultural factors, or pregnancy outside of marriage), cannot be separated from the subjectivity of judges in understanding the principle of the best interests of the child to be applied to marriage dispensation cases. The ambiguity of the concept of the best interests of the child in both the Convention on the Rights of the Child (KHA) and Law No. 23 of 2002 on Child Protection has encouraged judges to interpret which decisions they see as fulfilling the best interests of the child in the marriage dispensation cases before them.

The Supreme Court has essentially established a mechanism for examining marriage dispensation cases in the best interests of children

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<sup>3</sup> Siaran Pers Nomor: B- 031/SETMEN/HM.02.04/01/2023, “Kemen PPA: Perkawinan Anak di Indonesia Sudah Mengkhawatirkan,” *Kementerian Pemberdayaan Perempuan Dan Perlindungan Anak Republik Indonesia*.

<sup>4</sup> Pengadilan Agama Tulungagung, *Laporan Tahunan Pengadilan Agama Tulungagung*, 2022.

<sup>5</sup> Pengadilan Agama Nganjuk, *Laporan Tahunan Pengadilan Agama Nganjuk*, 2022.

<sup>6</sup> Pengadilan Agama Blitar, *Laporan Tahunan Pengadilan Agama Blitar*, 2022.

<sup>7</sup> Pengadilan Agama Kabupaten Kediri, *Laporan Tahunan Pengadilan Agama Kabupaten Kediri*, 2022.

as outlined in Supreme Court Regulation (*Perma*) No. 5 of 2019. It deals with the Guidelines for Adjudicating Marriage Dispensation Cases, such as hearing the child's opinion, considering the child's physical and psychological condition, age, education, and others.<sup>8</sup> However, the evidence in court shows that judges, in adjudicating marriage dispensation cases generally, do not consider the interests of children. Judges also pay little attention to the women's unique experiences different from men's, both biologically and socially. In addition, judges do not involve women's and children's protection organizations, psychologists, medical personnel, social workers, and social welfare personnel.

In addition, the application of the principle of the best interests of the child becomes problematic when faced the provision of the ability to grant dispensation to marry for very urgent reasons formulated in Article 7 paragraph (2) of Law No. 16 of 2019 is also ambiguous. In line with Marilang's opinion, it is unclear or biased legal norms in the legislation regarding the basic reasons for granting a dispensation to marry.<sup>9</sup>

Anthin Lathifah, Brilian Ernawati, and Anwar Masduki also found problems in the legal substance that is still ambiguous. Legal structure related to child marriage and the practice of legal culture are contained in the legal behavior of child marriage and the lack of social efforts to improve the culture of marriage at an adult age.<sup>10</sup>

The subjectivity of judges in interpreting the best interests of children cannot be separated from the lack of clarity of the legal substance in *Perma* No. 5/2019, as researched by Mughniatul Ilma.<sup>11</sup> According

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<sup>8</sup> Kelompok Kerja (POKJA) Perempuan and Anak Mahkamah Agung, *Buku Saku Pedoman Mengadili Permohonan Dispensasi Kawin*, 2020, 38.

<sup>9</sup> Marilang, "Dispensasi Kawin Anak di Bawah Umur," *Al-Daulah* VII, no. 1 (2018).

<sup>10</sup> Anthin Lathifah, Brilian Ernawati, and Anwar Masduki, "Problem With The Islamic Legal System Regarding Child Marriages in Indonesia During The Covid-19 Pandemic Period," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 2 (2022).

<sup>11</sup> Mughniatul Ilma, "Regulasi Dispensasi dalam Penguatan Aturan Batas Usia Kawin Bagi Anak Pasca Lahirnya UU No. 16 Tahun 2019," *Al-Manhaj* 2, no. 2 (2020).

to Hasan and Kamaluddin's research, the purpose and objective of the enactment of *Perma* No. 5 of 2019, is actually to serve as a standard for judges in adjudicating marriage dispensation to pay attention to the best interests of children, has not been implemented.<sup>12</sup> This finding is convinced by Iklilah Muzayyanah Dini Fajriyah (et.al) which found that the best interests of children are not a priority for judges in deciding marriage dispensation as mandated by *Perma* No. 5 of 2019.<sup>13</sup>

Yunus and Ahmad Faisal<sup>14</sup> and Marwa<sup>15</sup> also found that various aspects of child protection failed to be achieved from the existence of marriage dispensation, the prevailing of marriage dispensation caused more harm than benefit. According to Rana, Arifin, and Kurniawan's findings, state law regulating the age of marriage is ineffective because the public recognize and follow religious provisions that do not limit the age of marriage.<sup>16</sup> The various research results above show that they have not specifically discussed the legal construction of the judges in implementing the best interests of children in marriage dispensation from women's perspectives have not been the attention of researchers.

This article seeks to discuss how judges view the best interests of the child and evaluate the judges' considerations in examining and deciding marriage dispensation cases. The judges' considerations have

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<sup>12</sup> Fahadil Amin Al Hasan and Deni Kamaluddin Yusup, "Dispensasi Kawin dalam Sistem Hukum Indonesia: Menjamin Kepentingan Terbaik Anak Melalui Putusan Hakim," *Al-Ahwal* 14, no. 1 (2021).

<sup>13</sup> Iklilah Muzayyanah and Dini Fajriyah, "Dispensasi Perkawinan Anak yang Menjerumuskan: Studi Putusan Hakim di Jawa Timur," *The Indonesian Journal of Socio-Legal Studies* 2, no. 2 (2023).

<sup>14</sup> Sri Rahmawaty Yunus and Ahmad Faisal, "Analisis Penetapan Dispensasi Kawin dalam Perspektif Undang-Undang Perlindungan Anak (Studi Kasus di Pengadilan Agama Limboto)," *Jurnal Ilmiah Al-Jauhari (JIAJ)* 13, no. 12 (2018).

<sup>15</sup> Muhammad Habibi Miftakhul Marwa, "Mitigasi Bencana Perkawinan Anak Sebagai Mewujudkan Keluarga Sakinah: Perspektif Fikih Perlindungan Anak," *Vej* 7, no. 2 (2021).

<sup>16</sup> Mohamad Rana, Tajul Arifin, and Cecep Soleh Kurniawan, "When Religion and Culture Meet Economy Socio-Legal Factors for the Early Marriages of Muslims Families in Cirebon," *Al-Ahwal* 15, no. 1 (2022).

reflected the best interests of the child which reflects the protection of the soul, mind, religion, offspring, property, as well as considering the unique biological and social experiences of women. This study focuses on cases of dispensation of marriage for reasons of fear of violating religious norms conducted in four religious courts in East Java, namely the Tulungagung Religious Court, Nganjuk Religious Court, Blitar Religious Court, and Kediri District Religious Court, with the consideration that dispensation of marriage in these four judicial institutions is dominated by reasons of fear of violating religious norms and judges have the same perspective in applying the best interests of the child in adjudicating marriage dispensation cases.

This research uses a socio-legal approach with a *maqāṣid al-syarī'ah cum-mubadalah* perspective. This article highlights how judges apply the best interests of children in adjudicating marriage dispensation cases. Primary data sources are data obtained directly from the judicial institution that is the object of research based on observations and interviews with judges involved in a trial case in a marriage dispensation case and the Legal Aid Post (*Posbakum*). Data analysis was conducted using an interactive model that included three streams of activities, namely data condensation, data presentation, and conclusion drawing or verification.<sup>17</sup>

This article contributes to the concept of child protection in marriage dispensation cases in religious courts based on the best interests of children by integrating the key concepts of human benefit in *al-kulliyāt al-khams* with a *mubadalah* perspective. It argues that the subjectivity of judges in applying the best interests of children has implications for the increasing number of marriage dispensations in Indonesia.

### Theory of *Maqāṣid al-Syarī'ah cum-Mubadalah*

The theory of *maqāṣid al-syarī'ah cum-mubadalah* is a new idea in contemporary fiqh methodology. Kodir defines *maqāṣid al-syarī'ah cum-*

<sup>17</sup> Matthew B. Milles, A. Michael Huberman, and Jihnnny Saldana, *Qualitative Data Analysis: A Methods Source Book* (America: SAGE Publication, 2014), 12–13.

*mubadalah* as the goal of Islamic law that is accompanied by the perspective that men and women are full subjects of life and the relationship between the two is one of complementarity and cooperation.<sup>18</sup> The way *maqāṣid al-syarī'ah cum-mubadalah* works is by integrating the key concepts of human welfare in *al-kulliyāt al-khams* (the five principles) with the perspective of equality. This integration is implemented in two strategies.

First, focusing on the equality of men and women as whole human beings, servants of Allah, and *khalīfah fī al-'ard* (steward of the earth). In this context, all forms of *maqāṣid al-syarī'ah in al-kulliyāt al-khams* include both men and women as fellow human beings who are servants of God and caliphs on earth. Second, paying attention to the specificities experienced by women in their life experiences, and not experienced by men, both biologically and socially. Women's biological experiences can include menstruation, pregnancy, childbirth, postpartum, and breastfeeding. While women's social experiences are in the form of stigmatization, marginalization, violence, and double burden. These social experiences are specific to women simply because they are female.

Kodir believes that women's unique biological and social experiences need to be seen as human experiences that must be included in the conception of benefit in all forms of *maqāṣid al-syarī'ah* so that the unique experiences of women are not the concern of women alone, but are the joint responsibility of men and women. The conception of benefit must be realized through *al-kulliyāt al-khams*, which includes the protection of religion, soul, offspring, mind, and property.<sup>19</sup>

In the context of the examination of marriage dispensations in religious courts in East Java, the use of *maqāṣid al-syarī'ah cum-mubadalah* theory is relevant as an analysis to evaluate whether the examination and court decisions in marriage dispensation cases have considered the protection of the soul, mind, religion, property, and honor of children,

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<sup>18</sup> Faqihuddin Abdul Kodir, "Menawarkan Gagasan Maqāṣhid Syarī'ah Cum-Mubadalah," n.d.10 June 2023.

<sup>19</sup> *Ibid.*

as well as considering the unique experiences of women both biologically and socially, or not.

### Judges' Interpretations of Children's Best Interest

The examination of marriage dispensation cases in the four religious courts that were the object of the research was conducted by a single judge. Given the unavailability of judges certified as juvenile judges in the four courts, the courts appointed existing judges to examine marriage dispensation cases. In conducting case examinations, judges have applied most of the procedures outlined by *Perma* No. 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications, such as exploring the reasons for child marriage, digging up information related to the child's consent to be married, hearing testimony from the applicant and related parties, considering the presence or absence of psychological, physical, sexual, and economic coercion, and ensuring parental commitment to take responsibility for and accompany the child's marriage. However, the implementation of these procedures is still only a formality, not yet leading to the substance of the principles of child protection that uphold the best interests of the child.

Religious court judges have the same perspective in understanding the best interests of children in marriage dispensation cases. Judges apply the principle of the best interests of the child by juxtaposing it with benefit and harm in Islamic law. Judges measure the best interests of the child by weighing the size of the *mafsadat* or harm and the benefits for the child by referring to the *fiqh* rule *dar'u al-mafāsīd muqaddam 'alā jalbi al-maṣā'alib*. The reason for urgency is understood to be the same as an emergency. The measure of emergency is that if the application for dispensation to marry is not granted, there will be harm or bad things so that the child will commit adultery or *nikah sirri*, so the application for dispensation should be granted. Thus, granting a dispensation to marry under these conditions is considered *maslahat* for the child. However,



in practice, judges sometimes have different measures in determining whether a case falls into the category of *mudarat* or *maslahat*.

*Mudarat* and *maslahat* are based on the reasons for the request for dispensation to marry and the testimony of the applicants at trial regarding the extent of the closeness of the relationship between the prospective bride and groom. If the two love each other the relationship is already very close, and have even had sexual intercourse, and both intend to get married to avoid adultery, then the judge considers it a very urgent reason to get married immediately. If they do not get married immediately, it is feared that greater harm will occur, namely the continuation of adultery.

Although the bride and groom had not yet had sexual intercourse, they had made a good faith effort to come to the court to apply for dispensation to marry because they were afraid of committing adultery and the judge saw that they were ready to settle down both physically and financially, so the judge saw this as an urgent reason to marry. In the judge's view, if the application for dispensation is rejected, it will cause greater harm to the child, so it is better to grant it. In other cases, if the applicant's child was still in school and under the age of 15, the judge did not grant the dispensation application and advised the child to continue their education. However, these cases are very few.<sup>20</sup>

The general criteria determined by judges in the four religious courts regarding the urgent reasons for allowing child marriage are pregnancy outside marriage, a very close dating relationship and fear of pregnancy, a very close dating relationship and fear of adultery, a very close dating relationship and fear of being viewed badly by the community, a very close dating relationship and having dropped out of school. These reasons were considered by the judge to be very urgent reasons for marriage. Granting the application for dispensation to marry on these grounds is a form of concern for the best interests of the child.

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<sup>20</sup> Juraemi Arief, "Interview" July 04th, 2023; Daim Khoiri, "Interview" July 06th, 2023; Ugan Gandaika, "Interview" July 07th, 2023.

If not married off immediately, it is feared that greater harm will occur to the child. Juraemi Arief, a judge at the Tulungagung Religious Court, believes that although early marriage causes harm to children, if it is urgent, it must be married off immediately, as the *fiqh* rule *al-darūratu tubīhu al-mahzūrāt*.<sup>21</sup>

The judges' perspective that sees the parents' concern over their children's violation of religious norms as a form of emergency to enter marriage shows that the judges position children, especially women, as adults. This is not in line with the principles of *maqāṣid al-ṣyari'ah* and child protection. Child marriage has the potential to cause human rights violations because child marriage has an impact on the non-fulfillment of children's rights, the risk of sexual violence, and the threat to girls' reproductive health,<sup>22</sup> and cause psychological problems for children who are already married.<sup>23</sup> Parents' concerns should not be seen as a reason for urgency. Moreover, the child for whom marriage dispensation is sought has never had sexual intercourse during their courtship.<sup>24</sup>

The social conditions of the community are also a consideration for judges in determining whether child marriage is an emergency. The culture of the community that marries off their children at a young age is a consideration for judges in granting applications for dispensation of marriage. According to Daim Khoiri, a judge at the Tulungagung Religious Court, if the application for dispensation of marriage is not granted, the child will feel embarrassed by the surrounding community, especially

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<sup>21</sup> Arief, "Interview" July 04<sup>th</sup>, 2023.

<sup>22</sup> M. Anwar Nawawi et al., "Harmonization of Islam and Human Rights: Judges' Legal Arguments in Rejecting Child Marriage Dispensation in Sukadana, Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 1 (2022): 117–133.

<sup>23</sup> Darmawan, Asmaul Husna, Mirza Rahmatillah and Helmi Imran, "Marriage Dispensation and Family Resilience: A Case Study of the Bener Meriah Shariah Court, Aceh Province," *Ahkam* 22, no. 1 (2022): 433–54.

<sup>24</sup> Gina Wulandari and Tirtawening Paritkesit, "Fulfillment of The Principle of The Best Interest of Children in The Granting of Child Marriage Dispensation in Indonesia," *Legal Brief* 11, no. 3 (2022): 1446–1460.

since his age has exceeded the age of marriage in the area.<sup>25</sup> Judges find it difficult to avoid cultural factors in adjudicating marriage dispensation cases. In the end, the legal cultural factors of society contribute to the increase in child marriage in Indonesia.<sup>26</sup>

### *Maqāṣid al-Syarī'ah cum-Mubadalah* in Marriage Dispensation

The lack of clarity of legal substance in Law No. 16 of 2019 regarding the permissibility of dispensation to marry for very urgent reasons and Perma No. 5 of 2019 regarding the concept of the best interests of children has implications for the subjectivity of judges in interpreting the law. The subjectivity of judges in applying very urgent reasons and the best interest of the child has implications for the increasing number of marriage dispensation applications granted by religious courts.

Cases of applications for dispensation to marry for reasons of fear of violating religious norms or committing adultery where the prospective bride and groom are not pregnant can be explained as follows. In the Tulungagung Religious Court in 2022 there were 271 cases, in the Blitar Religious Court in 2023 there were 101 cases, in the Kediri District Religious Court in 2023 there were 184 cases. The Nganjuk Religious Court revealed that cases of dispensation of marriage for reasons of fear of violating religious norms reached 60 percent. These findings reinforce the results of research conducted by Ashabul Fadhli and Arifki Budia Warman that the reason for worry is found in almost all cases of marriage dispensation.<sup>27</sup>

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<sup>25</sup> Khoiri, "Interview" July 06<sup>th</sup>, 2023.

<sup>26</sup> JM Muslimin, "Law and Culture: 'Urf as a Substance of Islam Nusantara as Reflected in Indonesian Religious Court Decisions" 154, no. Icclas 2017 (2018): 153–156; Siti Musawwamah et al., "Resistance to Child Marriage Prevention in Indonesia and Malaysia," *Abkam: Jurnal Ilmu Syariah* 23, no. 1 (2023): 259–280.

<sup>27</sup> Ashabul Fadhli and Arifki Budia Warman, "Alasan Khawatir Pada Penetapan Hukum Dispensasi Kawin di Pengadilan Agama Batusangkar," *Al-Ahwal* 14, no. 2 (2021).

The judge's consideration in granting the application for dispensation of marriage is illustrated in the following stipulations; Determination of the Tulungagung Religious Court Number 459/Pdt.P/2023/PA.TA, Determination of the Nganjuk Religious Court Number 72/Pdt.P/2023/PA.Ngj., Determination of the Kediri Religious Court Number 499/Pdt.P2023/PA.Kab.Kdr., and Determination of the Blitar Religious Court Number 0327/Pdt.P/2023/PA.BL. From these decisions, it can be concluded that the judge in examining the case of an application for dispensation to marry for fear of adultery has not fully applied the principles of the best interests of the child. Judges' considerations tend to be oriented towards religious protection (*hifẓ al-dīn*) under the pretext of preventing children from violating religious norms. Judges do not consider the protection of the soul, offspring, mind, property, and religion of girls, and do not integrate women's unique human experiences both biologically and socially. Women's biological experiences can include menstruation, pregnancy, childbirth, postpartum, and breastfeeding. While women's social experience is in the form of stigmatization, marginalization, violence, and double burden. These social experiences are specific to women simply because they are female.

Judges tend to inherit patriarchal thinking that places men as the main power holder, so they must have a higher degree than women. Meanwhile, women are seen as subordinate to men. This can be seen from several aspects, namely bias in measuring the meaning of maturity and readiness of girls to marry, non-fulfillment of children's educational rights, neglected reproductive health rights, and subordination of women in the spiritual realm.

## Measuring Maturity and Readiness in Marriage

### *Maturity Standards*

The ideal age and measure of maturity in marriage are not explicitly determined in Islamic law. *Ulama* only determines the size of a

person's maturity by *balig*. However, the maturity of a person tends to be different. Women tend to reach puberty about 3-5 years earlier than men. Adulthood will affect a person's behavior towards the opposite sex, such as the growth of a sense of attraction.<sup>28</sup> In addition to the *balig* factor, a person's maturity can be seen from age. The age of 19 as the minimum limit of marriage in Law No. 16 of 2019 is seen as the initial stage of entering adulthood and is considered mature enough to enter marriage.

In examining marriage dispensation cases, judges have a biased perspective in applying the age limit for marriage. In general, judges do not consider age as a measure of a person's maturity, especially for women. Judges tend to rely on maturity in the physical sense, namely *balig*. Whereas in Islam the measure of maturity is multilevel, namely *balig* (physically mature), *'aqil* (mature in thinking), and *rusyd* (mentally mature).<sup>29</sup> Even though the girl is under 19 years of age, she has reached the age of puberty, and her thinking is mature, so her request for dispensation should be granted.

The judge's view shows that girls are only seen in the context of their bodies, which are imagined as adult women, and the gender roles they will assume in marriage.<sup>30</sup> From the perspective of child protection, this view is not in line with Article 1 of Law No. 23 of 2002 concerning Child Protection which emphasizes that ages under 18 are classified as children, so they are not yet sufficient to enter into marriage.

Maturity and maturity of a person are important in marriage so that a quality relationship is created in the household. The most important maturity in marriage includes physical and biological maturity, but it must also consider socio-economic maturity.<sup>31</sup> According to BKKBN,

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<sup>28</sup> Mardi Candra, *Pembaruan Hukum Dispensasi Kawin dalam Sistem Hukum di Indonesia* (Jakarta: Kencana, 2021), 43.

<sup>29</sup> Ahmat Hilmi and dkk, *Mendobrak Kawin Anak, Membangun Kesadaran Kritis Pencegahan Kawin Anak* (Jakarta: Yayasan Rumah Kita Bersama, 2018), 36–37.

<sup>30</sup> Fajriyah and dkk, "Dispensasi Perkawinan Anak yang Menjerumuskan: Studi Putusan Hakim di Jawa Timur."

<sup>31</sup> Candra, *Pembaruan Hukum Dispensasi Kawin dalam Sistem Hukum di Indonesia*.

the readiness needed in marriage is physical readiness, mental readiness, financial readiness, moral readiness, psychological readiness, and social readiness. Unfortunately, judges do not consider these aspects in examining marriage dispensation applications.

The age difference between the prospective wife and prospective husband is not a consideration for judges in adjudicating marriage dispensation applications as mandated by *Perma* No. 5 of 2019. Even though the age difference is far adrift between the two, the judge does not see it as a problem in granting marriage dispensation. In Islamic law, there is no prohibition on marriages of different ages, even the marriage of the Prophet PBUH shows a marriage of 15 years of age difference. However, marriage can provide happiness until the end of their lives because it is based on faith, sincerity, and mutual love. Although the marriage was successful, as a father, the Prophet did not want his daughters to be married to men whose ages were far apart. For example, the Prophet married his daughter Siti Fatimah to Sayyidina Ali ra. whose age was only two years different, and rejected the proposal of a man whose age was far different from Fatimah as the following hadith narrated by Abdilllah ibn Buraidah (HR. Al-Nasa'i no. 3221)<sup>32</sup>

The Prophet's decision is a reference that age difference is one of the important factors that must be considered in marriage, especially those involving child marriage as intended by *Perma* No. 5 of 2019 so that the marriage can bring quality relationships and achieve the purpose of marriage, namely the realization of a family that is *sakinah, mawaddah wa rahmah*, as outlined by the Qur'an.

Age-gap marriages also risk exploitation of the much younger partner, divorce, or domestic violence. Age differences in marriage can also affect the level of depressive symptoms among older adults. The greater the age difference between married couples, the higher the

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<sup>32</sup> Al-Nasa'i, "Sunan Al-Nasa'i, Kitab Al-Nikah Tajawwaja, Al-Mar'ah, Mislaha Fi Al-Sunan," n.d., 21 Juli 2023.

severity of depression experienced.<sup>33</sup> A study shows that a five-year age difference in marriage has an 18 percent probability of divorce, and a 10-year age difference has a 39 percent probability of divorce. Meanwhile, marriages with a 20-year age difference are 95 percent likely to have an acute relationship that triggers divorce.<sup>34</sup>

The judge in granting dispensation to marry for couples with a large age gap did not consider the typical social experience of women. With child marriage, women are vulnerable to injustices that have taken root in society, namely stigmatization, subordination, marginalization, double burden, and violence. Such a judge's decision cannot be considered *makruf* because it denies women's unique experiences. Judges' decisions should consider women's social experiences and transform women's conditions into human beings with noble dignity, as the center of life as men, and free from violence.<sup>35</sup>

### *Psychological Readiness*

Judges measure the mental or psychological readiness of girls to marry based on verbal statements in the form of "yes" or "no" in response to the judge's normative questions "Are you ready to get married?" "Were you forced or threatened to get married?" The judge does not delve deeply into why the girl for whom dispensation is sought feels ready to marry and how mentally or psychologically prepared the child is to deal with the household problems that will be undertaken. The Nganjuk Religious Court has synergized with the Nganjuk Regency Puspaga (Family Learning Center) to provide counseling to the applicant's child and see the extent of the child's mental readiness to undergo marriage. However, the involvement of psychologists has not been

<sup>33</sup> Jae-Hyun Kim, Eun-Cheol Park, and Sang Gyu Lee, "The Impact of Age Differences in Couples on Depressive Symptoms: Evidence from The Korean Longitudinal Study of Aging (2006-2012)," *BMC Psychiatry* (2015): 15: 10.

<sup>34</sup> Nabila Tashandra, "8 Tantangan Pernikahan Beda Usia yang Bisa Memicu Perceraian," n.d., 23 Juli 2023.

<sup>35</sup> Faqihuddin Abdul Kodir, *Metodologi Fatwa KUPI: Pokok-Pokok Pikiran Musyawarah Keagamaan Kongres Ulama Perempuan Indonesia* (Cirebon: KUPI, 2022), 111.

effective because the number of marriage dispensation applicants is relatively large, while the available human resources are limited.<sup>36</sup>

In addition, girls' mental readiness for marriage is measured by their readiness to take on their roles as wives and housewives to do domestic work, especially cooking. In other words, the ability to cook is used as a standard for a woman's readiness to navigate domestic life. A good wife is envisioned as a wife who can cook. Wives who are good at cooking are seen as *salibah* wives and are perceived to be able to create comfort for their husbands at home.<sup>37</sup> Measuring women's piety only by looking at the wife's ability to carry out domestic work is certainly not something that should be done by judges. Domestic work such as cooking, washing, and preparing family needs do not recognize gender.

Measuring a woman's readiness to enter marriage by her ability to do household work shows that judges standardize woman's roles in the domestic sphere. It is as if judges see women's potential only in the domestic sphere as servants of men. Meanwhile, men are portrayed as priests and heads of families who must be obeyed and served by their wives. Judges should not make patterns of division of labor based on gender. The division of labor is a cultural product that has taken root in society so that women are subordinated.<sup>38</sup>

Making the ability to do domestic work as a measure of women's readiness to enter marriage is an effort to domesticate women, which places women as domestic creatures whose roles are limited to the realm of housekeeping. The domestication of women generally develops in societies that still uphold patriarchal traditions and culture. In a patriarchal society, men are placed as first-class citizens whose interests must be prioritized. In contrast, the role of women is only positioned

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<sup>36</sup> Gandaika, "Interview" July 07th, 2023.

<sup>37</sup> Ibid.

<sup>38</sup> Mesraeni, Indra Rahmatullah, and Abdul Halim Mahmud, "Teori Hukum Feminisme Dan Kaidah Fikih Sebagai Pertimbangan Hakim dalam Perkara Dispensasi Kawin (Studi Penetapan Hakim No. 10/Pdt.P/2017/PA.Bjn di Pengadilan Agama Bojonegoro)," *Palastren Jurnal Studi Gender* 13, no. 1 (2020).



as subordinate to men, who in Javanese society are referred to as *kanca wingking* who only take care of the kitchen, well and bed.<sup>39</sup> The subordination and marginalization of women is contrary to the principle of protecting human dignity (*hifẓ al-'ird*). In the perspective of *mubadalah*, Islam requires equality and equality of the human dignity of women and men as described in the following verses of the Qur'an:<sup>40</sup> both men and women are servants of Allah SWT. (Q.S. Ali Imran: 195); men and women are *khalifahs* on earth (Q.S. Al-Baqarah: 30); men and women receive a primordial covenant with God (Q.S. Al-A'raf: 172).

### *Economic Readiness*

Financial readiness is important in preparing for marriage. By having good financial readiness, a married couple can live a quiet household life without financial constraints. The financial readiness of the prospective bride and groom must be taken into consideration by the judge in adjudicating the marriage dispensation application. In general, judges only see the financial ability of the prospective husband. Meanwhile, the readiness of the bride-to-be in economic terms, such as the ability to manage family finances, is not taken into consideration by the judge. This is not in line with the principle of *hifẓ al-māl* (protection of property and the economy) which emphasizes the importance of protecting property from damage and any wasteful use.<sup>41</sup>

A person who marries at a child's age is not mature enough to build a family, so it will likely be difficult to work or manage family finances. Thus, the protection of property in child marriage is difficult to fulfill properly. Financial support to meet basic needs, especially food, clothing, shelter, health, and education, is inadequate due to the limited ability of

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<sup>39</sup> Siti Nurul Hidayah, "RUU Ketahanan Keluarga, Ketimpangan, dan Domestikasi Perempuan," n.d., 23 Juli 2023.

<sup>40</sup> Aliftya Amarilisyaningtyas, "Perlawanan Terhadap Marginalisasi Perempuan Dalam Islam: Analisis Wacana Kritis," *Jurnal Komunikasi Islam* 10, no. 02 (2020).

<sup>41</sup> Lies Marcoes, *Maqasid Al-Islam: Konsep Perlindungan Manusia dalam Perspektif Islam* (Jakarta: Yayasan Rumah Kita Bersama, 2018), 90.

children to access decent work. In addition, children cannot yet develop their potential to increase their income and opportunities in the world of work.<sup>42</sup>

The judge measured financial capability from the prospective husband's job, without considering the amount of income earned and whether it was sufficient to support the needs of the household or not. For the judge, the prospective husband's job shows the seriousness and responsibility of the man to provide for the family, even though his income is relatively low. To protect married children, the Nganjuk Religious Court requires a certificate of the prospective husband's income if he is already working and is known by an authorized official as proof of financial readiness to live a household life.<sup>43</sup>

The judge's consideration that only looks at economic readiness from the male side does not reflect the principle of *mubadalah* which emphasizes that husband and wife have equal rights and obligations in the family, there is no pattern of division of labor based on gender, and the breadwinner is not only the husband's obligation. The division of labor is a cultural product legitimized by society so that women are subordinated.<sup>44</sup> Women's subordination has implications for the stereotype that women's responsibilities are limited to domestic matters.<sup>45</sup> Situationally, women are seen as less empowered than men to realize their self-actualization needs.<sup>46</sup> This is contrary to the framework of Feminist Legal Theory which emphasizes the equality of men and women in public affairs, individualism, and rationality.<sup>47</sup>

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<sup>42</sup> *Ibid.*

<sup>43</sup> Gandaika, "Interview" July 07th, 2023.

<sup>44</sup> Mesraeni, Rahmatullah, and Mahmud, "Teori Hukum Feminisme dan Kaidah Fikih sebagai Pertimbangan Hakim dalam Perkara Dispensasi Kawin (Studi Penetapan Hakim No. 10/Pdt.P/2017/PA.Bjn di Pengadilan Agama Bojonegoro)."

<sup>45</sup> Nancy Levit and Robert R.M Verchick, *Feminist Legal Theory A Primer*, Second Edi (New York and London: New York University Press, 2016), 20–23.

<sup>46</sup> George Ritzer, *Teori Sosiologi Dari Sosiologi Klasik Sampai Perkembangan Terakhir Postmodern* (Yogyakarta: Pustaka Pelajar, 2014), 794.

<sup>47</sup> Levit, *Feminist Legal Theory A Primer*.

The lack of financial ability to enter into marriage is not a consideration for judges because in marriage dispensation it is necessary to have parental involvement and responsibility to provide financial support for the continuity of their children's households. Unfortunately, judges do not see and consider the financial capacity of parents who apply for dispensation of marriage as mandated by *Perma* No. 5 of 2019. Many marriage dispensation applications come from underprivileged or poor people. The transfer of economic responsibility from parents to prospective husbands without considering the parents' inadequate economic financial capacity can result in the insufficiency of economic child protection.<sup>48</sup>

In certain cases, the judge granted the request for dispensation to marry with the consideration of fear of violating sharia in the best interests of the child by involving parents to provide financial support for the continuation of their child's marriage.<sup>49</sup> The judge's consideration was not in line with *Perma* No. 5 of 2019 and the principles of child protection. The child who applied for dispensation to marry did not receive a recommendation from the Integrated Service Center for the Protection of Women and Children (P2TP2A) considering that the child did not have the readiness to enter marriage, and there were no urgent reasons, such as pregnancy outside of marriage. Depending on the parents results in the child's right to achieve a decent standard of living, happiness, physical and mental prosperity is difficult to achieve, because the economic capacity of the parents is not considered by the judge in granting dispensation to marry.

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<sup>48</sup> Achmad Bahroni et al., "Dispensasi Kawin Dalam Tinjauan Undang-Undang Nomor 23 Tahun 2002 Juncto Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak," *Jurnal Transparansi Hukum* 2, no. 2 (2019).

<sup>49</sup> Nurul Hikmah, "Interview" September 18<sup>th</sup>, 2023; Kamali, "Interview" September 20<sup>th</sup>, 2023.

## Education Right Insufficiency

The judge's argument for granting dispensation to marry for fear of adultery, which is seen as a form of applying the best interests of the child, needs to be criticized because the reality is that children who marry will generally stop or drop out of school so that children do not get a proper education and according to their age. Every child, whether male or female, has the right to education for personal development and contribution to the future welfare of the family and society. Child marriage also hinders children's rights to education, psychological well-being, and health.<sup>50</sup>

The judge's decision, which tends to grant marriage dispensation without an emergency element, is not in line with *maqāṣid al-syarī'ah* in the aspect of *hifẓ al-'aql* which emphasizes that humans have intellectual and moral qualities.<sup>51</sup> With child marriage, girls' rights to compulsory education will not be fulfilled. Islam also emphasizes the importance of facilitating children's rights related to education, which is explained in several verses of the Qur'an, including the following: First, the right to obtain appropriate and necessary knowledge and information. (Q.S. Al-Nahl: 78); Second, the right to obtain and enjoy facilities for education, development, and empowerment. (Q.S. Al-Isra': 24); Third, the right to equal treatment with peers in the education process to strengthen their mental character (Q.S. Al-Nur: 59); Fourth, the right to training and development of the soul, feelings, and heart with all the love, affection, acceptance, and care. (Q.S. Al-Furqan: 74).

Child marriage does not bring benefits, because children cannot acquire life skills that can help them to grow and develop as humans

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<sup>50</sup> Sonny Dewi Judiasih, Susilowati Suparto Dajaan, and Bambang Daru Nugroho, "Kontradiksi Antara Dispensasi Kawin Dengan Upaya Meminimalisir Perkawinan Bawah Umur di Indonesia," *Acta Diurnal, Jurnal Ilmu Hukum dan Kenotariatan* 3, no. 2 (2020).

<sup>51</sup> Marcoes and dkk, *Maqasid Al-Islam: Konsep Perlindungan Manusia dalam Perspektif Islam*.

according to their age stages with their intellect. This certainly has an impact on the low human resources of children, especially women. In other words, child marriage is the dumbing down of women.<sup>52</sup> The figure of a mother who is considered as al-madrasah al-‘ulā or the first and foremost school for her children will not be realized if the mother herself is not educated enough.<sup>53</sup>

The low human resources of women will affect the intellectual quality of the generation that is born. This is contrary to the Qur’anic message in QS. Al-Nisa’ verse 9 which prohibits humans from leaving a weak generation, which includes aspects of faith, reason, economy, health, and mental. Such conditions must be avoided by stopping child marriage as a form of human responsibility for future generations, which is one of the universal objectives of Islamic law (*maqāṣid al-syarī‘ah*), namely the aspect of protecting offspring (*hifẓ al-nasl*). In the context of child protection, *hifẓ al-nasl* is defined as the principle of protecting and facilitating the growth and development of children in a healthy, supportive, and loving family environment. Meanwhile, child marriage has the potential to create a poor generation. Generations from poor families are then born new poor families and communities. Such conditions will certainly hamper the country’s sustainable development.<sup>54</sup>

Intellectual limitations will also affect the limited social space that women can access. This in turn will strengthen the acute patriarchal system, which makes women increasingly marginalized and experience various forms of gender injustice, such as stigmatization, marginalization, discrimination, subordination, and even violence.

Women’s biological experience is not taken into consideration by judges in examining applications for dispensation to marry. Underage

<sup>52</sup> Mukti Ali, *Fikih Kawin Anak: Membaca Ulang Teks Keagamaan Perkawinan Usia Anak-Anak* (Rumah Kitab, 2015), 141.

<sup>53</sup> Hilmi, *Mendobrak Kawin Anak, Membangun Kesadaran Kritis Pencegahan Kawin Anak*.

<sup>54</sup> “Perkawinan Anak Perbesar Peluang Ciptakan Generasi Miskin,” July 23th, 2023.

girls who enter into marriage will face more impacts and burdens than boys, because girls will experience menstruation, pregnancy, childbirth, postpartum, and breastfeeding. They no longer have time to socialize, play and grow according to their age because they have to undergo motherhood at an immature age. Socio-cultural activities and age-appropriate games can influence children's mental, intellectual and social development.<sup>55</sup>

It is undeniable that some cases of marriage dispensation cases show that the children who applied for marriage dispensation had dropped out of school before coming to court, especially children who come from a social environment and geographical conditions that support child marriage. The applicant applied for dispensation of marriage for his child because he was worried about committing adultery. Dispensation to marry is not an emergency exit for teenagers who have dropped out of school to marry. Child marriage on the grounds of avoiding adultery by Quraish Shihab is illustrated as people treating diseases with other diseases, they should treat diseases with something that heals.<sup>56</sup> To prevent child marriage, synergy from various parties is needed to strengthen the capacity and awareness of adults, namely parents, teachers, community leaders, or religious or traditional leaders in communicating with adolescents related to child marriage and reproductive health issues.<sup>57</sup>

### Neglected Health Reproduction Rights

Judges understand that child marriage has the potential to have many negative impacts. Therefore, judges consider it important to advise applicants for marriage dispensation to postpone their marriage if there is

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<sup>55</sup> Faqihuddin Abdul Kodir and Lies Marcoes Natsir, *Fikih Hak Anak: Menimbang Pandangan Al-Qur'an, Hadis, dan Konvensi Internasional untuk Perbaikan Hak-Hak Anak* (Jakarta: Yayasan Rumah Kita Bersama, 2022), 133.

<sup>56</sup> Suci Amaliyah, "Nikah Muda Untuk Hindari Zina? Begini Penjelasan Prof. Quraish Shihab," September 23th, 2023.

<sup>57</sup> Kementerian PPN/Bappenas, "Strategi Nasional Pencegahan Perkawinan Anak," 2020, 29.

no urgent reason. However, the advice given by the judge to the applicant did not consider the basic rights of children related to the reproductive health of girls. Reproductive health is an important thing that must be considered in marriage which includes a state of physical, mental, and social well-being as a whole. A child's reproductive health is disrupted and even threatened if she marries at a young age because her reproductive organs are not yet ready. The results showed that girls who marry at the age of 15-19 years are at risk of damage to the reproductive organs and complications during pregnancy and childbirth which results in death.<sup>58</sup>

In terms of *maqāṣid al-syarī'ah* in the realm of *hifẓ al-naḥs* (preservation of the soul or life), the right to life of children must be fulfilled. Likewise, the child's right to physical and spiritual survival, the right to develop according to a decent standard of living to develop well physically, mentally, spiritually, morally, and socially must also be fulfilled.<sup>59</sup> The right to life and survival of children is difficult to fulfill if children have entered the world of marriage, even marriages conducted by minors can threaten the lives of children. The womb of a minor is not ready for active reproduction,<sup>60</sup> The child is in danger of becoming pregnant and giving birth at an early age. The child's basic rights as a human being and the protection of his or her dignity as a human being are not protected and guaranteed if he or she marries at a child's age, because the child is forced to enter into adult life and must undergo the role of an adult. Therefore, prioritizing the child's soul from the risk of child marriage is more important than regeneration (*hifẓ al-naḥs*) at an insufficient age.

Reproductive health protection is also needed as a manifestation of the principle of preserving offspring (*hifẓ al-naḥs*), which is to provide

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<sup>58</sup> Woro Srihastuti Sulistyaningrum, *Perkawinan Anak: Dampak, Tantangan, dan Strategi Pencegahannya* (Jakarta: Direktur Keluarga, Perempuan, Anak, Pemuda dan Olahraga Kementerian PPN/Bappenas, 2020), 8.

<sup>59</sup> Abdul Kodir and Natsir, *Fikih Hak Anak: Menimbang Pandangan Al-Qur'an, Hadis, Dan Konvensi Internasional untuk Perbaikan Hak-Hak Anak*.

<sup>60</sup> Ali, *Fikih Kawin Anak: Membaca Ulang Teks Keagamaan Perkawinan Usia Anak-Anak*.

protection for the biological reproductive organs of the child from all physical and psychological threats, so that in time as an adult he can have a good family with healthy reproductive organs.<sup>61</sup> Men and women in reproductive health relations are full subjects. This means that no one is considered a secondary subject let alone an object. In realizing the principle of *hifẓ al-nasl*, it is necessary to instill ideal values in households as outlined in the Qur'an, such as the principle of doing good to each other (*mu'āsyarah bil ma'rūf*), protecting each other, and bringing peace and love to each other.<sup>62</sup>

### Subordination of Women in Spiritual Realms

Judges measure the readiness of children to marry based on the ability to read the prayer and recite the Qur'an, especially the prospective husband, which in turn becomes the judge's consideration for granting or rejecting a marriage dispensation application. Even the prayer ability of the prospective husband is used as the main consideration by the judge in granting the dispensation application. A man must be able to be a prayer leader at least in his family, so he is required to be able to pray and recite the Qur'an. In fact, the judge feels sinful if the application for dispensation is granted while the prospective husband cannot pray, because the parents' prayer ability will affect the spiritual quality of the generation that is born.<sup>63</sup> Meanwhile, the religious ability of the bride-to-be was not considered by the judge.

The judge's view above shows that the judge privileged men and positioned men as having a higher spiritual status than women, and at the same time the judge placed women in a lower position than men and considered them inferior in religious matters. This patriarchal view of

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<sup>61</sup> Abdul Kodir and Natsir, *Fikih Hak Anak: Menimbang Pandangan Al-Qur'an, Hadis, dan Konvensi Internasional Untuk Perbaikan Hak-Hak Anak*.

<sup>62</sup> Abdul Kodir, *Metodologi Fatwa KUPI: Pokok-Pokok Pikiran Musyawarah Keagamaan Kongres Ulama Perempuan Indonesia*.

<sup>63</sup> Khoiri, "Interview" July 06th, 2023.



judges in the religious sphere is not born from religion or religious texts, but is born from the views of society that have been built in a patriarchal tradition, related to their interpretation of religious texts.<sup>64</sup>

When viewed from the perspective of *maqāṣid al-syarī'ah cum-mubadalah*, the judge's consideration is not in line with the principle of *hifẓ al-dīn*, which emphasizes the importance of protection and provision of adequate facilities for both men and women to obtain spiritual strengthening from the religious values they adhere to, so that they can worship freely as fellow servants of Allah. Gender should not prevent women from obtaining the benefits of life, especially in terms of spirituality. Judges should strengthen women's existence as dignified human beings and servants of Allah. on earth by ensuring that women's religious qualities are not degraded because of their unique reproductive experiences. It is known that Islam comes to this world with its spiritual mission to bring mercy and benefit to human beings, both men and women, without discrimination.<sup>65</sup>

## Conclusion

This article shows that judges apply the best interests of children in marriage dispensation cases by juxtaposing them with the benefits and harms in Islamic law. Judges measure the best interests of the child by weighing the size of the *mafsadat* and the benefits to the child. However, judges tend to be subjective in determining whether marriage dispensation cases fall into the category of *mudarat* or *maslahat*. The subjectivity of judges in interpreting the best interests of children has an impact on the lack of protection of children's rights in marriage dispensation.

From this study, judges must ensure that the principles mandated by *Perma* No. 5 of 2019 are not violated in the process of examining marriage

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<sup>64</sup> Hilmi, dkk, *Mendobrak Kawin Anak, Membangun Kesadaran Kritis Pencegahan Kawin Anak*.

<sup>65</sup> Faqihuddin Abdul Kodir, *Qira'ah Mubadalah: Tafsir Progresif untuk Keadilan Gender Dalam Islam* (Yogyakarta: IRCiSoD, 2019).

dispensation cases. The judge examining marriage dispensation cases must provide protection for children's basic rights which include protection of the girl's life, heredity, mind, property and religion. Judges must also realize women's essential justice by considering the unique experiences of women biologically and socially, not being biased in measuring the meaning of maturity and readiness of girls to marry, paying attention to women's reproductive health rights, and upholding justice between men and women in the educational and spiritual realms.

This research is limited to an empirical study that portrays the legal construction of judges in protecting children's rights in the dispensation of marriage for reasons of fear of violating religious norms in East Java, especially in the Kediri coordinator area. In line with that, a follow-up study is needed that evaluates the considerations of judges in examining and deciding marriage dispensation cases in a broader scope of areas, because East Java is an area that has the highest rate of child marriage nationally. In addition, further research is needed to find the best concept for children in marriage dispensation. This allows for more comprehensive information and the best solution to the problem of marriage dispensation in Indonesia so that efforts can be made to protect children in marriage dispensation that prioritizes the best interests of children.

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