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Evaluating the Effectiveness of Age Restriction on Marriage in Indonesia

Article	Abstract
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INTRODUCTION

Indonesia, as a constitutional state (*rechtsstaat*), operates under the rule of law, not mere power (*machtsstaat*).¹ This implies that all national and state affairs must adhere to the 1945 Constitution, further detailed in other legal statutes.² This aligns with Hans Kelsen's *Stufentheorie*, the hierarchy of legal norms,³ where Pancasila, the fundamental norm, stands at the apex. Pancasila's principles ensure that citizens' human rights remain inviolable, undisturbed by any entity, including the state itself. These rights encompass the freedom to practice one's religion and beliefs. The 1945

¹ Eduardus Marius Bo, *Teori Negara Hukum Dan Kedaulatan Rakyat* (Malang: Setara Press, 2019).

² Encik Muhammad Fauzan, *Dasar-Dasar Perundang-Undangan Di Indonesia* (Malang: Setara Press, 2020).

³ Hans Kelsen, *General Theory of Law and State* (New York: Russel & Russel, 1961).

Constitution's Article 28B reinforces this notion, asserting that "every individual is entitled to establish a family and procreate through lawful marriage. The state guarantees the rights of children to life, growth, and development, as well as protection from violence and discrimination".⁴

The introduction of Law No. 1 of 1974, along with Law No. 16 of 2019, came into effect on October 1, 1975.⁵ Despite its enactment over four decades ago, it continues to present various challenges,⁶ with the issue of marital age limit being one of them.⁷ There are legal ramifications: Firstly, Law Number 1 of 1974 stipulates that the ideal age for marriage is 21 (twenty-one) years for both men and women.⁸ This age threshold is generally perceived as the age of maturity (baligh⁹), signifying readiness for marriage. This aligns with Article 98, paragraph (1) of the Compilation of Islamic Law (KHI),¹⁰ which asserts that the age at which a child can be considered mature or independent is 21 years. Similarly, Article 330 of the Criminal Code defines minors as "those who have not yet reached the age of 21 years and have not been married previously".

According to Islamic law, the prerequisite for marriage is reaching the age of majority (baligh), signified by biological changes—wet dreams for men and menstruation for women.¹¹ In contrast, traditional law does not define maturity by age. Instead, maturity is considered incidental, determined by an individual's capability or incapability to execute legal actions.¹² Secondly, the Marriage Law indirectly enables child marriage as it provides an alternative for those under the minimum age limit of 19 years to apply for a court dispensation.¹³ Thirdly, there is a lack of legal certainty in handling underage marriage cases. The issuance of the Indonesian Supreme Court Regulation, Number 5 of 2019, potentially legitimizes child marriage in Indonesia.

From a sociological perspective, marriage is intrinsically linked with population issues. Imposing an age limit on marriage could potentially reduce the birth rate¹⁴ and contribute to family

⁴ UUD Republik Indonesia, "UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA 1945," 105 § (1945).

⁵ Kaharudin, *Nilai-Nilai Filosofi Perkawinan Menurut Perkawinan Islam Dan Undang-Undang RI Nomor 1 Tahun 1974 Tentang Perkawinan* (Jakarta: Mitra Wacana Media, 2015).

⁶ Aristoni and Junaidi Abdullah, "4 Dekade Hukum Perkawinan Di Indonesia : Menelisis Problematika Hukum Dalam Perkawinan Di Era Modernisasi," *Jurnal Pemikiran Hukum Dan Hukum Islam* 7, no. 1 (2016): 75–97, <https://doi.org/http://dx.doi.org/10.21043/yudisia.v7i1.2133>.

⁷ Anwar Usman, "Putusan MK No. 22/PUU-XV/2017 Tentang Uji Materi Batas Usia Antara Laki-Laki Dan Perempuan Umur 19 Tahun," *Mahkamah Konstitusi RI* 01 (2017): 1–7.

⁸ "UU No. 1 Tahun 1974 Tentang Perkawinan" (n.d.) Article 6 Paragraph (2): To carry out a marriage, a person who has not yet been adopted at the age of 21 (twenty one) years must obtain permission from both parents.

⁹ "signs of puberty, fiqh scholars explain that the size person's puberty can be known in two ways, first by looking at the indications that show that someone has reached puberty, namely wet dreams for men and menstruation for women," n.d.; Ahmad Imam Mawardi, *Pemikiran NU Terhadap Program Pendewasaan Usia Perkawinan Di Jawa Timur* (Surabaya: Pustaka Raja, 2018).

¹⁰ The compilation of Islamic Law (KHI) "as one of the effort to renew the legal system concerning marriage, inheritance and endowment. applicable according to the president instruction No. 1 Year 1991, 10th June 1991, which then followed by the issuance of the decision letter of Religious Ministry of Indonesia No. 154 Year 1," n.d.

¹¹ Zaeni; Sahrudin; Lalu Hadi Adha; Israfil Asyhadie, *Hukum Keluarga Menurut Hukum Positif Dan Indonesia* (Depok: Rajagrafindo Persada, 2020).

¹² Asyhadie.

¹³ "Law Number 16 of 2019, in conjunction with Law Number 1 of 1974 concerning Marriage. Article 7 Paragraph (2) (2) In the event of a deviation from Paragraph (1) of this Article, you can request a dispensation from the court or other official appointed by both parents of the male or female party" (Indonesia, n.d.).

¹⁴ Saidah, *Perempuan Dalam Bingkai Undang Undang Perkawinan Indonesia* (Yogyakarta: TrustMedia Publishing, 2017).

welfare. This policy is thus enforced as a means to regulate societal behavior.¹⁵ A 2018 UNICEF report revealed that women aged between 20-24 who had married before turning 18 were estimated to number 1,220,900. This places Indonesia among the top ten countries with the highest absolute number of child marriages globally.¹⁶

The significant prevalence of child marriage arises from several factors, primarily social and cultural perspectives¹⁷ that view marriage as a solution rather than a problem. Both parents and children often perceive marriage as a pathway to resolve their issues. Parents, under the burden of financial stress, believe marrying off their children transfers their responsibility to another party, particularly the husband in patriarchal societies. Meanwhile, the child might view marriage as an escape from a toxic family environment, often characterized by violence or familial disintegration.¹⁸

Law No. 12/2011 stipulates the formation of laws and regulations in a definite, standardized manner that binds all lawmaking authorities.¹⁹ However, the content of the law falls short of its intended purpose, which includes justice, certainty and legal benefits.²⁰ The existence of the Marriage Law and its accompanying regulations necessitates legal reform to prevent conflict, ambiguity, and legal vacuums, particularly where sanctions for violations are not explicitly defined.

Logemen asserts that legal rules are binding when they exhibit a necessary (coercive) relationship between a condition and its consequences.²¹ According to Hans Kelsen, “Sanctions are imposed by the legal order with the intention of inducing certain actions deemed desirable by the lawmaker”.²² This understanding underpins the author’s exploration of the issue of marriage age limits in Indonesia.

RESEARCH METHODOLOGY

The research adopts a normative legal (doctrinal law) methodology, defined as “a process of identifying legal rules, principles, and doctrines to address the pertinent legal issues.”²³ This research employs a blend of statutory, philosophical, and analytical approaches, augmented by comparative studies and case analysis. The primary sources were gleaned from comprehensive library research, which included a systematic review of existing regulations to identify discrepancies within current laws. The research primarily revisits the Law on Child Protection in conjunction with Law No. 1 of 1974, including its amendments and other crucial regulations. Case studies were evaluated based

¹⁵ Winengan Winengan, “POLITIK HUKUM KELUARGA ISLAM DI ARAS LOKAL: Analisis Terhadap Kebijakan Pendewasaan Usia Pernikahan Di Nusa Tenggara Barat,” *Al-Ahwal: Jurnal Hukum Keluarga Islam* 11, no. 1 (2019): 1, <https://doi.org/10.14421/ahwal.2018.11101>.

¹⁶ Hakiki; dkk. Gaib, *Pencegahan Perkawinan Anak, Percepatan Yang Tidak Bisa Ditunda* (Jakarta: BPS, Unicef, Pusaka, 2020).

¹⁷ Muntamah, A. L., Latifiani, D., & Arifin, R. (2019). Pernikahan dini di Indonesia: Faktor dan peran pemerintah (Perspektif penegakan dan perlindungan hukum bagi anak). *Widya Yuridika: Jurnal Hukum*, 2(1), 1-12.

¹⁸ Joko Jumadi, (2022), On the Socialization of Child Marriage in Lombok from perspective customary practice. Arranged by KPKSK organization. State Islamic University, 12 October 2022.

¹⁹ Jazim Hamidi, *Pedoman Praktis Pembentukan Peraturan Daerah Partisipatif* (Jakarta: Prestasi Pustaka, 2008).

²⁰ Achmad Ali, *Mengungkap Teori Hukum (Legal Theory), Dan Teori Peradilan (Judicialprudence), Termasuk Interpretasi Undang-Undang (Legisprudence)* (Jakarta: Kencana, 2017).

²¹ Hamzah Halim, “Kemal Redindo Syahrul Putera, Cara Praktis Menyusun Dan Merancang Peraturan Daerah (Suatu Kajian Teoritis, Dan Praktis Diserai Manual), Konsepsi Teoritis Menuju Artikulasi Empiris,” in 3 (Jakarta: Kencana Prenada Media Group, 2013).

²² Hans Kelsen, *Teori Umum Tentang Hukum Dan Negara, Terj. Raisul Muttaqien* (Bandung: Nusa Media, 2009).

²³ Peter Mahmud Marzuki, “Penelitian Hukum,” 2005.

on the psychological impact, using empirical data from various preceding studies and real-world circumstances.

ANALYSIS AND DISCUSSION

The Evolution of Marriage Law in Indonesia

Reform is regarded as an introspective process that scrutinizes various legal provisions and implements transformative measures aimed at optimizing efficiency and fairness, and promoting access to justice within the framework of existing law.²⁴ Legal reform also contemplates the law-making process or policy formulation of the legal substance.²⁵ Soetandyo Wigjosoebroto delineates two facets within legal reform—'legal reform' and 'law reform'.²⁶ Both aspects are intrinsically linked to the notions of 'sustainable societal development', 'sustainable intellectual activity', 'sustainable intellectual philosophy', and 'enduring intellectual conceptions or fundamental ideas'. The exploration of this subject inherently constitutes a "generational" study.

Presently, according to Anderson, legal systems within the Islamic world can be categorized into three broad types. Firstly, systems that continue to uphold sharia as the foundational law, such as Saudi Arabia; Secondly, systems that have renounced sharia, supplanting it with secular law, exemplified by Turkey; and Thirdly, systems that harmonize these two paradigms. Indonesia falls within this third model.²⁷ The impetus for Islamic law reform in Muslim countries arose from the interaction between Islam and the West, primarily during colonial rule. Post-independence, further legal reform was driven by the realization of the disparity between Muslim society from Western advancement.²⁸ Importantly, since attaining independence, Indonesia has steadfastly acknowledged human rights as constitutional rights.²⁹

The goals of driving marriage law reform vary across countries and can typically be classified into three categories. Firstly, countries that aspire to consolidate their family law;³⁰ secondly, countries aiming to uplift the status of women; and thirdly, nations endeavoring to adapt to the progression and demands of contemporary times, as they perceive traditional fiqh concepts to be less equipped to address these issues.³¹ The enactment of the Marriage Law is perceived as the culmination of a process that refined historical perspectives on marriage law, coupled with the ambition to establish a national marriage law that aligns with current and future legal necessities.³²

²⁴ Teguh Prasetyo, *Pembaharuan Hukum Perspektif Teori Keadilan Bermartabat* (Malang: Setara Press, 2017).

²⁵ Rikardo Simarmata, *Pembaharuan Hukum Daerah Menuju Pengembalian Hukum Kepada Rakyat* (Jakarta: YBH Bantaya, Yayasan Kemala, HuMA, 2003).

²⁶ Yesmil Anwar & Adang, *Pembaharuan Hukum Pidana (Reformasi Hukum Pidana)* (Jakarta: Gramedia Widiasarana Indonesia, 2008).

²⁷ Jazuni, *Legislasi Hukum Islam Di Indonesia* (Bandung: Citra Aditya Bakti, 2005).

²⁸ Yulia Fatma, "BATASAN USIA PERKAWINAN DALAM HUKUM KELUARGA ISLAM (Perbandingan Antar Negara Muslim: Turki, Pakistan, Maroko Dan Indonesia)," *Juris: Jurnal Ilmiah Syariah* 18, no. 2 (2019): 117–35, <https://doi.org/10.31958/juris.v18i2.1670>.

²⁹ Ardhanariswari, R., Nursetiawan, E., Amalia, S. D., Cahyani, E. D., & Fadzil, R. M. (2023). Upholding Judicial Independence through the Practice of Judicial Activism in Constitutional Review: A Study by Constitutional Judges. *Volkgeist: Jurnal Ilmu Hukum dan Konstitusi*, 183-207.

³⁰ "This renewal for unification is due to the existence of a number of schools of thought followed in the country concerned, which may consist of Sunni schools of thought, but may also be between Sunni and Shi'i," n.d.

³¹ Khairuddin Nasution, *Sejarah Singkat Pembaruan Hukum Islam, Dalam M. Atho' Muzdhar, Dan Khairuddin Nasution, Hukum Keluarga Dunia Islam Modern* (Jakarta: Ciputat Press, 2003).

³² Muhammad Abdun Nasir, *Positivisasi Hukum Islam Di Indonesia* (Mataram: IAIN Mataram Press, 2004).

Consequently, the law is continually updated to respond to global shifts. Law No. 1 of 1974 was revised for the first time after 49 years, culminating in the creation of Law No. 16 of 2019, specifically Article 7, which prescribes the minimum age for marriage.

In the view of Khoiruddin Nasution, efforts towards marriage law reform persist, Firstly, the draft prepared by the Ministry of Religious Affairs team revises the Compilation of Islamic Law; secondly, the draft produced by the Gender Mainstreaming team, Counter Legal Draft (CLD KHI).³³ Additionally, there is the draft of the material law of Islamic family law, which will serve as the foundation for case resolution in the Religious Courts.

The stipulation of the minimum age of 19 for prospective spouses warrants reconsideration, as this age threshold is arguably young, representing “early adulthood,” to embark on marriage. This corresponds with the views of Indonesian Islamic scholars who oppose age standardization, advocating instead that emotional maturity is the prime determinant for marriage.³⁴ Hasbi ash-Shiddieqy posits that the age of adulthood, and thereby suitability for marriage, is 21. Conversely, Moh. Idris Ramulyo, suggests that the ideal ages for marriage are 25 for men and 18 for women.³⁵ From a health perspective, Dadang Hawari proposes ages for marriage and family planning to between 20-25 years for women and 25-30 years for men.

Therefore, there is a pressing need for future lawmakers to demonstrate determination and audacity in updating the minimum age for marriage from 19 to 21, an age widely recognized as the threshold of adulthood. This is crucial as children’s rights are an integral facet of human rights that must be guaranteed, protected, and upheld by parents, families, communities, governments, and the state.³⁶

The conceptual framework above is grounded in the philosophical foundation of the nation, Pancasila, and the Preamble of the 1945 Constitution of the Republic of Indonesia. Furthermore, the 1945 Constitution of the Republic of Indonesia serves as another philosophical pillar, particularly in relation to “the rights of children to recognition, protection, and the assurance of a fair and equal treatment before the law”.

Marriage, a cornerstone of societal and state life, deeply affects the honor of family and kinship. Therefore, its implementation must comply with the legally stipulated requirements to prevent undesirable deviations and contraventions that could tarnish family and kinship honor and dignity.³⁷ As per Article 1, paragraph (2) of Law Number 4 of 1961, adulthood is defined as having reached the age of 21 years, or having entered into marriage. Yet, legal reform remains a

³³ Nasution, *Sejarah Singkat Pembaruan Hukum Islam, Dalam M. Atho’ Muzdhar, Dan Khairuddin Nasution, Hukum Keluarga Dunia Islam Modern*.

³⁴ M. Hasbi Ash-Shiddieqy, *Pengantar Hukum Islam* (Jakarta: Bulan Bintang, 1975); Moh. Idris Romulyo, *Hukum Perkawinan Islam; Studi Analisis Undang-Undang No. 1 Tahun 1974 Dan Kompilasi Hukum Islam* (Jakarta: Bumi Aksara, 2002).

³⁵ Ash-Shiddieqy, *Pengantar Hukum Islam*; Romulyo, *Hukum Perkawinan Islam; Studi Analisis Undang-Undang No. 1 Tahun 1974 Dan Kompilasi Hukum Islam*.

³⁶ Anak Agung Istri Ari Atu Dewi et al., “The Role of Human Rights and Customary Law to Prevent Early Childhood Marriage in Indonesia,” *Sriwijaya Law Review* 6, no. 2 (2022): 268–85, <https://doi.org/10.28946/slrev.Vol6.Iss2.1885.pp268-285>.

³⁷ Syeh Sarip Hadaiyatullah and Nurul Huda, “PRAKTEK HUKUM ACARA DISPENSASI KAWIN,” *ASAS : Jurnal Hukum Ekonomi Syariah* 12, no. 01 (July 6, 2020): 150–66, <https://doi.org/10.24042/ASAS.V12I01.7133>.

possibility due to a lack of synchronization, leaving the provisions concerning age limits an open legal policy.³⁸

From a social perspective, marriage bears significant implications: 1) Married individuals often hold a higher societal status than unmarried counterparts; 2) Regulations exist limiting polygamy to four people, provided the man can ensure fairness.³⁹ Julianto Witjaksono asserts that women under 20 years old face heightened risk of illness and death when performing their reproductive duties.⁴⁰ According to Dr. Kartono Mohamad, teenage pregnancy is the leading contributor to maternal and child mortality, perpetuating a cycle of poor health and poverty.⁴¹ Nugroho Kampono further highlights the medical downsides of early marriage, stating that individuals under 20 years old are still undergoing cellular maturation and thus face an increased risk of cancer.⁴²

The Ideal Marriage Age in Legal Reformation

1. The Optimal Legal Age for Marriage

The amendment to Article 7, paragraph (1) of Law Number 1 of 1974, and Law Number 16 of 2019, deserves recognition. This amendment establishes the minimum age of marriage as 19 years for both genders, eliminating the previous disparity where the minimum age of men was 19, and for women, it was 16. This change stems from the Constitutional Court Decision Number 22 / PUU-XV / 2017. However, an update to Government Regulation Number 9 of 1975 and the Compilation of Islamic Law (KHI) has yet to follow, potentially leading to normative conflicts. While the principle of *Lex superior Derogat legi Inferior* applies, it may cause confusion for those unaware of the changes, as the previous law remains legally valid until superseded.

A comparative study of Singapore's law implementation, despite it not being a Muslim-majority country, is noteworthy. From a perspective of benefit (*maqasyid sharia*), setting the marriage age limit to 21 years has positively impacted family welfare. In India, legal reform discussions have been underway since 2021, awaiting ratification. One of the proposed articles sets the "minimum age of marriage" at 21 years for both genders,⁴³ shifting from the previous law that set the age of marriage at 18 for men and 17 for women.

As per author's interpretation, the 19-year age limit stipulated in Article 7, paragraph (2) of the Marriage Law may not represent the optimal age for marriage when assessed from a range of aspects. This age limit plays a significant role in the child's future prospects and sustainability, along with the objective of fostering prosperous families and a future Indonesian state that is both civilized and progressive. The realization of a prosperous family is intrinsically connected with the biological, psychological, economic, and educational maturity of the prospective marriage partners. Therefore, the individuals' readiness to undertake the responsibilities of marriage should be a central consideration in determining the ideal legal age for marriage.

³⁸ Kasmudin Kasmuddin, "Rekonstruksi Pengaturan Perkawinan Anak Dibawah Umur Berbasis Nilai Keadilan," *Jurnal Hukum Kaidah: Media Komunikasi Dan Informasi Hukum Dan Masyarakat* 18, no. 2 (2019): 83–101, <https://doi.org/https://doi.org/10.30743/jhk.v18i2.1182>.

³⁹ Wirani Aisyah Anwar, *Hukum Islam Dan Hukum Studi Tentang Kawin Lari* (Solok Sumatra Barat: Lembaga Pendidikan dan Pelatihan Balai Insan Cendekia, 2020).

⁴⁰ Winda Wijayanti, *Hukum Perkawinan Dan Dinamikanya* (Depok: RajaGrafindo Persada, 2021).

⁴¹ Wijayanti.

⁴² Ahmad Tholabi Kharlie, *Hukum Keluarga Indonesia* (Jakarta: Sinar Grafika, 2019).

⁴³ Kharlie.

Mukhtar Kusumaatmaja posits that the philosophical aims of a nation can only be achieved with the backing of high-quality human resources, characterized by patriotism, strength, courage, intelligence and responsibility.⁴⁴ The legal politics of a state, as outlined in Law Number 52 of 2009, necessitates the regulation and enhancement of population quality, and its mobilization as a robust resource for national development and resilience.⁴⁵ The Family Planning Program has introduced the Marriage Age Maturation (PUP) initiative, aimed at raising the age of first marriage to a minimum of 21 years for women and 25 years for men.⁴⁶ However, Hasto Wardoyo asserts that the age defined in the Revised Marriage Law may not be ideal from a biological perspective, as women under 19 are at a high risk of developing cervical cancer.⁴⁷ This is further backed by the research from UIN Syarif Hidayatullah Jakarta's Center for Women's Studies (PSW), which indicates that the average ideal marriage age for women is around 19, and for men, it is approximately 23.4 years. According to the Statistics Indonesia (BPS), the average marriage age for urban dwellers is 21.1 years, with the range varying across provinces.⁴⁸ From these data, two primary observations can be drawn: Firstly, state efforts to enhance societal conditions by increasing the marriage age, and secondly, the discrepancy in marriage age between urban and rural communities.⁴⁹ A 2012 study published in the *Journal of Social and Personal Relationships* suggested that the most ideal age for marriage is 25. The US Census Bureau later reported in 2013 that the ideal marriage ages are 27 for women and 29 for men. Overall, these studies imply that the optimal age for marriage is approximately between 28 and 32 years.⁵⁰

Qualitative data reveal a rising trend in the average age of marriage, surpassing the age stipulated in Article 7 of the Marriage Law. Numerous factors contribute to this societal shift, including an increased understanding of spousal roles and responsibilities that contribute to a prosperous family life. Nonetheless, the issue of legal regulation is multi-dimensional and should not be evaluated solely on its legitimacy or as a reflection of justice values.⁵¹ This perspective aligns with a non-analytical school of thought that views law as an institution working for and embedded within society, rather than as an autonomous entity.⁵²

The necessity to reform the marriage law, by lowering the minimum ideal age of marriage to 21 years, is an imperative task for policymakers (both legislative and executive). This reform aims at aligning with the future legal aspirations of the Marriage Law (*Ius Constituendum*). Insightfully, Law No. 1 of 1974 incorporates the principle of age maturity, as articulated in Article 6 paragraph (1)—stipulating the marriage age requirement to be 21 years for both men and women. This regulation aligns with the principle of primary benefit (*hizbun nafsi*), which discourages

⁴⁴ Ahmad Syahrus Sikti, *Hukum Perlindungan Perempuan Konsep Dan Teori* (Yogyakarta: UII Press, 2020).

⁴⁵ "Undang-Undang Nomor 52 Tahun 2009 Tentang Perkembangan Kependudukan Dan Pembangunan Keluarga Berencana" (n.d.).

⁴⁶ BKKBN RI, *Direktorat Remaja Dan Perlindungan Hak-Hak Reproduksi, Pendewasaan Usia Perkawinan Dan Hak-Hak Reproduksi Bagi Remaja Indonesia Perempuan* (Jakarta: BKKBN, 2010).

⁴⁷ Lia Harahap, "Versi BKKBN, Usia 20-21 Tahun Ideal Untuk Menikah Dari Sisi Biologis," BKKBN, 2023.

⁴⁸ Kharlie, *Hukum Keluarga Indonesia*.

⁴⁹ Kharlie.

⁵⁰ Admin Hello Sehat, "Hubungan Harmonis Usia Idial Menikah Suami Istri," n.d.

⁵¹ Rini Fitriani et al., "Legal Protection for Wife and Child as Consequence of Head of Family's Criminal Imprisonment Enforcement," *Volkgeist: Jurnal Ilmu Hukum & Konstitusi* 6, no. 1 (2023), <https://doi.org/https://doi.org/10.24090/volkgeist.v6i1.8232>.

⁵² Setiyowati, *Hukum Perkawinan Di Indonesia, Rekontruksi Peraturan Perundang-Undangan Berbasis Nilai Keadilan* (Malang: Setara Press, 2021).

actions leading to greater harm. It ensures that prospective brides and grooms understand the duties and responsibilities following the marriage contract, which ultimately fosters harmonious family relations (*sakinah mawaddah and warahmah*). Marriage transcends the simple legalization of biological relations (sex) between a man and a woman. It is a sacred covenant (*misaqun galizon*) binding for an extended duration—potentially eternal—with one of its objectives being procreation.⁵³

2. Divergence from the Prescribed Marriage Age Limit

Article 7, paragraph (2) of the Marriage Law permits individuals to marry below the stipulated age limit of 19 years, provided they seek a Court Dispensation based on compelling reasons backed by substantial evidence. The law remains ambiguous about the nature of these “urgent” reasons, leaving it to the judge’s discretion to decide the appropriateness of granting such dispensations.⁵⁴

This rule regarding dispensation is occasionally required due to extraordinary circumstances that deviate from the norm. In practice, while such dispensation may be viewed unfavorably, it is not legally culpable, as the establishment of a legitimate basis effectively negates the punishment of the party involved.⁵⁵ As per Soerjono Soekanto, dispensation is a deviation from the norm with a regulatory foundation.⁵⁶ Legal deviations can be categorized into two types:

- a. Justifications (*rechtvaar digingsgronden*), which are reasons that nullify the illegality of an act, thereby rendering the act justifiable.
- b. Excuses (*schuldopheffingsgronden*), which are reasons that eliminate the defendant’s guilt. The act committed by the defendant remains unlawful, but they are not convicted.⁵⁷

By raising the minimum marriage age to 21 years, it sets the standard for applying for court dispensation, since one of the key prerequisites for dispensation is that the prospective bride and groom be at least 18 years old, complemented by substantial supporting evidence. This adjustment can help curb child marriage, in accordance with various laws and regulations that set the age limit at 18 years. A question that emerges is whether cases of dispensation are on the rise. If this trend persists, it may be due to other unavoidable factors affecting both men and women. However, the prevalence of such cases is expected to be relatively low, reflecting on the heightened awareness and growing understanding within the community.

The progressive concept of setting an age limit for marriage is an innovative solution to the societal concerns surrounding child marriage. Progressive thinking entails the courage to depart from the traditional mindset of legal absolutism and instead, position the law within the broader context of humanitarian issues. While there is merit in adopting a legal-determinist approach, it is not an absolute necessity, especially when dealing with issues that require the application of modern legal logic, which otherwise might compromise human right and the pursuit of truth. A progressive legal paradigm prioritizes the human element within the law. In contrast, a positivistic legal paradigm places the law above humanity, even if it results in human marginalization, as long as the law is upheld. However, the progressive legal paradigm asserts that the law can be sidelined

⁵³ Erman Radjagukguk, *Hukum Dan Masyarakat* (Jakarta: Bina Aksara, 1983).

⁵⁴ Sarip Hadaiyatullah and Huda, “PRAKTEK HUKUM ACARA DISPENSASI KAWIN.”

⁵⁵ Ishaq, *Dasar-Dasar Ilmu Hukum* (Jakarta: Sinar Grafika, 2009).

⁵⁶ Soerjono Soekanto, *Sendi-Sendi Ilmu Hukum Dan Tata Hukum* (Bandung: Citra Aditya Bakti, 1993).

⁵⁷ Ishaq, *Dasar-Dasar Ilmu Hukum*.

to support human existentiality, truth, and justice. The primary objective of progressive law is to position humans at the center of any legal discourse. For progressive law, the law exists to serve humans, and not vice versa. The law does not exist in isolation, but rather, it is in place to uphold broader principles such as human dignity, happiness, welfare, and glory.⁵⁸

The acknowledgement of the human element guides progressive law towards a focus on human behavior and experiences. Under a positivistic legal paradigm, humans are subject to the law and its logic, often leading to a forced alignment with legal parameters. However, the progressive legal paradigm repositions the law to serve humans. When the human element, encompassing truth and justice, becomes the central to legal discussion, ethical and moral considerations naturally enter the discourse. These ethical and moral factors play a crucial role in shaping the concept of progressive law because they address notions of right and wrong, good and bad, which are intrinsically linked to human nature.⁵⁹ If ethical or moral values are diminished, law enforcement becomes ineffective, hindering the development of a prosperous and joyful society. Thus, fostering this level of mental awareness is crucial for enhancing moral and character development within the community. The objective is to cultivate a society characterized by high moral standards, paving the way for a peaceful, prosperous, just and fulfilled society.

3. Understanding the Concept of Marriage Dispensation

The issue of marriage dispensation, although explicitly mentioned, does not detailed guidelines on the conditions that warrant its approval. The existing explanation suggests that the parents of either party can request a dispensation from the court for “extremely urgent reasons,” supported by “sufficient evidence”. However, this provision is rather vague, as it does not define what constitute an urgent reason or what kind of evidence is considered sufficient for the court’s legal considerations.

The Indonesian Supreme Court has established that judges, in reaching their decisions, must take into account a range of factors, including juridical, philosophical, and sociological dimensions. This holistic approach is aimed at achieving, realizing, and ensuring accountability in judicial decisions, with an orientation towards legal, moral, and social justice.⁶⁰ The juridical aspect, which is the primary consideration, is based on the existing law. Judges, as law enforcers, must comprehend the law by identifying the legal provisions relevant to the case at hand. They must evaluate whether the application of the law in question brings about benefits or legal certainty. The philosophical aspect revolves around truth and justice, while the sociological aspect takes into account the cultural values inherent in society.⁶¹

Despite the ongoing efforts, the realization of women’s and children’s rights remains an uphill battle, marked by numerous instances of their rights being overlooked. This primarily stems from the absence of an equality perspective in the judicial handling of cases involving domestic violence, child marriages and divorces. The administrative mechanisms and legal considerations

⁵⁸ Satjipto Rahardjo, *Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicialprudence), Termasuk Interperstasi Undang-Undang (Legisprudence)* (Jakarta: Kencana, 2013); See to Ema Mar’ati Sholecha et al., “Justice Collaborator’s Position and Function on Witness Protection’s Rights as a Suspect from the Perspective of Criminal Law in Indonesia,” *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, June 30, 2023, 131–43, <https://doi.org/10.24090/VOLKSGEIST.V6I1.7246>.

⁵⁹ Satjipto Rahardjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia* (Yogyakarta: Genta Publishing, 2009).

⁶⁰ Mahkamah Agung RI, *Pedoman Perilaku Hakim (Code Of Conduct), Kode Etik Hakim Dan Makalah Berkaitan* (Jakarta: Pusdiklat MA RI, 2006).

⁶¹ Mahkamah Agung RI.

currently in place have yet to fully support the protection of the rights of women and children.⁶² The judicial approach to marriage dispensation cases must be comprehensive, factoring in the juridical, biological, and sociological aspects pertaining to the betrothed parties. These considerations encompass a broad array of issues, necessitating careful scrutiny of the legal prerequisites before deciding to either approve or dismiss each dispensation application.

As Bagir Manan points out, the general formulation of the law fails to encompass every possible legal scenario, serving only as a bridge linking concrete legal incidents with abstract legal provisions.⁶³ Judges, in their role, go beyond simply echoing the law; they continually strive to make legal discoveries by interpreting statutory provisions in relation to the events and legal facts unfolded in court. This allows them to form a conviction whether the actions of the defendants or the claims of either party in the case are substantiated by evidence, as stipulated in procedural law (Article 183 jo. Article 184 paragraph (1) KUHAP, and Article 163 jo. Article 164 HIR).

In this regard, the judge presiding over the application must strictly adhere to Article 20 point (a), which stipulates that the judge must hold a decree of the Chief Justice of the Supreme Court as a Juvenile Judge, having undergone training and/or technical guidance, or being certified in the Juvenile Criminal Justice System, or possessing experience in hearing Marriage Dispensation applications.⁶⁴

4. The Controversy of Marriage Dispensation: A Feminist Perspective

Magdalene, a digital platform specializing in gender issues, has broached the subject of marriage dispensation, positioning it as a significant exacerbation of child protection issues rather than a remedy. Over ten articles have argued that this practice legally deprives children of their rights, with the prevailing societal view being that a married child is automatically an adult.⁶⁵ However, *Magdalene* is not alone in its critique of marriage dispensation policies. Other platforms, including “Yayasan Kesehatan Perempuan”, “Suara Perempuan”, “The Jakarta Post”, and numerous others, have also expressed their disapproval.

With the introduction of the Act on Sexual Violence in April 2022, the feminist discourse has suggested that the sanctioning of marriage dispensation contributes to child sexual abuse, and should thus be classified as a criminal offense.⁶⁶ Sudirman et al. challenge this perspective, acknowledging that while marital dispensation may be linked to sexual violation, it is more closely associated with domestic abuse, mental health, and reproductive issues.⁶⁷ They argue that the majority of marriage dispensations are precipitated by unplanned pregnancies, suggesting that the sexual relations were consensual. Therefore, the families involved are often compelled to preserve their honor and the status of the unborn child.⁶⁸

⁶² Dzuhayatin; et. al Siti Ruhaini, *Menuju Hukum Keluarga Progressif, Responsif Gender, Dan Akomodatif Hak Anak* (Yogyakarta: Suka-Press PSW UIN Sunan Kalijaga The Asia Foundation, 2013).

⁶³ Bagir Manan, *Suatu Tinjauan Terhadap Kekuasaan Kehakiman Dalam Undang Undang Nomor 4 Tahun 2004* (Jakarta: Mahkamah Agung RI, 2005).

⁶⁴ “Perma No. 5 Tahun 2019 Tentang Pedoman Penanganan Permohonan Dispensasi Perkawinan.” (n.d.).

⁶⁵ <https://mgdalene.co>, several topics focuses on many perspectives such as “woman judges perspective (*dicari: hakim perempuan berpeerspektif gender untuk cegah perkawinan anak*), shared story from Resi (*kisah resi mencegah perkawinan anak dikampungnya*), etc...

⁶⁶ Revkin, M. R., & Wood, E. J. (2021). The Islamic State’s pattern of sexual violence: Ideology and institutions, policies and practices. *Journal of Global Security Studies*, 6(2), oga038.

⁶⁷ Sudirman, S., Ramadhita, R., Bachri, S., & Duran, B. N. (2023). Examining the complexity of child marriage as sexual violence in digital era. *Legality : Jurnal Ilmiah Hukum*, 31(2), 310–328. <https://doi.org/10.22219/ljih.v31i2.28881>

⁶⁸ Ramdani, R. (2023). Menekan Pernikahan Dini Melalui Dispensasi Nikah. *VERITAS*, 9(2), 55-64.

In response to the initial critique, several studies (N Arini, 2023; PSA Adiningsih, 2023; and AM Wafi, 2023) have been undertaken to understand the rationale behind judges' decisions when granting marriage dispensation. These studies do not solely rely on the marriage law but also consider the cultural context of the marriages. The first study, referencing Decision Number 273/Pdt.P/2022/PA.Wno and Decision Number 282/Pdt.P/2022/PA, highlights how the culture in Wonosari permits engaged couples to have sexual relations before marriage.⁶⁹ This cultural nuisance plays a significant role in the judges' rulings. The second study explores the potential application of Article 7, Paragraphs (1) and (2). These provisions grant judges the discretion to either approve or reject the dispensation based on the presence of compelling situation. However, the regulation do not clearly define these circumstances, leaving their interpretation to judges' discretion and proficiency. According to the Religious Court Decision Number 16/Pdt.P/2022/PA.Psp, compelling circumstances refer to a situation where both parties, who are in love and have consented to the relationship, fear the possibility of committing "Zina" (fornication).⁷⁰

Thus, the religious court's approval of marriage dispensation acts as a pull factor, driven by the push factor of complex circumstances. These circumstances often depend on various situations and are deeply influenced by multicultural character of Indonesia, which judges should duly recognize. Countering the feminist argument requires more than just examining individual cases. It necessitates a broader understanding that incorporates sociological and philosophical interpretations.

5. Understanding Legal Penalties for Breaching the Marriage Age Limit

The effectiveness of legal frameworks and regulations is significantly reliant on law enforcement. The application of laws can take multiple forms, including the imposition of sanctions, which could be criminal, civil, or administrative.⁷¹ This provision is not obligatory, which means that not all three penalties need to be employed. The appropriate sanction can be selected based on its effectiveness and relevance to the legal subject matter.

Sanctions serve as a coercive measure, compelling individuals to adhere to the rules and abide by legal provisions.⁷² As per J.C.T Simongkir et al., the term 'sanctions,' derived from the Dutch word 'Sanctie', implies a punitive threat intended to enforce compliance with laws and regulations.⁷³ Lawrence M. Friedman presents sanctions as tools for reinforcing norms or regulations,⁷⁴ defining them as: "de sanctie wordt gedefinieerd als: regels die voorschrijven welke gevolgen aan de niet naleving of de overtreding van de normen verbonden worden".⁷⁵ The presence of sanctions is a critical element of legal frameworks. Their purpose is to ensure that all established provisions

⁶⁹ Wafi, A. M. (2023). *TINJAUAN MASLAHAH TERHADAP ALASAN HAKIM PENGADILAN AGAMA WONOSARI DALAM MENGABULKAN PERMOHONAN DISPENSASI NIKAH (STUDI PENETAPAN NOMOR 273/PDT. P/2022/PA. WNO DAN PENETAPAN NOMOR 282/PDT. P/2022/PA. WNO)* (Doctoral dissertation, UIN SUNAN KALIJAGA YOGYAKARTA).

⁷⁰ ADININGSIH, P. S. A. (2023). *Pertimbangan Hakim dalam Penetapan Dispensasi Kawin (Tinjauan Yuridis Penetapan Pengadilan Agama Padang Sidempuan Nomor: 16/Pdt. P/2022/PA. Psp)* (Doctoral dissertation, Universitas Jenderal Soedirman).

⁷¹ Wicipto Setiadi, "Sanksi Administratif Sebagai Salah Satu Instrumen Penegakan Hukum Dalam Peraturan Perundang-Undangan," *Jurnal Legislasi Indonesia* 6, no. 4 (2009): 603–14.

⁷² Admin PPKN, "Pengertian Sanksi," n.d.

⁷³ Admin PPKN.

⁷⁴ Lawrence M. Friedman, *The Legal System, A Social Science Perspective* (New York: Russel Sage Foundation, 1975).

⁷⁵ R. Dupont L.; Verstraeten, *Handboek Belgisch Strafrecht* (Leuven: Acco, 1990).

are systematically adhered to and not breached.⁷⁶ This aligns with one of the essential principles in legislative formulation, which is the principle of utility and benefit. This principle implies that every legislative regulation is enacted because it is genuinely necessary and beneficial for managing societal, national, and state affairs.⁷⁷

A consistent and comprehensive approach to law enforcement yields societal benefits, most notably the deterrent effect, which prevents potential law-breakers.⁷⁸ Positive law, in its current form, fails to achieve societal equilibrium. This necessitates a fundamental and comprehensive overhaul of the existing legal system, targeting specifically its substance and beliefs.⁷⁹ The application of sanctions in laws and regulations serves several purposes: First, it enforces as legal provisions; Second, it penalizes those who breach legal norms; Third, it deters individuals from repeating legal offences; Fourth, it prevents potential lawbreakers from violating the law.⁸⁰

Government Regulation No. 9 of 1975 has established criminal penalties in response to breaches of certain sections of the Marriage Law. These criminal provisions, stipulated in Article 45 paragraph (1), apply unless otherwise specified in relevant laws and regulations. Therefore: a. Individuals who breach the provisions outlined in Articles 3, 10 paragraph (3), 40 of this regulation, are subject to a fine of up to Rp7,500.-; b. Recording Officers who violate the provisions detailed in Articles 6, 7, 8, 9, 10 paragraph (1), 11, 13, 44 of this regulation, are subject to a maximum sentence of 3 months' light imprisonment or a fine of up to Rp7,500.-.⁸¹

The act of violating the legally stipulated age of marriage is a form of law infringement, seen as a deviation from the law without a valid basis.⁸² As per W. Wirjono P., an illegal act is one that infringes upon another individual's legal rights, contradicts the perpetrator's legal obligations, or violates societal norms.⁸³ Underage marriages can be legally classified as a breach of decency. Decency-related crimes pertain to issues associated with sexual matters. The Criminal Code (KUHP) addresses this in Chapter XIV Book II, titled "Crimes Against Decency", which includes:

- a. the crime of adultery (Article 284).
- b. the crime of rape for sexual intercourse (Article 285).
- c. the crime of cohabitation with an unmarried female woman under 15 years old (Article 287); and
- d. the crime of cohabitation with a woman in marriage who is not yet of marriageable age, resulting in harm (Article 288).

Crimes against moral decency do not occur spontaneously. They typically evolve from overlooked harassment that eventually culminates in criminal behavior. Sexual harassment, in particular, is an abusive conduct that exploits the relationship between a man and a woman,

⁷⁶ Sri Nur Hari Susanto, "Karakter Yuridis Sanksi Hukum Administrasi: Suatu Pendekatan Komparasi," *Administrative Law and Governance Journal* 2, no. 1 (2019): 126–42, <https://doi.org/https://doi.org/10.14710/alj.v2i1.126-142>.

⁷⁷ "UU No. 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan" (n.d.).

⁷⁸ Bambang Waluyo, *Penegakan Hukum Di Indonesia* (Jakarta: Sinar Grafika, 2017).

⁷⁹ Ahmad Rifai Rahawarin, "Tiga Sistem Sanksi (Trisisa) Hukum Pidana (Ide Pembaharuan Sanksi Hukum Pidana Nasional)," *Legal Pluralism Journals of Law* 7, no. 2 (2017): 144–76.

⁸⁰ Rahawarin.

⁸¹ "Peraturan Pemerintah No. 9 Tahun 1975 Tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan." (n.d.) Peraturan ini mulai berlaku pada tanggal 1 Oktober 1975.

⁸² Ishaq, *Dasar-Dasar Ilmu Hukum*.

⁸³ R. Wirjono Projodikoro, *Perbuatan Melanggar Hukum* (Bandung: Sumur, 1993).

leading to the victimization and dehumanization of one party. Women are often subjected to various sensitive issues such as sexual violence and sexual harassment.⁸⁴

In the context of Indonesian marriage law reform, sanctions for violations of the marriageable age limit can be constructed into two categories. Firstly, Administrative sanctions, a form of legal penalty, is established as a foundation to uphold general rules outlined in universally binding laws and regulations. The imposition of these sanctions is inseparable from general and specific policies aimed at maintaining order, ensuring legal certainty, and safeguarding everyone's rights from infringements.⁸⁵ Secondly, criminal sanctions come into play, application of which must be based on clear criminal procedural law.⁸⁶ According to Sudarto, these are penalties enforced by the state on individuals who intentionally breach legal provisions, causing them to experience discomfort.⁸⁷ H.L. Packer suggests that while treatment aims to rehabilitate the offender, punishment serves to main objectives: a) to deter the incidence of crime or undesirable behavior; b) to inflict deserved suffering or retribution on offenders.⁸⁸ The punishment enforced by criminal law can result in the loss of freedom (detention), property (confiscation), dignity and in extreme cases, life (penalty death).

The incorporation of sanctions in the updated marriage law serves as a means of enforcing justice and fostering benefits for the nation's life and governance. It harmonizes with the material content in the KHUP⁸⁹—as outlined in Articles 401-405 on the concealment of marriage events, and Articles 411-423 on the acts of adultery and sexual abuse.⁹⁰ These actions can also be classified as Domestic Violence (KDRT) under Article 1 of the Domestic Violence Law: This act against a person, particularly women, resulting in physical, sexual, psychological, and or domestic neglect, including threats of coerce acts illegal deprivation of liberty within the domestic sphere."⁹¹

The responsibility for enforcing marriage law to protect against and prevent child marriage is shared among various parties. Their roles are defined by their involvement in the occurrence of an unlawful act. The key stakeholders include: 1) the government; 2) parents and or family members; 3) children; and 4) the community and other relevant stakeholders.

Thomas A. Wartowski emphasizes that for sanctions to be effectively applied, the law must garner the support of the community. Achieving this support requires the law to align with the values and legal culture of the people, thereby resonating with societal norms.⁹² Given the

⁸⁴ Christy Aleng, "Sanksi Hukum Terhadap Pelaku Pelecehan Seksual Secara Verbal," *Lex Crimen* 9, no. 2 (2020): 63–69.

⁸⁵ Elfi Nola Tumangger, Latifah Amir, and Ratna Dewi, "Terhadap Sanksi Dalam Peraturan Walikota Ditinjau Dari Undang-Undang Pembentukan Peraturan Perundang-Undangan," *Mendapo: Journal of Administrative Law* 4, no. 1 (2023): 75–90, <https://doi.org/10.22437/mendapo.v4i1.19449>.

⁸⁶ Admin PPKN, "Pengertian Sanksi."

⁸⁷ Sudarto, *Kapita Selekta Hukum Pidana* (Bandung: Alumni, 2006).

⁸⁸ Barda Nawawi Arif, *Kapita Selekta Hukum Pidana* (Bandung: Citra Aditya Bakti, 2003).

⁸⁹ Ira Guslina Sufa, "KUHP Terbaru Telah Disetujui Pada Sidang Paripurna DPR RI Pada 6 Desember 2022, Kemudian Presiden Joko Widodo, Telah Resmi Menandatangani Undang-Undang Nomor 1 Tahun 2023 Tentang Kitab Undang-Undang Hukum Pidana (KUHP) Pada Senin, 2 Januari 2023. Setelah ,," Kata Data, n.d.

⁹⁰ "Kitab Undang-Undang Hukum Pidana" (n.d.) Article 411 Paragraph (1) Reads: Every person who has sexual intercourse with someone who is not their husband or wife will be punished for adultery, with a maximum imprisonment of 1 (one) year or a maximum fine of Category II.

⁹¹ "Undang-Undang Nomor 23 Tahun 2004 Tentang Penghapusan Kekerasan Dalam Rumah Tangga" (n.d.).

⁹² Rahardjo, *Menguak Teori Hukum (Legal Theory) Dan Teori Peradilan (Judicialprudence), Termasuk Interperstasi Undang-Undang (Legisprudence)*.

high prevalence and detrimental impacts of child marriage, there is an urgent need to curb its occurrence in Indonesia. Mardi Candra suggests three potential solutions for policy makers. Firstly, criminal sanctions can be imposed on parties involved in unlawful child marriage. Secondly, strict regulations, accompanied by fines, could be enforced for granting marriage dispensation permits. Lastly, a large-scale public education campaign could be initiated to inform Indonesian citizens about the consequences of child marriage.⁹³

In contrast, Pakistan's approach to child marriage includes penal consequences for enablers. If individuals under the age of 18 is coerced into a marriage contract, the child's parents or guardians could face imprisonment up to one month and/or a fine not exceeding one thousand Rupees. However, women are exempted from imprisonment. If the marriage proceeds despite a court-issue warning, the parents or guardians face stiffer penalties, potentially leading to imprisonment up to three months and/or an increased fine. These penalties can be triggered either by the court's initiative or by a public complaint.⁹⁴

CONCLUSION

The optimal approach for future marriage law reform (*ius constituendum*) may be to increase the minimum age for marriage to 21 years. This age signifies biological, psychological, and sociological adulthood, as stipulated in Article 6 of the Marriage Law, Government Regulation No. 9 of 1975, and the Compilation of Islamic Law. Deviations from this age limit could still be permitted with court dispensation. However, it is crucial to standardize such dispensation by setting a minimum age limit of 18 years for both prospective brides and grooms when applying for marriage dispensation. Furthermore, the introduction of sanctions for parties involved in underage marriage, including guardians, witnesses, adult bridegrooms marrying underage girls, and officers of the Marriage Registrar, may be a step forward in eradicating this practice.

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⁹³ Mardi Candra, *Pembaruan System Dispensasi Kawin Dalam Sistem Hukum Di Indonesia* (Jakarta: Kencana, 2021).

⁹⁴ Muzdhar; & Khairuddin Nasution M. Atho', *Hukum Keluarga Dunia Islam Modern* (Jakarta: Ciputat Press, 2003).

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