

## Expediting Marriage Dispensation: Balancing Child's Best Interests with Expediency Principle

Andi Tenri Sucia<sup>1</sup>, Farida Patittingi<sup>2</sup>, Marwah<sup>3</sup>

<sup>1</sup> Faculty of Law, Universitas Hasanuddin Makassar, Indonesia. E-mail: [suciatenri@gmail.com](mailto:suciatenri@gmail.com)

<sup>2</sup> Faculty of Law, Universitas Hasanuddin Makassar, Indonesia. E-mail: [faridapatittingi@gmail.com](mailto:faridapatittingi@gmail.com)

<sup>3</sup> Faculty of Law, Universitas Hasanuddin Makassar, Indonesia. E-mail: [marwab@gmail.com](mailto:marwab@gmail.com)

**Abstract:** This study analyzes the application of the expediency principle in the Marriage Dispensation Decision in relation to the Principle of the Best Interest of the Child. Using an empirical legal research approach, the study gathers primary data from Pangkajene and Barru Religious Courts (Class II), Maros Religious Court (Class 1B), Makassar Religious Court (Class 1A), Barru District Court (Class II), and Makassar District Court (Class 1A Special). Descriptive qualitative analysis of the data reveals that the application of the expediency principle is linked to the Best Interest of the Child principle in the Pangkajene and Barru Religious Courts. However, there is room for improvement as judges often overlook important information regarding the child's background, needs, and problems, resulting in suboptimal cooperation across sectors for preventing underage marriage. In contrast, the Maros and Makassar Religious Courts have effectively balanced the child's best interests and expediency, leading to a decline in underage marriages. These courts prioritize the child's best interests and consider the law to ensure the child's well-being and continuity of life. The findings highlight the challenges and opportunities for improving the application of the expediency principle in Marriage Dispensation, ultimately benefiting the protection and welfare of children involved.

**Keywords:** Principles; Child; Dispensation of Marriage.

### 1. Introduction

According to the Central Statistics Agency (BPS), early childhood in Indonesia will reach 30.83 million in 2021. This figure is equivalent to 11.35% of Indonesia's current population, who are the next generation of the nation. Therefore, children must get the fulfillment of their rights to education, health, proper care and protection from all forms of violence, including protection from forms of violence, including protection from the practice of child marriage, because this will threaten their quality of life in the future.<sup>1</sup>

The development of human resources is the main target of development goals, because humans are the subject and at the same time the object of development.<sup>2</sup> Humans are God's most perfect creatures created in the best form. In addition, humans are social beings who have higher (perfect) dignity than other creatures. Therefore, among the nature possessed by humans from birth is to live in other social environments in society. One of the forms of human life is the biological need in the association of husband and wife, as well as aiming to fulfill the hope of obtaining physically and spiritually healthy offspring.<sup>3</sup>

<sup>1</sup>Mardi Candra, *Renewal of the Marriage Dispensation Law in The Legal System in Indonesia*, Kencana, Jakarta, 2021, p. Xiv (Foreword by the Ministry of Women's Empowerment and Child Protection).

<sup>2</sup>Muhammad Daud Ali, *Position in Islamic Law Development of Indonesian Law*, Risalah Foundation, Jakarta, 1984, p. 27.

<sup>3</sup>*Ibid.*, p. 28.

Increasing population growth implicitly requires the need for laws and government regulations governing marriage so that in a programmatic way, the purpose of a marriage can support the success of development.

Looking at the general results of observations, it is suspected that the number of young marriages since 2009 has tended to increase. Tens of thousands of Indonesian children enter into underage marriages every year, and the number continues to increase from year to year. In fact, according to data from the National Socioeconomic Survey (SUSENAS), more than 25 percent of Indonesian women aged 20-24 years have been married before they were 18 years old, equivalent to 3,695 girls per day in Indonesia. Of the total girls, 292,663 were married before the age of 16 and 110,198 before the age of 15. <sup>4</sup>Indonesia is the 2nd highest country in ASEAN in terms of the total number of child marriages after Cambodia, and ranks 7th highest in the world for the absolute number of child marriages.<sup>5</sup>

The rate of child marriage varies significantly in different regions, with an average of 8 percent in Sumatra to 16 percent in Kalimantan in 2018. <sup>6</sup>National Socio-Economic Survey (SUSENAS) data shows that child marriage is most prevalent in West Sulawesi, South Kalimantan, Central Java, East Java. At this time, if all parents in Indonesia obey Law Number 16 of 2019 concerning amendments to Law Number 16 of 2019 concerning Marriage, UNICEF estimates that cases of dispensation of marriage will increase by 2,000,000 (two million) cases every year. We can take a case example based on the website news page on the Kompas.com website dated February 10, 2021, <sup>7</sup>which had shocked the public, namely the news of the marriage of a teenage couple that took place in Central Lombok. In this case, the married couple were both underage, namely MI and AN who were 16 years old. When met by Kompas.com, the bride, AN, said she married because she was afraid of her mother after being scolded for staying at a friend's house. In other cases like this story it may have happened more than 10 years ago, but of course it is still fresh in some people's memories. Pujiono Cahyo Widiyanto, also known as Syekh Puji, in August 2008 proposed to a 12-year-old girl from Semarang with the initials LU. At that time, Pujiono was 43 years old, while LU was still in elementary school. Thus, the increase in child marriage is due to, among others, economic reasons, unwanted pregnancies, bored studying from home and avoiding adultery.

Chronologically, requests for dispensation from marriage to religious courts show an increase from year to year, in 2018 there were 14,547 cases, then in 2019 it increased sharply to 25,281 cases. Then in 2020 it increased again to 64,225 cases, in 2021 there were 62,919 cases, and in 2022 it decreased to 35,244 cases. There has been an increase in child marriage cases even though the government has made various efforts including revising Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. Since the amendment of the Law on Marriage, the number of marriages has even

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<sup>4</sup>Mardi Candra, *Renewal of the Marriage Dispensation Law in The Legal System in Indonesia*, Kencana, Jakarta, 2021, p. 2.

<sup>5</sup>Mardi Candra, *Aspect Indonesian Child Protection ; Analysis About Underage Marriage*, Kencana-Prenada Media Group, Jakarta, 2018, p. 33.

<sup>6</sup>Data source : Surveys National Social Economy ( Susenass ) 2018. Ministry of National Development Planning and United Nations Children's Fund (2019). *Achieving The SDGs For Children In Indonesia: Emerging Findings on Trajectories For Reaching The Target*. Jakarta: BAPPENAS and UNICEF.

<sup>7</sup><https://lifestyle.kompas.com/read/2021/02/10/151045820/selain-aisha-weddings-ini-6-cases-pernikahan-anak-yang- pernah-viral?page=all> accessed on 28 August 2022 at 15.00 WITA.

increased. In 2019 there were 25,281 cases recorded, then in 2020 there were 64,225 cases of dispensation of marriage.<sup>8</sup>

Based on these data it was found that child marriage has not been followed up with effective prevention. In addition, it can also be understood that the number of child marriages based on the granting of a marriage dispensation from the judiciary is no more than the total number of child marriages in Indonesia. Thus, 95 percent of child marriages in Indonesia are *illegal*, then in the name of interests and needs, there is no small amount of legal smuggling by making legal efforts through applications for its marriage in court.

The increasing number of child marriages is, of course, very worrying and a bad president for the future of the Indonesian nation, considering the negative impacts caused by child marriage are quite a lot, such as the lack of educational age for Indonesia's younger generation, because many children drop out of school and are even reluctant to continue their education. . This condition is very concerning due to the declining quality of life for some of Indonesia's younger generation, such as not having skills/knowledge. This is directly proportional to the increase in the poor population in cities and villages at a young age. Child marriage has also resulted in many health risks experienced by women, such as the risk of death for mothers and babies. Besides that, the high number of child divorces caused by domestic violence (domestic violence) is due to the absence of psychological-physical, mental readiness, lack of maturity of sociological knowledge in dealing with the institution of marriage.

The high number of child marriages and the negative impacts they cause are enough reasons to reduce the number of child marriages. Based on the description above, the authors are interested in examining the problem regarding the principle of expediency in the decision on dispensation of marriage associated with the principle of the *best interest of the child*.

## 2. Method

Type research used in study this, is study empirical is something method study working law for could look environmental laws Public with use case.<sup>9</sup> Approach Research used in study empirical that is Approach Structural that is something approach to it works law in society. Theory structural functional look Public as a whole working system for create order and stability social.<sup>10</sup>

The data that has been collected is analyzed qualitatively for answer the problems and objectives to be achieved in research. Next served in a manner descriptive, that is delivery from results analysis by selecting data that describes the actual situation. Explain and decipher which related with study this. So that the problems in this thesis can be drawn a conclusion.

## 3. Results and Discussion

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<sup>8</sup>Case Data Center Religious Courts, Directorate General of the Religious Courts of the Supreme Court of the Republic of Indonesia, accessed on the day Friday August 26, 2022.

<sup>9</sup>Peter Mahkum Marzuki, *Legal Research*, Kencana Prenada Media Group, Jakarta, 2011, p. 24.

<sup>10</sup>Irwansyah, *Penelitian Hukum (Pilihan Metode & Praktik Penulisan Artikel)*, Mitra Buana Media, Yogyakarta, 2020, hal. 42

### **3.1 Judge 'S Decision In Case Reflecting Marriage Dispensation Principle *The Best Interest Of The Child***

The Religious Courts are one of the legitimate Indonesian State Courts, which have authority in certain types of civil cases for Muslims in Indonesia. The Pangkajene Religious Court, the Barru Religious Court, the Maros Religious Court and the Makassar Religious Court serve as courts of first instance between people of the Islamic faith in the fields of marriage, inheritance, wills, grants, endowments, shadoqah and sharia economics.

One of the fields of marriage which is the authority of the religious court is the case of dispensation of marriage. The principle stated in the law is the maturity of the marriage age, meaning that the prospective bride and groom must be mentally and physically mature before getting married. In Law no. 1 of 1974 Jo. Law No. 16 of 2019 Article 7 paragraph (1) states the age limit for marriage, namely if the prospective bride and groom have reached the age of 19 years.<sup>11</sup>

Dispensation for marriage can be submitted to the Religious Court for those who are Muslim and to the District Court for those who are non-Muslim. The application for dispensation for marriage is submitted by one or both parents/guardians of the prospective bride and groom. The domicile of the court must match the domicile of one of the parents/guardians of the prospective bride and groom. When applying for dispensation, there are administrative requirements that must be completed, namely: application letter, photocopy of KTP of both parents/guardians, photocopy of Family Card, photocopy of KTP or Child Identity Card, and/or child birth certificate, photocopy of KTP or Child Identity Card and/ or the birth certificate of the prospective husband/wife, and a photocopy of the child's last educational certificate and/or a certificate of still schooling from the child's school.<sup>12</sup>

Marriage dispensation must be submitted for urgent reasons. An urgent situation is defined as a situation where there is no other choice and you are forced to get married. Consideration of these reasons must be accompanied by sufficient evidence, namely a statement proving that the age of the prospective bride and groom is still below the statutory provisions. For example, if the emergency situation is pregnant out of wedlock, you can submit proof of a certificate from a doctor or medical staff in the form of a pregnancy test. Therefore, judges can play an active role in preventing child marriage in a series of dispensation application processes, namely taking a persuasive approach with the prospective bride's parents.<sup>13</sup> Is it possible if their child's marriage is postponed and waiting for the child to marry at the age authorized by the state to enter into marriage, of course with considering the benefits and harms that will be caused. An application for a marriage dispensation can be revoked if the advisory process is approved and the marriage can be postponed. Before the marriage takes place, the judge can encourage and give advice to parents to guide and direct their children so that they are ready to live a household life.

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<sup>11</sup> Holilur Rahman, "The *Ideal Age Limit for Marriage perspective Maqashid Shari'ah*". Islamic and Human Studies , 1 (2016 ), p . 87-88.

<sup>12</sup> Lies Marcoes dan Nurhady Sirimorok, *Pengantar Monografi 9 Kajian Perkawinan Usia Anak di 5 Provinsi Indonesia: Yatim Piatu Sosial dan Kerja Kuasa Tersamar*, Rumah KitaB, Jakarta, Cet. 2, 2017. P.90.

<sup>13</sup> Mardi Candra, *Pembaruan Hukum Dispensasi Kawin dalam Sistem Hukum di Indonesia*, Kencana, Jakarta, 2021. P. 65.

The judge is a title (po<sup>14</sup>sition) that belongs to every person who is competent and works in legal and judicial aspects, where he often deals directly with various problems regarding freedom and justice in the context of the decisions of each case. The judge is considered to know the law, finding and determining the law is the business of a judge, so that the judge considers his decision is mandatory.<sup>15</sup>

Before making a decision, the judge will consider several matters related to the decision to grant or reject the application for marriage dispensation.<sup>16</sup> The applicant must provide strong reasons to be accepted by the panel of judges. Not all applications for marriage dispensation in the Religious Courts/District Courts are granted, sometimes they are also rejected when the evidence is examined and the reasons given by the applicants are not strong or cannot be proven certain. The judge's consideration in granting a marriage dispensation case is if the applicant, namely the parents of the prospective bride and groom, can provide original information accompanied by evidence such as witnesses or the behavior of the two prospective brides who are considered very close. The two bride and groom often go out and spend time together, not infrequently they even live under the same roof or even in one room. In addition, the judge also heard directly from the prospective bride and groom, whether there was an element of coercion or self-will to enter into a marriage and readiness to undergo a household ark with the obligations and rights of each. Witnesses will also be asked for information about the relationship that occurred between the two prospective bride and groom. Whereas in terms of refusing the application, if the applicants, the two bride and groom and/or witnesses presented do not provide convincing answers or instead have testimonies that contradict each other, there is no transparency in the trial, there is an element of coercion from the parents, or both the prospective bride and groom can still maintain their distance until the applicable marriage age, or not raise any fears of adultery.<sup>17</sup>

In order to complete the empirical data from the research results, the following is data on application cases received, decided, granted and rejected, which have been processed by the author from the Case Tracing Information System (SIPP), KINSATKER (Work Unit Performance System) and based on Case Reports Received and Reports on Cases Decided at the Pangkajene Class II Religious Court, Barru Class II Religious Court, Barru Class II District Court, Maros Class IB Religious Court, Makassar Class IA Religious Court and Makassar District Court Class IA Special from 2019 to 2022. The following list of tables of Case Reports Received and Case Reports Decisiond at Pangkajene Class II Religious Court, Barru Class II Religious Court, Barru Class II District Court, Maros Religious Court Class IB, Makassar Religious Court Class IA and Makassar District Court Class IA Special from year 2019 to 2022 as follows:

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<sup>14</sup> Abdi Koro, *Perlindungan Anak Di Bawah Umur Dalam Perkawinan Usia Muda Dan Perkawinan Siri*, P.T. Alumni, Bandung, Cetakan ke-1, 2012. P.34

<sup>15</sup> A Mukti Arto, *Teori dan Seni Menyelesaikan Perkara Perdata Di Pengadilan*, Kencana Prenadamedia Group, Jakarta, 2017. P. 54.

<sup>16</sup> Achmad Ali & Wiwie Heryani, *Asas- Asas Hukum Pembuktian*, Kencana Prenadamedia Group, Jakarta, 2012. P. 21.

<sup>17</sup> Fahadil Amin Al Hasan & Deni Kamaluddin Yusup, *Dispensasi Kawin Dalam Sistem Hukum Indonesia Menjamin Kepentingan Terbaik Anak melalui Putusan Hakim*, Al-Ahwal, 2021.

**Table 1 . Cases of Requests for Dispensation of Marriage Accepted and Dismissed Between 2019 and 2022**

Year	No	Court Jurisdiction	Number of Cases Received	Number of Cases Decided	
				Granted	Reject
<b>2019</b>	1.	Pangkajene Religious Court	69	59	1
	2.	Barru Religious Court	58	48	1
	3.	Maros Religious Court	70	70	-
	4.	Makassar Religious Court	83	60	1
	5.	Barru District Court	-	-	-
	6.	Makassar District Court	-	-	-
<b>2020</b>	1.	Pangkajene Religious Court	239	209	2
	2.	Barru Religious Court	109	95	4
	3.	Maros Religious Court	235	235	-
	4.	Makassar Religious Court	59	51	-
	5.	Barru District Court	-	-	-
	6.	Makassar District Court	-	-	-
<b>2021</b>	1.	Pangkajene Religious Court	226	203	17
	2.	Barru Religious Court	153	135	5
	3.	Maros Religious Court	188	188	-
	4.	Makassar Religious Court	44	43	-
	5.	Barru District Court	-	-	-
	6.	Makassar District Court	-	-	-
<b>2022</b>	1.	Pangkajene Religious Court	185	165	8
	2.	Barru Religious Court	49	41	2
	3.	Maros Religious Court	71	69	1
	4.	Makassar Religious Court	23	21	-
	5.	Barru District Court	1	1	-
	6.	Makassar District Court	1	-	-

Source: Research from the Case Tracing Information System (SIPP) Pangkajene Class II Religious Court, Barru Class II Religious Court, Maros Class II Religious Court, Makassar Class 1A Religious Court, Makassar District Court Special Class 1A and Barru District Court Class II

As for giving these decisions, the authors describe based on the Determination of Cases that have been decided by the Religious Courts and District Courts in several cases from the results of the research as follows:

**1. Judges ' Decisions Deliver Decision *Grant* among others, as following :**

A number of judges ' decisions in give decision *grant* namely : Determination No. 0217/ Pdt.P /2022/ PA.Pkj , Determination No. 212/ Pdt.P /2019/ PA.Mrs , Determination No. 3/ Pdt.P /2022/PN Bar, Determination No. Case 68/ Pdt.P /2022/PA.Br., and Determination No. Case 672/ Pdt.P /2022/ PA.Mks , following outlined in table under this :

**Based on Stipulation No.0217/Pdt.P/2022/PA.Pkj at the Pangkajene Class II Religious Court**, that the Petitioners with their Application Letter dated September 27 2022, the Petitioner intends to marry off a boy born on November 16 2003 (18 years old) with a girl, aged 13 years. The reason Petitioner I and Petitioner II wanted to marry off their children to a daughter of Petitioner III and Petitioner IV, the two brides were still underage, namely the prospective husband was 18 (eighteen) years old while the prospective wife was 13 (thirteen) years old because the children of Petitioner I and Petitioner II has been in a relationship and has been very close and has known each other for more than 2 (two) years, and the two of them often stay together without knowing their whereabouts for at least 3 (three) days and have even had frequent intercourse like husband and wife and have applied for it and was accepted. The applicant's child is currently working as a mixed goods entrepreneur and is able to finance the household. In addition, the prospective in-laws (Petitioner II and Petitioner III) have approved the plan to marry their children with the children of applicant I and applicant II. The judge's argument and reasons for granting a marriage dispensation are based on the reasons for applicant I and applicant II, documentary evidence and statements from two witnesses before the judge during the trial. The judge gave a marriage dispensation because the applicant's children had agreed to get married but had not yet reached the minimum age limit for marriage, while all other marriage requirements had been fulfilled, if the marriage dispensation was not granted it was feared that it would have unwanted negative impacts in the future for both parties and to avoid greater harm (adultery), even the judge in his legal considerations as contained in Article 7 paragraph (2) of Law Number 19 of 2019 concerning Marriage concerning the word "*urgent reason*", the judge considers this to have been done both of which are deviations that fall into the category of urgent reasons for the two bride and groom to put forward the best interests of the children and the survival of the two children in the future.

**Based on Stipulation Number 0212/Pdt.P/2019/PA.Mrs at the Maros Religious Court Class 1B**, that the Petitioner with his Application Letter dated 9 December 2019, the Petitioner intends to marry a daughter born on 15 June 202 (17 years 5 months) to a Male, 23 years old. The reason the Petitioner wanted to marry his daughter to a man was because it was very urgent to take place because the two of them already had such a close relationship and had become a topic of conversation in the family and society so that the parents (Petitioner) were very worried that an act prohibited by Islamic law would occur if not getting married soon. The judge's argument and reasons for granting a marriage dispensation are based on the reasons for applicant I and applicant II, documentary evidence and statements from two witnesses before the judge during the trial. The judge gave a dispensation for marriage because the applicant's children had agreed to marry, but the wedding plans were hindered because the prospective bride's age had not yet reached the minimum age limit for marriage, while all other marriage requirements had been met, and from an economic or occupational perspective, the prospective husband was able being the head of the family, if the dispensation from marriage is not granted it is feared that it will cause unwanted negative impacts in the future for both parties and to avoid greater harm (adultery), the Judge is of the opinion that the best legal solution is to grant dispensation to the applicant's child .

**Based on Stipulation Number 3/Pdt.P/2022/PN Bar at the Class II Barru District Court**, that the Petitioner with his Application Letter dated February 7 2022, the Petitioner intends to marry a daughter born on April 4 2004 (17 years 10 months) to a man -male, 19 years old. The reason the Petitioner wanted to marry her child to a man was because it was very urgent to take place because the Petitioner's child was pregnant, the two of them already had such a close relationship and had become a topic of conversation in the family and society so that the parents (Petitioner) were very worried that an act that would occur prohibited by the provisions of Islamic law if they are not married

immediately; The judge's argument and reasons for granting a marriage dispensation are based on the reasons for applicant I and applicant II, documentary evidence and statements from two witnesses before the judge during the trial. The judge gives a dispensation for marriage because the applicant's children have agreed to marry, but the wedding plans are hindered because the prospective bride's age has not yet reached the minimum age limit for marriage, while all other marriage requirements have been met, but if the dispensation is not granted, it is feared that it will have an impact unwanted negative things in the future for both parties and to avoid greater harm (adultery), the Judge is of the opinion that the best legal solution is to give dispensation to the child

**Based on Determination Number 68/Pdt.P/2022/PA.Br. at the Barru Class II Religious Court** , the Petitioner intends to marry a girl born on April 4 2004 (17 years 10 months) with a man, aged 19 years. The reason the Petitioner wanted to marry his daughter to a man was because it was very urgent to do so because the child had been in a relationship for a very long time, the two of them already had such a close relationship and it had become a topic of conversation in the family and society so that the parents (Petitioner) were very worried that an act would occur. those prohibited by the provisions of Islamic law if they are not immediately married; The judge's argument and reasons for granting a marriage dispensation are based on the reasons for applicant I and applicant II, documentary evidence and statements from two witnesses before the judge during the trial. The judge gives a dispensation for marriage because the applicant's children have agreed to marry, but the wedding plans are hindered because the prospective bride's age has not yet reached the minimum age limit for marriage, while all other marriage requirements have been met, but if the dispensation is not granted, it is feared that it will have an impact unwanted negative consequences in the future for both parties and to avoid greater harm (adultery), the Judge is of the opinion that the best legal solution is to grant a dispensation to the applicant's child.

**Based on Determination Number 672/Pdt.P/2022/PA.Mks. at the Makassar Religious Court Class 1A** , the Petitioner intends to marry a girl aged 17 years and 5 months to a man, aged 17 years and 9 months. The reason the Petitioner wanted to marry his daughter to a man was because it was very urgent to do so because the child had been in a relationship for a very long time, the two of them already had such a close relationship and it had become a topic of conversation in the family and society so that the parents (Petitioner) were very worried that an act would occur. which is prohibited by the provisions of Islamic law if not immediately married. As for the argument and reasons for the Judge in granting the dispensation of marriage based on the reasons of the Petitioners, documentary evidence and statements of two witnesses before the judge in the trial, and the judge giving consideration solely in the interest of the child, because the child is a mandate and a gift from God Almighty which is obligatory protected, as stated in Article 16 (f) of Law Number 7 of 1984 concerning Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (*Convention on the elimination of all forms of discrimination against women*); *The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount* ; (Same rights and responsibilities of husband and wife with regard to the protection, guardianship, care and adoption of children, or similar institutions where these concepts exist in national law; in all cases, the interests of the children are paramount) and the Judge gives a dispensation for marriage because the applicant's children have agreed to get married, but the wedding plans are hindered because the prospective bride's age has not yet reached the minimum age limit for marriage, while all other marriage requirements have been met, but if the dispensation is not granted, it is feared that it will cause undesirable negative impacts in the future for both parties and to avoid greater harm (adultery), the Judge is of the opinion that the best legal solution is to grant a dispensation to the applicant's child.



Analysis of several decisions in favor of the Petitioner's request, regarding the dispensation of underage marriages by Judges of the Religious Courts and District Courts with the following considerations and legal facts:<sup>18</sup>

- 1) Legal Considerations
  - a) Based on conditions for carry out marriage the good according to provision Islamic law as well applicable laws has fulfilled except condition age for child not yet reach marriage age ;
  - b) Not there is provision about ban marriage ( *syar'i* ) which is violated ;
  - c) Interest Best for Children;
  - d) Fiancé has going on Since Long
  - e) Low education ;
  - f) Children's Religious Education;
  - g) There is Parents ' Confession for responsible answer on Child Marriage ;
  - h) Ready Becomes Mother house ladder for girl and ready Becomes head house ladder for man ;
  - i) Already have income fixed ( as labourers , traders , coolies building , work on the Project , work on the Factory )
  - j) Second split parental side has give approval ;
  - k) Very urgent because has in circumstances pregnant out of wedlock;
  - l) More wide the harm than the maslahat if no quick married ;
  - m) Have done connection biological ( intercourse );
- 2) Corroborated facts at trial with :
  - a) Information both parents candidate bride , description second candidate direct bride listened to and recorded in front of trial ;
  - b) Evidence written other as Photocopy Marriage certificate of both parents bride and groom , Photocopy Deed Birth second candidate bride and groom , Photocopy Card Family (KK), Photocopy Identity Card , Certificate issued laboratory from Home Sick or Public health center local ( if in circumstances pregnant ), and Letter of Rejection from the Office of Religious Affairs .

Based on the Judge concerned handling the case of the application for Marriage Dispensation, he immediately adjudicates the case and subsequently makes a determination:

- a) Grant Application Petitioner ;
- b) Set give dispensation to child Applicant for marry with candidate husband / candidate his wife ;
- c) Set cost case according to applicable law ;

Based on the results of research and data analysis, it can be understood that the decisions of Religious Court Judges are based on the following matters:

#### 1) Rule Fiqhiyah

The definition of Fiqhiyah Rules is: "Laws related to the legal principles established by Syar'i and the objectives referred to in the syar'i", or "As a way to gain benefit and reject harm" (Asy-Syafi'I, 1988 ).<sup>19</sup>

In the discussion of Fiqhiyah Rules on the basis of the alphabet, and fiqhi systematics. In discussing the Fiqhiyah Rules on the basis of the alphabet, and the systematics of fiqhi. In the principle of asahi by Imam Muhammad Izzuddin bin Abdis

<sup>18</sup> Gunawan Hadi Purwanto, *Pertimbangan Hakim dalam Memutus Perkara Permohonan Dispensasi Kawin di Pengadilan Agama Bojonegoro*, Jurnal Independent Fakultas Hukum, 2019. p.56.

<sup>19</sup> Suwardi Sagama, *Analisis Konsep Keadilan, Kepastian Hukum Dan Kemanfaatan dalam Pengelolaan Lingkungan*, Mazahib Jurnal Pemikiran Hukum Islam.

"Rejecting damage and attracting benefit". This rule is the rule of the Imams of the Madhhab, while this principle consists of 5 (five) kinds of rules, namely:

- a) All problem depending on the purpose ;
- b) harm that must omitted ;
- c) Habit that could made law ;
- d) Sure it is no could removed with doubts ;
- e) Difficulty that could interesting convenience . ( Asy-Syafi'I , 1998);

Thus, the judge uses the basis of the Fiqhiyah rule in determining the dispensation of marriage, which means *avoiding damage/mafsadab must take precedence over maintaining good/mashlahab*. Decisions taken by judges are often different even in the same case, so it can be said that the subjectivity of judges is very high.

- 2) Constitution Number 16 of 2019 Concerning Changes to the Law Number 1 of 1974 concerning Marriage

Condition Marriage in force in Indonesia according to Constitution Number 1 of 1974 concerning Marriage is related with age marriage , nominee bride Men only allowed for marry During has reach age 19 ( nine fifteen ) years and candidates bride woman has reach age 16 ( six fifteen ) years . Provision this has changed through Constitution Number 16 of 2019 Concerning Changes to the Law Number 1 of 1974 concerning Marriage where the minimum age to marry for woman equated with man namely : age 19 ( nine fifteen ) years . Change this already corresponding with principles adhered to by law Declared marriage that candidate husband wife must already ripe soul body for marriage happy spared from various shape violence .<sup>20</sup>

In the context of legal positivism, the stipulation on the age of marriage as stated in the Marriage Law No. 1 of 1974, there is a problematic indication of the problem of the age of marriage that most prominently arises when confronted with Article 7 paragraph (2) concerning dispensation for marriage which the jurisdictional authority for this purpose is given to the Religious Courts appointed by both the male and female parents (Sumiyati, 2007). Thus this law still provides an "loophole" for couples who have not reached the age mentioned in Article 7 paragraph (1) to request dispensation from the court or appointed official if necessary.

- 1) Regulation Supreme Court of the Republic of Indonesia Number 5 of 2019 Concerning Guidelines Judging Application Marriage Dispensation

PERMA Number 5 of 2019 Concerning Guidelines Judging Application Marriage Dispensation regulates a number of Thing urgent like a judge should give advice especially formerly to the parties about the risks that will happen if carry out wedding early , for example risk cessation education , risk the disturbance health reproduction , entangled in circumference poverty , yet stable condition psychological children , and potential violence in house stairs .

This PERMA also regulates about attitude of the judge inside trial , for example the judge does not can make related statements with gender stereotypes , demeaning , blaming and/ or intimidating opposite woman with law . <sup>21</sup>Judge no can ask about background behind female victim sexuality and make Thing the as consideration as base for liberate or relieve the punishment . Even , if there is others for example disconcerting witness women , judges are entitled reprimand the person . This has also been set in PERMA

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<sup>20</sup>Rika Saraswati , 2009, *Women and Settlement Violence in Home Ladder* , PT. Citra Aditya Bakti , Bandung, p . 203.

<sup>21</sup> Bagya Agung Prabowo, " The judge 's considerations in Determination Dispensation Consequences of Early Marriage Pregnant out of wedlock at the Bantul Religious Court ", *Journal of Law IUS QULA IUSTUM Vol. 20 No.2* , 2013, p . 203.

- Number 3 of 2017 concerning Guidelines Judging Cases of Women Confront with the Law.
- 2) Constitution Republic of Indonesia Number 35 of 2014 concerning Changes to the Law Number 23 of 2002 Concerning Child Protection ;
  - 3) Article 16 (f) of the Act Number 7 of 1984 concerning endorsement Convention about Deletion All Shape Discrimination against women (*Convention on the elimination of all forms of discrimination against women*);
  - 4) Article 69 Compilation of Islamic Law;
  - 5) Presidential Decree Number 36 of 1990 concerning endorsement *Convention on the right of the Child* ( Convention about Children 's Rights );

Through interview conducted by the author with Salmirati , SH, MH as Chairman Barru Religious Court Class II, states :

*" Every trial process , applicant as well as candidate husband and the wife should too presented and given same opportunity for heard his opinion . If requested child application dispensation marry no present so the judge will postponed . Because before , 45 percent decision dispensation marry no indicate with clear is child present moment the judge or is corner he looked considered by the judge at the time trial . because it , with presented candidate bride , the judge can hear opinion child in a manner right away , knowing the conditions attached to the child , the judge can also know there is or nope element coercion , agreement child about plan marriage this , is it candidate bride this has capable in a manner physical , psychological , and economic for build house ladder or no , and whether candidate husband has work and have income for support his family later ? , if child still school , is it? with granted application dispensation marry child will permanent get right on education or no . Besides it was also the judge suggested that the child accompanied by a companion and asked recommendation for example from psychologist , power medical , power well-being social , worker society , and the Commission Indonesian Child Protection (KPAI). With ensure things as that , the judge can give fair and best decision for child with consider perspective child ."*

## 2. Judges ' Decisions Deliver Decision Refuse among others, as following :

A number of judges ' decisions in give decision *refuse* namely : Determination No. 0217/ Pdt.P /2021/PA.Br., Determination No. 361/ Pdt.P /2019/ PA.Mks , and Determination No. 251/ Pdt.P /2022/PA. Pkj ., following outlined in table under this :

**Based on Determination Number 217/Pdt.P/2021/PA. Br at the Barru Class II Religious Court,** the Petitioner intends to marry a girl aged 15 years and 1 month to a man, aged 22 years and 2 months. The reason the Petitioner wanted to marry his daughter to a man was because it was very urgent to do so because the child had been in a relationship for a very long time, the two of them already had such a close relationship and it had become a topic of conversation in the family and society so that the parents (Petitioner) were very worried that an act would occur. which is prohibited by the provisions of Islamic law if not immediately married. The Judge's argument and reasons for granting the dispensation of marriage are based on the Petitioner's reasons, documentary evidence and statements from 2 (two) witnesses before the judge during the trial. The judge rejected the marriage dispensation because the applicant's child was 15 years old and there was no compelling reason to grant the marriage dispensation request and the best interests of the child were not fulfilled, such as the risk of sexual disease increased, the risk of sexual violence increased, the risk of maternal and child mortality increased, the risk of children will experience mental disorders and the risk of having a low social and economic level.

**Based on Decree No. 361/Pdt.P/2019/PA.Mks at the Makassar Religious Court Class 1A ,** the Petitioner intends to marry a 15-year-old girl to a 17-year-old man. The reason the Petitioner wanted to marry his daughter to a man was because it was very urgent to do so because the child had been in a relationship for a very long time, the two of them already had such a close relationship and it had become a topic of conversation in the family and society so that the parents (Petitioner) were very worried that an act would occur. which is prohibited by the provisions of

Islamic law if not immediately married. The argument and reasons for the Judge in refusing to grant the dispensation of marriage are based on the Petitioner's reasons, documentary evidence and statements from 2 (two) witnesses before the judge during the trial. The judge rejected the marriage dispensation because the applicant's child was 15 years old and there was no urgent reason to grant the marriage dispensation application and the best interests of the child were not fulfilled, such as the cessation of continuing education rights for children, the child being requested was not yet independent, still living dependent on parents, parties The prospective husband does not have a permanent job so that this condition can be categorized as not having emotional maturity and financial maturity.

**Based on the Decree Number 251/Pdt.P/2022/PA.Pkj at the Pangkajene Class II Religious Court**, the Petitioner intends to marry a 15-year-old girl to a 23-year-old man. The reason the Petitioner wanted to marry his daughter to a man was because it was very urgent to do so because the child had been in a relationship for a very long time, the two of them already had such a close relationship and it had become a topic of conversation in the family and society so that the parents (Petitioner) were very worried that an act would occur. which is prohibited by the provisions of Islamic law if not immediately married. The argument and reasons for the Judge in refusing to grant the dispensation of marriage are based on the Petitioner's reasons, documentary evidence and statements from 2 (two) witnesses before the judge during the trial. The judge rejected the marriage dispensation because the applicant's child was 15 years old and there was no urgent reason to grant the marriage dispensation application and the best interests of the child were not fulfilled, such as the cessation of continuing the right to education for children, the child being requested was not yet independent, still living dependent on parents, parties The prospective husband does not have a permanent job so that this condition can be categorized as not having emotional maturity and financial maturity.

Based on several decisions rejecting the Petitioner's application, regarding the dispensation of underage marriages by Judges at the Religious Courts and District Courts, based on the research results the author analyzes the decisions related to legal considerations and facts as follows:

- 1) Legal Considerations
  - a) There is ban Sharia ' for married ;
  - b) Interest Best for Children;
  - c) Low Education ;
  - d) Not Ready Becomes Mother house ladder for girl and ready Becomes head house ladder for man ;
  - e) Don't have yet work / not yet income ;
  - f) There is element transactional and elemental coercion from parents candidate bride ;
  - g) Not happen pregnancy and yet once do intercourse .
  - h) The child still want to continuing education and yet ready for married ;
  - i) There is matchmaking from both parents against candidate bride ;
- 2) Corroborated Trial Facts with :
  - a) Information both parents candidate bride , description second candidate bride , description witnesses from second candidate direct bride listened to and noted down trial ;
  - b) Evidence written other as Photocopy Marriage certificate of both parents bride and groom , Photocopy Deed Birth second candidate bride and groom , Photocopy Card Family , Copy Identity Card , Rejection Letter from the Office of Religious Affairs or the Office of Records Civil for non-Islamic .

Based on the Judge concerned handling the case of the application for Marriage Dispensation, he immediately adjudicates the case and subsequently makes a determination:

- a) Rejecting the Petitioner's application;

b) Determine the cost of the case according to applicable law.

Considerations of Judges at the Pangkajene Class II Religious Court, Barru Class II Religious Court, Maros Class 1B Religious Court and Makassar Class 1A Religious Court in deciding the Dispensation of Marriage case, the Judge looks at the prospective husband of the Petitioner who will become her husband in terms of occupation, Religious Education, prospective bride have never had a relationship like husband and wife, both agree to postpone until the age limit is permissible to have a marriage according to statutory regulations.

However, in the dispensation case of getting pregnant out of wedlock, the judge's consideration in granting the request for dispensation from marriage is very urgent, and to provide guarantees of protection and legal certainty, for women and children who are born so that they have a clear legal status. And if it is not granted, it will cause wider disgrace to both the family and the prospective bride and groom.<sup>22</sup>

Thus, the Judge's consideration is the last resort. The inconsistency of the Judge's decision is due to the way in which legal considerations are taken which does not refer to legal principles, as well as progressive and responsive legal principles which are in line with the development of the law itself.<sup>23</sup> Even though Law No. 1 of 1974 has been revised, even the spirit of the Supreme Court of the Republic of Indonesia has contained a rule, namely the Supreme Court Regulation of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Trialing Cases of Requests for Dispensation of Marriage with a passion for preventing underage marriages by prioritizing the best interests of the child. So that there is no legal breakthrough to protect the future of children and women. The judge only used the articles contained in Law Number 16 of 2019 Concerning Amendments to Law Number 1 of 1974 to grant the Marriage Dispensation case.

### 3.2 Principle Benefits linked with Interest Best For the inner child Draft Judge 's decision in Case Application Marriage Dispensation

According to Jeremy Bentham, Usefulness Value this introduce theory *Utilitarianism* for first time , he said the most objective basis from something policy or action is no bring loss for related people in other words what policy or action the bring benefit or results that have use .<sup>24</sup> According to Jeremy Bentham's confession as law if law the could give utility great benefits for human . Another character is John Stuart Mill who teaches that something action should addressed to achievement happiness , and is something mistake if otherwise, with the sentence "*actions are right in proportion as they then to promote man's happiness, and wrong as they are to promote the reserve of happiness* ." <sup>25</sup>

Related with prevention wedding child , moment this in Indonesia has apply Law No. 16 of 2019 Concerning Changes to the Law Marriage Number 1 of 1974 About Marriage that sets a minimum age limit that is permitted marry is 19 years old good for man nor girl . Statutory Legislative Ratio this state that marriage age child raises impact negative for grow flower son and will causing no fulfillment right base child as right on protection from violence and discrimination , rights civil child , right health , rights education and rights social child . Determination 19 years old as the minimum age limit marriage no without base , on the explanation Law No. 16 of 2019 Concerning Changes to the Law Marriage Number 1 of 1974 About Marriage age limit is 19 years considered has ripe soul

<sup>22</sup> Lisman Lubis, *Dispensasi Kawin Jelang Dua Tahun Pasca Perubahan Undang-Undang Perkawinan*, Jurnal Ilmiah Penelitian LAW\_Jurnal, Volume II, Nomor 1, 2021. p. 34.

<sup>23</sup> Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence) Termasuk Interpretasi Undang-Undang (Legisprudence)*, Kencana Prenada Media Group, Jakarta, 2009, p. 212-213.

<sup>24</sup>Jeremy Bentham in Sony Keraf , 1998, *Business Ethics Guidance and Relevance* , Yogyakarta, p . 93-94.

<sup>25</sup> Bernart L. Tanya, et al , 2010, *Legal Theory , Orderly Strategy Cross Man . Space and Generation* , CV. Kita , Surabaya, p.127.

body for could carry out marriage in a manner good without end with divorce and get healthy and quality offspring .<sup>26</sup>

One method for support in push wedding children , the Religious Courts as one expected place in push wedding child past decision application marriage dispensation, however in implementation Maros Religious Court Class 1B in 2020 grant all case application case dispensation incoming marriage with various reasons and angles look , so too with Barru Religious Court Class II as well Pangkajene Religious Court Class II is also deep implementation dominant judges granted application dispensation acceptable marriage . Different case with The Maros Religious Court , the Makassar Religious Court Class 1A and the Makassar District Court Class 1A Special , who experienced decline application case Marriage Dispensation due with look culture society that has is at in area urban level awareness Public related education start seen and very influential so parents / guardians more attach importance for school his son as high as possible compared marry off his son in age teenager .

Inside judge decide case besides look to source law Law No. 16 of 2016 amendment about Law No. 1 of 1974, Perma No. 5 of 2019, and the Qur'an , sunnah and previous books , they also emphasize to source contextual experienced by the applicants , either that factor pregnant out of wedlock, economics as well as culture . Source law that becomes consideration early by the judges is Applicable laws ie Law No. 16 of 2019 changes on Law No. 1 of 1974 concerning marriage , where in Article 1 Law No. 16 of 2016 stated " Marriage is bond born and inner Among a Men with a woman as husband and wife with purpose form family ( home stairs ) that is happy and everlasting based on Supreme Godhead Esa ”.

Constitution Marriage this adhere principle , that couple husband wife must ripe body and soul in order to could carry out marriage , readiness soul and body inside marriage expected marriage the can lasting and distant from divorce as well as will produce good and healthy offspring ( Yustomi , 2020). With exists regulation latest ie Law No. 16 of 2016 amendment on Law No. 1 of 1974 stated in article 7, there is increase in the age limit for women from 16 years being 19 years old , made the judges come along worry and be attention big for they in operate rules . Because see case before raised just already tall number application marriage dispensation , and it turns out from data at the Maros Religious Court after exists increase in the age limit for marriage cases marriage dispensation increased rapidly as well as 99% of the data in the Religious Courts that application incoming dispensation Certain accepted by the judge.

Through interview researcher do with Masdanah ., Maros Religious Court Judge Class IB states:

*“ Pleading marriage dispensation at the Maros Religious Court 99 percent , accepted and almost no some are rejected , because even though the judge is inside disconnect application marriage dispensation see to Law No. 16 of 2019 but also see to another aspect ie Article 1 paragraph 5 and 6 of Perma No. 5 of 2019, where inside it explained :*

- (1) *Dispensation marry is gift permission married by court to candidate husband / wife who has not 19 years old for carry out marriage ;*
- (2) *Interests best for child is all must action considered for ensure protection , care , well- being , continuity live and grow flower child . Whereas the judges certainly did not abandon the existing rules, namely paying attention to the age limit of 19 years for both husband and wife candidates, but it must be remembered again that in Perma No. 5 of 2019 article 1 paragraph 2 must pay attention to the interests of the child, and people who register a marriage dispensation are on average an emergency and need to be married immediately. One of the efforts of the Maros Religious Court in preventing early marriage or filing a marriage dispensation application is by collaborating*

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<sup>26</sup> Undang-Undang Perkawinan Nomor 16 Tahun 2019 tentang Perubahan atas Undang-Undang Nomor 01 Tahun 1974 tentang Perkawinan

*with the Maros Regency Government's "PUSPAGA" Family Learning Center by going through predetermined procedures, namely before the bride, groom, and the parents of the prospective bride and groom submit a request for dispensation from marriage to the Maros Religious Court, first asking for assistance with the "PUSPAGA" Counselor who has been appointed by the PUSPAGA TEAM, then a Counseling/ Assistance Report is prepared regarding the eligibility of the prospective bride and groom to carry out the marriage with very strict considerations, so that it can be seen at the Maros Religious Court that there has been a decrease in the number of marriage dispensation cases received between 2021 with the number of cases being 188 cases reduced to 71 cases .<sup>27</sup>*

Reiterated by Salmirati,

*" Real judge already operate existing contents in PERMA No. 5 Year 2019, only only the judge did not can fully deepen statement of the parties , because that is accepted is statement in advance trial , if in advance hearing all witness agree and explain already capable for marry and take care of house stairs , then that was accepted by the judge. Because Perma No. 5 Year 2019 only mention terms and conditions , meanwhile decision refuse and accept is in the hands of the judge. Besides refers to Law No. 16 of 2019 as well Perma No. 5 of 2019, the judges also refer to Islamic law ie Al- Qur'an sunnah or earlier books . Religion indeed no forbid or against wedding below age and no there is criminalization to wedding below age , even in Islamic view "Marriage" is human nature and is highly recommended for Muslims , because marry is instinct humanity must fulfilled with legal way so as not to look for misguided path or disastrous path in adulterous relationship ."<sup>28</sup>*

Wedding age young is something anticipation from parents for prevent consequences negative can defame name good and destructive dignity of parents and family (Al-Azhar, 1985). because that , Islam is not explain in a manner concrete about the age limit wedding because Something wedding considered legal , if has fulfil terms and conditions . Although problem maturity or age limit marriage no including to in conditions and pillars of marriage, but the scholars differ opinion in face Thing this , because factor maturity or age is very condition important .

Based on the author's opinion, the judge's decision in case Number 212/Pdt.P/2019/PA.Mrs. not in accordance with the principle of expediency. The judge's decision is required to represent the principle of legal expediency. This means that the law is not only fulfilled based on the textual context and achieves an element of "fairness" for the parties to a case, but it is also important for the Judge to take into account the consequences of the decision being passed, the impact on the future of the Petitioner's child. Therefore, if the benchmark for the application submitted by the Petitioner is only due to the reason that the prospective bride and groom have such a close relationship or in other words not because of other urgent matters, then the decision is contrary to the principle of expediency, which in the future is between both of them can actually cause problems in the relationship due to mental unpreparedness and so on, especially for prospective brides who are still 17 years old. It is different if the application for filing a marriage dispensation states that the reason for filing a marriage dispensation is due to fears of falling into adultery, then referring to *ushul fiqh* , considerations from a benefit perspective can certainly take precedence. There is also in deciding a case, the Judge should make a broad legal proposition, so that the Judge in deciding a case also considers the psychological point of view, the future of the child, the social side, and prioritizes the Principle of *The Best Interest Of The Child* or usually interpreted " *The Best Interest Principle for Children* " .

In contrast to the Judge's Decision Case Number 217/Pdt.P/2022/PA.Pkj, based on the results of research conducted by the author at the Pangkajene Class II Religious Court, it was agreed

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<sup>27</sup> Interview with the Maros Religious Court Judge Class IB, (Dra. Hj . St. Masdanah ), on 02 January 2023 .

<sup>28</sup> Interview with the Judge of the Barru Religious Court Class II, ( Salmirati , SH, MH), on December 14 , 2022.

that the request for Dispensation for Marriage was appropriate, and fulfilled the phrase " *urgent reason* ". The reasons and arguments for the judge's considerations in granting the request for dispensation were because the prospective bride and groom, both the prospective wife and the prospective husband, had had sexual intercourse like husband and wife many times and had even stayed overnight together for 3 (three) consecutive days without their whereabouts being known. The judge in his *ijtihad* judged that based on the obtained trial facts this was included in the category of " *urgent reasons* " because if the marriage dispensation was not given there would be fears that it would have a negative impact in the form of continuous adultery that would be committed by the children of the Petitioners which was certainly not wanted at the time of that will come for both parties, so that the Judge is of the opinion that the best legal solution is to grant a marriage dispensation to the children of the Petitioners.

According to the author's opinion, the judge's decision in case Number 217/Pdt.P/2022/PA.Pkj. has been in accordance with the principle of legal expediency for the parties by looking at the suitability of the circumstances and a certain legal consideration and still paying attention to the values of justice in it.

So that it can be concluded based on the applicable legal provisions ( *ius constitutum* ) and associated with various opinions submitted by experts as well as relevant legal theories used in the legal system in Indonesia that the granting of dispensation from marriage as long as it is carried out in accordance with the provisions of the legislation and can provide the best benefit for the prospective bride and groom than the prevention itself, then the marriage dispensation is valid according to law, of course the application for marriage dispensation by the Single Judge has passed a long examination process accompanied by mature legal considerations in accordance with the circumstances, legal facts and grounds -the existing legal basis so that the results of the stipulation can provide the best benefits and achieve a sense of justice as the main purpose of law.

#### 4. Conclusion

Judge 's verdict in consideration the law to case application dispensation embodied marriage *the principle of the best interest of the child* or normal called with principle interest best for child still not optimal, still the number of Judges inside make decision no consider principle such , so rights child for operate his life as human man not yet fulfilled in a manner overall result no reduce number application dispensation married at the Pangkajene Religious Court Class II, Barru Religious Court Class II, Maros Religious Court Class 1B and Makassar Religious Court Class 1A. this caused lack of judge dig more in information related with background behind condition child , needs children , problems faced by children , rights what only have acquired and rights what just have n't fulfilled . In application dispensation married , the judge 's decision has been put forward principle expediency law will but not optimal yet with ambition law . From the corner view sociology law , purpose law focused on aspects benefit . Principle expediency law more look to human and not man there is for law . Inside judge make decision good granted nor rejected there is a number of factor as reject measure judge inside realize principle expediency associated with interest best child namely : aspect economic / financial , aspect education , aspect health , aspect psychology , aspect culture or custom customs prevailing in the environment society . Notice right live and grow flower child , award on opinion child , award on honor and dignity human beings , non- discrimination , gender equality , equality at the front law .

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