



## The High Number of Marriage Dispensations in Religious Courts: A Systematic Review from the Perspective of Human Rights and Maqashid Syariah Jasser Auda

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### ABSTRACT

The widespread practice of marriage dispensations in Indonesia, and the ease with which judges grant them, demonstrates the continued weakness of law enforcement, particularly in the private sphere. In Malang Regency, for example, 1,009 marriage dispensation cases were recorded in 2024, with 95% being granted. A similar pattern occurred in the Lumajang Religious Court (682 cases), the Tasikmalaya Religious Court (519 cases), and the Garut Religious Court (391 cases). This research is a systematic literature review using an integrative analytical framework between human rights and the maqashid sharia (Islamic principles) of Jasser Auda. The results indicate that the surge in dispensations and the ease with which they are granted reflect the weak enforcement of the marriageable age limit, potentially violating the rights to education, health, and child protection. However, in emergency situations, dispensations are understood as mitigation to avoid greater harm. The study concludes that dispensations can only be justified if they truly guarantee the benefit, justice, and welfare of children. The implications require responsive policies, strict monitoring mechanisms, and an integrative approach between human rights and maqashid sharia in handling dispensations.

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## 1. INTRODUCTION

Early marriage remains prevalent in Indonesia despite the minimum age for marriage being raised to 19 years through Law No. 16 of 2019. Instead of curbing the practice, this policy has been followed by an increase in requests for marriage dispensations, which in 2020 reached 64,222 cases, indicating the ineffectiveness of limiting the marriage age in preventing early marriage. [1] The high rate of granting marriage dispensations is reflected in various cases in religious courts. For example, in the Malang Regency Religious Court (Case Number 0123/Pdt.P/2024/PA.Mlg), a dispensation for a 15-year-old girl was granted on the grounds of preventing “promiscuity,” even without proof of pregnancy and complete economic dependence on her parents. A similar pattern was also found in the Tasikmalaya Religious Court (Case No. 0789/Pdt.P/2024/PA.Tsm), where a dispensation for a 14-year-old child was granted based on parental concerns about the influence of social media, without adequate psychological or social assessment. These examples confirm that despite the existence of minimum age regulations, judges' deliberations

are still dominated by social and moral concerns, rather than the holistic protection of children's rights.

Viewed from a Human Rights (HAM) perspective, underage marriage has the potential to violate a number of children's basic rights, such as the right to grow and develop, the right to education, and the right to protection from exploitation. [2] Article 52 of Law No. 39 of 1999 affirms the protection of children's rights as part of human rights, but in urgent conditions such as pregnancy outside of marriage, marriage dispensation can be granted to protect the right to life and dignity of the child and mother as an effort to prevent greater human rights violations. [3] In fact, pregnancy is often the main reason for granting marriage dispensation, such as in the Lumajang Religious Court which granted dispensation for a 10-week pregnant child on the basis of *emergency* without health and education evaluation, and in the Garut Religious Court which granted dispensation to prevent adultery, showing the dominance of moral-cultural considerations over comprehensive protection of children's rights.

In the framework of *the maqashid sharia* proposed by Jasser Auda, the Islamic legal approach is not only limited to

texts, but also considers the context and universal objectives of sharia (*maqashid al-syariah*), namely protecting religion, soul, mind, descendants, and property. [4] Analysis shows that judges' considerations are often based on the principle of *jalb al-mashalih wa dar'u al-mafasid*. For example, the reason for pregnancy is categorized as a necessary condition to protect descendants (*hifzh al-nasl*) and soul (*hifzh al-nafs*), while economic and educational reasons are placed as secondary considerations (*hajiyah*). However, in practice, the application of this principle is often not accompanied by an in-depth analysis of the psychological, educational, and reproductive health aspects of children, thus making the consideration of the benefit seem narrow and not holistic.

The integration of human rights and *maqāsid sharia* approaches demonstrates a common ground in protecting children's best interests, preventing exploitation, and exercising caution in legal decision-making. Although marriage dispensations are often viewed as weakening efforts to prevent early marriage, under certain conditions this policy can be justified if it is based on a comprehensive analysis of benefits and harms and remains oriented towards protecting children's basic rights. [5] However, practice in religious courts shows that judges' considerations are still dominated by emergency reasons without a comprehensive evaluation of the child's mental, educational, economic, and health readiness. This reflects the weak enforcement of the minimum age for marriage and the suboptimal integration of human rights and *maqāsid sharia* approaches in marriage dispensation decisions.

## 2. RESEARCH METHODS

This research employs a systematic literature review approach and legal document analysis. Empirical data, including marriage dispensation case numbers, were obtained from annual reports from Religious Courts, legal journals, and trusted news media as illustrative secondary data. The data serves to contextualize the phenomenon and strengthen the normative-theoretical analysis.

The analytical framework integrates human rights principles (particularly the CRC and CEDAW) and Jasser Auda's *Maqasid Sharia* in an integrative manner. The analysis focuses on a critique of the practice of religious courts in granting marriage dispensations.

## 3. DISCUSSION

### a. Theoretical Framework

#### 1) *Maqashid Syariah* in Jasser Auda's Perspective

##### a) Understanding *Maqāsid Syarī'ah*

*Maqāsid Syari'ah* are the meanings that radiate from Sharia laws which are systemized according to levels, whether these meanings are in the form of particular wisdom, universal beneficial values, or in the form of general characteristics. All of this has one goal, namely realizing human servanthood to Allah SWT, and achieving benefits for humans and the world and the hereafter. [14] So, *Maqāsid Sharī'ah* are the goals to be achieved from the establishment of Islamic law. The study of *Maqāsid Sharī'ah* is important because Islamic law originates from Allah's revelation and is intended for humans.

Al-Syathibi does not define *Maqāsid Syarī'ah* as benefit or goodness and welfare of humanity in the world. Among the *ushul fiqh* scholars in relation to *penta'lilan* and benefit as *Maqāsid Syarī'ah*, no differences were found between those who adhere to *Asy'ariyah theology* and those who adhere to *Muktazilah theology*. Al Ghazali is a well-known expert in *Asy'ariyah* circles. Abu Al-Hasan Al-Basri from among the *Muktazilah* in his view of God. This discussion is a clear line that can be drawn to the discussion about the benefits of being a *Maqāsid Syarī'ah*. [15]

Moving on from Al-Syathibi Jasser Auda's thoughts on *Maqasid al-Syari'ah* emerged from his anxiety about traditional *Ushul Fiqh*, which was considered too textual and ignored the purpose behind the text. This literal and textual reading is the result of the excessive focus of *Ushul Fiqh* scholars on aspects of language. In fact, according to Jamal al-Bana, *Ushul Fiqh* scholars' attention to linguistic aspects is greater than that of linguists themselves. Although the study of language is important, making it the sole basis for legal formulation is a significant problem.

#### b) System Features in the Implementation of *Fiqh* Proposals in Jasser Auda's Thought

To apply systems theory as an approach in Islamic law, there are six system features that Jasser Auda has optimized as an analytical tool, namely *cognitive nature*, *wholeness*, *openness*, *interrelatedness*, *hierarchy*, *multi-dimensionality* and *purposefulness*.

*Cognitive nature* (Cognition), what is meant by *cognitive nature* is the nature of knowledge that builds the Islamic legal system. Islamic law is established based on a *faqih's* knowledge of the texts that serve as legal reference sources. To dismantle the validation of all cognition (knowledge of texts), Auda emphasizes the importance of separating the text (the Qur'an and the Sunnah) from people's understanding of the text. A distinction must be made between sharia, *fiqh*, and *fatwa*. [16]

*Wholeness* (Whole), borrowing from systems theory, Jasser Auda states that every cause-effect relationship must be seen as parts of a whole picture. The relationship between the parts plays a certain function in a system. The interconnectedness is built holistically and is dynamic, not just a collection of static parts. [17]

Integrity as mentioned by Jasser Auda, that the legal arguments discussed and researched do not only use sources from one legal text, but must be differentiated from other texts such as: verses, *hadith*, *fiqh* and *urf* because it is still possible.

*Openness* (Openness), according to systems theory, every living system is open, even systems that appear dead are actually open. The

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openness of a system depends on its ability to achieve goals under various conditions. These conditions or environments influence the success of the system. Open systems always interact with their surroundings. [18]

Engaging in "cognitive culture" involves building a mental framework and nuances of reality through which one views and interacts with the outside world. This is a response to the phrase "the door of *ijtihad* has been closed." It requires interaction with environmental and other perspectives.

*Interrelatedness* : The fourth characteristic of a system is its hierarchical structure, where a system is built from smaller subsystems beneath it. Interrelationships determine the goals and functions to be achieved. The attempt to divide a complete system into smaller parts is a process of sorting out the differences and similarities among the many existing parts. The smallest part becomes a representation of the larger part, and vice versa.

Jasser tries to divide the *Maqasid* hierarchy into 3 categories, namely: First; *Maqasid al-'Ammah* (General *Maqasid*), Second; *Maqasid Khassah* (*Specific Maqasid*), Third; *Maqasid Juz'iyah* (*Partial Maqasid*). [19]

*Multidimensionality* (involving multiple dimensions): Islamic law as a system has various interrelated dimensions. The methodology in understanding traditional *fiqh* is fixated on the idea of binary opposition, a dichotomy between the division of *qath'i* and *dzanni arguments*, which, according to Auda, can reduce the methodology of Islamic law. The methodological step that can be taken to address conflicting arguments (*ta'arud al-adillah*) is to seek *the maqāsid* (purpose of Islamic law).

A system is not a single thing, but consists of several parts that are interrelated with each other. Within a system there is a coherent structure, because a system consists of parts that are quite complex and have a spectrum of dimensions that are not single. [20]

*Purposefulness* (Purpose/intent), the purpose of law (*maqasid*) is a feature that encompasses the five previous features, so this purpose is the core methodology of the systematic analysis above. The application of *maqasid* is a very important and fundamental basis for the sustainability of the Islamic legal system that is to be studied. The exploration of *maqasid* must also be returned to the main text (the Qur'an and hadith), not the opinions or thoughts of the *faqih* (products of *ijtihad*). Thus, the realization of the purpose will be the benchmark for the validity of each *ijtihad*, without linking it to a particular tendency or school of thought. In addition, and this is the most important, that the purpose of Islamic law must be focused on the welfare of the surrounding community. [21]

## 2) Human Rights (HAM) and Child Protection in the context of early marriage

Early marriage has substantively violated a number of children's human rights guaranteed nationally and internationally. Children who marry before the age of 18 often lose their basic rights, such as the right to education, protection, play, and equality. This violation is not only individual, but also systemic, considering that children are forced into adult responsibilities that they are not ready to bear. From a human rights perspective, child marriage is a form of discrimination and hidden violence that ignores *the principle of the best interests of the child*. [6]

The guarantee of children's rights is specifically regulated in the Convention on the Rights of the Child (CRC) adopted in 1989, as an international legal instrument that establishes children's rights such as the right to education and protection from exploitation. The CRC was born in response to the vulnerability of children who are often overlooked in the policy-making process, and recognizes that children need special protection due to their physical and mental immaturity. Indonesia has ratified the CRC through Presidential Decree Number 36 of 1990, although with several reservations regarding certain articles. [7]

In an interrelated context, the protection of girls from early marriage is closely related to the fulfillment of women's rights in general. CEDAW (1979) serves as an international instrument to protect women and prevent discrimination in various fields, such as politics, economics, and social. Both conventions demonstrate the development of international human rights law that increasingly pays attention to vulnerable groups and emphasizes the responsibility of states to ensure the fulfillment of their rights. [8]

From a child protection perspective, early marriage has the potential to have long-term impacts on physical and mental health. Girls who marry young are vulnerable to pregnancy complications, psychological stress, and loss of access to education. Furthermore, they are also at greater risk of experiencing domestic violence (KDRT) and limited opportunities for self-development. This clearly contradicts the spirit of the Child Protection Law, which emphasizes guaranteeing children's rights to life, growth, and optimal participation. [9]

In the context of Islamic law which is based on *maqāsid al-sharī'ah*, underage marriage can be considered contrary to the principle of protecting the soul (*hifz al-nafs*), reason (*hifz al-'aql*), and offspring (*hifz al-nasl*). [10] Therefore, both positive and Islamic law fundamentally reject marriage practices that harm children's futures. However, in practice, several countries, including Indonesia, still permit marriage below the minimum age through dispensation mechanisms, which often blur the boundaries of child protection.

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Comparative studies show variations in marriage dispensation policies across countries. In Indonesia, the minimum age for marriage is 19 years (following the amendment to Law No. 16 of 2019), with dispensations granted through a judicial process in the Religious Courts. Meanwhile, in Malaysia, the minimum age is 18 years for men and 16 years for women based on the Islamic Family Law Act 1984, with administrative permission through local religious authorities. This difference shows that although both allow dispensations, the process in Indonesia is more formal through the courts, while in Malaysia it is more decentralized. [11]

In other Muslim countries such as Egypt and Morocco, approaches to dispensation also vary. Egypt has codified the marriage age through a number of laws with a *maqāsid al-syarī'ah* approach and a synthesis across schools of thought. [12] Meanwhile, Morocco regulates dispensation in the 2004 Family Law Law, which requires a judge's consideration, the involvement of medical experts, and a social investigation before permitting marriages under 18 years of age. In Indonesia, dispensation is regulated in the Marriage Law and the Compilation of Islamic Law, with the authority of the Religious Courts to permit marriages under the age limit based on urgent reasons. In general, all three countries strive to balance religious norms and child protection, but still face implementation challenges due to the influence of social norms, patriarchal culture, and diverse religious interpretations. [13]

Therefore, the government's role is crucial in enforcing child protection through affirmative and consistent policies. Weak oversight and outreach have the potential to render the marriage age regulation merely a mere discourse. Synergy between ministries, religious institutions, and the community is needed to break the cycle of child marriage, including through reproductive health education, gender equality, and economic empowerment.

Ultimately, protecting children from early marriage is not only the responsibility of the state, but also of society and families. All parties must ensure that the decision to marry does not compromise the fundamental rights of children as the nation's future generation. Therefore, protecting children's human rights in the context of marriage must be viewed as an investment in their future that cannot be compromised.

#### **b. Considerations of Religious Court Judges in Indonesia in Granting Marriage Dispensation Requests Reviewed from Jasser Auda's Human Rights and Maqashid Syariah Theory**

Viewed from a human rights perspective, judges' considerations in marriage dispensations still focus on administrative aspects, parental consent, and classic reasons such as avoiding adultery or pregnancy outside of marriage. [22] In fact, Law No. 35 of 2014 concerning Child Protection expressly requires the state and parents to prevent child marriage. [23] Meanwhile, Article 7 paragraph (2) of Law No. 16 of 2019 actually opens up

space for dispensations that give rise to legal ambiguity. As a result, judges often grant requests to resolve urgent social problems without in-depth analysis of the fulfillment of children's rights after marriage, such as health, education, and protection from exploitation. [24] This approach ignores the principle of the best interest of the child, which is at the heart of international human rights conventions that Indonesia has ratified.

Through the perspective of Jasser Auda's *maqashid sharia*, especially *Cognitive Nature*, the judge's considerations can be criticized because they are still based on a partial interpretation of classical *fiqh*, focusing on biological aspects and preventing sin, without considering the long-term impact of early marriage. In fact, according to Auda, Islamic legal decisions are the result of human interpretation that must be contextual and responsive to developments in science and social reality. [25] Thus, the absence of serious consideration of scientific evidence regarding reproductive health risks, psychological impacts, and educational obstacles in dispensation decisions is a failure to apply a critical cognitive character.

Furthermore, the Wholeness and Purposefulness features within the Auda framework require judges to consider the impact of their decisions holistically and ensure they align with the highest goal of *sharia*, namely public welfare (*maslahah*). [26] Narrow considerations, which only see marriage as a solution to individual moral problems (such as premarital pregnancy), ignore the systemic impact of early marriage on the continuity of offspring (*hifzh al-nasl*), mental and physical health (*hifzh al-nafs*), and the potential loss of the right to intellectual development (*hifzh al-aql*) through education. [27] Therefore, decisions that easily grant dispensation without adequate protection conditions for children can actually be contrary to the *maqashid* of *sharia* itself, because they cause more harm (*mafsadat*) than benefit.

#### **c. The Impact of Judges' Ease of Granting Marriage Dispensation Requests on Children's Rights**

The tendency of Religious Court judges to easily grant marriage dispensation requests, as reflected in data from Malang, Lumajang, Tasikmalaya, and Garut, has a real, detrimental impact on the fulfillment of children's basic rights. From a human rights perspective, this ease systematically erodes the guarantees of child protection stipulated in the constitution and various international agreements. This practice risks perpetuating a cycle of child human rights violations, where the right to development, the right to health, and the right to education are often sacrificed. [28] Girls, as the most vulnerable in early marriage, lose control over their bodies and futures, are trapped in forced domestic roles, and are cut off from access to education, which is key to empowerment and social mobility.

The multidimensional impact is in line with Jasser Auda's multidimensional critique of the *maqashid syariah* system. This approach reveals that the impact of early marriage is not singular but touches on health, psychological, economic, and social aspects. [29] The ease with which dispensations are granted without

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considering medical evidence regarding the high risk of maternal death, cervical cancer, and pregnancy complications at a young age is a disregard for the principle of protecting the soul (hifzh al-nafs). Similarly, ignoring psychological findings regarding the vulnerability of children who marry early to stress, depression, and domestic violence means ignoring the protection of the mind and soul (hifzh al-aql wa al-nafs).

Auda's Interrelated Hierarchy feature explains how these impacts are hierarchical and interconnected. At the individual level, dropping out of school hinders the development of reason (hifzh al-aql). At the family level, new economic burdens can actually worsen the maintenance of wealth (hifzh al-mal). At the community and national level, the loss of potential young human resources contributes to the low Human Development Index (HDI) and structural poverty. [30] Thus, every judge's decision that grants dispensation without thorough consideration actually reinforces a broad hierarchy of harm, from the personal to the national level.

Finally, Auda's principle of Openness offers a way out. The legal system, including religious courts, must be open to developments in science and universal values such as human rights. Judges need to integrate considerations from the disciplines of health, psychology, and sociology into their judicial *ijtihad*. Refusing to grant dispensation, or granting it with strict conditions that guarantee the continuity of the child's education and health, is more in line with the dynamic spirit of *maqashid sharia* and oriented towards universal welfare. [27] Therefore, reform of the paradigm and capacity of judges to interpret and apply the law contextually, in line with both human rights principles and the spirit of *maqashid sharia*, is a necessity to break the chain of violations of children's rights through the institution of marriage dispensation.

#### 4. CONCLUSIONS

Religious Court (PA) judges' considerations in granting marriage dispensations tend to be textual and procedural, dominated by moral-cultural reasons such as preventing adultery or addressing out-of-wedlock pregnancies. From a human rights perspective, judges fail to consider the principle of the best interests of the child and basic rights such as education, health, and protection from exploitation. Meanwhile, from the perspective of Jasser Auda's *maqashid sharia*, judges often fail to apply the features of cognitive nature (critical cognition) and wholeness, resulting in decisions that are not holistic and tend to ignore the long-term impact on the child's well-being.

Training and decision-making guidance that comprehensively integrates human rights principles and the *maqasid sharia* (Islamic principles) are needed. Judges should not only focus on urgent reasons (*dharuriyat*) but also conduct multidisciplinary assessments (psychological, health, and educational) before deciding on dispensation.

The ease with which judges grant marriage dispensations has serious implications for the violation of children's rights, particularly the right to education, reproductive health, and protection from exploitation. From a human rights perspective, this practice erodes guarantees of child protection and reinforces the cycle of human rights violations. From the perspective of Jasser Auda's *maqashid sharia*, easy dispensations actually contradict the objectives of *sharia* (*maqashid*), namely protecting the soul (hifzh al-nafs), intellect (hifzh al-aql), and offspring (hifzh al-nasl), because they cause more harm (*mafsadat*) than good.

Strict oversight mechanisms and ongoing protection requirements for children granted dispensation, such as guaranteed education and access to healthcare, need to be established. The justice system must also be more open to scientific findings and human rights values in every decision.

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