

# Implementation of *Sadd Dzari'ah* in the Decision of Religious Courts Class I.B Blora Concerning Marriage Dispensation

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**Abstract:** *Implementation of Sadd Dzari'ah in the Decision of Religious Courts Class I.B Blora Concerning Marriage Dispensation.* This research aims to analyze the judge's considerations in granting dispensation for child marriage in the Religious Courts Class I.B Blora (case number 153/Pdt.P/2019/PA.Bla). This research is qualitative using a normative approach. Data were obtained through a review of several case examination documents, books, articles, journals, and regulations related to the research topic. According to the prevailing regulation, the age limit for marriage for both men and women is 19 years. If the man and woman have not reached the specified age, the family is allowed to apply for a marriage dispensation to the Court. This study found that the judge's considerations in deciding the case were based on the concept of *sadd al-dzari'ah* (closing the path of evil). This is because in the case submitted there is two conflicting badness. First, the badness of Early-age marriage relates to the health condition of the prospective bride and groom, which includes the health of reproductive organs, pregnancy, the expected child, and the possibility of a break in the household. Second, the bad impact that arises if the dispensation application was rejected, the two prospective brides continue to be involved in adultery. Of the two bad impacts, adultery is far worse. Based on the *sadd al-dzari'ah*, the judge, therefore, granted the dispensation request.

**Keywords:** Child Marriage, *sadd al-dzari'ah*, court decision

**Abstrak:** *Penerapan Konsep Sadd al-Dzari'ah dalam Putusan Pengadilan Agama Kelas I.B Blora tentang Dispensasi Pernikahan.* Penelitian ini bertujuan untuk menganalisis pertimbangan hakim dalam memberikan dispensasi pernikahan usia anak pada perkara nomor 153/Pdt.P/2019/PA.Bla. di Pengadilan Agama Kelas I.B Blora. Penelitian ini bersifat kualitatif yang menggunakan pendekatan normatif. Data diperoleh melalui penelaahan sejumlah dokumen perkara ditambah dengan buku-buku, artikel, jurnal, serta peraturan perundang-undangan yang berkaitan dengan topik penelitian. Menurut ketentuan perundang-undangan yang berlaku, batas usia pernikahan baik pria maupun wanita adalah 19 tahun. Jika pria dan wanita tersebut belum mencapai umur yang telah ditentukan, pihak keluarga diperbolehkan mengajukan dispensasi pernikahan ke Pengadilan. Penelitian ini menemukan fakta bahwa hakim dalam memutus perkara nomor 153/Pdt.P/2019/PA.Bla. berdasarkan kepada konsep *sadd al-dzari'ah* (menutup jalan keburukan). Hal ini dikarenakan dalam kasus yang diajukan terdapat dua *maḍlârat* yang saling bertentangan. Pertama, *maḍlârat* pernikahan usia dini yang berkaitan dengan kondisi kesehatan calon mempelai, yang meliputi kesehatan alat reproduksi,

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kehamilan, anak yang dikandung, dan kemungkinan keretakan rumah tangga. Kedua, *madlârat* yang muncul jika permohonan dispensasi itu ditolak, yakni terus menerusnya kedua calon mempelai berkecimpung dalam kubang perzinaan. Dari kedua *madlârat* tersebut, perzinaan merupakan *madlârat* yang jauh lebih besar. Oleh karena itu, berdasarkan pertimbangan *sadd al-dzari'ah*, hakim kemudian mengabulkan permohonan tersebut.

**Kata kunci:** pernikahan usia anak, *sadd al-dzari'ah*, putusan pengadilan

## Introduction

Article 7 paragraph (1) of Law number 16 of 2019 concerning Amendments to Law No. I of 1974 concerning marriage stipulates that “*marriage can only be permitted if a man and woman have reached the age of 19 (nineteen) years*”. Next in article 7 paragraph (2) it is stated that “*In the case of deviations from paragraph (1) of this article, one can request a dispensation from the Court or other official appointed by both the parents of the male and female parties*”. Furthermore, article 7 Paragraph (3) states that “*The provisions regarding the condition of one or both parents as referred to in Article 6 paragraph (3) and (4) of this Law shall also apply in the case of the request for dispensation as stated in paragraph (2) in the same article without alleviating to what is meant in Article 6 paragraph (6)*”.<sup>1</sup> The rules mentioned above provide space for a prospective bride who is not old enough to hold her marriage legally and officially in a government institution, namely the KUA.

Marriage dispensation is a concession given by the Religious Courts to prospective brides who are not old enough to carry out marriages. The marriage dispensation provision in the Marriage Act is needed as a relief given by the judge to the prospective underage bride to get married. It must be remembered, however, that the granting of the dispensation cannot be done simply but must be based on urgent reasons, a situation where there is no other alternative that requires the marriage to take place. The urgent reason is not just a claim, but must be supported by sufficient evidence. Therefore, in granting a dispensation, judges are required to provide considerations that prioritize the concept of *maslahah*

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<sup>1</sup> Indonesian Marriage Law Number 1/1974

(benefit), namely consideration of goodness and rejecting harm (*madhârat*) in society. The intended benefit is that essential and general in nature, in the sense that by granting the marriage dispensation, it can be accepted by common sense that the marriage brings benefits to both the prospective bride and groom and their respective families and avoids harm and prolonged violations of religious law.<sup>2</sup>

In 2019 the Religious Court of Blora Regency Class 1. B has decided on the case with registration number 153/Pdt.P/2019/PA. Bla. about marriage dispensation. In its decision, the Religious Court granted a marriage dispensation to the prospective bride who, at the time of submitting the dispensation, was 18 years and 1 month old. The granting of a marriage dispensation to the prospective bride, when viewed from a health point of view, is the potential to bring harm to the reproductive organs of the prospective bride. In addition, it also may have a bad impact on the future of the family relationship due to the emotional instability of the prospective bride and groom. On the other hand, however, the rejection of the marriage dispensation will have an impact on the continuity of the two prospective brides falling into the puddle of adultery. This is because the two candidates, before applying for the dispensation, often traveled and lived together and even conducted sexual relations as a married couple.<sup>3</sup>

Studies on marriage dispensation have been carried out by several people. The study can be mapped into four groups as follows: 1) Study on marriage dispensation seen from a normative legal point of view, as was done by Safrin Salam.<sup>4</sup> 2) Studies on marriage dispensation are seen from the point of view of women's protection, as conducted by Widihartati Setiasih.<sup>5</sup> 3) Studies on the arguments for granting a dispensation, as

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<sup>2</sup> Nurhidayah Nurhidayah, "Efektivitas Pemberian Dispensasi Perkawinan Terhadap Perkawinan Di Bawah Umur Di Makassar," *El-Iqthisady: Jurnal Hukum Ekonomi Syariah*, June 1, 2019, <https://doi.org/10.24252/el-iqthisadi.v1i1.9904>.

<sup>3</sup> The copy of the Religious Court's Decision Number 153/Pdt.P/2019/PA.

<sup>4</sup> Safrin Salam, "Dispensasi Perkawinan Anak di Bawah Umur: Perspektif Hukum Adat, Hukum Negara & Hukum Islam" *Pagaruyuang, Law Jurnal*, Vol. 1, no. 1 (2017): 15.

<sup>5</sup> Widihartati Setiasih, "Analisis Putusan Dispensasi Nikah di Bawah Umur dalam Perspektif Perlindungan Perempuan," *Jurnal Penelitian dan Pengabdian Kepada Masyarakat Unsiq* 4, no. 3 (September 30, 2017): 235–45, <https://doi.org/10.32699/ppkm.v4i3.428>.

done by Ramadhita,<sup>6</sup> Faiq Tobroni,<sup>7</sup> Bagya Agung Prabowo,<sup>8</sup> and Sri Ahyani.<sup>9</sup> 4) Study on dispensation regulations, as done by Mughniatul Ilma. From the explanation above, there is a gap where the dispensation needs to be seen from the aspect of *maslahah* and *mudlârat* (good and bad) through the *sadd al-dzari'ah* method. It is intending to fill the gap that this research was conducted.

## Method

This research is a normative legal study using qualitative data. The approach used is a normative juridical approach, namely a legal research method carried out by examining library materials or secondary data as research materials in the form of regulations and other literature related to the problems studied.<sup>10</sup> The primary data sources used are in the form of application letters for child marriage dispensation and the results of the case determination at the Class I.B Blora Religious Court; while the secondary data sources are scientific books, articles, journals, laws, and other regulations related to this study.

## Early-age Marriage, Supporting Factors and its Negative Impacts

Early-age marriage is a social phenomenon that does not stand alone, separated from its environment. Several factors influence the emergence of this phenomenon, each of which has different interrelationships and consequences. These factors include:

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<sup>6</sup> Ramadhita Ramadhita, "Diskresi Hakim: Pola Penyelesaian Kasus Dispensasi Perkawinan," *Journal de Jure* 6, no. 1 (June 30, 2014), <https://doi.org/10.18860/j-fsh.v6i1.3192>.

<sup>7</sup> Faiq Tobroni, "Putusan Nomor 74/PUU-XII/2014 dan Standar Konstitusional Dispensasi Perkawinan," *Jurnal Konstitusi* 14, no. 3 (January 9, 2018): 573, <https://doi.org/10.31078/jk1436>.

<sup>8</sup> Bagya Agung Prabowo, "Pertimbangan Hakim dalam Penetapan Dispensasi Perkawinan Dini Akibat Hamil di Luar Nikah pada Pengadilan Agama Bantul," *Jurnal Hukum Ius Quia Iustum* 20, no. 2 (April 2013): 300–317, <https://doi.org/10.20885/iustum.vol20.iss2.art7>.

<sup>9</sup> Sri Ahyani, "Pertimbangan Pengadilan Agama atas Dispensasi Pernikahan Usia Dini Akibat Kehamilan di Luar Nikah," *Jurnal Wawasan Yuridika* 34, no. 1 (December 15, 2016): 31, <https://doi.org/10.25072/jwy.v34i1.107>.

<sup>10</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, (Jakarta: Rajawali Press, 2001), 13-14.

## 1. Economy

In many countries, child marriage is often associated with poverty. Most child marriage is more common among poor families, although it also occurs among upper-class families.<sup>11</sup> A low and uncertain family economy is 1.75 times more vulnerable to early-age marriage than a family with an established economic level. For parents in poor families, children are the heaviest burden in the family's economic life. By encouraging their daughters to get married immediately, the burden of parents in carrying out the family economy becomes lighter because, practically, all the fulfillment of the woman's needs will be transferred to her husband's shoulders. The hope of achieving social and financial security after marriage for the daughter cause many parents to agree to early marriage. For this reason, many parents from poor families tend to agree to their daughter's request for marriage, even though their age is not legally accepted by the regulation. Early marriage has also something to do with the work of the perpetrators. Economic motives can also arise from the child and become an impetus for them to get married immediately. Through Marriage, they expect that they can achieve social status and financial security to ease the economic burden of their parents.

## 2. Culture

Among certain community groups/communities, traditions and culture have influenced the increasing number of Early-age marriage cases. This is driven by the social stigma of viewing the status of a young woman passing through puberty who has not found a life partner as a shame.<sup>12</sup> People with the views like this can be found in certain places, such as in Manado, North Sulawesi, Toraja, South Sulawesi, and Indramaty, West Java province.

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<sup>11</sup> Eddy Fadlyana and Shinta Larasaty, "Pernikahan Usia Dini dan Permasalahannya," *Sari Pediatri* 11, no. 2 (November 25, 2016): 136–41, <https://doi.org/10.14238/sp11.2.2009.136-41>.

<sup>12</sup> Rina Yulianti, "Dampak Yang Ditimbulkan Akibat Perkawinan Usia Dini," *Jurnal Pamator: Jurnal Ilmiah Universitas Trunojoyo* 3, no. 1 (March 12, 2010), <https://doi.org/10.21107/pamator.v3i1.2394>.

### 3. The Influence of Parents and the Lack of Communication in the Family

Two important elements play important role in determining the decision to marry off children, namely: parents, as the holder of power in the family, and the family, as a communication component in building and maintaining intimate relationships among family members.<sup>13</sup> Of these 2 (two) elements, parents have a very significant role in the future of their children's lives, including, in this case, the issue of marriage.

The decision to marry at a young age is also related to the background of the relationship that is built between parents and children with their circle of friends. The role of parents is to determine adolescents to undergo marriage at a young age, including delaying the age of child marriage. This is in line with research conducted by Nurhajati, et al, which revealed that the decision to marry at a young age is largely determined by the role of parents. When parents see their daughters grow up to be teenagers, they tend to marry them off immediately.<sup>14</sup> Another pattern is that due to unaffordable education costs, children drop out of school and are then married off to transfer the burden of parental responsibility to support the child to their partner.

### 4. Education

Early marriage is also influenced by factors of adolescent education and parental education. This is because education is very influential in addressing problems and making decisions, including more complex matters or psychosocial maturity.<sup>15</sup> This is in line with research conducted by Nandang Maulana which shows that young adolescents with low education have 4 times the risk of getting married early than young adolescents with higher education. On the other hand, teenagers who have a high educational background have a lower risk of getting married early

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<sup>13</sup> Irne W Desiyanti, "Faktor-Faktor yang Berhubungan Terhadap Pernikahan Dini Pada Pasangan Usia Subur di Kecamatan Mapanget Kota Manado" *Jurnal Jikmu*, vol.. 5, no. 2 (2015): 11.

<sup>14</sup> Nurhajati L., Wardyaningrum D, *Komunikasi Keluarga dalam Pengambilan Keputusan Perkawinan*. (Jakarta: Universitas Al Azhar, 2013).

<sup>15</sup> Sarwono, S, *Psikologis Remaja*. (Jakarta: Raja Grafindo Persada, 2007).

than those who have a low educational background.<sup>16</sup> From various studies, it is found that there is a correlation between the level of education and age at marriage, the higher the age of the child at marriage, the higher the education of the child and vice versa. Early marriage, according to a 2006 UNICEF study, appears to be associated with a lower level of education. In addition, parental education also has a role in decisions for their children.<sup>17</sup> Teenagers who have low-educated parental backgrounds have a greater risk of getting married early than adolescents who have high-educated parental backgrounds.<sup>18</sup>

## 5. Promiscuity

Sex out of marriage is one of the dominant factors that encourage Early-age marriage among teenagers. The reason parents approve of child marriage is often based on the fear of pregnancy out of wedlock due to promiscuity. Parents are worried that they will be disgraced because their daughter is dating a very clingy man, so she immediately marries her son. The lack of strict supervision from parents to their children causes them to fall into the abyss of promiscuity and results in many young women getting pregnant. As revealed from documents in the Registrar's Office of the Class I.B Religious Court of Blora Regency, during the period of early 2020 to August 2021, there were 237 applications for marriage dispensation that went to the Blora Religious Court; 220 applications of which have been decided have been dismissed. Of the many reasons behind the application of the dispensation, the most dominant is because the prospective bride has been conceived as a result of promiscuity which encourages them to have sex outside of marriage.<sup>19</sup>

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<sup>16</sup> Nandang Maulana Nandang Maulana, Ijun Ridwan. Ijun Ridwan., "Faktor-Faktor Yang Berhubungan Dengan Usia Menikah Muda Pada Wanita Dewasa Muda di Kelurahan Mekarsari Kota Bandung," *Jurnal Kesehatan Kartika, STIKES A. Yani*, 2007, <https://adoc.pub/faktor-faktor-yang-berhubungan-dengan-usia-menikah-muda-pada.html>.

<sup>17</sup> Juspun, L., Ridwan T., Zulkifli A., "Studi Kasus Kebiasaan Pernikahan Usia Dini Pada Masyarakat Kecamatan Sanggalangi Kabupaten Tana Toraja. Makasar," *Jurnal MKMI* 5, no. 4 (n.d.), <https://www.semanticscholar.org/paper/Studi-Kasus-Kebiasaan-Pernikahan-USia-Dini-Pada-Landung-Thaha/51a97c2ae627746ae3529e9a08708ed834179504>.

<sup>18</sup> Nandang Maulana, Ijun Ridwan., "Faktor-Faktor yang Berhubungan dengan Usia Menikah Muda pada Wanita Dewasa Muda di Kelurahan Mekarsari Kota Bandung."

<sup>19</sup> Liputan6.com, "Hamil di Luar Nikah Picu Tingginya Angka Pernikahan Dini di

## 6. The Influence of Technology

Living in the industrial era 4.0 causes us to be unable to avoid the positive/negative impacts of communication technology. The presence of the internet and social media is indeed very beneficial for modern human life; Not only it makes communication between each other more practical and easy but it also provides easy and quick access to unlimited information. Among the applications that are popular among teenagers are Facebook, WhatsApp, Instagram, Twitter, and Tik-Tok. Unfortunately, the information that is accessed by teenagers, both through the internet and social media, contains a lot of negative content that will gradually affect their mental, attitudes, and behavior. The incessant exposure to sex in the mass media causes modern teenagers to be more permissive towards sex outside of marriage.

Early-age marriage has a negative impact on the couple, family, community, and even the country.<sup>20</sup> Marriages carried out by children who are not yet mature and do not have psychological maturity will have the potential to damage their future. This is marked by the cessation of their education and the threat of economic difficulties because they do not have sufficient skills and readiness required in the labor market.<sup>21</sup> Child marriage often causes children no longer in school, because now she has a new responsibility, as a wife and mother-to-be, or as the head of the family who is expected to play a greater role in taking care of the household.

Viewed from the perspective of psychology, early-age couples can be said to be completely unprepared to navigate the ark of the household. This is because adolescence, as a transition period from childhood to adulthood, is a period of searching for identity or what is often referred to as ego identity. During this period, adolescents often experience thought balance disorders, emotional instability, anxiety, and opposition, all of

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Blora," liputan6.com, September 24, 2020, <https://www.liputan6.com/regional/read/4364887/hamil-di-luar-nikah-picu-tingginya-angka-pernikahan-dini-di-blora>.

<sup>20</sup> BeritaSatu.com, "Beragam Efek Buruk Pernikahan Dini," beritasatu.com, April 12, 2014, <https://www.beritasatu.com/news/177423/beragam-efek-buruk-pernikahan-dini>.

<sup>21</sup> Rina Yulianti, "Dampak yang Ditimbulkan Akibat Perkawinan Usia Dini" .



which have the potential to trigger conflict in the household. Married couples who have married at a young age do not know, and cannot fulfill, their rights and obligations as husband and wife. This arises because their physical and mental immaturity tends to both have high selfishness. Becoming a parent at an early age accompanied by a lack of skills to care for children as adults have can put children who are born at risk of being mistreated and/or neglected. Various studies have shown that children born from early marriage are at risk for developmental delays, learning difficulties, and behavioral disorders, and tend to become parents at an early age.<sup>22</sup> In addition, Early marriage in adolescents also tends to have a negative impact on adolescent reproductive health. Women aged 15-19 years are twice as likely to die in childbirth as those aged 20-25 years, while those under 15 are five times more likely to die. Young women who are pregnant according to research will experience several things, such as bleeding, miscarriage, and long or difficult childbirth.<sup>23</sup>

In addition to having an impact on couples who get married, marriage at a young age also has an impact on their children. The process of pregnancy requires readiness in the reproductive organs. Women getting married under the age of 20 years, when pregnant, will experience disturbances in the anatomy of the womb which will affect the development of the fetus.<sup>24</sup> Young women who are pregnant, based on research, will experience several things, such as bleeding, miscarriage, and long or difficult delivery. Even until the baby is born, other problems may still arise, such as being underweight, premature, or stunting babies. etc.<sup>25</sup> Another risk is the potential for the baby to be born with defects because the woman's pelvic space is still narrow, making it difficult for the baby to move when turning to get out. This kind of condition is even at the risk of infant death.<sup>26</sup> Many pieces of research found that girls aged 10-14 years are five times more likely to die during pregnancy

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<sup>22</sup> Eddy Fadlyana, Shinta Larasaty Pernikahan Usia Dini dan Permasalahannya

<sup>23</sup> BeritaSatu.com, "Beragam Efek Buruk Pernikahan Dini."

<sup>24</sup> Rina Yulianti, "Dampak yang Ditimbulkan Akibat Perkawinan Usia Dini"

<sup>25</sup> BeritaSatu.com, "Beragam Efek Buruk Pernikahan Dini."

<sup>26</sup> Kurdi, "Pernikahan di Bawah Umur Perspektif *Maqâshid* al-Qur'an," *Jurnal Hukum Islam*, Volume 14, Number 1, June 2016, 83.

or childbirth compared to the age group 20-24 years, while this risk doubled in the age group 15-19 years.<sup>27</sup>

Moreover, marriage at a young age will also have an impact on each of their families. If the marriage between their children is smooth, of course, it will benefit their respective parents. But if on the other hand, their household conditions are not happy and in the end what happens is divorce. This will increase their cost of living and will sever the ties of kinship between the two parties. As a further consequence, it is not uncommon for the couple to depend on their parents' help again, which means the burden on the parents becomes heavier, increasing the number of poor families that already exist.

The increase in the number of poor families will, in turn, become a burden for the government, because the government has the responsibility to prosper the lives of its people.

### **The Concept of *Sadd al-Dzari'ah* in the Islamic Legal System**

Islamic teachings (*shari'a*) require the overall benefit (*mashlahah 'ammah*) in human life. Therefore, all things that have the potential to damage the benefit must be removed.<sup>28</sup> One of the efforts to eliminate the harm is through *sadd al-dzari'ah*. The term *sadd al-dzari'ah* comes from two words, namely *sadd al-dzari'ah*. Etymologically, the word *al-dzari'ah* means “*the path that leads to something, both good and bad*”. This understanding contains a neutral connotation regardless of the results of the action. Ibn Qayyim (w: 751 H) interprets the term *al-dzari'ah* as “*what is an intermediary and a way to something*”. In his view, the definition of *al-dzari'ah* is better put forward in a general way. Thus, the term *al-dzari'ah* can contain two meanings, namely something that is prohibited, called *sadd al-dzari'ah*, and something that is required to be carried out, called *fath al-dzari'ah*.<sup>29</sup>

<sup>27</sup> Eddy Fadlyana, Shinta Larasaty, *Pernikahan Usia Dini dan Permasalahannya*.

<sup>28</sup> Liputan6.com, “Hamil di Luar Nikah Picu Tingginya Angka Pernikahan Dini di Blora.”

<sup>29</sup> Muhammad Bin Abi Bakar Ayyub Azzar'i Abu Abdillah Ibnul Qayyim al Jauzi, *I'lâmul Muqî'in*, Vol 5 (Online Islamic book, 2010), 496.

In addressing the concept of *sadd al-dzarî'ah*, the Muslims scholars are divided into three groups. The first group fully accepts it as a method of establishing law. This group was pioneered by Maliki's school and the Hambali. This group bases its opinion on the word of Allah in QS. 6 (Surah Al-An'am): 108. The second group did not fully accept it as a method of formulating a law. This group was pioneered by the Hanafi school and the Shafi'i. This group rejects *sadd al-dzarî'ah* as a method of extracting law in certain cases, but uses it in other cases. Among the Hanafi scholars who indirectly alluded to *sadd al-dzarî'ah* was Ibn Najim (w: 970 H). He proposes the fiqh rule "الضرر يزال" (the madlârat (malignance) must be removed) which is the original rule having several branches and close relationship with the *sadd al-dzarî'ah* including:

دَرَاءُ الْمَفَاسِدِ أَوْلَىٰ مِنْ جَلْبِ الْمَصَالِحِ

(Rejecting harm is more important than attracting benefit).

Imam Shafi'i (d. 204 H) used the *sadd al-dzarî'ah* method very carefully. This caution can be seen in his description in his book "Al-Umm". There he, in one case, applied the *sadd al-dzarî'ah* method, and in another discussion, in the same book, refused to use it.<sup>30</sup> The third group rejecting *sadd al-dzarî'ah* as a method of absolute law determination is Dzahiriyyah's school of thought. Their refusal is following their principle that only set the law based on textual meaning (*zâhir al-lafzh*). *Sadd al-dzarî'ah*, according to their view, is the result of reasoning against an action that is still at the level of conjecture, despite its strong suspicion level. Thus, *sadd al-dzarî'ah*, in their view, is merely a product of reason and is not based on texts directly.

Age Limit and Marriage Dispensation according to Law no. 16/2019

In Indonesia, the age limit for marriage is regulated in Law number 16 of 2019 concerning Amendments to Law number 1 of 1974. In article 7 paragraph (1) of Law number 16 of 2019, it is stated that *Marriage can only be permitted if a man and a woman have reached the age of 19*

<sup>30</sup> Hifdhotul Munawaroh, "Sadd al-Dzarî'at dan Aplikasinya pada Permasalahan Fiqih Kontemporer," *Ijtihad: Jurnal Hukum dan Ekonomi Islam* 12, no. 1 (April 10, 2018): 63–84, <https://doi.org/10.21111/ijtihad.v12i1.2584>.

(*nineteen*) years.<sup>31</sup> In addition to this regulation, Law No. 23 of 2002 on Child Protection also mentions the prohibition of child marriage. In article 26 par (1) the law stipulates that parents are obliged and responsible for (a) nurturing, educating, and protecting children (b) nurturing children according to their abilities, talents, and interests, and (c) preventing marriage at the age of children. The government's policy in setting the minimum age limit for marriage has certainly gone through a process and various considerations to make sure that both parties are truly ready and mature from physical, psychological, and mental contexts.<sup>32</sup>

Meanwhile, Islamic law does not explicitly regulate or provide a certain age limit for carrying out a marriage. However, the Shari'a implicitly requires people wanting to get married to be mentally, physically, and psychologically ready, mature, and understand the meaning of marriage. The absence of a fixed age within certain limits provides freedom for the people to adjust the matter to the situation, interests, personal conditions of the family, and or the habits of the local community. Thus it is clear that the physical and spiritual maturity of both parties is a priority in the view of religion.<sup>33</sup>

In Article 7 paragraph (2) of Law no. 16 of 2019 concerning Amendments to Law Number 1 of 1974, it is emphasized that in the case of deviations from paragraph (1) of this article, a dispensation can be requested from the Court or other official appointed by both parents of the male and female parties, with very urgent reasons accompanied by sufficient supporting evidence. Furthermore, paragraph (3) explains that the granting of dispensation carried out by the Court must listen to the opinions of the two prospective brides who will carry out the marriage.

That means the deviation in paragraph (1) of this article is a situation where the male and female parties are not yet 19 years old. Meanwhile,

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<sup>31</sup> Copy Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

<sup>32</sup> Rini Fidiyani, "Kerukunan Umat Beragama di Indonesia (Belajar Keharomonisan dan Toleransi Umat Beragama di Desa Cikakak, Kec. Wangon, Kab. Banyumas)," *Jurnal Dinamika Hukum* 13, no. 3 (September 15, 2013): 468–82, <https://doi.org/10.20884/1.jdh.2013.13.3.256>.

<sup>33</sup> M. Cholil Nafis, *Fikih Keluarga: Menuju Keluarga Sakinah, Mawaddah, Wa Rahmah, Keluarga Sehat, Sejahtera, dan Berkualitas*, (Jakarta Selatan: Mitra Abadi Press, 2009), 63.

what is meant by 'Court' appointed by both male and female parents is “*for those who are Muslim, they must apply for a dispensation to the Religious Court and Christians, apply to the District Court*”. Although the law provides an open way for minors to apply for a marriage dispensation, the provisions of Article 7 paragraph (2) do not explicitly stipulate the reasons for granting dispensation in detail. Probably, this is because the reasons for granting marriage dispensations are varied in line with the needs and rapid development of society. Thus, the solution is left entirely to the court through the facts revealed before the trial. It is the court that will examine and explore the most appropriate reasons to be used as the basis for considering the granting of a dispensation.

### **Marriage Dispensation in the Determination of Case Number 153/Pdt.P/2019/PA.Bla**

The stipulation of Case Number 153/Pdt.P/2019/PA. Bla was decided in the assembly deliberation meeting on Wednesday, November 27, 2019 AD, which coincided with the 29th of Rabi'ul Awwal 1441 Hijriyyah. In the meeting, M. Syaifudin Zuhri, and M. Zubaidi, and Farhan Munirus Su'aidi, respectively as Member Judges.

The decision was motivated by the application for a marriage dispensation submitted by a father with the initials DM (48 years old), a resident of Dukuh Ngawen Rt. 07 Rw. 05 Jepon Village, Jepon Sub-district, Blera Regency. In this case, DM has appointed Masirin, an advocate whose office is in Karangtalun Village, Rt. 08 Rw. 01 Banjarejo District, Blera Regency, as his proxy. Mr. DM (applicant) applied on November 11, 2019, and was registered at the Blera Religious Court registry with registration number: 153/Pdt.P/2019/PA. Bla.

In his statement, the applicant (Mr. DM) was married to a woman with the initials ID on August 14, 2000, at the Office of Religious Affairs (KUA) Jepon District, Blera Regency, as stated in the Marriage Certificate No. 307/45/VII/2000. The marriage was blessed with two children, namely: 1) IS (18 years 1 month), and 2) MN (17 years 7 months). The two children went with their mother after the applicant officially divorced his ex-wife on April 8, 2013, with Divorce Certificate Number: 674/AC/2013/

PA. Bla. On December 14, 2013, the applicant remarried a woman named SL at KUA Kapas District, Bojonegoro Regency, East Java as stated in the Marriage Certificate Number: 403/07/XII/2013 dated December 16, 2013.

The application for a marriage dispensation is in the context of the applicant wanting to marry off his daughter, IS, with his prospective husband, AS, a resident in Hamlet Bringin Rt. 01 Rw. 01 Sumberagung Village, Banjarejo District, Blora Regency. The husband-to-be lives with his mother SP (49 years old) together with her new husband (ND) who is married at the KUA, Banjarejo District, Blora Regency after her official divorce at the Blora Religious Court with her ex-husband (SM) in 2010 under the Marriage Certificate Number: 273/07/VI/2011 on June 6, 2011. According to the applicant's plan, the marriage of his daughter, IS, to his prospective husband AS will be carried out and registered before the Marriage Registrar (PPN) KUA Jepon District, Blora Regency, Central Java.<sup>34</sup>

Viewed from both Islamic Law and the applicable legislation, the stipulation of Case No. 153/Pdt.P/2019/PA. Bla regarding the application for a marriage dispensation has fulfilled all the elements, requirements, and pillars of marriage, except that the minimum age limit for marriage has not been fulfilled. as regulated in Law number 16 of 2019. The Law was ratified by Joko Widodo, the President of the Republic of Indonesia, on October 14, 2019, which was then followed up by a Circular Letter from the Directorate General of Islamic Community Guidance, Ministry of Religion of the Republic of Indonesia number B-4345/DJ.III/HK.001./10 /2019 concerning the Circular for the Enforcement of Law Number 16 of 2019. With this provision starting from October 15, 2019, Prospective grooms and brides who are less than 19 years old must obtain a dispensation permit from the Religious Courts. Whereas, the stipulation of Case No. 153/Pdt.P/2019/PA. Bla was decided on Wednesday, November 27, 2019 AD, which means that Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage has only taken effect for approximately one month.

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<sup>34</sup> Copy of Putusan Pengadilan Agama Nomor 153/Pdt.P/2019/PA.Bla

Furthermore, according to Law number 16 of 2019, deviations can be granted for prospective grooms/brides under the age of 19 (nineteen) years by submitting an application for dispensation by the parents of one or both parties. For couples who are Muslim, the application is submitted to the Religious Court while for adherents of other religions submitted to the District Court.<sup>35</sup> Although the provisions in article 7 paragraph (1) state that marriage is permitted if both the prospective bride and groom are 19 years old, the next paragraph states that “In the event of a deviation from the age provisions as referred to in paragraph (1), the parents of the male and/or the woman's parents may request a dispensation from the Court on very urgent grounds accompanied by sufficient supporting evidence”. This shows that the parties involved can waive the minimum age requirement for marriage.

What is meant by the phrase “*very urgent reasons*” in Article 7 paragraph (2) is a situation where there is no other choice and it is very forced to hold a marriage. The urgent reason cannot be just a claim, but there must be sufficient supporting evidence. Whereas what is meant by “*sufficient supporting evidence*” is a certificate proving that the age of the bride and groom is still under the provisions of the law and a certificate from a health worker supporting the parents' statement that the marriage is very urgent to be carried out.<sup>36</sup>

In the case that was decided through the Determination of Case No. 153/Pdt.P/2019/PA. Bla there were several urgent reasons namely: 1) the prospective bride has been proposed to by the prospective groom. 2) The two prospective brides are very close and often go together and the prospective groom often stays at the prospective bride's house or vice versa. In fact, despite being advised, the prospective groom does not want to go home and instead stays at the Petitioner's house since September 2019. The Petitioner, therefore, was very worried that both of them would do things prohibited by Islamic law. 3) The Petitioner is

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<sup>35</sup> Copy of Keputusan No 006270 A, Penjelasan Atas Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

<sup>36</sup> Copy of Keputusan No 006270 A.

urged by the Village apparatus to immediately marry off his daughter to avoid gossip among the neighbor around.<sup>37</sup>

Viewed from the prevailing laws and norms, the urgent reason for the application for a marriage dispensation by Mr. DM bin Kasiman for his daughter is acceptable. Apart from that, in the Determination of Case No. 153/Pdt.P/2019/PA. Bla regarding the application for marriage dispensation, the applicant has included written evidence in the form of a rejection letter from the KUA Jepon, photocopy of ID card, marriage certificate, family card, birth card, including a certificate from the Blora Regency Government, Population and Civil Registrar.<sup>38</sup> In addition to this written evidence, the applicant also presented two witnesses to corroborate his application before the Religious Court. The two witnesses took an oath in advance according to the procedure, so that they conveyed what they saw and experienced.<sup>39</sup>

Based on the evidence presented by the Petitioner to the Religious Court above, the judge then summons the two prospective brides to present their opinions or statements before the Court. The prospective bride (18 years 1 month) explained before the Panel of Judges that she wanted to marry the prospective groom because they already loved each other, and both of them had had sexual relations like husband and wife when the prospective groom stayed at his house. In addition, between the two there is no familial relationship that can prevent the marriage.<sup>40</sup>

Similarly, on the same occasion, the prospective groom, AS (20 years), explained that he was ready to marry the prospective bride because they love each other, and have been dating for a long time, and had had sex like a married couple, even though she was not pregnant. In addition, between the two parties, there is no familial relationship that can damage the marital relationship, and the prospective groom already has a fixed salary of Rp. 1.500.000,- (one million five hundred thousand rupiah).<sup>41</sup>

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<sup>37</sup> Copy of Keputusan Pengadilan Agama Blora No. Number 153/Pdt.P/2019/PA.Bla

<sup>38</sup> Copy of Keputusan Pengadilan Agama Blora No. Number 153/Pdt.P/2019/PA.Bla

<sup>39</sup> Copy of Keputusan Pengadilan Agama Blora No. Number 153/Pdt.P/2019/PA.Bla

<sup>40</sup> Copy of Keputusan Pengadilan Agama Blora No. Number 153/Pdt.P/2019/PA.Bla

<sup>41</sup> Copy of Keputusan Pengadilan Agama Blora No. Number 153/Pdt.P/2019/PA.Bla



Based on the description, the Class I.B Blora Religious Court, in the Assembly Deliberation Meeting, compiled the arguments as the basis of consideration in deciding Case number 153/Pdt.P/2019/PA. Bla. These considerations include 1) the unsuccessful effort to make peace through mediation; 2) the existence of written evidence; 3) the statements from the bride and groom, the parents, and two witnesses having sworn an oath according to their religious procedures. 3) the fact that the bride and groom are both physically and spiritually ready to get married.<sup>42</sup> Based on these considerations, the Panel of Judges of the Class I.B Religious Court of Blora Regency decided to grant dispensation to IS (18 years 1 month to marry AS (20).

### **The Determination of Case Number 153/Pdt.P/ 2019/PA.Blora. in *Sadd al-Dzari'ah's* Perspective**

Taking a lesson from case number 153/Pdt.P/2019/PA. Bla regarding the request for a marriage dispensation, there are several interesting things that the author needs to point out here, namely:

#### **1. Marriage Category**

The Marriage requested for dispensation to the Blora Religious Court can be classified as early-age marriage. This is because one of the couples who will marry, namely the prospective bride (IS), is still 18 years and 1 month old. Such has not fulfilled the provisions of Law Number 16 Years 2019 Article 7 paragraph (1) which states that "*Marriage can only be permitted if a man and a woman have reached the age of 19 (nineteen) years.* Moreover, if viewed from the perspective of Article 1 of Law Number 23 of 2003 concerning Child Protection, the marriage can also be referred to as child marriage.

#### **2. Related Factors**

Considering the information or facts revealed in the trial, the author can identify several factors that encourage the application of marriage

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<sup>42</sup> Copy of Keputusan Pengadilan Agama Blora No. Number 153/Pdt.P/2019/PA.Bla

dispensation above. These factors include the following:

### **a. Low Education Level**

The state of not going to school or dropping out of school, both at the age of compulsory schooling and beyond, is one of the factors that encourage the practice of marriage at an early age. This also happened in the case above where the two prospective brides, namely IS and AS, based on the evidence before the Religious Courts, had a low educational background. Both only graduated from Junior High School (SMP) and subsequently did not continue to the next level of education. Whereas the government, through the law of the national education system, has required every citizen to take a 12-year study period or at least to the level of Secondary Education (SMA/SMK). After dropping out of school, AS (20 years), the prospective groom, filled his time by working as a construction worker, while IS (18 years 1 month) just stayed at home, helping his parents.

### **b. Promiscuity**

As it was revealed in the court hearing, the two prospective brides admitted that they had often had sexual intercourse like husband and wife. For Indonesians who are predominantly religious, relationships outside of marriage are a disgrace that can only be removed by marrying off the two perpetrators. In such a position there is no other alternative for their parents other than to marry them, inspite the prospective bride was still at an early age. The decision to get married immediately is also in line with the wishes of the two prospective brides (IS and AS) where, by marriage, they would no longer violate religious norms and be able to channel their biological desires legally under a marriage bond.

### **c. Lack of Family Communication**

It was also illustrated in the case above, that each prospective bride and groom had come from a broken home family, considering that their respective parents had divorced. Within this situation, they practically

got less attention and guidance from their parents, causing them to fall into the abyss of promiscuity, and conduct things that violate social, legal, and religious norms.

Furthermore, as it can be comprehended from the case, the Judges, while examining Case Number 153/Pdt.P/2019/PA. Bla, seemingly, was faced with a dilemmatic situation. This is because either accepting or rejecting the application, the judge would still be faced with the risk of a difficult choice. On the one hand, if they approved the request, the two prospective brides (IS and AS) will be saved from continuing adultery. But, under the same policy, this means that the judges allowed early-age marriage with all of its negative risks. On the other hand, if they rejected the application, child marriage could be prevented to occur; But, the policy would encourage the couple to continue committing adultery. Faced with this dilemmatic situation, the judge seemed not only to stick to fiqh rules which read *الضرر يزال* (*the harm or damage must be removed*) but also to adhere to other rules which read:

إِذَا تَعَارَضَ مَفْسَدَاتَانِ رُعيَا أَظْمَهُمَا ضَرَرًا بِأَرْتَابِ أَخْفِهِمَا

*“If two infamies collided, then what must be paid attention to is the one with the bigger risk than the one with the lighter.”*

Using the fiqh rules above, the judge then decided to approve the request with the consideration that the *madlârat* (bad risk) that arises from early-age marriage is much lighter than the *muḍlârat* that arises due to violations of legal and religious norms.<sup>43</sup> This is because the disadvantages of Early-age marriage are still conjecture (*dzan*) and do not necessarily occur as many facts prove that early-age marriages do not necessarily result in the risk as imagined. Whereas violations of legal and religious norms will have an impact on prolonged adultery, which not only harms the perpetrator but also the family's reputation,

<sup>43</sup> About the harm or damage must be removed, see Abdul Qodir Zaelani, Khairuddin, and Rudi Santoso, “Understanding Civil Society Through the Perspective of *Ushul Fiqh* (Basic Principle in Islamic Law):” (1st Raden Intan International Conference on Muslim Societies and Social Sciences (RIICMuSSS 2019), Bandar Lampung, Indonesia, 2020), <https://doi.org/10.2991/assehr.k.201113.012>.

including the surrounding community. In fact, in Islamic teachings, adultery is one of the major sins that must be avoided and is threatened with severe punishment.<sup>44</sup> Thus, the *madlârat* from the rejection of the marriage dispensation will be much greater than the *madlârat* that arises as a result of the granting of the request for Early-age marriage. Besides, the *madlârat* that occur if the request was not granted would have been certain and had even occurred.

By considering the good and the bad effects (benefits and *madhbârat*) that may arise as a logical consequence of the decision made, the panel of judges in Blora PA finally decided to accept the application submitted by Mr. DM and gave dispensation to the marriage of his daughter, IS, to AS. With the approval of the request, the judge, then, had closed *wasîlah* (the path) for the two prospective brides to commit continuous adultery. Closing or breaking the *wasîlah* (the path) to adultery, in the theory of the *ijtihâd*, is called *sadd al-dzari'ah*, a method that in essence is a preventive measure to close the *wasîlah* (the path) towards infamy.

## Conclusion

The judge's decision, in case number 153/Pdt.P/2019/PA.Bla. regarding the application for marriage dispensation, has been carried out based on the concept of *sadd al-dzari'ah* (closing the path of infamy). This is because in the case submitted there are two conflicting *madlârates*. First, the *madlârat* that may arise if the marriage application is accepted, ranging from those related to the health of the bride's reproductive organs, the possibility of pregnancy disorders, the health of the child being conceived, to the possibility of a household fracture. Second, is the *madlârat* that may arise if the dispensation application is rejected, namely the continuous involvement of the bride and groom in the puddle of adultery. Of the two *madlârat*, adultery has a far bigger *madlârat*. Therefore, by applying *sadd al-dzari'ah* method, the judge then approved the request. The judge's decision to accept the request, from the perspective of *sadd al-dzari'ah*, was right and full of wisdom.

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<sup>44</sup> Muhammad bin Ismail bin Ibrahim bin al-Mughirah al-Ja'fi al-Bukhari, *Shahîh al-Bukhârî*, (Riyadl: Dar al-Hadlarah, 2015) p. 1.083

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