

**THE PROBLEMS OF MARRIAGE DISPENSATION  
ON ACT NO. 1 YEAR 1974 ON MARRIAGE ARTICLE 7 PARAGRAPH (2)  
IN MASLAHAH PERSPECTIVE**

**Thesis**

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In the name of Allah (swt),

With consciousness and responsibility towards the development of science, the writer declares that the thesis entitled:

**THE PROBLEMS OF MARRIAGE DISPENSATION  
ON ACT NO. 1 YEAR 1974 ON MARRIAGE ARTICLE 7 PARAGRAPH (2)  
IN MASLAHAH PERSPECTIVE**

is truly the writer's original work. It does not incorporate any material previously written or published by another person. If it is proven to be another person's work, duplication, plagiarism, this thesis and my degree as the result of this action will be deemed legally invalid.

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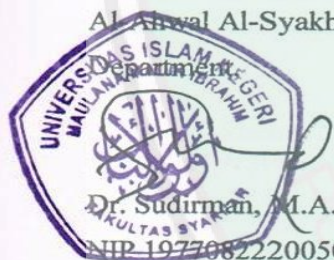
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ON ACT NO. 1 YEAR 1974 ON MARRIAGE ARTICLE 7 PARAGRAPH (2)  
IN MASLAHAH PERSPECTIVE**

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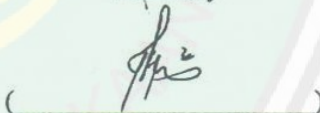
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## MOTTO

“يَا مَعْشَرَ الشَّبَابِ، مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصَرِ،  
وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وَجَاءٌ”

(الحديث)

*“O young men, whoever among you can afford to get married, let him do so, because  
it can lower their gazes and guard their private parts and whoever cannot afford it,  
let him fast that will be a shield for him”*

(Al-Hadits)

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With all of the support, effort, help, guidance, briefing, and discussion of various parties in the process of writing this thesis, the writer with his great humility expressed his thanks infinitely to:

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- 2 Dr. H. Roibin, M.H.I., as the Dean of Sharia Faculty of State Islamic University of Maulana Malik Ibrahim Malang, an also as lecturer guardian for guiding the writer in any academic processes while studying in Sharia Faculty. Many thanks are expressed for everything he has provided to the writer in guidance, advice, and motivation.
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giving us many advices and guiding the writer in any academic processes on any subject especially how to write a good academic writing in english.

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Malang, February 20<sup>th</sup>, 2017

Writer,

Candra Dwi Irawan

Student ID Number 12210141



## TRANSLITERATION GUIDANCE

### A. Consonant

Arab	Latin	Arab	Latin
ا	a	ط	Th
ب	B	ظ	Zh
ت	T	ع	'
ث	ts	غ	Gh
ج	J	ف	F
ح	H	ق	Q
خ	kh	ك	K
د	D	ل	L
ذ	dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	ه	H
ش	Sy	ء	'
ص	Sh	ي	Y
ض	Dl		

### B. Vocal, long-pronounce and diphthong

Vocal *fathah* = A

Vocal *kasrah* = I

Vocal *dlommah* = U

Long-vocal (a) = Â e.g. قال become Qâla

Long-vocal (i) = Î e.g. قيل become Qîla

Long-vocal (u) = Û e.g. دون become Dûna

Diphthong (aw) = و e.g. قول become Qawlun

Diphthong (ay) = ي e.g. خير become Khayrun

### C. Ta' marbûthah (ة)

*Ta' marbûthah* transliterated as “t” in the middle of word, but if *Ta' marbûthah* in the end of word, it transliterated as “h” e.g. للمدرسة الرسالة become *al-risalat li al-mudarrisah*, or in the standing among two word that in the form of *mudlaf* and *mudlaf ilayh*, it transliterated as *t* and connected to the next word, e.g. في رحمة الله become *fî rahmatillâh*.

### D. Auxiliary Verb dan Lafdh al-Jalâlah

Auxiliary verb “al” (ال) written with lowercase form, except if it located it the first position, and “al” in lafadh jalâlah which located in the middle of two word or being or become *idhafah*, it remove from writing.

- Al-Imâm al-Bukhâriy said ...
- Al-Bukhâriy in muqaddimah of his book said ...
- Masyâ' Allâh kâna wa mâ lam yasya' lam yakun.*

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## ABSTRACT

Candra Dwi Irawan, 12210141, 2017. *The Problems of Marriage Dispensation on Act No. 1 Year 1974 on Marriage Article 7 Paragraph (2) in Maslahah Perspective*. Thesis. Al-Ahwal Al-Syakhshiyyah Department, Sharia Faculty, The State Islamic University Maulana Malik Ibrahim Malang. Supervisor: Dr. H. Zaenul Mahmudi, MA.

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**Key Words:** Marriage, Marriage Dispensation, Act No. 1 of 1974 on Marriage, *Maslahah*.

In Indonesia, the marriage is set about marriageable age namely nineteen years old for a man and sixteen years old for a woman. An underage bride and groom are allowed to get married by approving of marriage dispensation. The approving of marriage dispensation should be based on the crucial reasons. It is in order the ratio legist of marriage dispensation and the marriageable age can be achieved well. The marriage dispensation is regulated on Article 7 Paragraph (2) Act No. 1 of 1974 on Marriage. The rule of marriage dispensation is not formulated clearly. It does not give the requirements and the limitations of marriage dispensation should be given to the bride and groom who are under the marriageable age. It encourages people for submitting marriage dispensation freely. The absence of requirements for marriage dispensation has taken achieved intents of marriage dispensation become uncertain. Thus, it is interesting to analyze the problems of marriage dispensation by studying on Article 7 Paragraph (2) Act No. 1 of 1974 on Marriage which is analyzed in perspective of *maslahah* in Marriage.

In this study, the problem statements of the research are: 1) What are the problems of marriage dispensation and how do they influence the society? 2) How does *maslahah* theory view marriage dispensation on Act No. 1 year 1974 on Marriage Article 7 Paragraph (2)?

This study is normative research or library research. This study uses the approach of juridical normative that uses a combination of the statue approach and conceptual approach. Source of the data are secondary data. It is divided into primary legal material, secondary legal material, and tertiary legal material. Collection data method is primary legal materials and secondary legal materials collected according to the topic issues that have been formulated based documentation system. Analyzing data method which used in this study is inductive analysis. It summarizes a specifically concrete issue to the generally abstract issue.

The result indicates that the problems of marriage dispensation on Article 7 Paragraph (2) of 1974 on Marriage are: a) the rule of marriage dispensation is obscure. Marriage dispensation on Article 7 Paragraph (2) of Marriage Law does not give the clear formulations and requirements. It encourages people for submitting marriage dispensation freely b) Marriage dispensation leads the society to get married under the marriageable age. The Marriage under the marriageable age is contradict with Child Protection Law and other regulations. It is also deprivation of the child's rights. Marriage dispensation in the perspective of *maslahah* is marriage dispensation should be approved only to couples which the girl has been pre-marital pregnancy with some requirements.

## ملخص البحث

جانندرا دوي إيراوان، 12210141، 2017. المشكلة عن إعفاء الزواج في النظام رقم 1 سنة 1974 عن الزواج فصل 7 اية 2 عند المصلحة. بحث العلمي. قسم الأحوال الشخصية، كلية الشريعة، جامعة مولانا مالك إبراهيم الإسلامية الحكومية مالانق. المشرف : الدكتور الحاج زين المحمودي الماجستير.

**الكلمة الرئيسية :** الزواج، إعفاء الزواج، النظام رقم 1 سنة 1974 عن الزواج ، المصلحة.

ينظم ترتيب الزواج في إندونيسيا على أن الحد السن الأدنى في مقابلة الزواج تسعة عشر من العمر للرجل وستة عشر للنساء. قد استأذن لمن لم يبلغ في حد سن الزواج لمقابلة الزواج بتصريح إعفاء الزواج. وينبغي على إعفاء الزواج بالأمور الأساسية، حتى يمكن أن يتحقق نسبة الإعفاء من الزواج. ينظم إعفاء الزواج في فصل 7 اية 2 رقم 1 سنة 1974 عن الزواج. وأن هذا النظام لا يرتب بترتيب واضح. وكذلك لا يرتب هذا النظام بشروط إعفاء الزواج و حدوده. وهذا الأمر يسبب الناس على طلب إعفاء الزواج. ويسبب هذا الأمر غير مؤكد في الأهداف إعفاء الزواج. تتعلق بهذا الأمر، سيبحث الباحث في تحليل المشكلة في نظام عن إعفاء الزواج في النظام الزواج عند المصلحة فصل 7 اية 2 رقم 1 سنة 1974.

تتعلق بخلفية البحث فأسئلة البحث في هذا البحث و هي (1) ما المشكلة التي تقع في اعفاء الزواج وكيف اثارها في المجتمع العامة؟ (2) ما رأي نظرية مصلحة في نظام عن إعفاء الزواج في النظام الزواج فصل 7 اية 2 رقم 1 سنة 1974.

يتضمن هذا البحث دراسة وصفية أو مكتبية. يستخدم هذا البحث مجموعة النظريات من نظرية القانونية والمفاهيمية. مصدر البيانات التي يستخدمها الباحث و هي مصدر البيانات الثانوية.

وينقسم مصدر البيانات إلى مصدر القانون الأساسي والثانوي والثالثي. وطريقة جمع البيانات هي يجمع بمواد القانون الأساسي والثانوي على أساس المشكلة الموصوغة في ظام التوثيق. طريقة تحليل البيانات المستخدمة هي التحليل الاستقرائي، وهو أخذ النتيجة من المشكلة الخاصة إلى المشكلة التجريدية العامة.

و نتائج هذا البحث يبين على النظام الزواج فصل 7 اية 2 رقم 1 سنة 1974 (أ) لا يرتب النظام بترتيب واضح و لا يبين بالشروط الواضحة حتى يدفعه الناس لطلب إعفاء الزواج (ب) يدفع إعفاء الزواج الناس أن يتزوج في تحت السن. وذلك يشبه على حرمان النظام حقوق الأبناء وغيرها. وأما إعفاء الزواج عند المصلحة إعفاء الزواج يعطي إلى الأزواج تحت السن التي كان نسائها حاملة خارج النكاح ببعض شروط محددة.

## ABSTRAK

Candra Dwi Irawan, 12210141, 2017. *Problematika Dispensasi Nikah pada Pasal 7 Ayat (2) Undang-Undang No. 1 Tahun 1974 tentang Perkawinan Perspektif Kemaslahatan*. Skripsi. Jurusan Al-Ahwal Al-Syakhshiyah Fakultas, Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Dr. H. Zaenul Mahmudi, MA.

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**Kata Kunci:** Pernikahan, Dispensasi Nikah, UU No. 1 Tahun 1974 tentang Perkawinan, Kemaslahatan.

Di Indonesia, pernikahan diatur tentang usia minimum pernikahan yaitu 19 tahun bagi laki-laki dan 16 tahun bagi perempuan. Calon pasangan suami istri yang masih di bawah umur diizinkan untuk menikah melalui izin dispensasi nikah. Izin dispensasi nikah tersebut harus didasarkan pada alasan yang mendasar. Hal itu agar rasio legis dispensasi nikah dapat dicapai dengan baik. Dispensasi nikah diatur di dalam Pasal 7 Ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan. Peraturan dispensasi nikah tersebut tidak diformulasikan secara jelas. Peraturan tersebut tidak memberikan persyaratan-persyaratan atau batasan-batasan tentang dispensasi nikah harus diberikan kepada calon suami istri yang masih di bawah umur. Hal itu mendorong masyarakat untuk mengajukan dispensasi nikah secara bebas. Kekosongan persyaratan-persyaratan tersebut menjadikan tujuan yang ingin dicapai dispensasi nikah menjadi tidak pasti. Oleh karena itu, hal ini menarik untuk dikaji mengenai permasalahan-permasalahan peraturan dispensasi nikah melalui studi analisis terhadap Pasal 7 Ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan menurut nilai-nilai kemaslahatan di dalam perkawinan.

Dalam kajian ini, rumusan masalah dari penelitian ini adalah: 1) Apa permasalahan-permasalahan dispensasi nikah dan bagaimana pengaruhnya terhadap masyarakat? 2) Bagaimana teori kemaslahatan memandang dispensasi nikah pada Pasal 7 Ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan?

Penelitian ini termasuk jenis penelitian normatif atau studi kepustakaan. Penelitian ini menggunakan gabungan pendekatan dari pendekatan undang-undang dan pendekatan konseptual. Sumber data yang digunakan adalah sumber data sekunder. Itu terbagi menjadi sumber hukum primer, sumber hukum sekunder dan sumber hukum tersier. Metode pengumpulan data adalah bahan hukum primer dan bahan hukum sekunder dikumpulkan berdasarkan isu yang diformulasikan berdasarkan sistem dokumentasi. Metode analisis data yang digunakan adalah dengan menggunakan analisis induktif. Analisis induktif adalah menarik kesimpulan dari suatu permasalahan konkret yang bersifat khusus kepada permasalahan abstrak yang bersifat umum.

Hasil penemuan menunjukkan bahwa problematika dispensasi nikah pada Pasal 7 Ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan adalah:



a) peraturan dispensasi nikah tersebut kabur. Dispensasi nikah pada Pasal 7 Ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan tersebut tidak memberikan formulasi dan persyaratan yang jelas. Hal itu mendorong masyarakat untuk mengajukan dispensation nikah secara bebasb) Dispensasi nikah mendorong masyarakat untuk menikah di bawah umur. Perkawinan di bawah umur bertentangan dengan Undang-Undang Perlindungan Anak dan peraturan-peraturan yang lainnya. Hal itu juga merupakan perampasan terhadap hak-hak anak. Dispensasi nikah menurut teori kemaslahatan adalah dispensasi nikah hanya diberikan kepada pasangan yang masih di bawah umur yang mana pihak perempuan telah hamil di luar nikah dengan beberapa persyaratan.





## CHAPTER I

### INTRODUCTION

#### A. Background of Research

Marriage is first step to construct a family by processing of agreement (*mitsaqan ghalidhan*) between a man and a woman. In Indonesia, the marriage is set about marriageable age. The marriageable age is nineteen years old for a man and sixteen years old for a woman.<sup>1</sup> An underage bride and groom have not been allowed to get married.<sup>2</sup> An underage bride and groom are allowed to get married by a license of marriage dispensation.<sup>3</sup>

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<sup>1</sup>Based on the Article 7 Paragraph (1) Act No. 1 year 1974 on Marriage.

<sup>2</sup>Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama*, (Bandung: CV. Mandar Maju, 2007), p. 47.

<sup>3</sup>Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan*, p. 49.

The marriage dispensation is a government's policy to solve an underage bride's and groom's problems which require deviation the marriageable age. The license of marriage dispensation should be given to the underage bride and groom on certain reasons. The licensing of marriage dispensation should be given to the underage bride and groom because of their condition requiring to get married.

The essence of marriage dispensation is an exemption of the marriageable age. The licensing of marriage dispensation should be in line with the intents of marriageable age. The license of marriage dispensation should be based on the crucial reasons. The license which is based on the crucial reasons is in order the ratio legit of marriage dispensation and the marriageable age can be achieved well.

Many people have submitted the petition for marriage dispensation to the courts. The annual report of religion courts in 2013 and 2014 noted that the number of marriage dispensation is high. The petition for marriage dispensation in Religion Court of Jombang is an average 136 petitions per year.<sup>4</sup> Then, the petition for marriage dispensation in Religion Court of Tulungagung is an average 248 petitions per year.<sup>5</sup> Moreover, the petition for marriage dispensation in Religion Court of Kabupaten Malang is an average 395 petitions per year.<sup>6</sup>

The submission of marriage dispensation is caused by the various factors. They are slander in the community, worries of parents toward adultery, and pre-

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<sup>4</sup>Based on the annual report from the Religion Court of Jombang 2013 and 2014.

<sup>5</sup>Based on the annual report from the Religion Court of Tulungagung 2013 and 2014.

<sup>6</sup>Based on the annual report from the Religion Court of Kab. Malang 2013 and 2014.

marital pregnancy.<sup>7</sup> In addition, submission of marriage dispensation is caused by economic factor, education factor, environment factor and culture factor.

The marriage dispensation is regulated on Article 7 Paragraph (2) Act No. 1 year 1974 on Marriage (next be translated by Marriage Law). It states that:

*In deviation from the provision in paragraph (1) of this article, dispensation may be petitioned to the Court or other authority designated by the parents of both the male and female marriage candidate.*

The article explains about the legal basic of marriage dispensation. According to the article, the parents can apply a dispensation to the Court or the other authorized officials.

The rule of marriage dispensation is not formulated clearly. It does not give the requirements and the limitations of marriage dispensation should be given to the bride and groom who are under the marriageable age. It encourages people for submitting marriage dispensation freely. The absence of requirements for marriage dispensation makes the achieved intents of marriage dispensation become uncertain. The rule of marriage dispensation should give specific formulations by determining the requirements of marriage dispensation. Thus the intents of marriage dispensation can be realized well.

Obscurity of the formulation about marriage dispensation causes variety interpretations. The judges are permitted to interpret the article freely without specific

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<sup>7</sup>Candra Dwi Irawan, dkk., *Pertimbangan Hukum Dispensasi Kawin bagi Pasangan Calon Perkawinan Belum Bekerja (Unemployment) oleh Hakim Pengadilan Agama Jombang, Report of PKLI Research 2015* (Malang: Fakultas Syariah UIN Malang, 2015), p. 58-60.



formulations. Generally, the judge's decision is based on the weak reasons. The judges have rarely based their decision on the more crucial reasons; they are like effect of marriage under the marriageable age, consequences to the education, and other rights of child. It indicates that the reasons for licenses of marriage dispensation are very weak.

Currently the formulation of marriage dispensation indicates incompatibility the ratio legist of marriage dispensation with the intents of the marriageable age. The obscurity of marriage dispensation formulation has consequences to the marriage without definitely marriageable age and the freely legalized marriage under the marriageable age.

The marriage under the marriageable age is contrary to the values contained in the principle of marriage. The Marriage Law determines the principle of a bride and a groom should be mature physical and mature soul to get married. The principle intends to realize the purpose of marriage well without ended at divorce as well as get the healthy offspring.<sup>8</sup>

A marriage under the marriageable age is not recommended for health reasons. The underage woman's reproductive tool is not prepared yet to be fertilized. The marriage under the marriageable age makes possible a young age pregnancy. According to *Badan Koordinasi Keluarga Berencana Nasional* (BKKBN), too young age for pregnancy can be risk to the maternal mortality and infant mortality.<sup>9</sup>

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<sup>8</sup>Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Jakarta: Rajawali Pers, 2013), p. 48.

<sup>9</sup>Badan Koordinasi Keluarga Berencana Nasional (BKKBN), 2007.

The maternal mortality has reached a high number. *Survei Demografi dan Kesehatan Indonesia* (SDKI) in 2012 has noted that the number of the maternal mortality is 359 per 100.000 live births. One of the factors is very young age for pregnancy.<sup>10</sup>

A marriage under the marriageable age will put the domestic life at risk and disharmony. The disharmony will occur because of the lack of a married couple's awareness to have responsibility in the domestic life. It causes a conflict which leads to the divorce.<sup>11</sup>

The marriage under the marriageable age is violation of the Child Protection Law. It regulates that every child have a right to receive education and teaching.<sup>12</sup> If the children are married by their parent, they will be blocked to obtain the formal education.

A marriage under the marriageable age and an adolescent pregnancy influence the low level of women education, low working women participant and young family with low income. They have consequences on family crisis and less profitable level of welfare. Marriage under the marriageable age also influences to the decline of human resources quality, the child abuse, the increase poverty, the exploitation, and the child commercial sex.<sup>13</sup>

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<sup>10</sup>Kementerian Kesehatan RI, *Pusat Data dan Informasi Kementerian Kesehatan RI*, (Jakarta: Kementerian Kesehatan RI, 2014), p.1.

<sup>11</sup>Hendy Hermawan, *Pengaruh Pernikahan Dini terhadap Perceraian Dini (Studi Kasus di Pengadilan Agama Klaten Tahun 2008-2010)*, Thesis (Yogyakarta: UIN Sunan Kalijaga, 2010), p. 102.

<sup>12</sup>Based on the Article 9 Paragraph (1) Act No. 23 year 2002 on Child Protection.

<sup>13</sup>Muhammad Nizar Fauzi, *Pandangan Masyarakat dalam Pernikahan Usia Dini Studi Kasus di Desa Cikurutug Kecamatan Cikreunghas Kabupaten Sukabumi Provinsi Jawa Barat*, Thesis (Jakarta: UIN Syarif Hidayatullah, 2014), p.3.

A marriage under the marriageable age is much opposed by the community. According to Gunilla Olsson (the head of UNICEF Indonesia Representative) states that marriage under the marriageable age harms the children. The marriage under the marriageable age threatens people into the poverty. In addition, Abdul Muth'i (the general secretary of PP Muhammadiyah) argues that early marriage is not in accordance with the Islamic teachings. The girls are allowed to get married because they have matured physically, intellectually and spiritually.<sup>14</sup>

Marriage dispensation opens opportunity a marriage under the marriageable age. The marriage under the marriageable age has many negative impacts for household and the couple. The negative effects will be straight to increase if the formulation of marriage dispensations does not provide clearly requirements and limitations. Unregulated justifiable reason to apply dispensation has reduced the marriage dispensation concept itself. Thus, it is interesting to analyze the problems of marriage dispensation by studying on Act No. 1 year 1974 on Marriage Article 7 Paragraph (2) in the perspective of *maslahah*.

## **B. Statement of Problem**

Based on the background of research above, the statement of problems which become the object of discussion are:

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<sup>14</sup><http://kabar24.bisnis.com/read/20150903/79/468656/unicef-pernikahan-dini-di-indonesia-membahayakan-anak>, accessed on February 10<sup>th</sup> 2016.

1. What are the problems of marriage dispensation and how do they influence the society?
2. How does *maslahah* theory view marriage dispensation on Act No. 1 year 1974 on Marriage Article 7 Paragraph (2)?

### C. Objective of Research

The objectives to be achieved of the research are:

1. To find out, explain and analyze the problems of marriage dispensation and the influences to the society.
2. To find out and explain *maslahah* theory views marriage dispensation on Act No. 1 year 1974 on Marriage Article 7 Paragraph (2).

### D. Significance of Research

The result of the present study is expected to be a useful reference, both theoretically and practically. They are:

1. Theoretical benefits

Theoretically, this study aims to describe, determine, and analyze the limitation of permission for marriage dispensation in the Court or the other authorized officials. It is expected to give thoughts and sciences contribution as well as to be a reference for continuing study related to marriage dispensation.

2. Practically benefits



- a. For the society, this study will be a consideration for reducing the underage marriage culture by submitting a marriage dispensation.
- b. For the judges, this study will be a material consideration on the license of marriage dispensation for the crucial reasons.
- c. For the government, this study will be a legal material for revising or renewal the rule of marriage dispensation.

#### **E. Operational Definition**

1. Dispensation: An exemption from prohibition as a common rule.
2. Marriage dispensation: An exemption from a prohibition of marriage under 16 years and 19 years old based on the Marriage Law.
3. Marriage under the marriageable age: A marriage is established by a bride and a groom under the 16 years old and 19 years old.

#### **F. Research Method**

##### **1. Kind of research**

Kind of this research is normative legal research. It analyzes the prevailing regulations. The normative legal research is a finding process of the rules, principles of law, as well as legal doctrines in order to solve the legal issues. Then, it is obtained the new argumentations, theories and concepts as a problem solving prescription.<sup>15</sup>

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<sup>15</sup>Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2005), p. 35.

This research is called as normative legal research because it is finding the problems of marriage dispensation by studying on the Article 7 Paragraph (2) of Marriage Law. Currently the formulation of marriage dispensation puts the marriage without definitely the minimum age and freely legalized marriage under the marriageable age.

## 2. Research approach

This research uses the statute approach and conceptual approach. The statute approach is analyzing the regulations related to the legal issues.<sup>16</sup> The conceptual approach is begun from the developing doctrines in the jurisprudence.<sup>17</sup>

This research analyzes interrelatedness between the rule of marriage dispensation's ratio legis and the application in the court. The interrelatedness is caused by unclearly formulations of marriage dispensation. Besides, the researcher find the definition of law, the concept of law, as well as the principles of law related to the legal issues by analyzing the doctrines. Result of the analyzing is an argument to solve the legal issues.

## 3. Source of data

The data sources used in the normative research are secondary data. It is divided into primary legal material, secondary legal material, and tertiary legal material.<sup>18</sup>

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<sup>16</sup>Peter Mahmud Marzuki, *Penelitian Hukum*..., p. 93.

<sup>17</sup>Peter Mahmud Marzuki, *Penelitian Hukum*..., p. 95.

<sup>18</sup>Peter Mahmud Marzuki, *Penelitian Hukum*..., p. 118.

Primary legal material consists of legal norms, regulations and also jurisprudence.<sup>19</sup> Primary legal material which be used are the Act No. 1 year 1974 on Marriage, the Act No. 35 year 2014 on Change of the Act No. 23 year 2002 on Child Protection, and also some legislation which has a connection to do with Marriage Law, and judicial decision.

Secondary legal materials which be used are some literatures on book of child protection, book of marriage dispensation as well as book of life-span development and books or articles of *maslahah* theory. The tertiary legal materials in this study are materials that give additional information to the primary legal materials and secondary legal materials, which from a dictionary or encyclopedia.

#### **4. Collection data method**

Both primary legal materials and secondary legal materials collected according to the topic issues that have been formulated based documentation system.<sup>20</sup> The researcher explores the materials obtained and classified according to the source and hierarchy to be studied comprehensively.

#### **5. Analyzing data method**

The legal materials obtained by reference research are explained and correlated between each material. It is written down systematically to solve the legal issues.

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<sup>19</sup>Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Grafindo, 2010), p. 118-119

<sup>20</sup>Jhon W. Creswell, *Research Design: Pendekatan Kualitatif, Kuantitatif, dan Mixed*, terj. Achmad Fawaid, (Yogyakarta: Pustaka Pelajar, 2010), p. 269.

The legal material is analyzed inductively. It summarizes a specifically concrete issue to the generally abstract issue.<sup>21</sup> The problem is begun from the formulation of marriage dispensation on Marriage Law. The problems are analyzed descriptively according to the Child Protection and *maslahah* theory. Then, it be obtained the generally conclusions.

### G. Previous Research

This research adds some previous researches. They are:

- a. *Dampak Dispensasi Nikah Terhadap Eksistensi Pernikahan (Studi Analisis di Pengadilan Agama Kendal)*<sup>22</sup>

This research is written by Abdul Munir. His research and this research have similarity and difference. The similarity both is equally studying about marriage dispensation. The difference both are Abdul Munir's research analyzes the judge's legal judgements of marriage dispensation in the Religion Court Kendal as well as effect of marriage dispensation toward an existence of marriage. This research analyzes the problems of marriage dispensation in the court caused by unclearly formulation of marriage dispensation and analyzes the judge's decision to formulate the requirements and limitations of marriage dispensation.

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<sup>21</sup>Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum*, (Bandung: Mandar Maju, 2008), p. 166.

<sup>22</sup>Abdul Munir, *Dampak Dispensasi Nikah Terhadap Eksistensi Pernikahan (Studi Analisis di Pengadilan Agama Kendal)*, Skripsi (Semarang: IAIN Walisongo, 2011).

The result of previous research is concluded that Religion Court of Kendal's decision for marriage dispensation is not influence to the existence of marriage. However, marriage by dispensation put the domestic life at the risk and disharmony.

*b. Analisis Yuridis Dispensasi Perkawinan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan*<sup>23</sup>

This research is written by Dinda Wulan Bestari. Dinda Wulan Bestari's research and this research have similarity and difference. The similarity both is equally using the statue approach and equally using the Marriage Law as the primary legal material. The difference both are the previous research analyzes compatibility between marriage dispensation formulation and its application in the court. This research analyzes the problems of marriage dispensation in the court caused by unclearly formulation of marriage dispensation and analyzes the judge's decision perspective *maslahah* theory for formulating the requirements and the limitations of marriage dispensation.

Result of the previous research is summarized that applications of marriage dispensation in Religious Court of Jember conform to the Marriage Law. The judge's decision is based on the fact as well as witness's information.

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<sup>23</sup>Dinda Wulan Bestari, *Analisis Yuridis Dispensasi Perkawinan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan, Skripsi* (Jember: Universitas Negeri Jember, 2010).



c. *Kajian Hukum Dispensasi Kawin Menurut Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*<sup>24</sup>

This research is written by Siffadatus Sofi Lailiyah. Her research and this research have similarity and difference. The similarity both is equally using the statue approach and equally using Marriage Law as the primary legal material. The difference both are the previous research analyzes, interprets, and describes the rule of marriage dispensation according to Marriage Law. This research analyzes the problems of marriage dispensation in the court caused by unclearly formulation of marriage dispensation and analyzes the judge's decision perspective *masalah* theory for formulating the requirements of marriage dispensation.

The previous research summarizes that underage bride and groom may submit the petition to the court or the other authorized official for marriage dispensation. If they get married without the dispensation, the marriage does not have a legal effect.

d. *Praktik Pemberian Dispensasi Kawin (Studi Penetapan Pengadilan Agama Tigarakasa Kabupaten Tangerang Tahun 2013)*<sup>25</sup>

This research is written by Fariha Atiyani. Her research and this research have similarity and difference. The similarity both is equally studying about marriage dispensation. The difference both are the previous research's kind of research is field research and this research is normative legal research (library research). The previous

<sup>24</sup>Iffadatus Sofi Lailiyah, *Kajian Hukum Dispensasi Kawin Menurut Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan*, Skripsi (Jember: Universitas Negeri Jember, 2012).

<sup>25</sup>Yulianti, *Praktik pemberian Dispensasi Kawin (Studi Penetapan Pengadilan Agama Tigarakasa Kabupaten Tangerang Tahun 2013)*, Skripsi (Jakarta: UIN Syarif Hidayatullah, 2014).

research analyzes the application (procedure of marriage dispensation, factors of marriage dispensation, and legal judgments) of marriage dispensation in the Religion Court Tangerang and this research analyzes the problems of marriage dispensation and formulation of marriage dispensation.

Result of the previous research is summarized that factors of marriage dispensation are factor of education, psychology, pre-marital pregnancy and economic. The judge's reasons permitting the dispensation are based on *Qowaidul Fiqhiyah*. It is "درء المفسد مقدم على جلب المصالح".

#### **H. Structure of Discussion**

This thesis is prepared with a systematic procedure, and organized in four chapters. Each chapter has its focused discussion as described as follows:

Chapter I (Introduction) contains a description of the background that lead to research on the problems of marriage dispensation. Obscurity of marriage dispensation formulation causes problems. Then, from the background is obtained the statements of problem. In this chapter also provides a foundation of thinking, research purpose, research benefits, research methods, and a basic overview of the flow of research that be done by researcher.

Chapter II reviews the concepts and theoretical basis for study and analysis. It is revealed the concept of problems of marriage dispensation. Further in this chapter discusses the concept of the principles of marriage, the concept of child protection, the concept of parent's and child's rights and duties as well as the concept

of life-span development. Then, these concepts are used as the basis of analysis of the research.

The results of the research and discussion are presented in Chapter III. In this chapter describes the legal materials that have been obtained from the research literature. The legal materials are analyzed based on decided analyzing data method. This analyze is used to solve the statements of problem. The findings and discussion are presented in the form of description paragraph.

Chapter IV presents the conclusions of the study analyzes the previous chapters. It can be known the problems of marriage dispensations in the court caused by unclearly formulation of marriage dispensation. This chapter also states some suggestions that are expected to become a contribution of scientific ideas and gives some feedback to Marriage Law especially about the formulation of marriage dispensation.

## CHAPTER II

### THEORETICAL FRAMEWORK

#### A. Marriage Dispensation

##### 1. The Concept of Marriage Dispensation

Dispensation is a prohibited matter to be allowed.<sup>26</sup> Article 1 Paragraph 21 of Act No. 30 year 2014 on Government Administration states that:

*Dispensation is the decision of the authorized government officials as a form of approval of the application for citizens is an exception to a prohibition or injunction in accordance with the provisions of the legislation.*<sup>27</sup>

<sup>26</sup>Poerwadarminta, *Kamus Umum Bahasa Indonesia*, (Jakarta: Balai Pustaka, 2011). p.88.

<sup>27</sup>Article 1 Paragraph (21) Act No. 30 year 2014 on Administration of Government.

According to Black's Law Dictionary, dispensation is an exemption from some laws; a permission to do something forbidden; an allowance to omit something commanded; the canonistic name for a license.<sup>28</sup>

Dispensation is related to the crucial conditions.<sup>29</sup> Thus, the license of dispensation should not be given without requirements. The license of dispensation should be given with specific requirements.

Marriage dispensation is an exemption from prohibition of marriage under the minimum of marriage. Roihan A. Rasyid<sup>30</sup> argues that the marriage dispensation is licensed by a court to a bride and groom under 16 years old and 19 years old.

The marriage dispensation is submitted by an underage bride's and groom's parents.<sup>31</sup> Marriage dispensation is voluntary. If the principal dissatisfied with the judge's decision, they can appeal to the Supreme Court on the case.<sup>32</sup>

## 2. The Marriageable Age based on Marriage Law

The Marriage Law is the basis law of marriage in Indonesia. The Marriage Law regulates the purposes of marriage, the requirements of marriage, and others.

<sup>28</sup>Henry Campbell Black, *Black's Law Dictionary*, (ST. PAUL, MINN: WEST PUBLISHING CO, 1968), p.557.

<sup>29</sup>Mr. N.M. Spelt dan Prof. Mr. J.B.J.M. ten Berge dalam Y. Sri Pudyatmoko, *Perizinan: Problem dan Upaya Pembenahan*, (Jakarta: Grasindo, tt), p.8.

<sup>30</sup>Roihan A. Rasyid, *Hukum Acara Peradilan Agama*, (Jakarta: Raja Grafindo Persada, 1998), p.32.

<sup>31</sup>Based on Article 7 Paragraph (3) of The Marriage Law.

<sup>32</sup>Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI, *Buku II Pedoman Pelaksanaan*, (Jakarta: Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI, 2013), p. 148.



One of the requirements of marriage is the couple have to reach the age of marriage.

It can be known on Article 6 and Article 7 of Marriage Law, stating that:

**Article 6**

- (1) *A marriage shall be founded upon agreement between the marriage candidates*
- (2) *Marriage of a person under the age of 21 (twenty-one) years shall require the consent of both parents.*
- (3) *When one of the parents has deceased or is not in a position to state his or her will, it shall suffice that the consent referred to in paragraph (2) be obtained of the surviving parent or of the parent who is in a position to state his or her will.*
- (4) *When both parents have deceased or are unable to state their will, the consent may be obtained from the guardian, the supporter or a relative by consanguinity in direct ascendance, as long as such persons are still living and in position to state their will.*
- (5) *In the event of difference among the persons referred to in Paragraphs (2), (3), and (4) of this article, or when one or more of them has not made a statement, the Court having jurisdiction over the domicile of the person to be married may, at the request of the latter grant approval after hearing the persons referred to in paragraphs (2), (3), and (4) of this article.*
- (6) *The provisions of paragraphs (1) through (5) of this article are applicable in so far as the laws of the respective religions and beliefs of the parties concerned do not prescribe otherwise.*

**Article 7**

- (1) *A marriage is only allowed when the male marriage candidate has reached the age of 19 (nineteen) years and the female marriage candidate the age of 16 (sixteen) years.*
- (2) *In deviation from the provision in paragraph (1) of this article, dispensation may be petitioned to the Court or other authority designated by the parents of both the male and female marriage candidate.*
- (3) *The provisions on the circumstances of one or both of the parents as referred to in article 6 paragraphs (3) and (4) of this Law shall be equally applicable in the case of petitioning dispensation as referred to in paragraph (2) of this article, without prejudice to the provision in article 6 paragraph (6).*

Article 6 Paragraph (2) states that the marriage between a man and a woman under 21 years old should obtain permission from their parents. A people permit for marriage when they are 19 years old for a man and 16 years old for a woman. It is interpreted that the Marriage Law does not require a marriage under the age.<sup>33</sup>

Marriage has a relationship with a population problems. The low age of marriage especially women, resulting in a higher birth rate than with a higher age limit.<sup>34</sup> Because of the reason, the Marriage Law sets the marriageable age for a man and a woman. The purposes of the marriageable age are maintaining the groom's and the bride's health and their descendants.<sup>35</sup>

Principally, the Marriage Law does not require a marriage under the age. If the groom and bride are under the age, the parents should apply a marriage dispensation to the court or the other authorized officials. The marriage dispensation is an allowance given by the court for the groom and the bride which are still under the age.<sup>36</sup> The Marriage dispensation should be given on certain reasons in order the enactment of marriage dispensation is in line with the purposes of the minimum age of marriage.

The purposes of marriageable age are maintaining the bride's and the groom's health and their descendants. The marriage dispensation should be in line with the purposes of the marriageable age. So, the ratio legist of marriage

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<sup>33</sup>Hilman Hadikusuma, *Hukum Perkawinan Indonesia...*, p. 9.

<sup>34</sup>Sudarsono, *Hukum Perkawinan Nasional*, (Jakarta: Rineka Cipta, 2005), p. 8.

<sup>35</sup>Article 7 Paragraph (1) the Explanation of Act No. 1 year 1975 on Marriage.

<sup>36</sup>Roihan A. Rasyid, *Hukum Acara Peradilan Agama...*, p. 32.

dispensation and the purpose of marriage through the enactment of the marriageable age are not opposing each other.

### 3. The Marriageable Age based on Islamic Law

Basically Islamic law does not specify the marriageable age. No one rule determines the marriageable age. Marriage under the age had been going on between the Prophet Muhammad *Shallallahu 'Alaihi wa Sallam* and his wife named 'Aisyah ra. As in a Hadith of the Prophet Muhammad *Shallallahu 'Alaihi wa Sallam* narrated by Muslim, states that the Prophet Muhammad *Shallallahu 'Alaihi wa Sallam* married 'Aisyah when she was six years old.

تَزَوَّجَهَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَهِيَ بِنْتُ سِتٍّ وَبَنِي بِهَا وَهِيَ بِنْتُ  
تِسْعٍ وَمَاتَ وَهِيَ بِنْتُ ثَمَانٍ عَشْرَةَ (رواه مسلم)

“Rasulullah SAW has Married with his wife ('Aisyah) in six years old and he has lived with her when she was nine years old and he died when he was eighteen years old”. (HR. Muslim)<sup>37</sup>

The Hadith explains to us that the Prophet Muhammad *Shallallahu 'Alaihi wa Sallam* married 'Aisyah when she was six year old. He lived together and had intercourse with 'Aisyah when she was nine years old.<sup>38</sup>

The most scholars said that the wedding of Prophet Muhammad *Shallallahu 'Alaihi wa Sallam* with 'Aisyah cannot be used as general proposition. According to Ibn Syubramah, he interprets that the wedding as the privilege for Prophet

<sup>37</sup>Abul Husain Muslim bin al-Hajjaj al-Qusyairi an-Naisaburi, *Al-Musnad Al-Shahih Al-Mukhtasar min Al-Sunan bi Al-Naql Al-'Adl 'an Al-'Adl 'an Rasulullah Shalallahu'alaihi Wasallam* (Shahih Muslim) Juz 2, (Beirut: Dar Ihya' al-Turas al-'Arabi, 1972), p. 1039.

<sup>38</sup>Hilman Hadikusuma, *Hukum Perkawinan Indonesia...*, p. 51.

Muhammad *Shallallahu 'Alaihi wa Sallam* which cannot run by Prophet Muhammad's people.<sup>39</sup>

The purposes of marriage in Islam are running a command of Allah *Subhanallahu wa Ta'ala*, obtaining the descendants, avoiding the adultery, and forming the *sakinah*, *mawaddah*, and *rahmah* family. The people should be considering the purposes of marriage before doing the marriage under the age. The marriage under the age should not be performed if it is hurtful and causing the purpose of marriage is not realized.<sup>40</sup>

Islamic law prohibits the marriage of children before they are puberty. According to Ibn Syubramah<sup>41</sup>, the essences of marriage are biological needs and keeping the descendants. Both of them will not be encountered if the people have not been *baligh*. The capacity of women for having intercourse is her readiness to perform sexual activity (*wath'iy*) along with all the consequences, like as pregnancy, giving birth, as well as breastfeeding which is marked by puberty.<sup>42</sup>

Based on concept of Islam, the maturity of someone is seen from the physical maturity rather than the maturity of the soul. It can be known for example from the imposition of the law (*taklif*) for a person called as *mukallaf*<sup>43</sup>. In the hadith, Prophet Muhammad *Shallallahu 'Alaihi wa Sallam* said:

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<sup>39</sup>Yusuf Hanafi, *Kontroversi Perkawinan Anak di Bawah Umur*, (Bandung: CV. Mandar Maju, 2011), p. 13.

<sup>40</sup>Hilman Hadikusuma, *Hukum Perkawinan Indonesia...*, p. 51.

<sup>41</sup>Ibn Syubramah dalam Yusuf Hanafi, *Kontroversi Perkawinan Anak...*, p. 13.

<sup>42</sup>Yusuf Hanafi, *Kontroversi Perkawinan Anak...*, p. 12.

<sup>43</sup>A person is considered capable or qualified to do the deed law.



رُفِعَ الْقَلَمُ عَنْ ثَلَاثٍ عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ وَعَنِ الْمَجْنُونِ حَتَّى يَفِيقَ وَعَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ

*“Someone's accountability is raised over three things: he who lies until she wakes up, a madman until he recovered and children until he dreams (and ejects semen / ihtilam).”<sup>44</sup>*

The hadith suggests that the maturity of someone is based on the symptoms of his sexuality. It can be known from the discharge of semen for men and menstruation (*haid*) for women.<sup>45</sup>

The age for marriage according to the Islamic law, can be used as a basis law in reviewing the problems of marriage dispensation currently. The expectation, marriage dispensation formulations is re-arranged for clearly intention and goal of its enactment

#### 4. The Principles of Marriage

Marriage Law is a legal basis of marriage in Indonesia following some principles of marriage. The Principles must be able to realize the five basic principles of the Republic of Indonesia and the values of the Constitution. The principles also have to accommodate all the reality that life in society.

The principles of marriage which be presented in the Marriage Law contains seven principles of rule of law. The principles have been adapted to progress and demands of times. They are:<sup>46</sup>

<sup>44</sup>Sulaiman bin al-Asy'as bin Ishak bin Basyir bin Syidad bin Amar al-Azdi as-Sijistani, *Sunan Abu Daud Jus 4*, (Beirut: Al-Maktabah Al-Ashriyyah, tt), p. 141.

<sup>45</sup>Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, p. 62.

<sup>46</sup>Zainuddin Ali, *Hukum Perdata Islam di Indonesia*, (Jakarta: Sinar Grafika, 2006), p.7.



### 1. The principle of forming a happy and everlasting family

The couple of marriage needs to help each other and complement in order to create a spiritual and material wellbeing.<sup>47</sup> The spiritual and material wellbeing is one of indicators of happy family. The principle is in line with the QS. Ar-Rum (30): 2,

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ  
بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

*“And it is among His signs that He has created for you wives from among yourselves, so that you may find tranquility in them, and He has created love and kindness between you. Surely in this there are signs for a people who reflect”*<sup>48</sup>

### 2. The principle of legality of marriage based on the couple's religion and belief, and noted by the authorized officer

A legal marriage according to the marriage Law is a marriage based on the rule of law of each couple's religion and belief. The term of “each couple's religion and belief” is the rule of law of a religion. The term is not interpreted as a rule of law of each couple's religion and also their family's religion.<sup>49</sup> The marriage will be illegal if it is celebrated based on Islamic law then they do it again based on another religion.

Principle of marriage based on the couple's religion and belief means that there is no marriage outside the laws of each religion and beliefs, in accordance to the

<sup>47</sup>Zainuddin Ali, *Hukum Perdata Islam*..., p.7.

<sup>48</sup>QS. ar-Rum(30): 21.

<sup>49</sup>Hilman Hadikusuma, *Hukum Perkawinan Indonesia*..., p.25.

Constitution. The laws of each religion and beliefs are including the provisions of the legislation that applies to the religion and beliefs, while not specified by legislation.

### 3. The principle of monogamy

Essentially, marriage in Indonesia follows the principle of monogamy. However, the principle will not apply if the law of the principal's religions permits to marry more than a wife. The marriage of a husband with more than a wife must fulfill some requirements determined by the law of religion as well as the law. The marriage must also get permission from the Court.<sup>50</sup> The principle is in line with QS. An-Nisa (4): 3,

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ  
مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ  
ذَلِكَ أَذْنَىٰ أَلَّا تَعُولُوا

*“If you fear that you will not do justice to the orphans, then, marry the woman you like, in twos, in threes and fours. But, if you fear that you will not maintain equity, then (keep to) one woman, or bondwomen you own. It will be closer to abstaining from injustice.”<sup>51</sup>*

The verse explains that you can marry two girls of them, three girls of them and four girls of them that you love. However you can marry a girl if you worry cannot be fair to your wives. Married with the only one girl can avoid the husband from the cruelty.<sup>52</sup>

<sup>50</sup>Refer to the general explanation of the Explanation of Act No. 1 year 1974 on Marriage.

<sup>51</sup>QS. An-Nisa(4):3.

<sup>52</sup>Al-Imam Abul Fida Isma'il Ibnu Katsir Ad-Dimasyqi, *Tafsir al-Quran al-Adzim*, Traslated by. Bahrin Abu Bakar, *Tafsir Ibnu Katsir Juz 4 Ali Imran 92-An-Nisa 23*, (Bandung: Sinar Baru Algensindo, 2000), p.433-442.

#### 4. The principle of bride and groom should have a mature body and soul

The bride and the groom have had a mature body and soul before they get married. The mature body and soul is readiness in physical health, reproductive tools and way of thinking. It affects the domestic life of the bride and groom and their descendants. Therefore, it should be prevented the bride and the groom are still underage.

Marriage has a relationship with population problems. The low age of marriage especially women, resulting in a higher birth rate than with a higher age limit.<sup>53</sup> In connection with it then the Marriage law sets a limit of age of marriage for men and women.

#### 5. The principle of preventing the divorce

The purpose of marriage is forming a happy family and everlasting. The everlasting family means a household that divorce does not occur. If between married couple is going to divorce, there must be reasons that justified by laws and performed in front of the Court.

The divorce between a husband and wife has to go through procedures prescribed by law. Before proceeding, the husband and wife were required to do mediation. It aims to prevent the occurrence of divorce. The principle is based on the words of the Prophet Muhammad *Shallallahu 'Alaihi wa Sallam* narrated by Ibn 'Umar:

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<sup>53</sup>Sudarsono, *Hukum Perkawinan Nasional*, (Jakarta: Rineka Cipta, 2005), p. 8.

أَبْغَضُ الْحَلَالِ إِلَى اللَّهِ الطَّلَاقُ (رواه أبو داود وابن ماجه)

*“A deed which is halal the most hated by Allah SWT is divorce.”*  
(HR. Abu Dawud, Ibn Majah)<sup>54</sup>

Essentially, divorce is allowed in Islam, but is hated by Allah *Subhanallahu Wa Ta'ala*. Divorce is hated because the causes that leads to the divorce and its consequences.

#### 6. The principle of husband's and wife's rights and position is balanced

A husband and a wife have the right and obligation in the domestic life. The existence of the rights and obligations is described in QS. Al-Baqarah (2) : 228,

وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَ بِالْمَعْرُوفِ وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ

*“Women have rights similar to what they owe in recognized manner though for men there is a step above them.”*<sup>55</sup>

This verse tells us that the wife has the right and also the obligation. The wife's obligation is husband's right. The verse means that the wife's rights and her position is equivalent with the husband's rights and his position. Nevertheless, the husband has the higher level position than his wife, namely head of the family.<sup>56</sup>

The wife's rights and her position is equivalent with the husband's rights and his position, in the domestic life and/or in the community. Thus everything within the family can be negotiated and decided upon jointly by husband and wife.

<sup>54</sup>Abu Abdullah Muhammad bin Yazid bin Abdullah bin Majah Al-Quzwaini, *Sunan Ibnu Majah Juz 1*, (Saudi Arabia: Dar Ihya' Al-Kutub Al-'Arabiyah, tt), p. 650.

<sup>55</sup>QS. Al-Baqarah (2): 228

<sup>56</sup>Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia, Antara Fiqih Munakahat dan Undang-Undang Perkawinan*, (Jakarta: Kencana, 2004), p. 159

## 7. The principle of marriage should be registered

Marriage is an important event which should be registered. It is because marriage has legal consequences in the form of rights and obligations. Essentially, marriage registration protects the rights and obligations of married couples and their descendants.

The registration of marriage is conducted by the official of marriage registration or the official of civil registration. Marriage outside the official of marriage registration or the official of civil registration does not have the power of law.<sup>57</sup>

The marriage registration aims to realize a marriage order in society.<sup>58</sup> It gives clarity to the person's marital status. Marriage registration also avoids one forbidden marriage.

Marriage dispensation as a deviation from the marriageable age should be maintaining the principles of the. Thus the ratio legist of marriage dispensation will be in line with the principles and purposes of marriage.

## B. The Child Protection in Indonesia

### 1. The Concept of The Child Protection in Indonesia

The country's commitment towards the child protection has been there since the founding of Indonesia State. It can be known on fourth paragraph of preamble of

<sup>57</sup>Ahmad Rofiq, *Hukum Perdata Islam...*, p.93.

<sup>58</sup>Ahmad Rofiq, *Hukum Perdata Islam...*, p.91.



UUD RI 1945 states that the purpose of the State is promote the general welfare and develop the mentality of the nation. Implicitly, the term of general welfare and developing the mentality of the nation are dominated to the definition of children because developing the mentality of the nation is organized through an education process which is generally done by the children with all the ages.<sup>59</sup>

One of State's commitments to the child protection is through Act No. 23 year 2002 on Child Protection (then changed to Act No. 35 year 2014 on the Change of the Act No. 23 year 2012 on Child Protection), (next be translated by Child Protection Law).<sup>60</sup>

Philosophically, the Child Protection Law based on some of the basic assumptions in drafting the regulation. One of the assumptions is that the United State of Republic Indonesia ensures the welfare of each of its citizens includes the protection to the children. According to Child Protection Law, child is the mandate and the gift of God the Almighty that in him there is the dignity of humanity.<sup>61</sup>

The child is a young generation successor the ideals of nation. The child has strategic roles and characteristics that guarantee existence of the nation and the country on future. Each child is expected to assume the responsibilities. Thus he needs to get a chance to grow and develop optimally through the effort of child protection and child welfare by fulfillment of the rights without discrimination.<sup>62</sup>

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<sup>59</sup>Hadi Supeno, *Kriminalisasi Anak*, (Jakarta: Gramedia, 2010), p. 42.

<sup>60</sup>Hadi Supeno, *Kriminalisasi Anak...*, p. 43.

<sup>61</sup>The Child Protection Law. Pdf.

<sup>62</sup>The Child Protection Law. Pdf.

Child protection is the activity guaranteeing and protecting the children and their rights. The child protection should not be done over protectively. The child protection is done by considering the effects to the environment and his self. Thus, the effort of child protection does not bring up the negative impact.

The child protection is carried out rationally, responsibility, usefully, effectively and efficiency. Effort of the child protection should not kill child's initiatives, creativities, and something else which make the children become dependence upon the others and uncontrolled. Consequently, the children have no skill and have no willingness to use their rights and carry out their obligations.<sup>63</sup>

Child protection is divided into juridical and non-juridical. Juridical child protection includes the protection in public law and civil law. Non-juridical child protection includes the protection in social field, health field, and education field.<sup>64</sup> The implementation of child protection becomes the obligation and responsibility of the State, government, communities, families, and parents.<sup>65</sup>

The concepts above describe the concept of child protection in Indonesia based on Child Protection Law. If we analyze the issues of marriage in Indonesia based on the concepts of legal protection, the concepts of marriage, especially marriage under the age by dispensation should be in line with the concepts of child protection.

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<sup>63</sup>Maidin Gultom, *Perlindungan Terhadap Anak...*, p. 33.

<sup>64</sup>Maidin Gultom, *Perlindungan Terhadap Anak...*, p.34.

<sup>65</sup>Article 20 of the Child Protection Law.

## 2. The Principles of Child Protection in Indonesia

According to the Convention on the Right of the Child ratified in Child Protection Law there are four general principles of child protection. The principles should be foundation for the Country to organize the child protection, they are:<sup>66</sup>

### a. Principle of Non Discrimination

The principle of non-discrimination is all the rights recognized and contained in the Convention on the Right of the Child should be implemented to the each child without exception.<sup>67</sup> As stated in article 2 Paragraph (1) and (2) the Convention on the Right of the Child, stating that:

#### **Article 2**

- (1) *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*
- (2) *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*

The article is ordered the State Parties to do not discriminate the child for any reason. The State should respect to the child's right. The State and the citizen should not treat the children differently based on their tribe, their race, and their ethnic.

<sup>66</sup>Hadi Supeno, *Kriminalisasi Anak...*, p. 53.

<sup>67</sup>Hadi Supeno, *Kriminalisasi Anak...*, p. 54.

## b. Principle of Best Interests of the Child

The principle of the best interest of the Child is the important principle for child protection. The principle of the best interest of the Child is stated on Article 3 Paragraph (1) the Convention on the Right of the Child, stating that:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The article expects to the all parties of child protection that each activity and the decisions should be considering the future of the child, not the adult's interests. Anything good according to adults is not necessarily good according to the interests of the child. Something best according to adults could be the destruction of the future of children.<sup>68</sup>

A lot of State's policy that needs to be questioned, like as: Marriage law that allow the girls marrying at the age of 16 years, is it considering the best interests for the child? The varied television programs, is it considering the best interests for the child? Or are these policies only for political purposes, business interests or others? Thus the rights and interests of children are neglected and sacrificed. The Convention on the Right of the Child, the Constitution of 1945, and the Child Protection Law explicitly prohibit anyone to practice violence, discrimination, as well as exploitation to the child.<sup>69</sup>

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<sup>68</sup>Hadi Supeno, *Kriminalisasi Anak...*, p. 56.

<sup>69</sup>Hadi Supeno, *Kriminalisasi Anak...*, p. 58.

### c. Principle of the Right to Life, Survival and Development

Every child has the right to life and to develop normally. The child should receive the treatment needed to ensure the physical health, mental health, and emotional health as well as intellectual development, social development, and cultural development. Principle of the Right to Life, Survival and Development as stated in the Article 6 Paragraph (1) and (2) the Convention on the Right of the Child stating that:

**Article 6**

*(1) States Parties recognize that every child has the inherent right to life*

*(2) States Parties shall ensure to the maximum extent possible the survival and development of the child*

The article explains that the States should make sure each child will be assured his survival because the right to life is the right adhering the child's self. The right to life is not the granting of the State or individuals.<sup>70</sup> To guarantee the right to life, the State should provide an environment that is conducive, suitable slaving facilities and infrastructure, as well as access for every child to obtain the basic needs. The States and all parties are prohibited disturb the child's right to life.

The States should also ensure the fulfillment of the right to grow and develop. The growing concerns the physical aspects. The developing concerns Psychic aspects. Implementation of this principle is the States through the regulation and institution owned should encourage the children to grow and develop optimally.

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<sup>70</sup>Hadi Supeno, *Kriminalisasi Anak...*, p. 58.



#### d. Principle of Respect for the Views of the Child

Respect for the views of the child is respect for the rights of the child to participate and state opinions in decision making related to the child's life. Each child has a right to valued her opinion and given the opportunity to discuss. The principle is basing on Article 12 Paragraph (1) the Convention on the Rights of the Child, stating that:

*States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*

The most important of this principle is that the child is a subject who has an autonomous personality. Therefore, he could not be seen in weak and passive position. The child is autonomous private which has experiences, willingness, imagination, obsession, and aspiration which is not certainly same as adult.<sup>71</sup>

The child's aspiration usually is characteristic and not understood by parents. The child has their own expectations. Parents do not impose his passion by ignoring the child's opinions and expectations.

The principle of respect for the views of the child should be appreciated because the adult is not always the holder of decision for the child. In many ways, the child has high objectivity that has not been contaminated by the interests of adults.

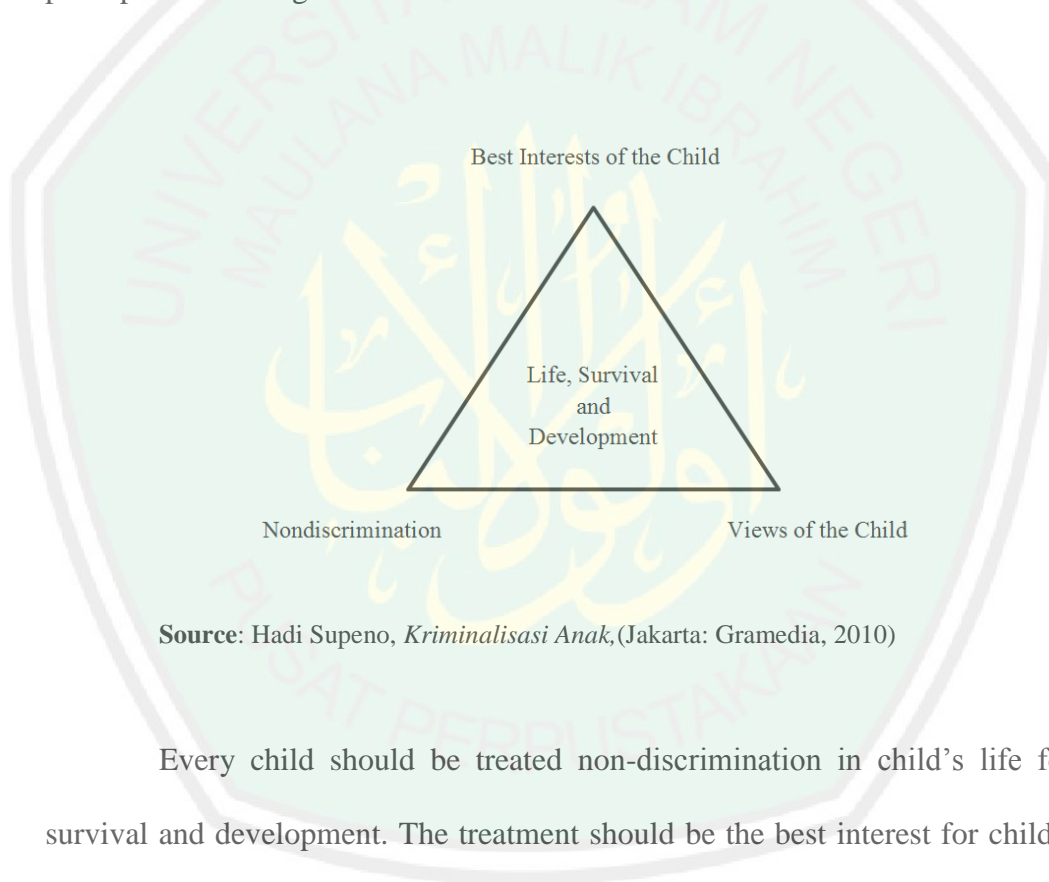
Islamic law does appreciate the principle of respect for the views of children, for the example in the problem of child guardianship on a married couple getting

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<sup>71</sup>Hadi Supeno, *Kriminalisasi Anak...*, p. 59-60.

divorced. The child's decision must be respected to choose one of them if the child is *mumayiz*. It is also expected to be applied in other life, in the economic field, the social field, the cultural field, and the legal field.<sup>72</sup>

The four general principles of child protection above which be centrifugal and centripetal is the principle of the right to life, survival and development. The four principles are configured as follows:



**Source:** Hadi Supeno, *Kriminalisasi Anak*, (Jakarta: Gramedia, 2010)

Every child should be treated non-discrimination in child's life for their survival and development. The treatment should be the best interest for child. Every child also should be given an opportunity to be participant. It gives a space for the child's survival, growth, and development to be optimal.

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<sup>72</sup>Hadi Supeno, *Kriminalisasi Anak*..., p. 62.

The general principle of child protection prevails in all fields including the marriage dispensation. The marriage dispensation is a marriage involving the age of child. Thus, the formulation of marriage dispensation should be in line with the principles of child protection.

### 3. The Obligations and Responsibilities of Parents And Children

Marriage is the deeds of the law which bring up the rights and obligation for the husband and wife. If the couples have descendants, the marriage also brings up the rights and obligation for the husband and wife as the parents and his children. It aims to ensure the children's interests and to protect the children from the violence and discrimination.

The Marriage Law and The Child Protection Law regulate the rights and the obligations between parents and his children. The obligations are: the obligation of parents in keeping and child education, the obligation of children to parents, and the control of parents.<sup>73</sup> The parent's and children's obligations and responsibilities regulate in Article 45-49 of the Marriage Law.

#### **Article 45**

- (1) *Both parents bear the responsibility for the sustenance and education of their children to the best of their ability*
- (2) *The parental responsibility referred to in Paragraph (1) of this article remains effective until the children marry or become independent, and continues being effective even though the marriage between the parents may have been dissolved*

#### **Article 46**

- (1) *Children shall honor their parents and obey their well-meant wishes.*

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<sup>73</sup>Sudarsono, *Hukum Perkawinan Nasional...*, p.188.

- (2) *On reaching adulthood, children shall to the best of their ability support their parents and relatives by consanguinity in the direct ascending line when they are in need of support*

**Article 47**

- (1) *A child below the age of 18 (eighteen) years and unmarried remains in the custody of its parents in so far as they have not been divested of parental power*
- (2) *The parents shall represent their child in any legal acts in and out of court*

**Article 48**

*Parents are prohibited from transferring title in or pledging to immovable property of their children below the age of 18 (eighteen) years and still unmarried, except when the interests of the children so require*

**Article 49**

- (1) *A parent or parents may by Court order be divested of his/their parental authority over one or more of their children for a certain period of time at the petition of the other parent, a relative of the child by consanguinity in the direct ascending line, an adult sibling of the child or a competent official for any of the following reasons:*
- a. Gross neglect of responsibility for the child;*
  - b. Evil conduct in life*
- (2) *Although divested of parental authority, parents shall remain responsible for the sustenance of their child.*

The Marriage Law determines that the parents have the obligation to care the children and educate the children as well as. It is done until they are married and standing alone. The obligations apply continuously even though the parents are divorce. The parents become a guardian for their children under 18 years and/or unmarried children. The parent's authority to their children includes representing the children doing the deeds of the law inside and outside the court.

The parent's authority is limited on prohibiting move the children's right. It is permitted if the children's needs determine for it.

The parent's authority to their children can be revoked for a certain time, if the parents neglect their obligations towards the children. Revocation of parent's authority to their children is done by the decision of the Court. The revocation of parent's authority is not including as the guardian of marriage. The parents are obliged to give children's costs although their authority is revoked.

The parent's obligation and responsibility to their children also regulate on Article 26 Child Protection Law. The article has undergone a change from previous legislation.

**Article 26**

*(1) Parents are obliged and responsible for:*

- a. caregiving, nurturing, educating, and protecting a child*
- b. growing and developing a child in line with his/her competencies, talent and interest*
- c. preventing early marriage at child's age, and*
- d. Providing education character and planting value a noble mind on child*

*(2) In the event of absence of parents, or their whereabouts are not known, or due to one thing or another they cannot perform their obligations and responsibilities, then obligations and responsibilities as meant by verse (1) can be switched to extended family, which is executed following existing rules and regulation.*

The article states that the parent's obligation and responsibility includes caring, keeping, educating, and protecting the children, developing the children's ability, preventing the occurrence of marriage under the age, as well as providing the character education and the cultivation of the values of character in children.



This regulation provides the obligation and responsibility to the parents besides to the State, the government, and society community. Essentially the parents are closest with their children in daily. The parents observe directly the physical and psychic growth, as well as keep an eye on their children association in daily.

The parents are obliged to give affection, caring, keeping, and educating to the children until they become an adult. Affection, caring, and keeping are the fulfillment of children's needs as well as protecting the children from the things that can hinder child's development. So that children can grow up normally and balanced.

The children have a right to obtain a formal education or moral education. Parents are obliged to provide opportunities and support to the children to obtain a formal education through the education unit and on the basis of compulsory education. In addition, the parents are obliged prevent marriage under the age. It aims to ensure growing of the children.

The parents as much as possible keep an eye on children's socialization. The obligations should be done by parents, including preventing the marriage under the age for the children. Thus, the child should not be harmed.

#### **4. The Child's Right and Needs**

According to the Minimum Age Convention number 138 (1973), the definition of child is a person who is under 15 years old and under. Then, Convention on the Rights of the Child (1989) ratified by Government through Presidential Decree

No. 39 of 1990 state that child is a person who is under 18 years old. Moreover, UNICEF defines the child as a person who is 0-18 years old.<sup>74</sup>

In Indonesia, the definition of a child is defined on some regulations. The Act No. 4 year 1979 on Child Welfare, states that child is not yet 21 years old and unmarried. Then the Marriage Law sets the marriageable age, 19 years old for man and 16 years old for woman. Moreover, based on Child Protection Law state that: “A child is to mean a person under eighteen (18) years of age, including a child still in the womb”.<sup>75</sup>

From some definitions above, it can be known that age range of the child lies on a scale of 0 to 21 years. The age of 21 years assigned based on considerations and the interests of social welfare efforts as well as consideration of social maturity, personal maturity and mental maturity of a person that is generally achieved after 21 years old.<sup>76</sup>

#### 1. The Child's Rights

Children's rights are universally has been established through the United Nations General Assembly on 20 November 1959, with the proclamation of the Declaration of the child's rights. The Declaration's preamble implied that everyone

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<sup>74</sup>Abu Huraerah, *Child Abuse (Kekerasan terhadap Anak)*, (Bandung: Penerbit NUANSA, 2007), p. 31.

<sup>75</sup>Article 1 Paragraph (1) of The Child Potection Law.

<sup>76</sup>Abu Huraerah, *Child Abuse*....,p. 31.

shall be obliged to provide the best for kids. This Declaration contains ten basic about the child's rights, they are:<sup>77</sup>

- a. Every child has the right to enjoy its rights based on the provisions contained in this Declaration. Every child should be guaranteed their rights without discrimination.
- b. Every child has the right to obtain special protection and opportunity that are guaranteed by law. It is expected the children be able to develop their selves in good situation physically, psychologically, morally, spiritually, and socially based on emancipation and their dignity. Its application in the law is by considering the best interest for children firstly.
- c. Every child has a right to get a name for identity and citizenship status since they was born.
- d. Every child has a right to grow well and should be guaranteed socially. Every child has a right to get enough nutrient, good place, recreation, and serving health.
- e. Every child that disability must be given special treatment, education and care based on the conditions.
- f. Every child has the right to obtain the parent's compassion and attention in order the child's personality grows well and balanced. Every child as much as possible is growth under his parent's care and responsibility. The parents should always create the loving atmosphere, physically healthy, and spiritually healthy.

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<sup>77</sup>Maidin Gultom, *Perlindungan Hukum Terhadap Anak dalam Sistem Peradilan Pidana Anak di Indonesia*", (Bandung: PT. Refika Aditama, 2008), p. 45.

- g. Every child should receive education free of charge and on the basis of compulsory education.
- h. Every child in any situation should receive protection and first aid.
- i. Every child must be protected from any forgetfulness, violence, and exploitation. Children should not be made the subject of a trade. Children may not be employed before a certain age. Children should not be involved in the work that can be detrimental to health or education as well as something that affect the development of body, soul, and attitude.
- j. Every child must be protected from any social discrimination, religious discrimination, and other forms of discrimination.

In Indonesia, the protection of the child's rights as the Declaration set in Act No. 4 year 1979 on Child Welfare (next be translated Child Welfare Law) and Child Protection Law. The definition of child welfare is defined on Article 1 Paragraph (1) point *a*, Child Welfare Law, stating that: *"The welfare of children is a procedure of life and the life of children which can ensure the growth and the progress properly, whether spiritual, physical and social"*

The child protection is all activities to ensure and protect children and their rights in order to life, grow, develop, and participate optimally in accordance with the dignity of humanity. Child protection is an effort to protect children from violence and discrimination.<sup>78</sup>

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<sup>78</sup>Article 1 Paragraph (2) of the Child Protection Law.

Children's rights are recognized and guaranteed by the State in order the children are protected from violence and discrimination. Children's rights are mentioned in article 2 of the Child Welfare Law, stating that:

**Article 2**

- (1) *Every child is entitled to acquire prosperity, care, education, and guidance based on affection both in family and special education to grow and develop properly.*
- (2) *Every child is entitled to acquire service to develop social life and ability in line with the culture and personality of nation to be good and useful citizen.*
- (3) *Every child is entitled to acquire care and protection before and after birth.*
- (4) *Every child is entitled to acquire protection toward living environment which endangers or impedes growth and development properly.*

The article explains that the children have the right to life and grow well. All parties are obliged to ensure the children's welfare. The children have the right to obtain a good parenting from their parents and family up to they are adult. The children have the right to maintained and protected from violence, discrimination, and environment that can inhibit the children's growth and children's development.

The Article 3 of Child Welfare Law states that the child should receive help, protection and first aid in dangerous situation. Children who have no families have a right to obtain care from the State or a person or entity.<sup>79</sup> Children who are economically weak should get help in order the children can grow and develop well.<sup>80</sup> The Children with behavior problems are given the service and care.<sup>81</sup>

<sup>79</sup>Article 4 Paragraph (1) the Child Welfare Law.

<sup>80</sup>Article 5 Paragraph (1) the Child Welfare Law.

<sup>81</sup>Article 6 Paragraph (1) the Child Welfare Law.



Child protection efforts are strengthened with the enactment of the Child Protection Law. Children's rights are relatively more complete mentioned in the Child Protection Law. The rights are:<sup>82</sup>

- a. Every child has the rights to life, grow, develop, as well as participate well and humanely, and to obtain the protection from the violence and discrimination.
- b. Every child has the rights for a name as the identity and citizenship status.
- c. Every child has the rights to worship according to his religion, think, and express based on his intelligence and his age under the parent's or the guardian's guidance.
- d. Every child has the rights to know his parents, treated and taken care of by his parents.
- e. Every child has the rights to obtain health services and social security based on the physical needs, the mental needs, the spiritual needs, and the social needs.
- f. Every child has the rights to obtain education and teaching based on the interest and talent in order to develop the personality and intelligence.
- g. Every child has the rights to protected from the sexual crimes in the education unit.
- h. Every child with disability also has the right to gain incredible education.
- i. Every child has the rights to be heard and expressed his opinion, receive information, search for information, and provide information based on his intelligence and his age to develop his personality with the right way.

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<sup>82</sup>Abu Huraerah, *Child Abuse...*, p. 36.

- j. Every child has the rights to rest and use the spare time, hang out and play with friends, go out for recreation and express his personality and his intelligence based on the interest and talent.
- k. Every child with disability also has the rights to obtain rehabilitation, social helps, and social welfare.
- l. Every child has the rights to obtain the protection from discrimination and exploitation economically and sexual, neglect, cruelty, violence, injustice, and other wrong treatments.
- m. Every child has the rights to be taken care of by his parents, unless the regulation determines the others based on best interest for the child.
- n. Every child has the rights to obtain the protection from political abuse, participation of armed forces, participation of social unrest, participation of violence, participation of war, and sexual violence.
- o. Every child has the rights to obtain the protection from the persecution, the cruelty or the inhuman punishment.
- p. Every child has the rights to obtain the freedom based on law like as the abduction, the detention. Criminal punishment is the last effort to punish the child.
- q. Every child deprived his freedom has the rights to obtain the humanly treatment, to be housed separately from adults, to obtain the legal assistance and other helps effectively in every step of legal, to provide for his self, and to obtain the legal justice.

- r. Every child being the victim or the subject of the sexual violence and/or having problems with the law has the rights to be kept the identity secret.
- s. Every child being the victim or the subject of criminal act has the rights to get the legal assistance.

The child's rights to life, grow, develop and participate are in line with the Article 28B paragraph (2) Constitution of 1945. The article states that: *"Every child is entitled to live, grow, develop, and participate decently in line with dignity of humanity, and acquires protection from violence and discrimination"*. The child's rights to life, grow, develop and participate are also in accordance with the principles of the Convention on the Rights of the Child.

Every child has the right to have a name given by his parents and also the citizen status for the identity. The child is given the opportunity to worship, think, and express the interest and intelligence in order the child has able to develop the personality, creativity, and intellectuality. The developing of personality, creativity, and intellectuality should be under parent's guidance.<sup>83</sup>

Every child has the right to know his parents. It aims to avoid the disconnection of the lineage between the child and his parents. The child should be

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<sup>83</sup> Achmad Asfi Burhanudin, *Kewajiban Orang Tua atas Hak-hak Anak Pasca Perceraian*, <https://www.google.com/url?q=http://ejournal.kopertais4.or.id/index.php/elfaqih/article/download/648/434&sa=U&ved=0ahUKEwi975r7s7POAhVGvI8KHREAArYQFggLMAA&usg=AFQjCNEEPGIXvyh4HkXjFXxNiVK8GxieA>, (diakses tanggal 1 Agustus 2016). p. 12.

growth and treated by his parents in order the child is obedient and respectful to the parents.<sup>84</sup>

Every child should obtain the health service and social security based on the physical needs, the mental needs, the spiritual needs as well as the social needs and obtains the education and teaching which aims to develop the personality and intelligence. Every child has the rights to be heard and expressed his opinion, receive information, search for information, and provide information based on his intelligence and his age. Every child has the rights to take time to rest, play, go out for recreation, and has the creation based on his interest and capability.

The regulation also gives the protection to child with the disability like as rehabilitation, social helps, and social welfare. It aims to guarantee their humanely life, develop their confidents, develop their participation to the social life, nation and State.<sup>85</sup>

The rights above should be guaranteed by the State, the government, the community, as well as the parents and family. The aspects are part of the development to advance the life of nation and State.

The parents, family, and community have responsible to keep and maintain the child's right as well as based on the responsibilities charged by regulation. The responsibilities should be done continuously to protect the child's rights and to

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<sup>84</sup>Achmad Asfi Burhanudin, *Kewajiban Orang Tua atas Hak-hak Anak Pasca Perceraian...*, p. 12-13.

<sup>85</sup>Achmad Asfi Burhanudin, *Kewajiban Orang Tua atas Hak-hak Anak Pasca Perceraian...*, p. 13-14.

guarantee the child's growth and development physically, mentally, spiritually as well as socially.<sup>86</sup>

## 2. The Child's Needs

The child has the basic requirements that should be fulfilled to grow and develop well. According to Katz which is cited by Muhidin (2003:2-3) states that the important basic requirements for the children are the relationship between the parents and the children like as the attention and affection that continuously, protection, support, and parenting must be fulfilled by parents. According to Brown and Swanson in Muhidin (2003:3) states that the general requirements of the children are protection, affection, attention, and opportunity to participate a good experience which be able to develop a healthy mental life.

The child's needs are also mentioned by Huttman in Muhidin (2003:3). Huttman specifies the detail the child's needs as follows:<sup>87</sup>

- a. Parent's affection;
- b. Emotional stability;
- c. Understanding and attention;
- d. Growth of personality;
- e. Creative impulse;
- f. Construction of intellectual ability and basic skills;
- g. Health maintenance;

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<sup>86</sup>Achmad Asfi Burhanudin, *Kewajiban Orang Tua atas Hak-hak Anak Pasca Perceraian...*, p. 13-14.

<sup>87</sup>Abu Huraerah, *Child Abuse...*, p. 38-39.



- h. The fulfillment of food needs, clothing needs, healthy home needs;
- i. Constructive and rational Recreation;
- j. Parenting and protecting.

The child's needs divided into physical and psychological needs as well as social needs. The Children needs the nutritious foods, clothing, sanitation, and health care for assurance the physical growth. The children needs affection, understanding, creative impulse, creative stimulus, self-actualization, and intellectual development for assurance the psychological and social needs. The children need education and the basic socialization, teaching of social responsibility, social roles since, and basic skills since the early in order the child becomes a helpful community.<sup>88</sup>

Failure in the process of fulfilling those needs will impact negatively on the growth of child's physical, intellectual, mental, and social. It impacted on the physical vulnerability because of nutritional and health quality, a mental obstacle, weak in thought, and maladaptive behavior, such as autism and naughty which would encourage them to be an abnormal human and criminals.<sup>89</sup>

The government, social organization, community, and also the parents are expected recognizing the child's rights and needs and support the efforts for fulfilling. Likewise about marriage, the government's policy should be considering the child's right and needs. Thus, the children's future is not put for political needs.

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<sup>88</sup>Suharto dalam Abu Huraerah, *Child Abuse...*, p. 39.

<sup>89</sup>Abu Huraerah, *Child Abuse...*, p. 39.

## C. *Maslahah* Theory

### 1. The Concept of *Maslahah* Theory

In Islamic legal term, *maslahah* is known as *maslahah mursalah*. *Maslahah mursalah* consists of two words namely *maslahah* and *mursalah*. *Maslahah* means benefits that produce pleasure and avail or Prevention and care, such as away from disadvantages and diseases, while the word *mursalah* means off.<sup>90</sup>

*Maslahah mursalah* is a *maslahah* which does not have the basic postulate, but also there is no a cancellation. Something is considered *maslahah* but there is no firmness of the law that support or reject it. The purposes of *maslahah mursalah* are removing disadvantages and keep the benefits.<sup>91</sup>

According to Al-Ghazali, *maslahah* is keeping the objectives of Islamic law, they are keep the religion (*hifzh al-diin*), keep the soul (*hifzh al-nafs*), keep the mind (*hifzh al-aql*), keep the offspring (*hifzh an-nasl*), and keep the treasure (*hifzh al-mal*). Everything to keep the goals of Islamic law are the five is *maslahah*. On the other hands, everything to ignore the goals of Islamic law are the five is *mafsadah*.<sup>92</sup>

Al-Ghazali mentions the kinds of *maslahah* based on justified and not justified by the proposition of *syara'*. He referred to it into a three of a kind, they are:<sup>93</sup>

<sup>90</sup> Rachmar Syafi'i, *Ilmu Ushul Fiqh*, (Bandung: CV Setia Pustaka), p. 117.

<sup>91</sup> Satria Effendy, *Ushul Fiqh*, (Jakarta: Kencana Predana Media Group), p. 149

<sup>92</sup> Al-Ghazali, *al-Mustashfa min Ilm Ushu* Tahqiq Dr. Muhammad Sulaiman al-Asyqar, (Beirut/Lebanon: Al-Resalah, 1997 M/1418 H), p. 416-417.

<sup>93</sup> Al-Ghazali, *al-Mustashfa min Ilm Ushu* Tahqiq Dr. Muhammad Sulaiman al-Asyqar..., p. 414-416.

1. *Maslahah* which is justified by *syara'* (*maslahah mu'tabarah*). It can be *hujjah* and the conclusion refers to *qiyas*, namely take a law based on *nash* and *ijma'*. The example: every heady foods and drinks are forbidden (*haram*), it is analogous with alcohol.
2. *Maslahah* which is cancelled by *syara'* (*maslahat mulgah*).
3. *Maslahah* which is not justified and not cancelled by *syara'* (*maslahah mursalah*).

Al-Ghazali then divides the *maslahah* viewed in terms of the strength of its substance. He states that the *maslahah* is divided on *dharuriyah* (primary needs), *hajiyyah* (secondary needs), and *tahsiniyah* (tertiary needs).<sup>94</sup>

In terms of maintaining the goal of *syara'* to reach the *maslahah* should be at the position of *dharuriyah*. It is the highest level of *maslahah*.<sup>95</sup> The second level is the *maslahah* to be in the position of *hajiyyah*. It is not until the *dharuriyah* position, but it is necessary to obtain the benefit and to get the goodness that is expected in the future.<sup>96</sup>

The third level is the *maslahah* that does not return to the *dharuriyah* nor to *hajiyyah*. The third level is *maslahah* in position of *tahsiniyah* (beautify), *tazyiniyah* (embellish), and *taisiriyah* (simplify) to get some privileges, added value, and keeping the best attitude in daily life.<sup>97</sup>

<sup>94</sup> Al-Ghazali, *al-Mustashfa min Ilm Ushul...*, p. 416.

<sup>95</sup> Al-Ghazali, *al-Mustashfa min Ilm Ushul...*, p. 417.

<sup>96</sup> Al-Ghazali, *al-Mustashfa min Ilm Ushul...*, p. 418.

<sup>97</sup> Al-Ghazali, *al-Mustashfa min Ilm Ushul...*, p. 418.

*Hajiyah* and *tahsiniyah* cannot be used as a consideration in the determination of Islamic law, except *hajiyah* which occupies level of *dharuriyah*. *Hajiyat* is like it, according to al-Ghazali can be made *hujjah* the determination of Islamic law.<sup>98</sup>

According to the explanation of al-Ghazali, it can be concluded that al-Ghazali makes operational limitation of *maslahah mursalah* to be accepted as a basis in the establishment of law:

1. *Maslahah* should be in line with the objectives of Islamic law, they are keep the religion (*hifzh al-diin*), keep the soul (*hifzh al-nafs*), keep the mind (*hifzh al-aql*), keep the offspring (*hifzh an-nasl*), and keep the treasure (*hifzh al-mal*)
2. *Maslahah* should not be contrary to the Qur'an, *Sunnah* and *Ijma'*. *Maslahah* that does not return to maintain the objectives of the Islamic law which can be understood from the al-Qur'an, *Sunnah*, and *Ijma'* and the *maslahah* is not in line with the actions of *syara'* (*garibah maslahah*), the *maslahah* is cancelled.<sup>99</sup>
3. *Maslahah* must be position of *dharuriyah* or *Hajiyah* which be position of *dharuriyah* (primary needs) or *hajiyah* (secondary needs) is on *dharuriyah* level.  
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4. The *maslahah* should be *qat'i* or *zanny* approaching *qat'i*.
5. In certain cases necessary requirements, must be *qat'iyah*, *dharuriyah*, and *kulliyah*.<sup>101</sup>

<sup>98</sup>Lihat Al-Ghazali, *al-Mustashfa min Ilm Ushul...*, p. 420.

<sup>99</sup>Al-Ghazali, *al-Mustashfa min Ilm Ushul...*, p. 430.

<sup>100</sup>Lihat Al-Ghazali, *al-Mustashfa min Ilm Ushul...*, p. 420-421.

Based on operational requirements made by Imam al-Ghazali above seen that Imam al-Ghazali does not consider that *maslahah mursalah* as the proposition that stand alone or apart from the Qur'an, *Sunnah* and *Ijma'*. Imam al-Ghazali considers that *maslahah mursalah* just as a method of *istinbath* (discovery law), not as the proposition or a source of Islamic law.

The operational scope of *maslahah mursalah* is not mentioned by Imam al-Ghazali explicitly, but based on the results of research conducted by Ahmad Muneef Suratma Putra to the examples of the case of *maslahah mursalah* being pointed out by Imam al-Ghazali in his books, it can be concluded that the Imam al-Ghazali limits operational scope of *maslahah mursalah* namely only in the *muamalah* field.<sup>102</sup>

## 2. *Maslahah* in Marriage

*Maslahah* as explained previously is to maintain the objectives of Islamic law are five. Everything is ignoring the goals of Islamic law which are the five is broken (*mafsadah*). *Maslahah* substantially should be on the level of *dharuriyah*. The *maslahah* is expected in various aspects of life, including in terms of marriage.

The destination of marriage is forming a happy and everlasting family. Indicator of happy family is *sakinah*, *mawaddah*, and *rahmah* household, as well as the marriage can bring *maslahah* to the couple.

<sup>101</sup>Muhammad Khalid Mas'ud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shatibi's Life and Thought*, (Islamabad Pakistan: Islamic Research Institute, 1977), p. 149-150.

<sup>102</sup>Ahmad Munif Suratmaputra, *Filsafat Hukum Islam Al-Ghazali : Mashlahah Mursalah & Relevansinya dengan Pembaharuan Hukum Islam...*, p. 144.



One form of *maslahah* in households is a husband and wife can run as well as satisfy his obligations and rights in the household. Obligations and responsibilities in the household should be well understood by married couples. If the obligations and responsibilities are neglected, it will affect to the harmony in the household. So, the goal of marriage could not be realized well.

Liability and responsibility can be done well if married couples have matured physically and psychological. Married couples are not ready physically and psychological causes married couples would have difficulty in understanding the obligations and their responsibilities in the household. They will be more likely to be concerned with their selfishness rather than have to think to do their responsibilities and obligations well.

Physical and psychological maturity within marriage is also defined as the ability to get married. It was narrated in a Hadith of the Prophet Muhammad,

"يَا مَعْشَرَ الشَّبَابِ مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصَرِ، وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وِجَاءٌ". (مُتَّفَقٌ عَلَيْهِ)

"O young men, whoever among you can afford to get married, let him do so, because it can lower their gazes and guard their private parts and whoever cannot afford it, let him fast that will be a shield for him" (Muttafaq alaih)<sup>103</sup>

The hadith describes the *sunnah* to get married. The Prophet Muhammad commands to young people who have able to get married and have treasure (a living) to marry. Prophet Muhammad recommends to the young people who have not been

<sup>103</sup>Imam An-Nawawi, *Al-Minhaj Syarh Shahih Muslim ibn al-Hajjaj*, translated by. Suharlan and Darwis, *Syarah Shahih Muslim Jilid 6*, (Jakarta: Darus Sunnah Pers, 2010), p. 804.

able to get married in order to hold off getting married with fasting until he has able to marry. Indeed, fasting can keep himself from crimes caused by passion and desires.

The scholars differs in the definition of lafazh *baa'ah* in the Hadith. The opinion which is most *sahih*, that the meaning of *baa'ah* is *jima'*. The Hadith can be defined that "who would want to *jima'* because its ability to give a living family, let him get married. Whoever cannot do *jima'* because he has not been able to give the living families, while he wants to *jima'*, he should fast to curb the desire and avoid sexual crimes."<sup>104</sup>

Other opinion describes lafazh *baa'ah* is the dowry and a living or family needs. Anyone who has been able to give the reasons for *jima'* (dowry) and family needs (a living), he is recommended to be married. He has not been able to give the living families, he should fast.<sup>105</sup>

Based on *Nash* above explains that the marriage is the way to avoid sin and cohabitation. Marriage aims to form a happy family, eternal and prosperous. Marriage is only recommended to them who have been able to marry. The ability to marry means readiness for *jima'* as well as being able to pay the dowry and give the needs of family (a living).

<sup>104</sup>Imam An-Nawawi, *Al-Minhaj Syarh Shahih Muslim ibn al-Hajjaj...*, p. 811.

<sup>105</sup>Abdullah bin Abdurrahman al-Bassam, *Taudhih Al Ahkam min Bulugh Al Maram*, translated by. Thahirin Suparta, etc., *Syarah Bulughul Maram*, (Jakrta: Pustaka Azzam, 2006), p. 257 and Imam An-Nawawi, *Al-Minhaj Syarh Shahih Muslim ibn al-Hajjaj...*, p. 811.

A marriage partner is not yet able to give a living family is not recommended to get marriage, especially males. It is explained on QS. An-Nur (24):

33, Allah SWT said:

وَلَيْسَتَعَفِيفَ الَّذِينَ لَا يَجِدُونَ نِكَاحًا حَتَّى يُغْنِيَهُمُ اللَّهُ مِنْ فَضْلِهِ وَالَّذِينَ يَبْتَغُونَ  
الْكِتَابَ مِمَّا مَلَكَتْ أَيْمَانُكُمْ فَكَاتِبُوهُمْ إِنْ عَلِمْتُمْ فِيهِمْ خَيْرًا وَآتُوهُمْ مِنْ مَالِ اللَّهِ  
الَّذِي آتَاكُمْ وَلَا تُكْرِهُوا فَتِيَاتِكُمْ عَلَى الْبِغَاءِ إِنْ أَرَدْنَ تَحَصُّنًا لِيَبْتِغُوا عَرَضَ الْحَيَاةِ  
الدُّنْيَا وَمَنْ يُكْرِهْنَهُنَّ فَإِنَّ اللَّهَ مِنْ بَعْدِ إِكْرَاهِهِنَّ غَفُورٌ رَحِيمٌ

*“And those who cannot afford marriage should keep themselves chaste until Allah enriches them out of His grace. And those of your slaves who wish to enter the contract of Kitabah (emancipation by paying money), contract Kitabah with them, if you recognize some good in them, and give them out of the wealth of Allah that He has given to you. And do not compel your maids to prostitution – if they wish to observe chastity – in order that you may seek the temporary benefit of the worldly life. If one compels them, then after their being compelled, Allah is Most-Forgiving, Very merciful.”<sup>106</sup>*

The sentence of “وَلَيْسَتَعَفِيفَ الَّذِينَ لَا يَجِدُونَ نِكَاحًا” on tafsir jalalain is meant

that people who do not have the capital to get married like paying the dowry and a living required keeping herself from fornication.<sup>107</sup> The groom who does not yet have income to pay a dowry and a living is not required for him to get married until he was able to, because it can affect the harmony of couple's households. The husband is considered not responsible in fulfillment of a living to the family. So, the problems can not realize the purpose of marriage and lead to divorce.

<sup>106</sup>QS. An-Nur (24): 33.

<sup>107</sup>Al-Imam Jalaluddin Muhammad and Al-Imam Jalaluddin Abdirrahman, *Tafsir Jalalain*, terj. Najib Junaidi (Surabaya: Pustaka eLBA, 2010), h. 610

Another *maslahah* in marriage is the biological needs. Preparedness reproduction tools in sexual intercourse with the opposite type (*jima'*) should be prepared to maintain the couple's health. According to the health sciences, the readiness of a person for sexual intercourse is when he has been adulthood.

Marriage besides the biological needs, marriage is also a matter of worship and servant's obedience to the God. Islam does not explicitly restrict the marriageable age. Islam only requires specific conditions of marriage should or should not be done. Sayyid Sabiq in the book of *Fiqhussunnah* divides marriage into five laws based on certain conditions. It can be a hujjah of desired marriage in Islam. They are:<sup>108</sup>

1. Obligatory (*wajib*)

Marriage is obligatory for they who are already able to get marriage, their lust has urged and be afraid fall in thefts. Keep away from forbidden things (*haram*) is mandatory. These problems cannot be done except by marriage.

Someone who has been able to get marriage and be afraid fall in thefts, they obliged to get marriage. According to Qurthuby states that unmarried youth who has been able to get marriage and they are afraid if their selves and their religion becomes broken, While there is no way to save him except with marriage, there is no quarrel opinions about the obligation to marry.

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<sup>108</sup>Sayyid Sabiq, *Fiqhussunnah*, translated by Mohammad Thalib, *Fikih Sunnah* 6, (Bandung, PT Alma'arif: 1980), p. 22.

## 2. *Sunnah*

The marriage is *Sunnah* for they who the lust has urged, but can still hold their selves from adultery. Married for him is better than perseveres in worship. Baihaqy narrated the Hadith of Abu Umamah, that the Messenger of Allah said:

تَزَوُّجُوا فَإِنِّي مَكَاثِرٌ بِكُمْ الْاُمَمَ يَوْمَ الْقِيَامَةِ

“Marry, for I will boast of your great numbers to other ummah/members of religion in the judgment day”<sup>109</sup>

In another narration, also from Anas Ibn Malik, Prophet Muhammad shallallahu ‘alaihi wa sallam said:

مَنْ تَزَوَّجَ فَقَدْ اسْتَكْمَلَ نِصْفَ الْاِيْمَانِ، فَلْيَتَّقِ اللَّهَ فِي النِّصْفِ الْبَاقِي

“When a man marries, he has fulfilled half of the belief/ religion, so let him fear Allah regarding the remaining half.”<sup>110</sup>

These propositions explain that marriage is better for the people who have able to get marriage. The marriage is *Sunnah* while they want to intercourse and able to pay the dowry and also give a living.<sup>111</sup>

## 3. Forbidden (*Haram*)

The marriage is forbidden for the people who have not able give the dowry and a living to his wife and his lust has not urged. According to Qurthuby states that

<sup>109</sup>Hadith *hasan*: narrated by al-Baihaqi (VII/78) from *Shahabah* Abu Umamah radhiyallaahu ‘anhu. This Hadith has some *syawahid*. Look at the genealogy of al-Ahaadiits ash-Shahiihah (no. 1782).

<sup>110</sup>Hadith *hasan*: narrated by ath-Thabrani on Mu’jamul Ausath (no. 7643, 8789). Syaikh al-Albani rahimahullaah states the this hadith is *hasan* . Look at the genealogy of al-Ahaadiits ash-Shahiihah (no. 625).

<sup>111</sup>Hadlratus Syaikh K.H. Muhammad Hasyim Asy’ari, *Dhau’ al-Mishbah fi Bayan Ahkam al-Nikah...*, p. 7.



if the *mukallaf* man does not be able give his wife's needs, give the dowry and also ensure his wife's rights, he should not marry. The man is prohibited to marry until he explains his condition to his wife or until he has able to ensure his wife's rights on the household.

In addition, if the woman understands that she does not able to give the husband's rights; she is prohibited to get marriage (*haram*). The woman should explain his conditions to his husband.

#### 4. *Makruh*

The marriage is *makruh* for the man who is weak desires or he is unable to give his wife's needs. For the example, if the man wants to marry but he is unable to give a living to his wife, the marriage is *makruh*. If the man has the cost of getting married but he is weak desires, the marriage is *makruh*.

#### 5. *Mubah*

The marriage is *mubah* if the man not distressed by the reasons which oblige or forbid to marry. He does not have a plunger or any barrier to marry. He just wants to carry out biological needs and he does not worry about adultery.

The capacity of a person to marry depends on such a person's condition. The laws requires a person to be married or to postpone to get marriage. If a person has been ready physical, mentally, and materially, he is allowed to marry. However, if the marriage can cause the negative effects and disadvantages (*mafsadah*), the marriage should be postponed.

The marriage will be *maslahah*, if the marriage gets a good and healthy offspring. Marriage is the way to keep the lineage and descendants. It is based on QS.

An-Nahl (16): 72, Allah SWT said:

وَاللَّهُ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَجَعَلَ لَكُمْ مِنْ أَزْوَاجِكُمْ بَنِينَ وَحَفَدَةً  
وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ أَفَبِالْبَاطِلِ يُؤْمِنُونَ وَبِنِعْمَتِ اللَّهِ هُمْ يَكْفُرُونَ

*“Allah has created spouses from among you and created sons and grandsons for you from spouses, and gave you provision from good things. Is it, then, the falsehood that they believe in, and the blessing of Allah that they reject?”<sup>112</sup>*

Allah SWT told humanity to get the children and offspring by sexual intercourse between a husband and wife who have been appointed by Allah. The excited children and offspring are a good morals and healthy in physical children.

Marriage is only recommended for them who have matured physically and psychically. Mature psychologically was in perfect sense (adulthood). It can be analogized on QS. An-Nisa' (4):5. Allah SWT said,

وَلَا تُؤْتُوا السُّفَهَاءَ أَمْوَالَكُمُ الَّتِي جَعَلَ اللَّهُ لَكُمْ قِيَامًا وَارْزُقُوهُمْ فِيهَا وَاكْسُوهُمْ  
وَقُولُوا لَهُمْ قَوْلًا مَعْرُوفًا

*“Do not give the feeble-minded your property that Allah has made a means of support for you, and do feed them from it, and clothe them, and speak to them in fair words”<sup>113</sup>*

People who have not been perfect on his mind based on the verse are the children who have not been puberty (*baligh*) or adulthood which cannot set up his treasures because of the lost of sense like crazy as well as people who have not been

<sup>112</sup>QS. An-Nahl (16): 72

<sup>113</sup>QS. An-Nisa' (4): 5

intelligent like the wasteful. On this verse, Allah SWT forbids the guardian handing their properties, people who have not been perfect on his mind, in order the properties the treasure is not discharged or perish. It is caused because Allah SWT makes the treasures as the underpinning of His servants for the affairs of the world and his religion.

They who have not been perfect on his mind could not perform its obligations (set up the properties or treasures) because of the limited ability. Therefore, God commands the guardian who act and control it. Guardian spends the treasure to eat and their clothes, as well as using it for something according to their needs related to the religion or the world.

The verse is analogized with marriage, that both are equally concerned with the granting of responsibility to someone. Marriage is the Act of law which gives the rights and obligations for the couple. The bride and groom should be burdened with the new obligation and the responsibility in domestic life. Liability and responsibility carry on *maslahah* of their domestic life. Thus, the marriage will bring on *maslahah* when the bride and groom have been perfect in his mind or adult.

Allah forbids children who still have not been perfect on his mind to operate his treasures because it was feared they could not manage it and use it well. Similarly, the bride and groom who have not been perfect on his mind, they should not be saddled with the responsibility and the crucial affairs of the household. They are still in the time to learn and enjoy his world. If it is enforced, it is feared that married couples could not perform their duties and obligations well.

The marriage will bring to *maslahah*, if it is in line with the concepts in Islam above. According to explanations above, it can be summarized that *maslahah* in marriage as follows as:

- a. Married couples can understand and carry out the obligations and responsibilities within their households.
- b. Satisfy the married couple's rights in the household in *lahiriyyah* and *bathiniyah*.
- c. Obtain a good and healthy offspring.

These *maslahah* can be realized well if the couple marriage has had readiness and capability physically, psychically, and materially as like as the principle of marriage. Physical abilities includes reproductive tools in readiness for the fertilized or for sexual intercourse. Psychic ability is the perfection of married couple's mind. Material readiness is a fulfillment of needs of their living and other needs.



### **CHAPTER III**

#### **FINDINGS AND DISCUSSION**

##### **A. The Problems of Marriage Dispensation on Article 7 Paragraph (2) of Marriage Law**

###### **1. The Obscurity of Marriage Dispensation**

The Marriage Law determines the marriageable age; it is 19 years old and 16 years old. However it does not cover the possibility marriage under the marriageable age. It is still much done by the communities. The parents marry off their sons and daughters under the marriageable age by asking a dispensation to the court or the other authorized officials.



Principally, marriage dispensation is not recommended based on positive law and the other sciences. Dispensation is rejected by communities because it encourages the people to get marriage under the marriageable age. The marriage dispensation only gives with the specific requirements and conditions which is best interest for the husband and wife.

Legally, marriage dispensation is regulated on article 7 paragraph (2) of Marriage Law. The regulation does not give the requirements in detail the criteria of deviation and dispensation referred to the Marriage Law or the other regulation. Thus, the regulation gives opportunities to the communities to get marriage under the marriageable age without specific requirements.

In addition, phrase of ‘other authorized officials’ on Article 7 Paragraph (2) of the Marriage Law should be deleted. Permit for dispensation by other parties besides the courts is obscure regulation and inconsistent to essence of the Court’s roles on the Marriage law.

The marriage dispensation is not recommended by positive law. The regulation of marriage dispensation currently is contrary to the Article 16 Paragraph (2) of *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)<sup>114</sup>, stating that:

*The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.*

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<sup>114</sup>Ratified on Act No. 7 of 1984 on Endorsement of the Convention on the Elimination of all forms of discrimination against women.

The article explains that every State to allow marriage under the marriageable age should be forbidden, including giving a permit to. Marriage under the marriageable age only gives in exceptional circumstances. Marriage under the marriageable age can be done by statute of the court and if only it is a best interest for couple under the marriageable age.<sup>115</sup> According to CEDAW states that marriage under the marriageable age must not be declared legitimate by law.<sup>116</sup>

The States can determine about criteria of 'exceptional circumstances'. It aims to regulate marriage dispensation with clear parameters. The parameters are for example like what dispensation can be done, what the criterias in order the dispensation can be done as well as what the consequences which are charged to the couples. The parameters should be formulated clearly in order a goal to give legal certainty can be in line with the goal of deviations to the rules.

An understanding of the implementation of dispensation should be known what the purposes to be achieved by the underlying regulatory. Article 7 Paragraph (2) of Marriage Law sets about the exemption to the minimal age for marriage regulated on Article 7 Paragraph (1) of Marriage Law. The explanation of the Article 7 Paragraph (1) of Marriage Law states that the purpose to be achieved of the

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<sup>115</sup>Antarini Arna, *Problem 'Penyimpangan' dan Dispensasi dalam Pasal 7 ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*, <http://www.hukumpedia.com//8coalition/problem-penyimpangan-dan-dispensasi-dalam-pasal-7-ayat-2-undang-undang-no-1-tahun-1974-tentang-perkawinan>, accessed on November 2<sup>nd</sup> 2015.

<sup>116</sup>Subdirektorat Statistik Rumah Tangga, *Kemajuan yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia Berdasarkan Hasil Susenas 2008-2012 dan Sensus Penduduk 2010*, (Jakarta: Badan Pusat Statistika, 2016), p. 9.

marriageable age is keeping the husband's and wife's health and their children.<sup>117</sup> Thus, the dispensation should be given only if the purpose of article 7 paragraph (1) of Marriage Law can be achieved.

The Article 7 Paragraph (2) of Marriage Law does not reflect a desire to achieve the purpose of the health of husband and wife and their children as referred to the Article 7 Paragraph (1) of Marriage Law. Article 7 Paragraph (2) of Marriage Law currently opens practice of marriage with any age under 19 years old and 16 years old. It is even done with any reasons without specific parameters.

Article 7 Paragraph (2) of Marriage Law currently requires that the reasons for getting marriage dispensation are not important priority. Dispensations can be granted as long as parents allow their children to get married under the marriageable age and it gets approval from the courts or other authorized official.

The judges are given authority by regulation to decide the dispensation based on his interpretation. Based on Article 13 Paragraph (3) of Regulation of the Minister of Religion No. 3 of 1975 on Marriage Officer's Liability and the Religion Court's Layout Work in implementing Legislation for a Muslim Marriage states that:

*“Religion Court after inspecting in the trial and was convinced that there are certain features that makes it possible to give the dispensation, then the religious court grant a marriage dispensation in accordance with the determination”*

The clausal explains that consideration of giving marriage dispensation by the Religion Court based only on the judge's interpretation. The article does not set

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<sup>117</sup>Article 7 Paragraph (1) on Explanation of Marriage Law.

specific criteria or justifiable reason for the dispensation may be granted. Unregulated the parameters of dispensation creates the various interpretations to the deviation of Article 7 Paragraph (1) of Marriage Law by judges or other authorized officials. It can be known from the religion court's decision giving the dispensation for marriage based on Article 7 Paragraph (2) of Marriage Law. The variety judge's interpretations can be read from the judicial decisions, they are:

No	The Decision of Court	The Judge's Reason
1.	Religion Court of Jombang No. 0046/Pdt.P/2015/PA.Jbg <sup>118</sup>	The son has had income and worries of parents toward adultery
2.	Religion Court of Tulungagung No. 0017/Pdt.P/2016PA.TA <sup>119</sup>	The bride and the groom physically have been already to get married. The other reason is the bride has been pre-marital pregnancy
3.	Religion Court of Kabupaten Malang No. 0244/Pdt.P/2015/PA.Kab.Mlg <sup>120</sup>	Based on the assumption that the couple of marriage is maturity ( <i>mukallaf</i> ) and capable to implement their rights and duties in domestic life
4.	Religion Court of Jombang No. 0057/Pdt.P/2015/PA.Jbg <sup>121</sup>	The relationship between the couple are very close and it is lasting long enough
5.	Religion Court of Kabupaten Malang No. O248/Pdt.P/2015/PA.Kab.Mlg <sup>122</sup>	The parents and the couple worry about something happening that is contrary to religious norm and legal norms if they don't immediately get married

Table 3.1. The reasons of granting marriage dispensation by Religion Courts

<sup>118</sup> Direktori Putusan Mahkamah Agung Republik Indonesia, putusan-mahkamahagung.go.id., accessed on April 1 <sup>st</sup> 2016.	
<sup>119</sup> Direktori Putusan Mahkamah Agung Republik Indonesia, putusan-mahkamahagung.go.id., accessed on April 1 <sup>st</sup> 2016.	
<sup>120</sup> Direktori Putusan Mahkamah Agung Republik Indonesia, putusan-mahkamahagung.go.id., accessed on April 1 <sup>st</sup> 2016.	
<sup>121</sup> Direktori Putusan Mahkamah Agung Republik Indonesia, putusan-mahkamahagung.go.id., accessed on April 1 <sup>st</sup> 2016.	
<sup>122</sup> Direktori Putusan Mahkamah Agung Republik Indonesia, putusan-mahkamahagung.go.id., accessed on April 1 <sup>st</sup> 2016.	



The decision of Religion Court of Jombang No. 0046/Pdt.P/2015/PA.Jbg permits dispensation based on the reasons that the son has had income and worries of parents toward adultery. Then, the decision of Religion Court Tulungagung No. 0017/Pdt.P/2016PA.TA permits dispensation based on the reasons that the bride and the groom physically have been already to get married. The other reason is the bride has been pre-marital pregnancy. Moreover the decision of Religion Court Kabupaten Malang No. 0244/Pdt.P/2015/PA.Kab.Mlg permits dispensation based on the assumption that the couple of marriage is maturity (*mukallaf*) and capable to implement their rights and duties in domestic life.

Religion Court of Jombang No. 0057/Pdt.P/2015/PA.Jbg permits dispensation based on the reasons that the relationship between the couple are very close and it is lasting long enough. Religion Court of Kabupaten Malang No. 0248/Pdt.P/2015/PA.Kab.Mlg permits dispensation based on the reason that the parents and the couple worry about something happening that is contrary to a religious norm and legal norms if they don't immediately get married.

Based on the religion court's decisions show the uncertainty of the reason for granting the marriage dispensation. Almost all the judge's decisions are not based on crucial reasons. The granting of marriage dispensation by judges is based only on the reason like as the closeness of relationship between the bride and the groom and



worries of parents toward adultery. Even the weak economic rationale of underage bride's and groom's family is justifiable to given dispensation for marrying.

The judges rarely grant the marriage dispensation with the more crucial reasons. The formality reasons like as parent's permission and absence of prohibition for them to get married can be used as consideration for granting a marriage dispensation. Permit of marriage dispensation is rarely found on the court's decisions considering the effects of marriage under the marriageable age, consequences to the education, and the other children's rights.

The problems of marriage dispensation are not on the implementation of Marriage Law but it is caused by obscurity rule.<sup>123</sup> If the Marriage Law formulates the requirements a dispensation may be granted to imitatively by considering the children's rights, the dispensation will be only granted by careful consideration and be based only on best interest for the brides and the grooms under the marriageable age.

The absence of clear requirements of dispensation makes the problems about what the purpose will be achieved. The formulation of marriage dispensation currently does not realize the purpose of Article 1 Paragraph (1) of Marriage Law. Article 1 Paragraph (2) of Marriage Law will be a loophole to break the marriageable age without a crucial reason.

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<sup>123</sup>Antarini Arna, *Problem 'Penyimpangan' dan Dispensasi...*

Unregulated justifiable reasons to grant a marriage dispensation has reduced the marriage dispensation concept itself. The formulation Article 7 Paragraph (2) of Marriage Law shows the weakness of regulation. Its Consequences are open permission for marriage under the marriageable age without a definite age.

The dispensation on Article 7 Paragraph (2) of Marriage Law can be obtained with permission of the court or the other authorized officials.<sup>124</sup> The Marriage Law does not determine who referred to the other officials besides the court in terms of marriage dispensation permits. The division of court's authority to the other authorized officials is an inconsistency of regulation.

“The other officials” on the Article 7 paragraph (2) of Marriage Law leads to confusion in understanding the structure of the State. If the authority has given to the court, the authority should be absolutely owned by the court. The absolute authority should not be divided or be owned by others officials.<sup>125</sup> The division of absolute authority is an intervention to the powers of the judiciary.

All approval and refusal to the deviations or exceptions towards the general provisions in the Marriage Law can only be granted by the Court. It can be understood based on the anatomy of the regulations in Marriage Law as follows:<sup>126</sup>

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<sup>124</sup>Based on Article 7 Paragraph (2) of Marriage Law.

<sup>125</sup>Lihat Setiawan Widagdo, *Kamus Hukum*, (Jakarta: PT. Prestasi Pustakaraya, 2012), p. 287.

<sup>126</sup>Antarini Arna, *Problem 'Penyimpangan' dan Dispensasi...*

- a. Article 3 Paragraph (1) regulates that the principle of marriage is monogamy but on Article 3 Paragraph (2), the court has the authority to allow polygamy.
- b. Article 6 Paragraph (1), (2) and (3) requires that bride and groom are younger than 21 years old should have a permission by parent or guardian to get married but Article 6 Paragraph (5) states that the court has authority to permit the marriage if the parents or the guardian do not give permission.
- c. Article 17 Paragraph (1), the court is authorized to decide a prevention of marriage or repeal the prevention of marriage.
- d. Article 21 Paragraph (1) *vide* Article 60 Paragraph (1) and (2) states that marriage registration officers can refuse to marry a bride and a groom but Article 21 Paragraph (3) *vide* Article 60 Paragraph (3) states that the court can revoke the refusal.
- e. Article 25, the court is authorized annul a marriage.
- f. Article 38 and Article 39 Paragraph (1), the court is authorized to divorce a husband and a wife.
- g. Article 41 and 44 paragraph (2), the court is authorized to decide on consequences of the divorce.
- h. Article 47 explains that the children is younger than 18 years old and unmarried children are under parent's authority but Article 49 states that the court can revoke the parent's authority to the child then appoint a guardian for the child.

- i. Article 55 Paragraph (1) states that the origin of a child is proved by the birth certificate but Article 55 paragraph (2) states that the court is given the authority to establish the origin of a child.

Based on the court's anatomies can be concluded that the court is authorized to give an approval or a refusal of a deviation or an exemption towards the general provisions in the Marriage Law. It is because the court the only institution that can decide whether a provision should be implemented or be broken or be given exemption by considering to the justice of the law, the benefit of the law, and legal certainty. Thus, the division of court's authority to the other authorized officials on Article 7 Paragraph (2) of Marriage Law is obscurity and inconsistency regulation toward the essence of the court's role in the Marriage Law.

## **2. Marriage Dispensation Leads the Marriage Under the marriageable age**

Marriage is a covenant between a bride and a groom in family relationships. Marriage is not just biological needs but also be a media actualization of devotion.

Marriage requires preparedness in physical, mental, psychic, and financial.<sup>127</sup> If someone hasn't been able to physically, mentally, spiritually, and financially, it must first be prepared before deciding to get married. Thus the goal of marriage can be realized well.

The Marriage Law has the principle that bride and groom should have a mature body and soul. The application of the principle is limiting the marriageable

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<sup>127</sup>Achmad Ichsan dalam Siti Fatimah, *Faktor-Faktor Pendorong Pernikahan Dini dan Dampaknya di desa Sarimulya Kecamatan Kemusu Kabupaten Boyolali*, Thesis (Semarang: Universitas Negeri Semarang, 2009), p. 2.

age. It is aiming that each person who is going to get married has the readiness in thought, the readiness in the soul, and physical readiness. Bride and groom who have the readiness can increase their awareness about the purpose of marriage. It can minimize the possibility of divorce.<sup>128</sup> Thus it must be prevented a marriage under the marriageable age.

Basically the Marriage Law does not expect marriage under the marriageable age. It aims to protect the bride's and groom's rights in maintaining his health. However, the deviation on Article 7 Paragraph (2) of Marriage Law is inconsistency of Marriage Law in preventing marriage under the marriageable age. Article 7 Paragraph (2) of Marriage Law allows deviating the marriageable age. Then it leads marriage under the marriageable age.

Dispensation on Article 7 Paragraph (2) of Marriage Law currently does not reflect the values contained in the principles of marriage, especially the principle of bride and groom should have a mature body and soul. The dispensation allows the children who are not ready yet physically and soul to get marry.

Marriage under the marriageable age by dispensation is still much done by the community. Based on the annual report of Religion Court 2014, the numbers of dispensation show a significant numbers. The numbers of dispensation is shown as following:

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<sup>128</sup>Kustini, *Menelusuri Makna di Balik Fenomena Perkawinan di Bawah Umur dan Perkawinan Tidak Tercatat*, (Jakarta: Kementerian Agama RI, 2013), p. 75.



No.	Religion Court	Total	
		Registered Petitions	Terminated Petitions
1	PA Malang <sup>129</sup>	84	87
2	PA Jombang <sup>130</sup>	132	123
3	PA Kab. Malang <sup>131</sup>	419	410
4	PA Tulungagung <sup>132</sup>	228	224

*Table 3.2. The Number of Marriage Dispensation 2014*

Based on the data is noted that Religion Court register an average of more than 211 petitions per year. That amount is enough concern. It shows that the marriage under the marriageable age by dispensation is still mushrooming in Indonesia.

One of the factors causing the high number of marriage dispensation is lacking a parent's control to their children's social intercourse. The parents do not know that their children are involved a free sex. The parents suddenly get their underage daughters have been pre-marital pregnancy. This condition becomes one of the factors of marriage under the marriageable age by dispensation.

Obscurity of Article 7 Paragraph (2) of Marriage Law also a cause of marriage under the marriageable age, besides parent's control. The article gives the authority to the court and other authorized officials to give marriage dispensation. If the authority is not limited to the criteria of marriage dispensation are clear, the Marriage Law does not control and prevention to the child marriage. Marriage

<sup>129</sup> [www.pa-malangkota.go.id/](http://www.pa-malangkota.go.id/), (Accessed on September 20<sup>th</sup> 2016)

<sup>130</sup> [www.pa-jombang.go.id/](http://www.pa-jombang.go.id/), (Accessed on September 20<sup>th</sup> 2016)

<sup>131</sup> [www.pa-malangkab.go.id/](http://www.pa-malangkab.go.id/), (Accessed on September 20<sup>th</sup> 2016)

<sup>132</sup> [www.pa-tulungagung.go.id/](http://www.pa-tulungagung.go.id/), (Accessed on September 20<sup>th</sup> 2016)

dispensation that exist today makes the Article 7 Paragraph (1) of Marriage Law is meaningless.

Marriage under the marriageable age is also caused by some internal factors and external factors. The internal factors are: (1) Adolescents are vulnerable to the sexual behavior that makes them perform sexual activity before marriage, thus causing pregnancy and should be married; (2) Adolescents think emotionally to get marriage, they just think that they love each other and are ready to get married; (3) Willing to try, *organobiologic* change which is experienced by teenagers have a sense to want to know, and has a tendency of trying new things.<sup>133</sup> External factors are influenced by economic factors, education factors, engagement factors, environment factors, and customs factors.<sup>134</sup>

The prohibition of marriage under the marriageable age is not listed clearly in the Marriage Law. Marriage law just sets minimum age allowed to get married. Deviations to the marriageable age can be done with the permission of marriage dispensation by the court or other authorized officials.<sup>135</sup> The Article 7 Paragraph (2) of Marriage Law gives an understanding that marriage under the marriageable age can be done if the parent ask for marriage dispensation the judges permit to. Thus, the marriage under the marriageable age can be performed by the will of the Marriage Law itself.

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<sup>133</sup>Eva Satya Nugraha, *Studi Kualitatif: Faktor-Faktor Yang Berkaitan Dengan Pernikahan Usia Dini Pada Remaja di Desa Panyili Kecamatan Palakka Kabupaten Bone Provinsi Sulawesi Selatan, Thesis* (Makassar: Universitas Hasanuddin, 2014), p. 12.

<sup>134</sup>Achmad Ichsan dalam Siti Fatimah, *Faktor-Faktor Pendorong Pernikahan Dini...*, p. 40.

<sup>135</sup>Based on Article 7 Paragraph (2) of Marriage Law.

Marriage under the marriageable age is not recommended according to the positive law in Indonesia and other scientific aspects. The following is an analysis of the marriage under the marriageable age according to the Child Protection Law.

Children are the next generation of the nation and successor development. The child is a generation that is prepared as a subject of implementing sustainable development and control the future of a country.<sup>136</sup> The quality of a nation depends on the quality of his generations. The generations are children who have prepared mentally and physically one of them through the process of formal education.

The age of child is the child's age to develop become an adult personal and mature in body and soul. Children in the growing age should get a guarantee of protection.

Child protection aims to ensure the realization of children's rights in order to realize a quality generation, noble character, and prosperous. The government, community, and parents are obligated to protect the child's rights. Any policy involving the children should take into consideration the best interests for the children, including a marriage dispensation.

Consequences of the marriage dispensation have been worsened the conditions of the quality of child growth in Indonesia. Children lose access to education and the opportunity to be able to develop and understanding the responsibilities in marriage before performing the marriage.

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<sup>136</sup>Nashriana, "*Perlindungan Hukum Pidana Bagi Anak di Indonesia*", (Jakarta, Rajawali Pers, 2011), p. 1.

The deviation and dispensation on the Marriage Law becomes a barrier for the government to run the programs to improve the quality of child. The country will not be able to compete for several decades into the future when children do not get the best early life.

According to the CEDAW State Party Report 2005, child marriage is very plural performed in Indonesia, especially in rural areas and areas with high poverty.<sup>137</sup> Marriage age children in rural areas are one-third higher than in urban areas. *Badan Pusat Statistik* notes that in 2012, the percentage of women married before 18 years old in rural and in urban areas is 29.2 per cent and 11.8 per cent.<sup>138</sup>

Marriage under the marriageable age is the act of deprivation of child's or adolescent's rights. The children and adolescents are threatened to lose the right to grow and develop as well as participate optimally.<sup>139</sup> According to the Human Rights Law on Article 52 to Article 66 states that marriage under the marriageable age is an abuse of children's rights including the right to education, the right to think and expression, the right to express opinions and be heard his opinion, the right to rest and the right to play, expression, and creating with friends as well as the right to obtain the protection.

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<sup>137</sup>United Nations on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and CRC Recommendations on Minimum Age of Marriage Laws Around the World (November 2013).

<sup>138</sup>Subdirektorat Statistik Rumah Tangga, *Kemajuan yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia...*, p. 26.

<sup>139</sup>Kustini, *Menelusuri Makna di Balik Fenomena Perkawinan di Bawah Umur dan Perkawinan Tidak Tercatat*, (Jakarta: Kementerian Agama RI, 2013), p. 74.

Reviewed according to the parent's obligations based on the Child Protection Law, parents who marry off their children still at under the marriageable age that is disobedience to the Child Protection Law. Parents have the responsibility to nurture, maintain, educate and protect the children, grow and develop the children in accordance with the child's abilities, talents, and interests.<sup>140</sup> When the children have to be married without any reasons are best for children, indirectly the parents have been shirking their responsibility and obligation as a good parent.

Parents should not allow their children who are still under the marriageable age to get married. Article 26 paragraph (2) Point c of the Child Protection Law states that parents have the responsibility for preventing the marriage at the age of the children. The parent's obligation into the rights of the child must be obtained. It should be a shared concern to protect the rights of the child.<sup>141</sup>

Marriage under the marriageable age is the deprivation of the child's rights, especially for the girl. Marriage under the marriageable age breaks the child's rights which are guaranteed by Child Protection Law. The child's right are the education rights, the health rights, the right to be free from violence and abuse, the right to be protected from exploitation as well as the right to live with parents. They are explained as follows:<sup>142</sup>

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<sup>140</sup> Article 26 Paragraph (1) of Child Protection Law.

<sup>141</sup> Kustini, *Menelusuri Makna di Balik Fenomena Perkawinan di Bawah Umur...*, p. 75.

<sup>142</sup> Subdirektorat Statistik Rumah Tangga, *Kemajuan yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia...*, p. 9.



## 1. The Education Rights

Marriage under the marriageable age is obstructing the child's right to get formal education, play, and develop potential of the child. The children's formal education who are married under the marriageable age can be interfered and interrupted. They will be preoccupied with the affairs of the household and their children. It enables them to dropouts.

Marriage under the marriageable age blocks the child to have the insight and higher education. Study does not look at the age, but if the children are forced to get married and then they have offspring, they will focus on taking care of the family and children.

Marriage under the marriageable age forces the children to leave their formal education. Children are also blocked to get a better job because of the limitations of the level of education besides dropout. Low education means limited knowledge of the skill or creativity that allows a person to compete in the employment.<sup>143</sup>

Children have the opportunity to grow and participate in the employment either male or female. Currently, the roles of women are much needed in all aspects of life. Women should be required to have an education and an extensive knowledge. If the woman is married in a still-productive age, it will have an impact on a low level of education of women, the low participation of women in work as well as young

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<sup>143</sup>Kustini, *Menelusuri Makna di Balik Fenomena Perkawinan di Bawah Umur...*, p. 85-86.

families with low income. It has effect on family crisis and less profitable level of welfare.<sup>144</sup>

Women have the right to have a formal education and an extensive knowledge. Thus, the stereotype of women stating that women are only on duty to take care of the household and reproductive affairs should be changed. It is an effort to improve the quality of human resources, especially the women roles.

## 2. The Right to be Protected from Violence and Abuse

Marriage under the marriageable age increases the vulnerability of the girl to physically violent, sexually violent, and mentally violent. Minister of Women Empowerment and Child Protection, Yohana Yambise, states that marriage under the marriageable age will only give the negatively impact for children. Marriage under the marriageable age is vulnerable to domestic violence with the women as victims.<sup>145</sup>

Based on a study through the logistic regression test there is a relationship between someone's ages of first married with the possibility of violence in the household during the marriage. Women who marry under 20 years have a risk of twice higher experience domestic violence than women who marry at the age of 20 years and above.<sup>146</sup>

Domestic violence is dominated by a marriage under the marriageable age. According to The Head of Women's Empowerment (BPMPKB) Kota Sukabumi,

<sup>144</sup>Muhammad Nizar Fauzi, *Pandangan Masyarakat dalam Pernikahan Usia Dini...*, h.3.

<sup>145</sup><http://student.cnnindonesia.com/inspirasi/20160318142526-322-118315/fenomena-pernikahan-dini-dan-solusinya/>, (Accessed on September 9<sup>th</sup> 2016).

<sup>146</sup>Atikah Pustikasari, "Dampak Pernikahan Dini Terhadap Kekerasan Dalam Rumah Tangga Pada Istri," *Jurnal Ilmiah Kesehatan*, 5 (2013), p. 2.

Nuning Sri Utami, states that one of the causes of domestic violence (KDRT) is the marriage under the marriageable age.<sup>147</sup> It is caused married couples who are still minors have emotions that are still unstable. They are less able to control over their emotions in addressing the problems of the household.

Biologically, the children's reproduction organs are still in progress towards maturity. The children especially the girls are not ready to have a sex with the opposite kind let and also to get pregnant and give birth. If it is enforced to, it will lead to the trauma as well as the infections of the reproductive organs will harm and also endangering her soul. The relationship of sex does not reflect the value of equality in terms of reproduction. It is a form of sexual violence and coercion to the child.<sup>148</sup>

### 3. The Health Right

Health is essential for human life. Health coverage is human rights of every human and children. Everything that can affect one's health should be avoided.

Marriage under the marriageable age has a high risk to the girl's health. Women who are married under the marriageable age is vulnerable infected the diseases related with early pregnancy and childbirth. Pregnant women who are under the marriageable age of 19 years are at risk of death. Women who are pregnant at a young age are also vulnerable to the occurrence of bleeding, miscarriage, premature

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<sup>147</sup><http://nasional.republika.co.id/berita/nasional/daerah/16/02/25/o33vzw284-pernikahan-dini-disebut-salah-satu-penyebab-kdrt>, (Accessed on September 25<sup>th</sup> 2016).

<sup>148</sup>Kustini, *Menelusuri Makna di Balik Fenomena Perkawinan di Bawah Umur...*, p. 85.

in conceiving and pregnancy.<sup>149</sup> Therefore, marriage under the marriageable age as much as possible should be avoided for protecting the children's health rights.

#### 4. The Right to be Protected from Exploitation

The State protects the children from all forms of forgetfulness, violence, and exploitation. Children should not be involved in matters that may be injurious to health or education, and something can disturb the development of body, soul, and moral.<sup>150</sup> One form of exploitation to the children that are frequently performed in the community is the marriage under the marriageable age.

Marriage under the marriageable age often occurs without the child's consent. Parents force their children to get married because of economic factor, social factor as well as politic factor without deciding a best interest for the children. Children should be harmed and their children's future will be sacrificed just because their parent's decisions.<sup>151</sup>

Marriage under the marriageable age is violence socially. Violence to the child socially includes child neglect and child exploitation. The child neglect is the attitude and treatment of parents who do not give proper attention to the process of child's growing and developing. Child exploitation is the attitude discriminatory or arbitrary treatment to children conducted by family or community. Usually the children are forced to do something for the benefit of economic, social and politic

<sup>149</sup>Lina, *Akibat Menikah Dini ditinjau dari Sisi Kesehatan*, <https://www.scribd.com/doc/145287214/Akibat-Menikah-Dini-Ditinjau-Dari-Sisi-Kesehatan>, (Accessed on September 25<sup>th</sup> 2016).

<sup>150</sup>Maidin Gultom, *Perlindungan Hukum Terhadap Anak...*, p. 46.

<sup>151</sup>Subdirektorat Statistik Rumah Tangga, *Kemajuan yang Tertunda: Analisis Data Perkawinan Usia Anak di Indonesia...*, p. 10.

without regard to the child's rights to obtain the protection physically, psychically and social status.<sup>152</sup>

Children are forced to marry at the prolific ages often caused by his family's economic life is weak. Parents assume that children which are forced to marry under the marriageable age would reduce the burden on families economically. It is oriented to benefit economically by sacrificing the children's future. It includes violence to the children socially.

#### 5. The Right to Live With His Parents

Parents have important roles in their children's lives. The affection and the role of parents becomes the child's needs that must be given to grow and develop. The responsibilities in the household makes the children will be difficult to get an affection and care of their parents.

Marriage under the marriageable age separates the children from their parents. Children who are married will be placed in a new environment and relationships. They should be charged with new obligations in the household. Children who still need the role of the parents should be preoccupied with taking care of the household and her family. It inhibits the growth and development of the children.

Marriage under the marriageable age basically violates the children's rights in equality especially for the girls. Marriage under the marriageable age can also inhibit the ability of children to live in equivalent with society. Marriage under the

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<sup>152</sup>Abu Huraerah, *Child Abuse...*, p. 48



marriageable age restrict the children to obtain a formal education, health coverage, economic empowerment, the opportunity to have an income in the future, the security and the protection, the activity and the ability of girls, as well as their status and role in the household and in the community. To guarantee the children's rights, it is required an assurance that the children are not married when they was still under the marriageable age, except the marriage is the best interests for the children with consideration for the children's rights.

#### **B. Marriage Dispensation in the Perspective of *Maslahah***

Exemptions to the regulations through a dispensation are justified legally. However, the application of a dispensation must be based on clear parameters in order not to occur any contradiction between granting a dispensation with the purpose of the regulation. It includes marriage dispensations contained on Article 7 Paragraph (2) of the Marriage Law.

The rules of marriage dispensations currently will not reflect the values of *maslahah* for married couples. The rule of marriage dispensations at this time causes the problems that reduce destination of marriage itself.

The rule of marriage dispensation is contrary to the Child Protection Law. Marriage dispensation violates the child's rights and ignores the interests of the child. Marriage dispensation sacrifices the future of our children. Indirectly, the rule of marriage dispensation currently legalizes existence of marriage under the marriageable age specified by Marriage Law.

The rule of marriage dispensations encourages the teens that are still minors to involved in free sex that causes pre-marital pregnancy. They will never think that they will not be harmed by the incident because the legislation has provided facilities in the form of the rule of marriage dispensation. When they are pre-marital pregnancy while their age has not been allowed to marry, they will easily to submit the marriage dispensation.

A marriage dispensation facilitates children who are pre-marital pregnancy and indirectly it legalizes cohabitation. It is not in line with Islamic law order. Marriage dispensation sacrifices the great interests of the Islamic law to protect the children who are damaging the Islamic order by free sex and cohabitation which impact on the pre-marital pregnancy.

The rule of marriage dispensation ignores the values of *maslahah* in marriage. Marriage dispensation allows the children without the readiness and the ability to get married. Marriage besides to relate with human beings (*habluminannas*), the marriage also relates with Allah SWT (*habluminanallah*). Thus, marriage should be done with the mature preparation and well because the marriage is worship unto Allah SWT.

The marriage which brings the *maslahah* is marriage that keeps the Islamic law order. When the marriage dispensation is given freely, the interests of the Islamic law will continue to be violated.

The rule of marriage dispensation currently is not regulated by a clear formulation, so it opens practice of marriage without a definite age limitations. The

rule of marriage dispensation should consider the child's best interests. Thus, it needs the clear parameters about marriage dispensation considering the interests of children (*maslahah*).

The rule of marriage dispensation does not reflect the values of *maslahah* in marriage. *Maslahah* in marriage is if the bride and groom have been ready physically, psychic, and materially. However, the marriage dispensation allows the bride and groom under the marriageable age to get married.

A marriage couple is still under the marriageable age still often drapes their economic life to parents. When they are forced to marry under the marriageable age without financial readiness, it is feared they will not be able to afford the dowry and give the needs of their household. The bride and groom who get marriage under the marriageable age most have the lower income and educational background. With a limited education and ability, they will be looking for jobs with low pay by reason of household needs. It shows that the marriage under the marriageable age does not have the readiness materially.

The teen age according to human development is between 13 years and 18 years.<sup>153</sup> The average age of marriage dispensation which is submitted to the Court is 13 to 15 years. The age is a period of transition from the age of infancy toward adulthood. The age is considered as the age of identity search.

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<sup>153</sup>Elizabeth B. Hurlock, *Psikologi Perkembangan Suatu Pendekatan Sepanjang Rentan Kehidupan Edisi Kelima*, (Jakarta: Erlangga, 1980), p. 184.

Teens are assumed to have the ability for sexual intercourse with the opposite type, but the readiness of children in terms of reproduction with all its consequences as well as the readiness of mentally is still not too ripe. When the children are forced to sexual intercourse on the age, it is feared to be at risk to his health, especially for women.

Psychologically, children at the age do not understand completely about sex. When the children are forced to have sex with the opposite type, it will cause a prolonged psychic trauma in his soul which is tough cured. The children will more often looks glum, even occasionally they regret his life over his decision to marry.<sup>154</sup>

A teenager is a person very moody and fickle his emotions. It is important for adults to realize that moody is a normal aspect of early adolescence and most teenagers are going through this period for subsequently evolved into a competent adult human. The emotions experiences during this time can cause serious problems, especially teen women who are more vulnerable to depression.<sup>155</sup> It will certainly affect the harmony home life of married couples.

Adolescence is considered problematic age. Teenage is the period of transition from childhood, so that it allows teens have not had experience in

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<sup>154</sup>Kustini, *Menelusuri Makna di Balik Fenomena Perkawinan di Bawah Umur...*, h. 85.

<sup>155</sup>John W. santrock, *Child Development, eleventh edition*, translated by. Mila Rachmawati and Anna Kuswanti, *Perkembangan Anak, edisi ketujuh, jilid dua*, (Jakarta: Erlangga, 2007), p. 19.

troubleshooting.<sup>156</sup> According to Osterrieth states that the psychic structure of the teenager come from childhood.<sup>157</sup>

Adolescence is also considered a difficult time emotionally.<sup>158</sup> Based on the conditio, if the children married, they would have difficulty in understanding the issues in household. Married couples will experience difficulties in resolving problems in the household. They will more concern with their selfishness rather than looking for solutions. Thus, marriage under the marriageable age is very risky to the divorce.

Many the problems and risks can be posed in the domestic life of the marriage couples under the marriageable age. In terms of ability to *jima*’ or reproduction, children under the marriageable age are very not recommended for sexual intercourse with the opposite type. It is at risk of incurring diseases dangerous or even death, especially for women. It shows that children who are still under the marriageable age do not have the ability to perform sexual intercourse or *jima*’.

Marriage under the marriageable age is very risky to get offspring that are less healthy physically. The children of the married couples who are still teenagers have faced the problems even before they are born. Pregnant teens usually suffer anemia and complications associated with immaturity compared with mothers aged 20 to 24 years. Teenagers who get pregnant have twice the risk for birth a baby with

<sup>156</sup>Achmad Juntika Nurihsan dan Mubiar Agustin, *Dinamika Perkembangan Anak dan Remaja...*, p. 59.

<sup>157</sup>Achmad Juntika Nurihsan dan Mubiar Agustin, *Dinamika Perkembangan Anak dan Remaja Tinjauan Psikologi, Pendidikan, dan Bimbingan*, (Bandung: Refika Aditama, 2011), p. 58.

<sup>158</sup>John W. santrock, *Child Development, eleventh edition*, translated by Mila Rachmawati and Anna Kuswanti, *Perkembangan Anak, edisi ketujuh, jilid dua*, (Jakarta: Erlangga, 2007), p. 18.



low weight (less than 5.5 pounds) that makes the baby has a risk for physical and mental deficiency.<sup>159</sup>

Baby who successfully passes a medical danger because have a mother who was a teenager, it is not necessarily can pass a social and psychological hazards.<sup>160</sup> According to Broman and Silver states that children who were born from teenage mothers are not able to work on intelligence tests as well as children who were born from mothers with age 20 years old.<sup>161</sup>

Children who were born from teenage mothers have more behavior problems. Teenage mothers apply parenting which is more not expected and has less realistic expectations regarding the development of their children than mothers who are older.<sup>162</sup>

The rule of marriage dispensation currently gives a freedom to the judge to interpret and give legal considerations of marriage dispensations. It has impacts on the judge's decision are varied and approves marriage dispensation without any consideration of *maslahah* values. In fact, judges rarely seen refuse to approve marriage dispensation. It then leads to increase numbers of marriages under.

One of the judge's decisions that ignore the value of *maslahah* and the best interests for the children is slander in the community and worries toward adultery if they are not married. These problems are not yet at the level of *dharuriyah*. These

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<sup>159</sup>Dryfoos dan McAnarney in John W. Santrock, *Adolescence*, translated by. Shinto B. Adelar and Sherly Saragih, *Psikologi Orang Dewasa*, (Jakarta: Erlangga, 2003), p. 415.

<sup>160</sup>Brooks-Gunn dkk., Luster etc., in John W. Santrock, *Adolescence...*, p. 415.

<sup>161</sup>John W. Santrock, *Adolescence...*, . 415.

<sup>162</sup>Field and Osofsky, in John W. Santrock, *Adolescence...*, p. 415.

problems can still be overcome by providing other solutions than a child should be married.

Reason of worries toward adultery should not be used as a consideration marrying children under the marriageable age. Allah SWT commands His servant to always keep their eyes from the forbidden things. It can be used as the way to avoid all the adultery and sin. Allah SWT said on Qs. An-Nur (24): 30 and 31,

قُلْ لِلْمُؤْمِنِينَ يَغُضُّوا مِنْ أَبْصَارِهِمْ وَيَحْفَظُوا فُرُوجَهُمْ ذَلِكَ أَزْكَى لَهُمْ إِنَّ اللَّهَ خَبِيرٌ بِمَا يَصْنَعُونَ

*“Tell the believing men that they must lower their gazes and guard their private parts; it is more decent for them. Surely Allah is All-Aware of what they do”*<sup>163</sup>

In addition Allah SWT said,

وَقُلْ لِلْمُؤْمِنَاتِ يَغْضُضْنَ مِنْ أَبْصَارِهِنَّ وَيَحْفَظْنَ فُرُوجَهُنَّ وَلَا يُبْدِينَ زِينَتَهُنَّ إِلَّا مَا ظَهَرَ مِنْهَا...

*“Tell the believing men that they must lower their gazes and guard their private parts, and must not expose their adornment, except that which appears thereof...”*<sup>164</sup>

It is Allah’s command to His servants to always keep their eyes from the forbidden things for them. They are not looking something except permissible things to them. When accidental look to the unlawful without deliberate, they immediately turn his sights as quickly as possible.<sup>165</sup>

<sup>163</sup>QS. An-Nur (24):30

<sup>164</sup>QS. An-Nur (24):31

<sup>165</sup>Al-Imam Abul Fida Isma’il Ibnu Katsir Ad-Dimasyqi, *Lubaabut Tafsir min Ibnu Katsir*, translated by M. Abdul Ghoftar, etc. *Tafsir Ibnu Katsir Jilid 6*, (Bogor: Pustaka Imam Asy-Syafi’i, 2004), p. 39. Pdf.

Cohabitation is caused by encouragement lusts that arise from one's self to sexual intercourse with the opposite type, while they are still not allowed. Islam offers for youth who have not been able to get married to fast, because fasting can subdue the lust. Thus, the teens will avoid from cohabitation.

Besides the efforts of each child, these concerns can be mitigated through the active role of parents and the community in surveillance to the children's social intercourse. Positive motivation in the form of sex education to children and youth needs to be given since they are still early. Children and teenagers should be briefed about the sexual maturity and all the effects and risks.

The child is the parent's responsibility. Parents have the duty to guard and supervise their children in children's relationships with their environment especially with their opposite. Parents should always care their children by providing the freedom that is still in parental controls.

Parents should always keep in two-way communication well with their children. The roles are more needed by children than marry off them at youth age. Thus, parents can control and know condition of their children

The legislation should provide limitation and requirements to the judge in approving marriage dispensations which consider the best interests of the child and contain the values of *maslahah*. It must be poured in the regulations which expressly and clearly.

By considering the negative effects of marriage under the marriageable age, it should not be established with any reason. Marriage under the marriageable age

does not provide *maslahah* in marriage. Any regulations that allow marriage under the marriageable age should be abolished, including the regulation of marriage dispensations.

Based on the explanation above, marriage dispensation in the perspective of *maslahah* are:

- a. Marriage dispensation is closely related to the stigmatization of children who were born from pre-marital pregnancy. Marriage dispensation is intended to avoid the birth of children who were born from pre-marital pregnancy. Based on the reason, as the efforts of legal protection, marriage dispensation can be approved to marriage couples who the bride has been pre-marital pregnancy.
- b. Marriage dispensation for marriage couples who the bride has been pre-marital pregnancy with some requirements, like as it should be proved by certificate of pregnancy and health from the midwife or the obstetrician. The certificate of health contains a description that couple's health is worthy to get marriage and does not harm for the couple.
- c. Parents still have the obligations to the couples to treat and care them until their children become adult.

The possibilities of marriage dispensation above consider the values of *maslahah* and best interest for the children. The rule of marriage dispensation which is regulated clearly by considering the values of *maslahah* and best interest for the

children can realize the ratio legist of marriage dispensation itself and the intents of marriageable age on the Marriage Law.







## CHAPTER IV

### CONCLUSIONS AND SUGGESTIONS

#### A. Conclusions

Based on the results of the study as described in previous chapters, and according to the purpose and objectives of this thesis, conclusions are can be drawn as follows:

1. The rule of marriage dispensation on Article 7 Paragraph (2) of Marriage Law has the problems. They are:
  - a. Marriage dispensation on Article 7 Paragraph (2) of Marriage Law is uncertain and obscure. Marriage dispensation on Article 7 Paragraph (2) of Marriage Law does not give the clear formulations and requirements.

Unregulated the parameters of dispensation creates the various interpretations to the deviation of Article 7 Paragraph (1) of Marriage Law by judges or other authorized officials and almost all the judge's decisions are not based on crucial reasons.

- b. Marriage dispensation on Article 7 Paragraph (2) of Marriage Law leads the marriage under the marriageable age. Marriage under the marriageable age is contradict with other regulation, especially Child Protection Law. Marriage under the marriageable age is deprivation of the child's right, they are: the education right, the right to be protected from violence and abuse, the health right, the right to be protected from exploitation, the right to live with his parents.
2. Marriage dispensation in the perspective of *maslahah* should be approved only to the marriage couples which the girl has been pre-marital pregnancy. It should be proved by certificate of pregnancy and health from the midwife or the obstetrician. In addition, the parents still have the obligations to the couples to treat and care them until their children become adult.

## **B. Suggestions**

From the results of those conclusions, there are several recommendations:

1. For the parents, in order to supervise and guard her children intensively from the free association (free sex) that can lead to pregnancy outside of marriage.

2. For the society, in order to participate supervise and keep the children from the free association (free sex).
3. For the judges, in order to consider the values of *maslahah* and the best interest for children and adolescents in approving marriage dispensation.
4. For the government, in order to immediately revise the Article 7 Paragraph (2) of Marriage Law.



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Thesis Title : THE PROBLEMS OF MARRIAGE DISPENSATION  
ON ACT NO. 1 YEAR 1974 ON MARRIAGE  
ARTICLE 7 PARAGRAPH (2) IN MASLAHAH  
PERSPECTIVE

No	Day/ Date	Subject	Signature
1	Wednesday, March 16 <sup>th</sup> 2016	Proposal	
2	Monday, May 9 <sup>th</sup> 2016	Chapter I, and II	
3	Monday, May 23 <sup>rd</sup> 2016	Review of Chapter I, and II	
4	Tuesday, November 15 <sup>th</sup> 2016	Chapter III, and IV	
5	Tuesday, December 27 <sup>th</sup> 2016	Review of Chapter III, and IV	
6	Wednesday, January 4 <sup>th</sup> 2017	Abstract	
7	Friday, January 6 <sup>th</sup> 2017	Review of All Chapters	

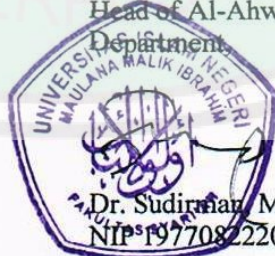
Malang, February 20<sup>th</sup>, 2017

Acknowledged by,

o.b. Dean

Head of Al-Ahwal Al-Syakhshiyah

Department



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## CURRICULUM VITAE

### Personal Detail



Full Name : CANDRA DWI IRAWAN  
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### Formal Education

1999-2004	:	State Elementary School Mojotrisno 1 Jombang
2005-2007	:	State Junior High School 1 Mojoagung Jombang
2008-2010	:	State Islamic High School Mojoagung Jombang
2012-2017	:	State Islamic University Maulana Malik Ibrahim Malang