

# Reconstruction of Marriage Dispensation Regulations in the Perspective of Human Rights Based on the Value of Justice

Sriono<sup>1\*</sup>, Anis Mashdurohaturun<sup>1</sup>, Sri Kusriyah<sup>1</sup>, Ahmad Rofiq<sup>2</sup>

<sup>1</sup>Sultan Agung Islamic University, Semarang, Indonesia

<sup>2</sup>UIN Walisongo, Semarang, Indonesia

DOI: [10.36348/sijlci.2023.v06i04.005](https://doi.org/10.36348/sijlci.2023.v06i04.005)

| Received: 11.02.2023 | Accepted: 03.04.2023 | Published: 15.04.2023

\*Corresponding author: Sriono

Sultan Agung Islamic University, Semarang, Indonesia

## Abstract

Marriage dispensation is the granting of permission to marry against deviations from the minimum age permitted in the marriage law. Marriage dispensation can be requested from the court with urgent reasons and must be married immediately. This urgent reason has caused debate, because based on the determination of the religious court as a whole it grants or gives dispensation approval to prospective brides who are pregnant or have committed acts prohibited by religious law and decency. While reasons other than that can be rejected by the judge. The purpose of this research is to analyze and find the reconstruction of the regulation of marriage dispensation in the perspective of human rights based on the value of justice. This study uses the Postpositivism paradigm, with an empirical juridical approach that uses primary data. Methods of data collection using interviews, observation, and field systems. The legal theory used in this dissertation is the theory of justice as the Grand Theory, the middle theory of the legal system theory and the Applaid theory of the theory of benefit. The results of this dissertation research found that the regulation of marriage dispensation in the perspective of human rights has not had the value of justice, namely the current marriage dispensation system based on Law Number 16 of 2019 has not fulfilled a sense of justice related to equal rights before the law and Article 28 B of the Law -The 1945 Constitution of the Republic of Indonesia, it can be seen that dispensation is only given to prospective brides who are pregnant. The current weaknesses in the regulation of the dispensation of marriage in the perspective of human rights are weaknesses in legal substance, legal structure and legal culture. The weakness of the marriage dispensation system is that it does not provide a clear understanding of the urgent reasons, causing debate regarding the urgent reasons and giving rise to the interpretation that the urgent reason is that the candidate is pregnant and results in differences of opinion from the judges. Reconstruction of the regulation on the dispensation of marriage in the perspective of human rights based on the value of justice, namely by reconstructing the provisions in Article 7 paragraph (2) of Law Number 16 of 2019, namely that it is necessary to change the sentence or phrase "reasons are very urgent" and amended with the phrase "which based on the interests of the candidate.

**Keywords:** Marriage Dispensation; Human rights; Reconstruction; Value of Justice.

**Copyright © 2023 The Author(s):** This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC BY-NC 4.0) which permits unrestricted use, distribution, and reproduction in any medium for non-commercial use provided the original author and source are credited.

## A. INTRODUCTION

Marriage is one of the important events in human life. Marriage that occurs between a man and a woman has both physical and spiritual consequences for their respective families, society and also for the assets acquired between them both before and during the marriage [<sup>1</sup>].

Marriage dispensation is the granting of permission to marry against deviations from the minimum age permitted in the marriage law [<sup>2</sup>].

<sup>1</sup>H. Bastomi. 2016. *Perkawinan Dini Dan Dampaknya (Tinjauan Batas Umur Perkawinan Menurut Hukum Islam Dan Hukum Perkawinan Indonesia)*. Yudisia, Vol. 7, No. 2, pp. 354–384 see too Ahmad Rofiq. 2019. *Hukum Perdata Islam di Indonesia*, Cetakan ke Empat. Jakarta: PT. Raja Grafindo Persada. p. 53.

<sup>2</sup>Daud Risman, Mahmutarom HR, Anis Mashdurohaturun, Ahmad Khisni, Law Reconstruction On The Reason Of Divorce In Islamic Marriage Law In Indonesia Based On Maqashid Syari'ah, International Journal of Business, Economics and Law, Vol. 16, Issue 5 (August), 2018, pp.68-71. See too Sahal Afhami, Anis Mashdurohaturun, The Laws On "Sirri Married And Ints Impact, "Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe" The 2nd Proceeding "Indonesia Clean of Corruption in 2020", Unissula Press, 2017, pp.489-502

Currently, the marriage law in Indonesia has undergone changes, namely Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. The change in the marriage law (Law Number 19 of 2019) was motivated by a lawsuit to the Constitutional Court regarding the minimum age limit for marriage [3]. As for the lawsuit to the Constitutional Court with number 22/PUU-XV/2017. In Article 7 paragraph (2) of Law Number 16 of 2019 it provides an opportunity for people to marry/marry at less than the permitted age, namely by asking for a dispensation from the court. Court dispensation according to Article 7 is only given for urgent reasons. The very urgent reason is translated with the understanding that because there is no other choice and it is very forced to have a marriage. Based on the results of observations that have been made that overall the marriage dispensation was requested by them that Sicalon was pregnant or had committed a prohibited act. Regarding the judge's decision that dispensation is only given if it is in accordance with Supreme Court Regulation Number 5 of 2019 concerning guidelines for adjudicating applications for marriage dispensation.

The concept of human rights in Pancasila shows that there are equal rights before the law and the right to form a family [4]. Based on the concept of human rights from Pancasila that the conditions for marriage, especially dispensation, can only be given with urgent reasons, this illustrates the existence of differences in rights for citizens who want to form a family, namely if the urgent reasons do not match what is intended, they will be rejected, and can result in an unsuccessful marriage. carried out unrecorded. The formulation of the problem that will be used as the focus of this research is how to reconstruct the regulation of marriage dispensation in the perspective of human rights based on the value of justice.

## B. RESEARCH METHOD

The paradigm used in this study is the Postpositivism paradigm. For this type of research used this research is descriptive analytical [5]. The approach method in this study uses a sociological juridical approach. Types and sources in this study are based on

<sup>3</sup>Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage

<sup>4</sup>Yeltriana, Ideal Reconstruction Of Protection For Layoff Victim At The Industrial Relations Court Based On Justice, International Journal of Law, Government and Communication, Volume: 4 Issues: 14 [March, 2019], pp.32-49.

<sup>5</sup>Anis Mashdurohatun, Zaenal Arifin, The Inconsistency of Parate Execution Object Warranty of Rights in Banking Credit Agreement in Indonesia, International Journal of Applied Business and Economic Research, Vol.15 Issue.20. 2017, see too Sukarmi, Impact of Traffic Congestion on Economic Welfare of Semarang City Community, Journal of Xidian University ,Volume 16, ISSUE 2, 2022.

1) primary data: 2) secondary data. Data collection techniques in research using a system of Field Studies, Observations, and Literature Studies [6]. To draw conclusions with a qualitative analysis method, then this qualitative data [7] is compiled and determined in abstraction and then derived according to the sequence which is closely related to the title of the research and the problem, so that consistency between the title, the problem and the conclusions of the research can be known.

## C) RESEARCH RESULTS AND DISCUSSION

### 1. Comparison with the Marriage Law regarding marriage dispensation in various countries

#### a) Malaysia

Malaysia is a country that has thirteen states including Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Perak, Perlis, Pulau Pinang, Sabah, Serawak, Selangor and Trengganu and three federal territories. The Federal Territory here is one of the countries or regions that form the Malay Land Alliance (Malaysia). The Federal Territory is ruled directly by the federal government under the rule of the Prime Minister [8]. The territory of the association has differences in family law regulations. However, in general it is regulated under Malaysian Law No. 164 relating to the Legal Reform/Act 1976 (Marriage and Divorce). This law does not apply to the indigenous people of Sabah or Sarawak or the indigenous people of Peninsular Malaysia. Marriages carried out below the minimum age permitted are called child marriages. In the Marriage Law of Malaysia there is a provision that in a marriage that is carried out must avoid marriage under the minimum age permitted to marry. The minimum age permitted to marry in Malaysia is 18 years for men and 16 years for women. Any deviation from the minimum age permitted for marriage must obtain permission from the court or the Sharia Court [9], regarding the provision that the court's permission is fully submitted to the court.

<sup>6</sup> Irwansyah, Ahsan Yunus, Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel, Mirra Buana Media , Yogyakarta. 2020.

<sup>7</sup> Carto Nuryanto, Gunarto, Anis Mashdurohatun, Reconstruction Of Criminal Sanction And Rehabilitation Combating On Narcotic's Victims Based On Religious Justice, The 5th International Conference and Call for Paper Faculty of Law 2019, Sultan Agung Islamic University, 2019,pp.91-95. See too Wawan Setiyawan and Anis Mashdurohatun, The Reforming Of Money Politics Cases In Election Law As Corruption Crime. Law Development Journal, Volume 3 Issue 3, September 2021, pp.621 – 629.

<sup>8</sup> Muhammad Rusfi. 2013. Hukum Keluarga Islam di Malaysia. Jurnal Fakultas Syariah IAIN Lampung. p.167.

<sup>9</sup>Edi Yuhermansyah and Mohd. Hakim Bin Mohd Akhir. 2018. Implementasi Batas Umur Pernikahan (Studi Kasus di Mahkamah Rendah Syari'ah Bukit Mertajam Pulau Pinang). Jurnal Samarah. 2 (2), p. 485-501

## b) Turkey

As a comparison with Turkey, the legal provisions for marriage in Turkey are related to the provisions on the minimum age limit for marriage, in Turkish law (The Ottomann Law Of Family Rights 1917 "capacity to marry" act 4-8) stipulates that the minimum age someone who wants to carry out marriage is 18 years for men and 17 years for women. Courts can also allow marriage at the age of 15 for boys and 14 for girls after obtaining parental and guardian consent. However, even though couples who get this exemption get dispensation from the Court, they still have to be over 15 years old for prospective grooms and 14 years for prospective brides.

## c) France

Dispensation regulations in France state that marriages carried out at the age of less than 25 years for men and 21 years for women must obtain permission from their parents. Meanwhile, the age limit for marriage is 18 years for men and 15 years for women. Against deviations in the age of marriage, the government is given the freedom to grant a dispensation accompanied by strong reasons

## 2. Marriage Dispensation Regulations in Indonesia Law Number 1 of 1974 Concerning Marriage

Article 2 paragraph (1) states that marriage is legal if it is carried out according to the laws of each religion and belief. So that according to the article regarding whether or not a marriage is legal is left entirely to the regulations regarding marriage in their respective religions.

Article 2 paragraph (2), that every marriage is recorded. This article does not mention that marriages that are carried out must or must be recorded but are norms that contain legality as a formal form of marriage. And it still raises debates about the understanding between paragraph (1) and paragraph (2) whether they are one unit or separate, so that unregistered or unregistered marriages are still valid which according to religious law are valid. Marriage registration is not a requirement for the validity of a marriage, but only as a requirement for the completeness of marriage administration. The validity of the marriage is carried out according to the rules based on the religion and beliefs of both parties who carry out the marriage [10]. So that the marriage dispensation is only an administrative requirement so that the marriage can be registered. As stipulated in Article 1 number (1) of the Regulation of the Minister of Religion of the Republic of Indonesia Number 20 of 2019 which states that the registration of marriages is an activity of administering a marriage event.

<sup>10</sup> Rachmadi Usman. 2017. *Makna Pencatatan Perkawinan Dalam Peraturan Perundang-Undangan Perkawinan Di Indonesia*. Jurnal Legislasi Indonesia. 14 (3). p. 255 - 274

## Law Number 39 of 1999 concerning Human Rights

In essence, human rights (HAM) are efforts to make humans live with dignity. However, then human rights developed not only to talk about human dignity. In simple terms, human rights can be understood as universal legal guarantees that apply to all human beings to protect individuals from actions or omissions by the State and some non-state actors that risk reducing fundamental human dignity.

Article 3 states:

- (1) Everyone is born free with human dignity
  1. Who are the same and equal and endowed with pure mind and heart to live in society, nation and state in a spirit of brotherhood.
  - (2) Everyone has the right to recognition, security, protection and fair legal treatment as well as legal certainty and equal treatment before the law.
  - (3) Everyone has the right to protection of human rights and basic human freedoms, without discrimination.

Article 10 namely:

- (1) Everyone has the right to form a family and continue offspring through a legal marriage.
- (2) A valid marriage can only take place with the free will of the prospective husband and wife concerned, in accordance with the provisions of the statutory regulations.

Article 17 states that "Everyone, without discrimination, has the right to obtain justice by filing requests, complaints and lawsuits, both in criminal, civil and administrative cases and to be tried through an independent and impartial judicial process, in accordance with procedural law that guarantees objective examination by an honest and fair judge to obtain a fair and correct decision.

The provisions for dispensation for marriage under Law Number 16 of 2019 contain violations of human rights due to restrictions on urgent reasons. The urgent reason for the Marriage Law has given rise to multiple interpretations so that the right to obtain justice without discrimination in the judicial process as contained in Article 17 is not achieved. Based on the results of research that child marriage is based on love, the will of the candidate and without coercion and avoiding acts of adultery can have an impact on maintaining dignity. The phrase urgent reasons that give rise to multiple interpretations of partiality towards human rights as stipulated in Article 3 in terms of fair treatment and obtaining legal certainty and equal treatment before the law. Likewise as regulated in Article 10, the right to form a family through legal marriage. Even though in paragraph (2) it mentions a valid marriage based on the applicable laws and regulations. Regarding the applicable laws and regulations relating to marriage, it has not shown a

definite understanding of legal marriage and is still causing debate. Because the definition of a valid marriage as stipulated in Article 2 of the Marriage Law is based on the religious law and beliefs of each party, on the other hand marriages that are performed are recorded at the marriage registrar. In the provisions of the regulations regarding the registration of marriages it only states that the registration of marriages is a form of administering a marriage event.

**Law on Child Protection (Law Number 23 of 2002, the first amendment to Law Number 35 of 2014 and the second amendment to Law Number 17 of 2016)**

Child protection aims to guarantee the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination, for the realization of quality, noble, and prosperous Indonesian children. (Article 3).

Children's rights include:

- a) Every child has the right to be able to live, grow, develop, and participate fairly in accordance with human dignity, and to receive protection from violence and discrimination. (Article 4)
- b) Every child has the right to a name as identity and citizenship status. (Article 5)
- c) Every child has the right to worship according to his religion, think and express according to his level of intelligence and age under the guidance of his parents or guardians (Article 6).
- d) Every child has the right to know his parents, to be raised and cared for by his own parents. (Article 7 paragraph 1). If the parents cannot care for the child, they have the right to be cared for or appointed as a foster child or adopted child by another person in accordance with the provisions of the applicable laws and regulations. (Article 7 paragraph 2).
- e) Every child has the right to obtain health services and social security in accordance with their physical, mental, spiritual and social needs. (Article 8).
- f) Every child has the right to receive education and teaching in the framework of developing his personality and level of intelligence in accordance with his interests and talents. (Article 9 paragraph 1).
- g) Every child has the right to receive protection in an education unit from sexual crimes and violence committed by educators, educational staff, fellow students, and/or other parties. (Article 9 paragraph 1a).
- h) Every child has the right to express and have his opinion heard, to receive, seek and provide information according to his level of intelligence and age for his own development in accordance with decency and decency values (Article 10).

- i) Every child has the right to rest and take advantage of free time, associate with children of the same age, play, have recreation and be creative according to their interests, talents and level of intelligence for self-development (Article 11).

Meanwhile, the obligations of parents towards children are regulated in Article 26 covering:

- a) Caring for, nurturing, educating, and protecting children;
- b) Develop children according to their abilities, talents and interests;
- c) Prevent child marriage from occurring;
- d) Providing character education and instilling moral values behavior in children

These various obligations require parents' understanding of their responsibilities as parents, knowledge in educating children, understanding children's rights, and having integrity as parents so as to set an example. This includes taking care of children and not engaging in early marriages. Based on the child protection law, it is a law that is specific in nature so that child protection is not an area of marriage law. Thus the phrase "urgent reason" is irrelevant because it only provides limitations on the right to freedom of children to be able to live, grow and participate naturally in accordance with human dignity and dignity, and to receive protection from violence and discrimination. Discrimination is in terms of restrictions to marry below the minimum age permitted. It is of the view that regarding mental, physical readiness and the ability to enter into a marriage cannot only be seen from age or the compulsion to immediately carry out a marriage.

**Law on Population Administration (Law Number 23 of 2006, Amendment Law Number 24 of 2013)**

Article 58 states that Population Data consists of data individual and/or population aggregate data. Individual data including marital status. The Population Administration Law does not explain in detail about a person's marital status, but regarding marital status it must be included both through data on the Family Card (KK) and Identity Card (KTP). As the executor of the Population Administration Law, it is further regulated in Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration. Article 11 regulates the conditions for Issuing a new KK, namely:

- a) Marriage book/quote of marriage certificate or quote of divorce certificate;
- b) Certificate of moving/certificate of moving in for Residents who are moving within the territory of the Unitary State of the Republic of Indonesia;
- c) Certificate of moving abroad issued by the Regency/City civil registration service (Disdukcapil) for Indonesian Citizens who come from outside the territory of the Unitary

- State of the Republic of Indonesia due to moving;
- d) A certificate of replacement for identification for vulnerable residents at the Population Administration; And
  - e) Excerpt of the Presidential Decree regarding citizenship and the minutes of taking the oath or statement of allegiance to Indonesian Citizens who were originally foreign citizens or excerpts from the Decree of the Minister administering government affairs in the field of law regarding changes in citizenship status.

For residents or married couples who will register to obtain a Family Card but do not have a marriage book/quotation of marriage certificate or other valid evidence but the relationship status shows that they are husband and wife, these residents can include a statement of absolute responsibility for the correctness of the data by known by 2 (two) witnesses (Article 34). Based on these regulations, it shows that the marital status is not registered or does not have a marriage book/certificate, they still get marital status with the status of "unregistered marriage". Likewise with the status of birth certificates, children born in sirri marriages are still recorded as children of their father and mother. Based on these regulations, it shows that marriage recognition is not recorded or sirri gets legal recognition by the State.

With the existence of population regulations, especially in recognition of unrecorded marital status, the arrangements for dispensation of marriage as stipulated in Article 7 paragraph (2) of Law Number 16 of 2019 cannot work effectively. This ineffectiveness can be seen if the application for marital dispensation is rejected by the court but they continue to have a religious marriage, the marital status will still receive legal recognition through population data.

### **3. Reconstruction of Marriage Dispensation Regulations in the Perspective of Human Rights Based on the Value of Justice**

Article 7 paragraph (2) of the Marriage Law regulates the dispensation of marriages under the minimum age which can be requested from the court or other officials by the parents of the man or the woman with urgent reasons accompanied by supporting evidence. The phrase "reason of urgency" is interpreted to mean that Sicalon must be married immediately because she is already pregnant. The marital dispensation given by the court because of pregnancy will give a stigma that the court has legitimized the act of adultery. Therefore, as the aim of the amendment to Article 7 paragraph (2) of the Marriage Law is as a form of preventing child marriage and providing protection for children.

In order to restore the purpose of the amendment to Article 7 paragraph (2), it is necessary to

reconstruct the marriage dispensation regulations. The direction of this reconstruction is towards the interests of children or candidates who will marry in order to achieve benefit.

Basically child protection aims to guarantee the fulfillment of two things, namely children's rights and child welfare. Whatever actions committed by parents or parties involved with children must pay attention to these two goals on the basis in the best interests of the child. Parties involved with marriage dispensation must pay close attention to will children's rights and also the welfare of children both physically and spiritually, both physically and psychologically. In this case what is meant by children's rights are various basic needs that children should be able to meet ensure the survival, development and protection of all forms of abuse, exploitation and neglect of children, including civil, economic, social and cultural rights. Meanwhile, prevention of child marriage is the responsibility of parents and the government through programs to provide rights or protection for children and welfare for children.

Indonesia has ratified the United Nations Convention on the Rights of the Child (UN Convention on the Rights of the Child/UNCROC 1989) since 1990. Technically, with this ratification, Indonesia has an obligation to ensure that the substance of the convention can be applied to existing regulations in Indonesia. In general, there are four main principles that can be drawn from the convention, namely the principle of non-discrimination (Article 2), the principle of the best interests of the child (Article 3), the principle of the right to life, survival and rights to develop (Article 6), as well as the principle of respect for children's opinions (Article 12) [<sup>11</sup>]. Of the four principles, the principle of the best interest of the child is the most important principle that underlies all children's rights listed in the Convention [<sup>12</sup>]. This principle is clearly stated in Article 3 of the UNCROC which states that "in all actions concerning children, whether carried out by public or private social welfare institutions, courts, government authorities or legislative bodies, the best interests of children should be a primary consideration." Therefore, the best interests of the child must be used as a paradigm and the main consideration in every decision making concerning a child.

<sup>11</sup> United Nations Human Rights Office of The High Commissioner. 2014. The Core International Human Rights Treaties, New York: United Nations Publication, p. 121.

<sup>12</sup>Michael Freeman. 2007. A Commentary on The United Nations Convention on The Rights of The Child Article 3: The Best Interest of The Child, Leiden: Martinus Nijhoff Publishers, p. 25.

Changes to the applicable Marriage Law to provide protection for children. This can be seen from the Constitutional Court Decision Number 22/PUU-XV2017 that the legal considerations that form the basis of the decision are to provide legal protection for children. Child marriage can occur at any time, and those who apply for a marriage dispensation are not always from poor families. Even some of them are families who are sufficient in terms of economy and education. And an important variable that also needs to be looked at is the existence of a legal mechanism related to underage marriage, namely the mechanism of marriage dispensation. And in that process, the judge has examined and considered all aspects. Which means, like other legal mechanisms. That's normal. Granting a marriage dispensation doesn't mean it's bad, and refusing it doesn't mean it's good.

Meanwhile, if the divorce rate is high, is it true that those who divorced were previously married with a dispensation? Which means they are not ready to get married but are given a dispensation to marry by the judge? Or does domestic violence always start with the granting of a marriage dispensation? Associated with maturity, which is often a separate issue. Where underage is always associated with underage. This is also questionable. Each region has a different maturity level. It could be that in an area, a 13 year old child is very mature. And ready to settle down. And most importantly, the broader perspective that needs to be understood is that marriage is a right. And as a right, it deserves to be respected by all parties.

The phrase "urgent reason" when reviewed and analyzed is based on John Rawls's theory of justice, namely that justice is required to be equal, with the reason that citizens in a just society have the same basic rights (equal liberty). In the phrase "urgent reasons" contained in Article 7 paragraph (2) of Law Number 16 of 2019 has not provided a sense of justice because if "urgent reasons" cannot be proven in court, the application for marital dispensation may be rejected. As described above, requests for dispensation are not only from poor families but also from rich families with higher education. Urgent reasons do not provide clear boundaries or criteria, giving rise to multiple interpretations among judges. Likewise PERMA No. 5 of 2019 as a guideline for implementing the granting of a marriage dispensation to the court, has not provided criteria for urgent reasons but rather prioritizes attention to the interests of the child.

If reviewed and analyzed with the theory of the legal system as stated by Friedman, the provisions for dispensation of marriage, which divides the legal system into three (3) components, have weaknesses. In order to fulfill these three components, the marriage dispensation provisions are changed to:

a) In terms of legal substance (substance rule of the law), the phrase "urgent reason" creates multiple

interpretations and does not pay attention to the main source of law in Indonesia, namely Pancasila. As the first precept that recognition of divine values must exist in every regulation that is formed. The phrase "urgent reasons" has not shown divine values and even the opposite, namely the existence of prohibitions on divine values that have been violated, such as the legitimization of adultery through courts. Likewise, from a human rights point of view, as fully recognized by the Indonesian people, for "urgent reasons" of course there are restrictions on anyone who is to marry but is under the age permitted. Based on the provisions of the 1945 Constitution concerning Human Rights, including the right to form a family through legal marriage, with these restrictions, of course, a person or partner cannot obtain a book or marriage certificate as a form of legal protection from the State.

- b) The structure of the law (structure of the law). The granting of marital dispensation is a deviation from the regulations that have been stipulated or enforced, in this case regulated by law, so the authority to grant dispensation is carried out through the courts. The court is an official body or agency that implements the justice system in the form of examining, adjudicating, and deciding cases (the institution where legal subjects seek justice). While the judiciary is everything or a process that is carried out in courts related to the task of examining, deciding and adjudicating cases by applying the law and/or finding the law "in concreto" (the judge applies legal regulations to real things that are presented to him for trial). and terminated) to maintain and guarantee compliance with material law, by using procedural methods stipulated by formal law.
- c) Legal culture. The law that lives and develops in society is called customary law which is recognized by the state, as contained in Article 18B paragraph (2) of the 1945 Constitution, which states that the state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law. In particular, the recognition of customary law has not been specifically regulated, but in certain laws the recognition of customary law is recognized, such as the Forestry Law which states that forest control by the State continues to pay attention to the rights of customary law communities, as long as in fact they still exist and their existence is recognized, and does not conflict with the national interest. Article 2 of the Marriage Law states that a valid marriage is not only based on religious law but also based on belief, this belief can be categorized as customary law. With regard to the

regulations on marital dispensation, using the phrase "urgent reason" does not fulfill the legal culture of the Indonesian people. Indonesian legal culture relates to marriage that by hastening children, especially women to get married soon, will relieve the burden on parents, even though currently there has been a change for married children not to be let go just like that, parents still help their children in living a household life. Plus the size of maturity according to legal culture in Indonesia is not only seen from age but from physical and psychological development.

Every regulation that is formed must be able to provide benefit (mashlahah) for all people and avoid harm. No exception to the rules governing the regulation of marriage dispensation. In terms of terminology, mashlahah can be interpreted as taking benefits and rejecting harm (danger) in order to maintain the goals of syara' (Islamic law). The purpose of syara' that must be maintained is to maintain religion, soul, mind, lineage and wealth. If a person carries out activities that are essentially to maintain the five aspects of syara' goals above, then it is called mashlahah. Besides that, to reject all forms of harm (danger) related to the five syara' objectives, it is also called maslahah.

In connection with the current marriage dispensation regulations, the dispensation is requested by the court through a marriage dispensation stipulation by the judge. Based on the results of the study, the judges in giving decisions prefer to use the arguments of fiqh rules which read as follows: "*Rejecting distress (madlarat) must take precedence (priority) rather than taking benefit*".

In the author's view that the argument used shows that it does not rule out the value of benefit but rather rejects harm if the application is rejected. Which means that if the application is rejected it can cause harm to the children who will carry out the marriage. Thus that the phrase "urgent reason" has not met the value of benefit in enforcing the regulation. Because if there is a rejection of the application for marital dispensation on the grounds that "urgent reasons" are not fulfilled, it can lead to bad actions towards the association of children who are already dating so that adultery can occur.

Based on the descriptions above, the author views that the phrase "urgent reason" needs to be reconstructed, including that there are weaknesses, namely causing multiple interpretations of this phrase. The reasons for the need for reconstruction are:

1. The phrase "urgent reason" places a limit on people who are about to enter into marriage but are hindered by an age that is less than the minimum age permitted, so that the good intentions and intentions of a person to form a family through a legal and registered marriage cannot be achieved,

while the provisions regarding legality a marriage as referred to in Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage states that a marriage is valid if it is carried out based on religious laws and beliefs. Marriage dispensation is only a requirement for administrative registration of sicalon whose age is less than the permitted age;

2. The phrase "urgent reason" is not in line with the legal meaning as stipulated in Article 2 paragraph (1) a valid marriage if it is carried out based on religious laws and beliefs. Based on the law of religion and belief referred to the pillars and conditions of marriage of each religion and belief. As long as someone who enters into a marriage is in accordance with the pillars and conditions, the marriage is valid. Dispensation for marriage based on the Marriage Law is an administrative requirement so that the marriage is registered and has a book or marriage certificate;
3. If the phrase "urgent reason" is interpreted as having to marry immediately because the sicalon is already pregnant, then the dispensation from marriage granted by the Court is a form of legitimacy for committing adultery. Adultery under the provisions of religious law is a prohibited act and a grave sin. So that there is a need for harmonization of rules between religion and the state.

According to the theory of concentric circles initiated by Muhammad Tahir Azhary, religion, law and the state when put together will form concentric circles which are a unit and are closely related to one another. Between the three forms an interconnected relationship. Religion is in the position of the first circle which is the deepest, showing the enormous influence of religion on the law which is in the second circle. Viewed from the perspective of the principles of "al-din al-islami" which consists of three components, namely rules with monotheism (Belief in One Almighty God) as the central point, sharia and morals must be reflected in the structure and substance of the law, so that the concept of law in the environment it contains, not merely law in a normative sense, but also law and decency. Strictly speaking the position of the state is in the third circle after the law intended in concentric circle theory, the state includes the two previous components, namely religion and law [13].

4. The phrase "urgent reason" is a form or method of tightening the granting of marriage dispensation and preventing child marriage, in fact it actually adds to the occurrence of child marriage. This can

<sup>13</sup> Abdul Chair Ramadhan. Teori Solvanisasi: Mempertemukan Kepentingan Agama dan Negara. Teori Solvanisasi Hukum: Mempertemukan Kepentingan Agama dan Negara - Hidayatullah.com. diakses pada tanggal 30 November 2022

be seen by the increase in requests for marriage dispensation. Based on the Child Protection Act, one of the responsibilities for preventing child marriage lies with each parent.

The form of reconstruction of the marital dispensation in the marriage law is to change the phrase "urgent reasons" as stipulated in Article 7 paragraph (2) of Law Number 16 of 2019 with the phrase "based on the interests of sicalon". The reason for the reconstruction of the phrase "based on the interests of the sicalon" refers to the basis or legal considerations for the form of ratification of the United Nations Convention on the Rights of the Child (UN Convention on the Rights of the Child/UNCROC 1989) against the principle of the best interests of the child (the best interest of the child). As well as accommodating the fulfillment of human rights as contained in Article 28B of the 1945 Constitution, regarding the right to form a family through legal marriage. Reconstruction of

marriage dispensation on the phrase "based on the interests of sicalon" after being compared with the provisions for granting dispensations in Malaysia, Turkey and France, namely the dispensation of marriage is left to the court to determine it but the minimum age that can be given a dispensation is limited.

The explanation for the phrase "based on the interests of the sicalon" is that a marriage dispensation can be granted or declared accepted by the court by first taking into account the interests of the candidate, namely he is still a child as stipulated in the provisions of the law on child protection. Likewise, the judge before making a decision in giving a stipulation of dispensation first provides input and advice regarding the impact on child marriage. The full form of the reconstruction of the marriage dispensation can be seen in the table below:

**Table 5: Results of marriage dispensation reconstruction**

Article/Law	Before reconstruction	After the reconstruction
Article 7 paragraph (2) Law no. 16 of 2019 regarding changes to Law Number 1 of 1974 concerning marriage	In the event of any deviation from age provisions as referred to in paragraph (1), the male's parents and/or parents women can ask for dispensation to Court on grounds of urgency accompanied by sufficient supporting evidence.	In the event of any deviation from age provisions as referred to in paragraph (1), the male's parents and/or parents women can ask for dispensation to Courts based on the interests of sicalon and include a statement of ability and readiness to marry as well as sufficient supporting evidence.

**D. CONCLUSION**

The marriage dispensation regulation that applies to Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning marriage has not fulfilled the element of justice. Injustice in the dispensation system is only limited to urgent reasons that can be given dispensation while those who do not have urgent reasons are rejected, so they cannot get married or continue to get married but are not registered. The function of registering marriages is only administrative in nature, while the determination of the validity of a marriage is determined by religious provisions and beliefs regarding marriage procedures. Likewise, the granting of it with urgent reasons becomes legitimacy for adultery while adultery based on religious law is a prohibited act. Marriage dispensation regulations also conflict with the 1945 Constitution of the Republic of Indonesia Article 28B concerning Human Rights, namely the right to form a family through legal marriage. Reconstruction of marriage dispensation regulations in the perspective of human rights is based on the value of justice. The form of reconstruction of the marriage dispensation regulation is as follows: changing the phrase "urgent reason" as stipulated in Article 7 paragraph (2) of Law Number 16 of 2019 with the phrase "based on sicalon interests". The reason for the reconstruction of the phrase "based on the interests of the sicalon" refers to

the basis or legal considerations for the form of ratification of the United Nations Convention on the Rights of the Child (UN Convention on the Rights of the Child/UNCROC 1989) against the principle of the best interests of the child (the best interest of the child). As well as accommodating the fulfillment of human rights as contained in Article 28B of the 1945 Constitution, regarding the right to form a family through legal marriage. This reconstruction of the phrase is also a form of alignment with the provisions regarding a valid marriage, which is based on the religious law and beliefs of each party. In religious law there is no minimum age setting for marriage, for example Islamic law views maturity from physical and psychological development.

**BIBLIOGRAPHY**

- Abdul, C. R. (2022). Teori Solvanisasi: Mempertemukan Kepentingan Agama dan Negara. Teori Solvanisasi Hukum: Mempertemukan Kepentingan Agama dan Negara - Hidayatullah.com. diakses pada tanggal 30 November 2022.
- Ahmad, R. (2019). *Hukum Perdata Islam di Indonesia*, Cetakan ke Empat. Jakarta: PT. Raja Grafindo Persada.
- Mashdurohaturun, A., & Arifin, Z. (2017). Gunarto, "The Inconsistency of Parate Execution

- Object Warranty of Rights in Banking Credit Agreement in Indonesia". *International Journal of Applied Business and Economic Research*, 15(20).
- Nuryanto, C., Gunarto, G., & Mashdurohatun, A. (2019). Reconstruction of Criminal Sanction and Rehabilitation Combating On Narcotic's Victims Based On Religious Justice. *Legal Reconstruction in Indonesia Based on Human Right*.
  - Risman, D., Mahmutarom, H. R., Khisni, A., & Mashdurohatun, A. (2018). Law Reconstruction on The Reason of Divorce In Islamic Marriage Law In Indonesia Based On Maqashid Syari'ah. *International Journal of Business*, 16(5).
  - Yuhermansyah, E., & Akhir, M. H. B. M. (2019). Implementasi Batas Umur Pernikahan (Studi Kasus Di Mahkamah Rendah Syari'ah Bukit Mertajam Pulau Pinang). *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, 2(2), 485-501.
  - Bastomi, H. (2016). *Perkawinan Dini Dan Dampaknya (Tinjauan Batas Umur Perkawinan Menurut Hukum Islam Dan Hukum Perkawinan Indonesia)*. *Yudisia*, 7(2).
  - Irwansyah, A. Y. (2020). Penelitian Hukum Pilihan Metode & Praktik Penulisan Artikel, Mirra Buana Media, Yogyakarta.
  - Michael, F. (2007). A Commentary on the United Nations Convention on the Rights of the Child Article 3: The Best Interest of The Child, Leiden: Martinus Nijhoff Publishers.
  - Muhammad, R. (2013). Hukum Keluarga Islam di Malaysia. *Jurnal Fakultas Syariah IAIN Lampung*.
  - Rachmadi, U. (2017). Makna Pencatatan Perkawinan Dalam Peraturan Perundang-Undangan Perkawinan Di Indonesia. *Jurnal Legislasi Indonesia*, 14(3).
  - Sahal, A., & Anis, M. (2017). The Laws on "Sirri Married and Ints Impact, "Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe" The 2nd Proceeding "Indonesia Clean of Corruption in 2020", Unissula Press.
  - Sukarmi, A. M., & Suwondo, D. (2022). Impact of Traffic Congestion on Economic Welfare of Semarang City Community. *Journal of Xidian University*, 16(2), 2289-1560.
  - The Core International Human Rights Treaties, New York: United Nations Publication, United Nations Human Rights Office of the High Commissioner. 2014.
  - Setiyawan, W., & Mashdurohatun, A. (2021). The Reforming Of Money Politics Cases In Election Law As Corruption Crime. *Law Development Journal*, 3(3), 621-629.
  - Yeltriana. (2019). Ideal Reconstruction of Protection for Layoff Victim at the Industrial Relations Court Based On Justice, *International Journal of Law, Government and Communication*, 4(14).