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## WHEN CHILDREN'S RIGHTS ARE AT STAKE, SHALL COURT REMAIN SILENT? ANALYSIS ON THE IMPLEMENTATION OF PASSIVITY OF JUDGE PRINCIPLE IN CHILD MARRIAGE DISPENSATION IN INDONESIA

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# WHEN CHILDREN'S RIGHTS ARE AT STAKE, SHALL THE COURT REMAIN SILENT? ANALYSIS ON THE IMPLEMENTATION OF THE PASSIVITY OF JUDGE PRINCIPLE IN CHILD MARRIAGE DISPENSATION IN INDONESIA

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## Abstract

*This article explores the existence of *asas hakim pasif* (passivity of judge principle) in cases involving children in civil cases in Indonesia. As one of the basic principles in civil procedure, judges must be bound by the scope of the case and evidence brought by parties. The principle is not absolute, however, showing that under the Law on Judicial Power; judges are obliged to uphold justice by exploring law and social values more than often. A study case in marriage dispensation shows that judges are facing pluralism orders. Therefore, judges' value and understanding of children's rights is a determinant factor. Recently, the Law on Marriage Number 1 of 1974 was amended along with the enactment of Supreme Court Regulation Number 5 of 2019 on Guidance of Marriage Dispensation Examination, which provides better protection for children from child marriage, both in substantive and procedural rights. This article then recommends judges to be more active in deciding on child marriage by upholding the spirit of child protection and encourages the Supreme Court (Mahkamah Agung) to increase its activities to mainstreaming child protection issues.*

**Keywords:** *children's rights; civil procedure; marriage; dispensation; indonesia*

## Abstrak

*Artikel ini menganalisis berlakunya *asas hakim pasif* pada perkara perdata yang terkait anak. Sebagai salah satu *asas fundamental* dalam sistem peradilan perdata, *asas hakim pasif* mengharuskan hakim untuk terikat pada ruang lingkup perkara dan alat bukti yang diajukan para pihak. *Asas tersebut tidak absolut, mengacu pada Undang-Undang tentang Kekuasaan Kehakiman; hakim wajib untuk menjunjung tinggi keadilan dengan menggali hukum dan nilai-nilai yang hidup di masyarakat. Studi kasus atas dispensasi kawin untuk anak menunjukkan bahwa hakim menghadapi kondisi pluralisme hukum. Alhasil, nilai dan pemahaman hakim tentang hak-hak anak adalah faktor yang amat menentukan. Belakangan, Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan mengalami perubahan juga diterbitkannya Peraturan Mahkamah Agung Nomor 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin yang berisi perlindungan yang lebih baik bagi anak dari perkawinan anak, baik hak substatif maupun prosedural. Artikel ini merekomendasikan hakim untuk lebih aktif dalam memutus dispensasi kawin dengan menjunjung nilai perlindungan anak dan mendorong Mahkamah Agung meningkatkan kegiatan pengarusutamaan isu anak.**

**Kata kunci:** *hak anak; hukum acara perdata; perkawinan; dispensasi; indonesia*

## I. INTRODUCTION

Child marriage is a critical problem in Indonesia. According to the 2012 Indonesia Demography and Health Survey (SDKI), 17% of women between the ages of 20 and 24 who were in a marriage or still in union, were married when they were under 18.<sup>1</sup> More recent data of Indonesia Statistic Center (BPS) shows that in 2017, among the women of 20-24 years old who were in a marriage or still in union, about 22,9% were married when they were under 18; and in several provinces, such as South and Central Kalimantan and Southeast Sulawesi, the prevalence of child marriage is even over 35%.<sup>2</sup>

Although several factors do contribute to the high prevalence of child marriage in Indonesia, for instance, level of education, poverty, gender norms, and family honor,<sup>3</sup> this Article finds that there are problems both in substantive and procedural law concerning child marriage.

First, the substantive law is ambiguous over marriageable age governed by Law Number 1 of 1974 concerning Law of Marriage (Marriage Law). Applying the norm from the Indonesian Civil Code, the Law sets the marriage age at 21, and those under 21 shall have parents' consent. However, it also governs that marriage is allowed if the groom's age is 19, and the bride is 16 (minimum age of marriage).

Second, on the procedural side, the Law sets up a civil procedure for those who are below the minimum age, whereby parents may file a marriage dispensation to court. Additionally, the Law does not set up a minimum age provision for filling the dispensation nor provide terms and conditions of dispensation.

Specifically, on the matter of substantive law, the Constitutional Court, at the end of 2018, by Court Decision Number 22/PUU-XV/2017 on the Judicial Review of Law Number 1 of 1974 on Marriage (Marriage Law)<sup>4</sup> ended discrimination for women, stating that the phrase "16 years old" of the Article 7 (1) violates Indonesian Constitution of 1945 and declared it as having no binding legal force. Furthermore, in the Decision, the Court also reasons that setting up 16 as the minimum age for girls violates protection to children because Indonesia has developed its legal framework on child protection which sets up 18 as a bar of adulthood.

The Constitutional Court Decision has received public praise as it is expected to support ending child marriage in Indonesia. In particular, the Law still has Article 7 (2), which gives parents' power to submit dispensation to court in case of marriage below the minimum age. This article leads us to a procedural issue. Dispensation falls under *voluntair* jurisdiction of civil cases governed by Indonesia's civil procedure. Pursuant to Law Number 48 of 2009 on Judicial Power,<sup>5</sup> the general court and the Islamic court are the courts with competency in deciding on child marriage dispensation.

<sup>1</sup> "Kemajuan yang Tertunda," BPS, accessed June 19, 2020, <https://www.bps.go.id/publication/2016/01/04/aa6bb91f9368be69e00d036d/kemajuan-yang-tertunda--analisis-data-perkawinan-usia-anak-di-indonesia.html>.

<sup>2</sup> Hoko Horii and Mies Grijns, "Pendahuluan" [Introduction] in *Menikah Muda di Indonesia, Suara, Hukum dan Praktik* [Married in Young Age in Indonesia, Voice, Law and Practice], ed. Mies Grijns *et al.* (Jakarta: Yayasan Pustaka Obor Indonesia, 2018), 6.

<sup>3</sup> Grilsnotbrides, "Child Marriage in Indonesia," accessed June 19, 2020, <https://www.girlsnotbrides.org/child-marriage/indonesia/>.

<sup>4</sup> Constitutional Court Decision, No 22/PUU-XV/2017, accessed June 19, 2020, [https://www.mkri.id/public/content/persidangan/putusan/22\\_PUU-XV\\_2017.pdf](https://www.mkri.id/public/content/persidangan/putusan/22_PUU-XV_2017.pdf).

<sup>5</sup> Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman (Law Regarding Judicial Power), UU No. 48 of 2009, LN No 157 Tahun 2009 (Law Number 48 Year 2009, SG No. 157 Year 2009).

This article, firstly, conveys an analysis of the plural orders of family law in Indonesia and its effect on marriage age governance. The subsequent analysis is the judge passivity principle in Indonesia Civil Procedure and its effect in deciding marriage dispensation. It then followed by an analysis of the urgency for judges' active role in marriage dispensation examination as mandated by the Amendment of Marriage Law and the Supreme Court Regulation Number 5 of 2019. Furthermore, this article enriches its analysis by elaborating theoretical, historical, and sociological backgrounds to gain a deeper understanding of the issue.

## II. LEGAL PLURALISM IN INDONESIA AND ITS EFFECT TO GOVERNANCE ON MARRIAGEABLE AGE

There have been some research on the issue of legal pluralism in general and its phenomenon in Indonesia. Sally Engle Merry defines legal pluralism as not "a legal theory or an explanation of how it functions, but a description of what the law is like."<sup>6</sup> That being said, legal pluralism is aimed to describe interaction not only within formal institutions but also between formal and non-formal institutions in a legal system. In many countries, the history can be traced from the colonization era when the colonial governments introduced their legal systems, as it then created interaction with existing non-formal legal systems.

Lukito describes the acts of colonial governments to force their laws in the occupied territory as a result of differentiation of civilized (European) and uncivilized (non-European) society, showing that from "the positivist worldview, Europe was the source of sovereignty, civilization, and law, whereas the non-European world started off with none of these variables."<sup>7</sup> According to Lukito, by using that sentiment, the colonial government (European) neglected the sovereignty of non-European in a particular territory. Hence, the non-European social organization "was seen falling short of the definition of a "State."<sup>8</sup> Typically, since the colonial governments were the ones with sovereignty, then the existed laws by locals are treated as an informal institution.

Lukito's findings echo what previous researchers claimed on how the colonial government introduced its laws to the occupied territory. British and Dutch Colonial Government infiltrated their colonies using their companies, showing that the companies tried to secure economic benefits by exerting their power in making laws and courts.<sup>9</sup> In India, the British Colonial Government allowed Muslim law to govern Muslims and Hindu law to govern Hindus. The British Colonial Government was open to the existence of customary law as long as it was not "repugnant" to "good conscience"; whereas the British Colonial Government asked the local leaders to inform them on the existing law, the process of transfer created dual legal systems.<sup>10</sup>

Meanwhile, in Indonesia, when the Dutch Colonial Government realized that the use of Dutch codes would yield economic benefits, it then tried to infiltrate by formalizing *Adat* (Customary) law. The attempt to formalize *Adat* Law occurred at least

<sup>6</sup> Sally E. Merry, "McGill Convocation Address: Legal Pluralism in Practice," *McGill Law Journal* 59 (September 2013): 2, <https://doi.org/10.7202/1018983ar>.

<sup>7</sup> R. Lukito, *Legal Pluralism in Indonesia, Bridging the Unbridgeable* (Abingdon: Routledge, 2013), 21.

<sup>8</sup> Lukito, *Legal Pluralism*, 22.

<sup>9</sup> Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Legal Studies Research Paper Series* (May 2008): 12, <http://ssrn.com/abstract=1010105>.

<sup>10</sup> Merry, "McGill Convocation," 4.

three times.<sup>11</sup> In Indonesia’s experience, the attempts were found to be unsuccessful, even created a heated discussion among the Dutch scholars.<sup>12</sup> Turkey had the same experience, citing Starr and Pool, Merry describes the replacement of Turkish Islamic Ottoman law by the Swiss Civil Code as rather successful even though the majority of Turkish continue to follow customs, as the transformation occurred gradually.<sup>13</sup>

Until the end of its colonization in Indonesia, the Dutch failed its attempts to enact a unification of family law.<sup>14</sup> After Indonesia declared its independence in 1945, national laws were promulgated to build a national legal system. However, the marriage law is still a complex mixture of *Adat* law, Islamic law, and Dutch-Colonial law. Historically, it was caused by the division of the Indonesian population into three groups by the Dutch Colonial Government affecting the types of laws applied to each of them. According to Article 163 Indische Staatsregeling (IS), the populations were classified into European, the Foreign Oriental, and the Indigenous Indonesian.<sup>15</sup> The governing laws for each of the groups were applied accordingly to Article 131 IS. For one, the article signified the concordance principle was applied for the Europeans—meaning that the Dutch Civil Code governed them. Furthermore, the Foreign Oriental were governed by their respective civil and criminal customary laws; and the Dutch Civil Code only applied to Chinese within the boundaries of the Dutch East Indies. At that time, for Indigenous Indonesia, their respective non-written customary laws were applied, but specific regulations (ordinances) might be enacted if needed. This table shows the pluralism in the legal framework regarding marriage that existed before 1947. Each of the laws bound different types of groups.

**Table 1. Marriage Governance in Indonesia<sup>16</sup>**

Law	Designated group
Huwelijksordonantie Christen Indonesie/HOCI (Staatblad 1933 No.74)	Indonesian, Christian
Burgerlijk Wetboek voor Indonesie/ Kitab Undang-Undang Hukum Perdata (Staatblad 1874 No.732)	European descendants, Indonesian-European descendants and other groups recognized same as European descendants
Burgerlijk Wetboek voor Indonesie/ Kitab Undang-Undang Hukum Perdata (Staatblad 1874 No.732)	China-East Foreigners and Indonesia-Chinese descendants

<sup>11</sup> Soepomo, *Bab-Bab tentang Hukum Adat* [Chapters on Adat/ Customary Law] (Jakarta: PT Pradnya Paramita, 1993), 4-8.

<sup>12</sup> Soepomo, *Bab-Bab*, 4-8.

<sup>13</sup> Sally E. Merry, “Legal Pluralism,” *Law & Society Review* 22 (1988): 880, <http://www.jstor.com/stable/3053638>.

<sup>14</sup> Ahmad Rifai *et al.*, “Sejarah Undang-Undang Perkawinan Atas Pendapat Hingga Pertentangan dari Masyarakat dan Dewan Perwakilan Rakyat Tahun 1973-1974” [The History of Law of Marriage from Argument to Opposition from Society and the House of Representative in the Year 1973-1974], *Journal of Indonesian History* Year 1 (2015): 4, <https://journal.unnes.ac.id/sju/index.php/jih/article/view/18401>.

<sup>15</sup> Indische Staatsregeling or IS promulgated for the state administration and governance under the Dutch East Indies. Article 131 and 164 of IS were no longer in force.

<sup>16</sup> Rosa Agustina, “Beberapa Catatan tentang Hukum Perkawinan di Indonesia” [Several Notes on Marriage Law in Indonesia], *Hukum tentang Orang, Hukum Keluarga dan Hukum Waris di Belanda dan Indonesia [Law on Person, Family Law and Inheritance Law in Netherlands and Indonesia]* (Denpasar: Pustaka Larasan, 2012), 131-132.

Their respective customary laws	East Foreigners and Indonesia-East Foreigners descendants
Their respective customary laws	Indonesian
Islamic laws which adapted to customary laws	Indonesian, Moslem
Regelment op de Gemengde Huwelijken/GHR (Staatblad 1898 No.158)	Mixed marriage

The division of groups was abandoned when Indonesia gained its independence. By the enactment of Instruction of the Ampera Cabinet Presidium Number 31 of 1966, dated December 27 of 1966, civil registration is no longer used the division of groups for the sake of Indonesia's unity.<sup>17</sup>

Twenty-nine years after its independence, Indonesia successfully enacted a Marriage Law. The Law was intended to unify marriage governance, instead, the Law became a part of coexisting plural orders itself. When the House of Representatives discussed the Law's bill, considerable opposition came from inside the House represented by Islamic parties. Those parties claimed that the bill was contrary to Islamic teaching.<sup>18</sup> Meanwhile, outside the House's building, religious organizations and non-governmental organizations tried to use their influence to gain public support to repeal the Bill.<sup>19</sup> After a long battle, the Law was passed. There was a slight surprise that the Law acts in a moderate stand towards conservatism. For instance, the Law governs marriageable age, but it also governs the minimum age for marriage allowance with parental approval and judicial dispensation. Here below are articles of the Marriage Law which govern marriageable age.

**Table 2. The Marriageable Age Governance in Indonesia**

Article	Content
Article 6 (1)	Marriage must be based on the agreement of both parties.
Article 6 (2)	To enter a marriage, a person who has not reached 21 (twenty-one) must obtain permission from both parents.
Article 6 (3)	If one of the parents has died or is unable to declare his will, then the permission referred to in paragraph (2) of this article is sufficiently obtained from parents who are still alive or from parents who can declare their will.
Article 6 (4)	If both parents have died or are unable to declare their will, then permission is obtained from guardians, carers or family members who have blood relations in a straight line up as long as they are still alive and in the circumstances can declare their will.

<sup>17</sup> Instruksi Presidium Kabinet Ampera 27 Desember 1966 No. 31/1966 (Instruction from the Ampera Presidium Cabinet Number 31 Year 1966.

<sup>18</sup> Rifai *et al.*, "Sejarah Undang-Undang," 3.

<sup>19</sup> Nety Hermawati, "Respon terhadap Hukum Perkawinan di Indonesia," [Response to the Law of Marriage in Indonesia] *Jurnal Al Mizan* 11 (2015): 38, <http://jurnal.iaingorontalo.ac.id/index.php/am>.

Article 6 (5)	In the case of differences of opinion between the people referred to in paragraphs (2), (3) and (4) of this article, or if one or more of them do not express their opinions, the Court in the jurisdiction of the person who lives will enter into marriage at the request of that person to permit first hearing the people in paragraphs (2), (3) and (4) of this article.
Article 6 (6)	The provisions of paragraphs (1) to paragraph (5) of this article shall be valid if the law of each religion and its belief from the concerned does not determine otherwise.
Article 7 (1)	Marriage is only permitted if men have reached the age of 19 (nineteen) years old, and women have reached 16 (sixteen) years old.
Article 7 (2)	In case of deviation of the minimum age provision, parents may file dispensation to a court or any relevant public officers.

In brief, the Law governs the marriageable age of 21 (twenty-one), but the minimum age of marriage is 19 (nineteen) for men and 16 (sixteen) for women. In the case of deviation, parents may petition the courts to marry off their children below the minimum age. This governance is ambiguous, the minimum age for men and women also validated gender inequity. This fact underscores that the Law has fallen behind the development of human rights and children's rights within international standards and Indonesia's legal framework.

The Universal Declaration of Human Rights or UDHR asserts the equality of men and women. Furthermore, Indonesia has ratified the Convention on the Elimination of All Forms of Discrimination against Women or CEDAW (Law Number 7 of 19884), which in Article 16 mandates the State Parties to take all appropriate measures to eliminate discrimination against women in all issues regarding marriage and family. The article provides details on rights that must be equal between men and women in the issues. The CEDAW does not explicitly address child marriage, but Article 16 (1) governs the right to choose a spouse and give full consent freely. These rights speak on the issue of consent, whereas in child marriage cases, legally, due to their young state of mind and physical development, children are not yet capable of deciding on such matters.

Next, Indonesia signed the Convention on the Rights of the Child or CRC and ratified it by Presidential Decree Number 36 of 1990, which became the breakthrough to Indonesia's commitment to child protection. The CRC also does not mention child marriage specifically. However, the CRC pertains to detail of children's rights, such as the right to equality, education, and the right to proper care that may be unfulfilled or even violated by the practice of child marriage.

Indonesia is also very robust in child protection national lawmaking. The parliament promulgated Law Number 35 of 2014 on the Amendment of Law Number 23 of 2002 on Child Protection. The Law governs in Article 26 (1) c that parents must prevent child marriage. On the issue of marriageable age, the Law defines as children anyone below 18 years old. Hence, the Marriage Law's governance on marriageable age no longer fits the current legal framework on children. Amending the Marriage Law is the best solution, but considering the boiling tension when the Law was formed, it is an uphill battle.

There is hope yet. A Constitutional Court's decision in response to a judicial review case filled by child marriage survivors supported by civil society organizations, Decision Number 22/PUU-XV/2017, decided that the phrase "16 years old" of Article

7 (1) violates the Indonesian Constitution of 1945 and declared it as having no binding legal force.

Responding to the Constitutional Court Decision on the minimum age of marriage, civil society organizations advocated the Limited Amendment of Law of Marriage. July 2019, a group of civil society coalition, consisted of Koalisi Perempuan Indonesia (Indonesia Women Coalition), the Center of Law, Gender, and Society of the Faculty of Law UGM, the Indonesia Criminal Justice Reform (ICJR), Kalyana Mitra, and Ecpat Indonesia drafted the bill of Amendment followed by series of advocacy activities, such as seminar, a public hearing with members of parliament, and public awareness campaign.<sup>20</sup> Koalisi Perempuan Indonesia (Indonesia Women Coalition) as the coordinator urged Dewan Perwakilan Rakyat (House of Representatives) to start a legislative session for the Amendment.<sup>21</sup>

After an intensive legislative session, September 17, 2019, the House of Representatives enacted the Limited Amendment of the Law of Marriage.<sup>22</sup> Here is the comparison of the governance, before and after the Amendment.

**Table 3. Comparison, before and after amendment of Marriage Law**

Article	Law of Marriage (Number 1 of 1974)	Amended Law of Marriage (Number 16 of 1974)
Article 7 (1)	Marriage is only permitted if men have reached the age of 19 (nineteen) years old, and women have reached 16 (sixteen) years old.	Marriage is only permitted if men and women have reached 19 (nineteen) years old.
Article 7 (2)	In case of deviation of the minimum age provision, parents may file dispensation to a court or any relevant public officers.	In case there is a deviation from the age requirement as referred to in paragraph 1, the male and/or female parent may request a dispensation from the court because it is very urgent accompanied by supporting evidence.
Article 7 (3)	-	In granting a dispensation, the court as referred to in paragraph 2 must listen to the bride and groom's opinions who are going to get married.
Article 7 (4)	-	The provisions regarding the condition of a person or both parents of the bride and groom as referred to in article 6 paragraph 3 and 4 shall also apply the provisions regarding dispensation requests as referred to in paragraph 2 without prejudice to the provisions referred to in article 6 paragraph 6.

<sup>20</sup> The bill of amendment drafted by the civil society coalition, *available at* ICJR, "Naskah Akademik RUU Perubahan UU Perkawinan," accessed June 19, 2020, <https://icjr.or.id/naskah-akademik-ruu-perubahan-uu-perkawinan/>.

<sup>21</sup> Fatiyah Wardah, "Koalisi Perempuan Desak Perubahan UU Perkawinan Sebelum DPR Periode Sekarang Berakhir" [Indonesia Women Coalition Urges the Amendment of Marriage Law Before the House of Representatives Current Administration Ended], accessed January 30, 2021, [Koalisi Perempuan Desak Perubahan UU Perkawinan Sebelum DPR Periode Sekarang Berakhir \(voaindonesia.com\)](https://www.voaindonesia.com/news/Koalisi-Perempuan-Desak-Perubahan-UU-Perkawinan-Sebelum-DPR-Periode-Sekarang-Berakhir-1.6000000).

<sup>22</sup> Rofiq Hidayat, "DPR Kukuhkan Batas Usia Perkawinan Minimum 19 Tahun" [DPR Enacted Minimum Age of Marriage is 19 Years-Old], accessed June 19, 2020, <https://www.hukumonline.com/berita/baca/lt5d7fcb7fc88bd/dpr-kukuhkan-batas-usia-perkawinan-minimum-19-tahun/>.



Looking at the comparison above, the Amendment changed the minimum age of marriage to equal for men and women. Moreover, it does open a new era where child marriage dispensation can only be permitted if proven very urgent. The Amendment also reflected public aspiration by requiring courts to listen to the bride and groom.

Those new governances give a better intention to end children, but how are those implemented before courts? The Amended Law gives a bit of clue on its Explanation Section. Article 7(2) Explanation clarifies two terms: "deviation" and "very urgent reasons", it states that<sup>23</sup>

*What is meant by "deviation" is that it can only be done through submission application for dispensation by parents of one or both parties of the future bride to the Islamic Courts for those who are Muslim and the District Courts for others, if the men and women concerned are under the age of 19 (nineteen) years old.*

*What is meant by "very urgent reasons" is a situation of no other choice and there are compelling circumstances for a marriage. What is meant by "sufficient supporting evidence" is a certificate proving that the bride's age is still under the provisions of the law and letters information from health workers supporting parents' statement that a marriage is very urgent.*

Furthermore, the Explanation also governs an obligation for the government to invest in community in the effort to end child marriage which stated as follows:

*To ensure the implementation of this provision, the Government conducts socialization and provides guidance to the community regarding early marriage prevention, the dangers of free sex and unregistered marriage to produce a superior generation for the nation.*

Meanwhile, Article 7 (3) Explanation states that:

*Provision of dispensation by the Islamic Courts for Muslim and District Courts for those of other religions is based on a spirit of prevention child marriage, moral considerations, religion, customs and culture, psychological aspects, health aspects, and the impact caused.*

*This Explanation provides a set of considerations for judges in deciding child marriage dispensation. Implicitly, the Law and its Explanation encourage judges to be more active in the examination of dispensation.*

### III. PASSIVITY OF JUDGE PRINCIPLE IN CIVIL PROCEDURE

The analysis above shows that in child marriage, judges must take an active role. In reality, the courts' civil procedural law in Indonesia is deeply rooted in Dutch-Colonial procedural codes. One of its fundamental principles is passivity. Lilik Mulyadi characterizes passivity of judge principle using two factors. *First*, based on the fact that initiative to take on a case came from parties. If there is no claim, then there will be no presiding judges (*nemo iudex sine actore*). *Second*, the case's scope is upon parties' authority to decide, presiding judges examine the case according to parties'

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<sup>23</sup> Undang-Undang tentang Perubahan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (Amendment of Law Regarding Marriage), UU No. 16 Tahun 2019, LN No. 186 Tahun 2019 (Law Number 16 Year 2019, SG No. 186 Year 2019).

submission (*secundum allegat iudicare*).<sup>24</sup>

Indonesia's legal framework, specifically Procedural Codes, governs implicitly on the issue of passivity. While Mahkamah Agung (Supreme Court) has vaguely ruled on the topic, showing that in several cases, it upholds the existence of passivity of judge principle under Article 178 HIR/ 189 RBg but in other cases, it modifies and shifts the paradigm to more active judges.<sup>25</sup> The table below shows governance on the passivity of judge principle in Indonesia both by laws and judge-made laws.

**Table 4. The Passivity of Judge Principle Governance in Indonesia**

Name of Source of Law	Content
HIR Article 130 RBg Article 154	Judge is bound by parties' decision to settle the case. Parties might resolve through mediation, resulted in a peace settlement or withdraw the claim.
HR Article 178 (2) and (3) RBg Article 189 (2) and (3)	(2) Judge is obliged to decide all claims submitted in the lawsuit. (3) Judge is prohibited from deciding beyond what parties asked.
Law Number 14 of 1970 concerning General Rules on Judicial Power	In performing its authority to hear, examine, and decide cases, the court also supports parties who want to settle through mediation.
Supreme Court Decision Number 339K/Sip/1969	Supreme Court rules that the district court decision on case a quo shall be annulled because it went beyond what parties asked and it gave more advantages to the defendant although there was no counterclaim, also the higher court regulation.
Supreme Court Decision Number 2827K/Pdt/1987	Supreme Court governs that judges are prohibited from going beyond the plaintiff's baseline of a claim in writing its consideration in the decision.
Supreme Court Decision Number 77K/Sip/1973	Supreme Court rules that the higher court decision which ordered the defendant to pay compensation to the plaintiff is invalid because the plaintiff did not ask for it.
Supreme Court Decision Number 964K/Pdt/1986	Supreme Court governs that Indonesia Civil Procedural Law is not that formalistic and the governance of passivity of judge pursuant to Article 178 HIR/ 189 RBg is not absolute. Judges might decide beyond what parties asked if it is not beyond facts submitted.
Supreme Court Decision Number 556K/Sip/1971	Supreme Court rules that judges might decide beyond what parties asked if it is still in line with material facts.
Supreme Court Decision Number 425K/Sip/1975	Supreme Court rules that deciding beyond what parties asked is permissible if in line with facts submitted. While both in criminal and civil procedure, judges are active.
Supreme Court Decision Number 1043K/Sip/1971	Supreme Court rules that adding more legal reasonings not submitted by parties is judges' obligation pursuant to Article 178 RID.

<sup>24</sup> Lilik Mulyadi, *Hukum Acara Perdata Menurut Teori dan Praktek Peradilan Indonesia* [Civil Procedural Law According to Theory and Practice in Indonesia Justice System] (Jakarta: Djambatan, 1999), 18.

<sup>25</sup> Mulyadi, *Hukum Acara*, 18-20.

#### IV. THE URGE OF JUDGES ACTIVE ROLE IN DECIDING CHILD MARRIAGE DISPENSATION

As parents act as petitioners, before enacting the Amendment of Marriage Law, judges have no obligation to summon the children to testify, also the observation of the physical and mental condition of the future bride and groom is only based on parents' testimony. The practice of how judges decided marriage dispensation, for one, can be observed through cases study.

Students and Instructors of Civil Cases Analysis Course at Faculty of Law, Universitas Gadjah Mada conducted mini research to study 61 decrees of general court and Islamic court between the years of 2008 – 2017.<sup>26</sup> The research finds that over 60% of the decrees received birth certificates as evidence. While only in the case of teen pregnancy, the petitioners submitted a health examination report from physicians. The proceedings only involved petitioners (parents); children did not come to the picture. At 53,4%, parents submitted the dispensations stating that children were involved in a relationship that would harm family and societal honor.

Two cases serving as an illustration of those findings are Putusan Nomor 0015/Pdt.P/2012/PA.Pbg and Putusan Nomor 22/pdt.P/2015/PA.Smn. The first case was decided by the Purbalingga Municipality Islamic Court. Parents from the bride and groom acted as the petitioners. In their petition for marriage dispensation, the petitioners cited that they were no longer able to prevent their children from going out, resulting in a violation of Islamic rule and national regulation on a pre-marital relationship. The bride was 15, and the groom was 16 years old. The judge examined documentary evidence consisted of proof of the children's birth and family records. In this case, the judge summoned the children to testify before the court. After evidentiary examination, the judge granted the petitioners to marry off their children. The judge reasoned that except for the age below the minimum age, the children fulfilled other marriage terms according to the national law on marriage. The judge also agreed that allowing the children to marry is the best course to avoid violating Islamic rule and national regulation, and values in society. Meanwhile, in the second case, the judge of Sleman Municipality Islamic Court acted further to examine the evidence by the petitioners. The judge asked the petitioners' commitment to their children after getting married, both financial and emotional support. In this case, the bride was three months pregnant. Similar to the first case, the judge cited no violation of marriage terms aside from the age; therefore, the marriage dispensation can be granted.

Those two decisions show undeniably that judges performed passivity whereas parents from both sides agreed to marry their children, then courts made it legal for the children to marry. By examining the decrees, it is found that most parents relied on religious norms about the relation of unmarried couples. Parents used customary and religious norms in deciding at what age their children should marry. These echo findings from Corradi and Desmet's research on how simultaneous contradictory orderings may be the reason for courts' failure to protect children.<sup>27</sup>

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<sup>26</sup> The case study was conducted in 2018 by seven students, namely: Aidha Hartina Putri, Dwin Indah Susmiyati, Edwin Adi Nugroho, Fachri Reza Pratama, Mahardika Dewi Mentari, Noviani Natalia P, Ray Adrian Purba and a lecturer, Laras Susanti.

Civil Cases Analysis Course, Faculty of Law, Universitas Gadjah Mada, *Tingkat Dispensasi Kawin di Indonesia Ditinjau Dari Putusan Direktori Mahkamah Agung RI* [Prevalence of Marriage Dispensation in Indonesia, Study Cases on Decrees Retrieved from the Supreme Court Directory.

<sup>27</sup> Giselle Corradi and Ellen Desmet, "A Review of Literature on Children Rights and Legal Pluralism,"

Nonetheless, in Indonesia, there is also a best practice of court deciding marriage dispensations. The second case shows that the judge can advise parents and children on the effect of child marriage and make sure of the parents' commitment to supporting their married children. Additionally, Batusangkar City Islamic Court acts not only as a judicial institution but also performs judges' efforts to gather information from parents and give life advice regarding the effect of child marriage.<sup>28</sup> The practice of Sleman and Batusangkar court reflects what is governed by the Amendment of Marriage Law.

A new hope is also coming from the Supreme Court. Without much delay, in the same year as the Amendment of Marriage Law was passed, the Court enacted Supreme Court Regulation Number 5 of 2019 on Guidance for Marriage Dispensation.<sup>29</sup>

First, the Regulation defines children's best interest as all actions that must be considered to ensure the protection, care, welfare, survival, and development of the child.

Second, the Regulation signifies several principles for judges in deciding marriage dispensation: best interest of children, rights of children to live and develop, recognition to children's opinions, recognition to human dignity, non-discrimination, gender equity, equality before the law, justice, utility, and certainty.

Third, the Regulation sets a clear purpose of the proceeding: to implement principles above, to guarantee a justice system that protects children, to increase parents' responsibility in preventing child marriage, to identify whether coercion occurred in the background, to establish a standard of procedure for marriage dispensation in courts.

Fourth, however, the Regulation does not require observation reports from physical and psychological examiners as required documents.

Fifth, the Regulation has its significance by governing marriage dispensation by upholding the spirit of child protection. In the first hearing, a petitioner must present their child as the subject for a marriage dispensation, the children's bride/groom, and their future parents-in-law (related parties) although it is not compulsory for them to be present on the same day of trial. Where the petitioner fails to present those parties; the trial is suspended. If the petitioner fails to do so until the third day of trial, then the petition is dismissed. Judges, further, are obliged to hear from related parties on the matter of the case.

Sixth, judges must use language and methods the children understand, and it is required not to use judges' and clerks' attributes during the trial.

Seventh, judges are obliged to advise the petitioner and related parties. Advises are

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*The Journal of Legal Pluralism and Unofficial Law* Year 47 Vol. 2 (2015): 232, <https://doi.org/10.1080/07329113.2015.1072447>.

<sup>28</sup> Ashabul Fadhli, "Izin Dispensasi Kawin: Masalah atau Solusi? (Studi tentang Peran dan Wewenang Hakim Pengadilan Agama Batusangkar terhadap Penetapan Hakim Dispensasi Kawin di Kabupaten Tanah Datar, Sumatera Barat)" [Marriage Dispensation Petition: Problem or Solution? Study on the Role and Authority of Judges in Islamic Court of Batusangkar to Court Decree on Marriage Dispensation in Tanah Datar Municipality, Sumatera Barat Province] in *Menikah Muda di Indonesia, Suara, Hukum dan Praktik* [Married in Young Age in Indonesia, Voice, Law and Practice], ed. Mies Grijns *et al.* (Jakarta: Yayasan Pustaka Obor Indonesia, 2018), 193.

<sup>29</sup> Peraturan Mahkamah Agung tentang Pedoman Mengadili Permohonan Dispensasi Nikah (Supreme Court Regulation Regarding Guidance of Marriage Dispensation Petition), Perma No. 5 Tahun 2019, BN No. 1489 Tahun 2019 (Supreme Court Regulation Number 5 Year 2019, OG No. 1489 Year 2019).

aimed to ensure that the petitioner and related parties are aware of the risk of child marriage to children's education, discontinuity of the 12 (twelve) year compulsory education of the children, the unpreparedness of children's reproductive physical organs, effects on the economy, social, and psychology of the children, potential for dispute and domestic violence. All advice given by judges must be included in the court's decree. In case the judges failed to perform the obligation, the decree is declared null and void.

Eight, judges must examine: that the children understand and agree to be married, the psychological and physical condition of the children, and the possible psychological, physical, sexual, economic coercion to children and/or family in the petition's background.

Ninth, judges may hear the children without parents' presence, advise a counselor to accompany the children, require a recommendation from health and mental physicians and relevant government and non-governmental institutions, and summon interpreters if needed.

Tenth, in examining for the best interest of children, judges must

- a. read carefully petition submitted;
- b. examine the legal standing of the petitioner;
- c. explore the reasons and background of the petition;
- d. explore whether there are obstacles in terms of marriage;
- e. explore whether children understand and agree to be married;
- f. identify whether age gap is present;
- g. hear from the petitioner and related parties;
- h. consider psychological, sociological, custom, education, health, the economic profile of children and parents—as recommended by health and mental physicians and relevant government and non-governmental institutions;
- i. consider whether coercion psychological, physical, sexual, economic coercions are present;
- j. assure commitment of parents to be responsible for the economic, social, health, and education challenges of children

Eleventh, more importantly, the Regulation sets clear guidance to judges in examining marriage dispensation. It requires judges to consider national laws and regulations, unwritten laws in the form of values of law, local wisdom, and the value of justice living in society, and international conventions and/or agreements on child protection.

It can be seen from points six to eleven that judges are expected to take an active role in deciding marriage dispensation. From advising to exploring local, national, and international laws and values, judges have an essential role in ending child marriage.

## V. CONCLUSION

This article finds that there has been much improvement in children's protection from child marriage after the Constitutional Court Decision Number 22/PUU-XV/2017. The lawmakers amended the Marriage Law, governing an equal marriage age for men and women and requiring very urgent reasons and evidence for marriage

dispensation, and obligation for judges to hear from children. The Supreme Court has responded to the amendment by enacting the Supreme Court Regulation Guidance for Marriage Dispensation. The Regulation gives judges clear guidance in deciding marriage dispensation, but still maintains the justice system's recognition of unwritten laws.

With those improvements, it is expected that a standard on deciding marriage dispensation would be developed. Notably, the standard upholds the goal to protect children. According to those improvements, the passivity principle's existence may be suitable for other types of private cases, but in deciding marriage dispensation judges must take an active role. Additionally, this article recommends that the Supreme Court increase activities to mainstream child protection issues. By doing so, the children's best interest will be the primacy in cases involving plural orderings like marriage.

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