

## Reconstruction of Marriage Dispensation Regulation in the Ethic Perspective of Care

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### Abstract

*This study aims to reconstruct the regulation of marriage dispensation in Indonesia through the perspective of Ethic of Care which emphasizes the value of care, empathy, and moral relationships in legal decision-making. The marriage dispensation regulation contained in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 and Supreme Court Regulation (Perma) Number 5 of 2019, basically seeks to protect children from the practice of early marriage. However, in practice, many dispensation decisions are still oriented towards legal formalism and socio-economic considerations alone, not in the best interest of the child. Through the Ethic of Care approach, this research offers a new paradigm that places affective, relational, and moral aspects as the basis for consideration by judges and policymakers in determining the marriage dispensation. This approach is expected to strengthen child protection while building a more humanistic and contextual legal policy. Thus, this study concludes that the Ethic of Care can be a new ethical and philosophical foundation for family law reform in Indonesia, especially in the context of marriage dispensation. This paradigm places law not just as a system of state orders, but as a means of maintaining life (caring justice). Care-based reconstruction will strengthen the protective function of the law against girls, who have often been victims of early marriage practices due to cultural or social pressures. Finally, the implementation of Ethic of Care in the regulation of marriage dispensation is expected to be able to give birth to a family law system that is more substantive justice, responsive to human values, and morally civilized. This paradigm not only corrects the weaknesses of legal formalism, but also restores the function of law as an instrument that hears, understands, and cares for human lives so that every legal decision is not only juridically valid, but also ethically and humanly correct.*

**Keywords:** *Marriage Dispensation, Ethic of Care, Care, Child Protection, Regulatory Reconstruction.*

### INTRODUCTION

The marriage dispensation is one of the complex, sensitive, and multidimensional legal issues in Indonesia. The complexity lies not only in the juridical aspect, but also in the social, cultural, economic, and public morality dimensions. Juridically, the marriage dispensation policy emerged as a form of legal flexibility to the marriage age limit that has been regulated by the state. Based on Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, the state has set the minimum age of marriage for men and women at the age of 19 years as an effort to protect children and adjust to the principles of gender equality mandated by the constitution and various international legal instruments on the rights of children and women.<sup>1</sup>

However, empirical reality shows that applications for marriage dispensation actually increased after the enactment of the revision. Based on data from the Directorate of the Religious Courts of the

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<sup>1</sup> Law of the Republic of Indonesia Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, *State Gazette of the Republic of Indonesia 2019 Number 18*.



Supreme Court, the number of marriage dispensation cases in 2024 reached more than 64,000 cases, an increase of almost double compared to the previous year.<sup>2</sup> This surge illustrates the tension between legal norms and social realities where society still views marriage as a solution to out-of-wedlock pregnancies, poverty, or social pressure, while the law seeks to uphold the principle of child protection. Thus, although formal regulations have been tightened, there is still a substantial gap between the ideality of norms and social praxis.

Normatively, marriage dispensation is actually intended as a legal solution in urgent circumstances (extraordinary measure), not as a routine mechanism to legalize child marriage. Article 7 paragraph (2) of Law Number 16 of 2019 states that in the event of an urgent reason, parents can request a dispensation from the court. In practice, however, judges' considerations in granting dispensation are often based more on traditional social and moral motives than on the best interests of the child as mandated by the Convention on the Rights of the Child (1989).<sup>3</sup>

This phenomenon shows that the regulation of marriage dispensation still operates within the framework of legal-formalistic *ethics*, namely the view that legal certainty and procedural validity are the main measure of moral judgment of a legal act. In this paradigm, the law is understood rigidly and regardless of the social context and subjective experiences of the parties, especially girls who are the most vulnerable subjects in early marriage. In fact, in the context of family law, a completely rational and formal approach is inadequate to assess moral issues involving affective relationships and responsibilities between individuals.

It is in this context that the Ethic of Care approach offers a new perspective to reconstruct the understanding and application of the law of the marriage dispensation. The Ethic of Care was first developed by Carol Gilligan in her work *In a Different Voice* (1982), which is a critique of the dominance of Lawrence Kohlberg's Ethic of Justice. Gilligan argues that moral decision-making cannot be separated from the context of relationships and responsibilities towards others, especially those in situations of dependence or vulnerability.<sup>4</sup> Similarly, Nel Noddings asserts that true morality does not arise from obedience to abstract rules, but from a "care relation," a reciprocal relationship between one-caring and cared-for.<sup>5</sup>

Applied to the context of marriage dispensation, the Ethic of Care demands that legal decisions not only consider legal-formal aspects, but also empathic, affective, and relational dimensions. Judges, policymakers, and parents are required to understand the emotional, psychological, and social conditions of the children involved. Caring legal decisions are those that sustain life and prevent suffering, not those that simply meet administrative requirements or conform to social norms.

Thus, this paper proposes a reconstruction of marriage dispensation regulations based on Ethic of Care as a normative paradigm in the formation and implementation of family law policies in Indonesia. This approach is expected to bridge the gap between law and social morality, while building a legal system that is more humanistic, responsive, and in favor of child protection. The caring approach is also in line with the spirit of *maqāṣid al-syarī'ah*, which places the protection of the soul (*ḥifẓ al-nafs*), reason (*ḥifẓ al-'aql*), and offspring (*ḥifẓ al-nasl*) as the main goals of Islamic law.<sup>6</sup>

## METHOD

This research uses a normative qualitative approach, which is an approach that places law not only as a prescriptive norm system, but also as a value system that has moral and philosophical

<sup>2</sup> Directorate of the Religious Courts of the Supreme Court of the Republic of Indonesia, *Annual Report 2021*, p.87.

<sup>3</sup> United Nations, Convention on the Rights of the Child, Adopted and Opened for Signature, *Ratification and Accession by General Assembly Resolution 44/25 of 20 November 1989*.

<sup>4</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982), p.19–22.

<sup>5</sup> Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984), p.4–7.

<sup>6</sup> Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2008), p.52–55.

dimensions. This approach is commonly used in legal research that is oriented towards the analysis of the concepts, principles, and values that underlie the formation and application of law.<sup>7</sup> Thus, this research does not solely aim to describe the laws and regulations regarding marriage dispensation, but also seeks to reflect and reconstruct the ethical basis of these regulations in the perspective of the Ethic of Care.

This type of research is normative legal research with qualitative nuances. Normative legal research focuses on “law in books,” which is law as written in regulations and official documents but combined with a qualitative interpretation of the moral and social values that surround it.<sup>8</sup> The qualitative character in this context means that the analysis is carried out through conceptual and hermeneutic reasoning, rather than by statistical measurements or quantitative data.

This normative qualitative approach is important because the issue of marriage dispensation cannot be separated from the context of humanity, morality, and substantive justice. Therefore, the legal analysis used does not stop at normative texts, but also interprets the moral spirit behind it.

Primary legal materials include: Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage; Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications; and Religious court rulings related to marriage dispensation cases in several regions of Indonesia. These three sources were chosen because they directly represent the positive norms and judicial practices that are the focus of the reconstruction in this study.

Secondary legal materials include literature that is conceptual, theoretical, and philosophical. Among them are the works of Carol Gilligan and Nel Noddings on the theory of Ethic of Care, feminist moral philosophy literature, and responsive legal theories from Philippe Nonet and Philip Selznick which emphasize the need for law to be adaptive to social and moral values.<sup>9</sup> In addition, Islamic legal literature and *maqāṣid al-syarī'ah* are also used to contextualize the principle of concern within the framework of Islamic law, considering that the issue of marriage dispensation also intersects with religious values in Indonesian society.

The data collection technique is carried out through the library research method or literature study. This method focuses on the collection, review, and analysis of relevant legal documents, scientific literature, and previous research results.<sup>10</sup> This stage includes the following activities:

Identify relevant laws and regulations, Collect religious court rulings related to marriage dispensation as secondary empirical material. Trace the theories and concepts of caring ethics from the literature of moral and legal philosophy. This method was chosen because it allows researchers to make reflective interpretations of legal texts and related moral ideas, without being bound by quantitative descriptive field data.

Data analysis was carried out using legal hermeneutic methods and philosophical-normative reconstruction approaches. Legal hermeneutics is used to interpret the meaning of legal texts contextually and historically, taking into account the moral values behind the birth of these legal norms.<sup>11</sup> Through this approach, law is not seen as a closed system, but rather as a historical product that can always be reinterpreted according to the moral and social needs of society.

The philosophical-normative reconstruction approach is used to reconstruct the philosophical and ethical basis of the regulation of marriage dispensation with a new perspective, namely the Ethic of Care. This approach is based on the belief that law should function as a means of “moral ordering of society,” not just a formal command system.<sup>12</sup>

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<sup>7</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2016), p.35–37.

<sup>8</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Press, 2015), p.14.

<sup>9</sup> Philippe Nonet dan Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper and Row, 1978), p.77–81.

<sup>10</sup> Lexy J. Moleong, *Metodologi Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 2019), p.157.

<sup>11</sup> Hans-Georg Gadamer, *Truth and Method* (London: Continuum, 2004), p.305–312.

<sup>12</sup> Satjipto Rahardjo, *Hukum Progresif: Hukum yang Membebaskan* (Jakarta: Kompas, 2009), p.22-25.

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With these two methods, the research seeks to explore the possibility of transforming the Indonesian family law paradigm from a legalistic model to a more empathetic, relational, and child protection-oriented model.

## RESULTS AND DISCUSSION

### The Normative Basis of Marriage Dispensation in Indonesia

Juridically, marriage dispensations a legal mechanism that provides an exception to the minimum age of marriage as stipulated in Article 7 paragraphs (1) and (2) of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. The article stipulates that marriage is only allowed if the man and woman have reached the age of 19, but allows for dispensation if there is an “urgent reason” approved by the court.<sup>13</sup>

Further provisions are regulated in Supreme Court Regulation (Perma) Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications, which requires judges to consider the best interest of the child by involving parents, prospective husband or wife, and presenting relevant supporting evidence.<sup>14</sup> Normatively, this regulation indicates that the state recognizes the dispensation of marriage as the *ultima ratio* step, which is the last resort that can only be taken if there is no other better alternative for the child..

However, in practice, the implementation of these provisions often deviates from the spirit of child protection. Based on data from the Religious Justice Agency of the Supreme Court of the Republic of Indonesia, most marriage dispensation applications are submitted due to out-of-wedlock pregnancy factors (more than 60%), economic factors (about 20%), and local social or cultural pressures (about 15%).<sup>15</sup> These considerations tend to be sociological-reactive and is rarely accompanied by an in-depth analysis of a child’s psychological readiness or potential long-term impact on girls’ mental health and well-being.

This shows that law is still practiced in a legal-formalistic framework, where the fulfillment of legal procedures is considered sufficient to justify the feasibility of an action. In fact, as emphasized by Satjipto Rahardjo, the law should not stop at normative textuality, but must function as an instrument of moral and social protection of human beings.<sup>16</sup> In the context of the marriage dispensation, the moral dryness of the law is seen when regulations are carried out without empathy for the child as weak and vulnerable legal subjects.

### The Concept of Ethic of Care and Its Relevance in Family Law

The concept of Ethic of Care emerged as an alternative to the paradigm of Ethics of Justice that has dominated Western moral philosophy and legal theory. The Ethic of Justice emphasizes the principles of universality, individual autonomy, and formal justice, as formulated by Lawrence Kohlberg in his model of moral development. In contrast, the Ethic of Care, as developed by Carol Gilligan in *In a Different Voice* (1982), emphasizes that true morality cannot be understood through abstract principles alone, but must take into account human relationships, concrete contexts, and responsibilities to others.<sup>17</sup>

According to Gilligan, women’s moral voices are often overlooked in modern moral theory because women are more likely to judge ethical situations through the context of relationships and care, rather than through rational calculations of justice. This view was later deepened by Nel Noddings, who argued that ethical action is rooted in care relations, which are the reciprocal relationships between one-

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<sup>13</sup> Law of the Republic of Indonesia Number 16 of 2019, *Ibid.*

<sup>14</sup> Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning *Guidelines for Adjudicating Applications for Marriage Dispensation, Article 3.*

<sup>15</sup> Directorate of Religious Courts of the Supreme Court of the Republic of Indonesia, *Annual Report 2021*, p.83–85

<sup>16</sup> Satjipto Rahardjo, *Hukum Progresif: Hukum yang Membebaskan, Ibid.*, p.41-45

<sup>17</sup> Lawrence Kohlberg, *Essays on Moral Development, Vol. I: The Philosophy of Moral Development* (San Francisco: Harper & Row, 1981), p.52–54.

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caring and cared-for). In that relationship, morality is not just obedience to norms, but a concrete form of compassion and responsibility.

In the context of family law, the Ethic of Care is particularly relevant because legal decisions in this area not only come into contact with legal rights and obligations, but also concern the emotional life, future, and well-being of individuals. Family law, therefore, should be oriented towards human relations and concern for the most vulnerable, especially children and women. In line with this, Robin West asserts that law as care can strengthen the social function of law and distance the law from its impersonal nature.<sup>18</sup>

### **Criticism of the Regulation of Marriage Dispensation from the Perspective of Ethic of Care**

From the perspective of Ethic of Care, the regulation of marriage dispensation in Indonesia still displays a less empathetic and relational face of the law. The law operates within the framework of procedural formalities without heeding the emotional and psychological context of the child. Judges' considerations often stop at empirical facts such as out-of-wedlock pregnancies or social pressure, without delving further into psychological vulnerability and potential long-term trauma.

For example, in many religious court rulings, judges granted requests for marriage dispensation on the grounds of "preserving family honor" or "avoiding the sin of adultery."<sup>19</sup> Such moral arguments do have social and religious grounds, but from the perspective of the Ethic of Care, such a decision can actually prolong the suffering of girls, as they are forced into marital relationships at an emotionally and physically immature age.

The ethics of caring demands that legal decisions not only maintain social order, but also to sustain life and prevent human suffering.<sup>20</sup> In this context, the regulation of marriage dispensation should not be seen as an attempt to "legalize the situation," but as an instrument of protection and redress for children in vulnerable situations.

### **Reconstruction of Marriage Dispensation Regulations Based on Ethics of Care**

The reconstruction of the regulation of marriage dispensation based on the Ethics of Care assumes a shift in the legal paradigm from a law that emphasizes legality to a law that emphasizes care. This reconstruction can be described in five main dimensions.

**Policy paradigm;** Regulations should be directed at protecting the emotional and psychological well-being of children, not solely to legalize marriage. The law must be on the side of the survival of the child, not on the moral legitimacy of the parents or society.

**Judicial Procedures;** In the examination of dispensation cases, judges are required to involve child psychologists and social workers to assess the emotional, mental, and social readiness of the prospective bride. This principle is in line with the interdisciplinary adjudication approach in child protection.<sup>21</sup>

**Care Assessment;** Each application for a dispensation must pass a care assessment, which is a comprehensive assessment of the psychological condition, family environment, and social support available to the child. This assessment is important to ensure that the court's decision is based on the best interests of the child which is holistic.

**Education of Judges and Apparatus;** Ethic of Care-based training is needed for judges and judicial officials to have moral sensitivity and empathy for the condition of girls and marginalized families.

**Normative Changes;** Laws and regulations need to be strengthened with explicit clauses that state that marriage dispensation can only be granted if it guarantees the best interests of the child as a whole, including the protection of his psychological and social welfare.

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<sup>18</sup> Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development, *Ibid.*

<sup>19</sup> *Ibid.*, p.73.

<sup>20</sup> Nel Noddings, Caring: A Feminine Approach to Ethics and Moral Education, *Ibid.*, p.4–6.

<sup>21</sup> Robin West, *Caring for Justice* (New York: New York University Press, 1997), p.25–30.

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### **Integration with the Principles of *Maqāṣid Syarī'ah***

The Ethic of Care approach can be contextualized with *maqāṣid al-syarī'ah* because both are oriented towards the protection of human life and dignity. Within the framework of *maqāṣid*, the purpose of Islamic law is not only to uphold norms, but also to realize *rahmah* (compassion) and *'adl* (substantial justice).<sup>22</sup>

The relevance of the Ethic of Care to *maqāṣid* can be seen in the similarity of its focus on protection: 1) *ḥifẓ al-nafs* (protection of the soul) in line with the principle of concern for the survival and health of the child; 2) *ḥifẓ al-nasl* (protection of offspring) leads to efforts to guarantee the future of the younger generation 3) *ḥifẓ al-'aql* (protection of reason) relates to mental and psychological readiness before entering marriage.

Thus, the reconstruction of the marriage dispensation through the perspective of the Ethic of Care not only has the moral legitimacy of modern ethical theory, but is also rooted in Islamic spiritual values that uphold compassion and protection for the weak.<sup>23</sup> This approach brings together feminist ethics and Islamic ethics to produce a more humanistic, empathetic, and substantive justice model of family law.

### **CONCLUSION**

The Ethic of Care approach offers an alternative ethical framework that is more humane, relational, and contextual in understanding and reconstructing the regulation of marriage dispensation in Indonesia. In the conventional legal paradigm rooted in the Ethic of Justice, law is often understood as a set of formal rules that demand adherence to universal norms and rational procedures. However, this approach often ignores the affective and situational dimensions of the human body, especially when the law intersects with vulnerable groups such as children and women.

In the context of the marriage dispensation, a legalistic approach that focuses only on formal proof of “compelling reasons” has ignored the voice and experience of the legal subject, the child himself. Often, dispensation decisions based on the grounds of out-of-wedlock pregnancies, social pressures, or economic factors do not take into account the emotional and psychological readiness of the girl, thus making the law an instrument of legitimization of suffering, not protection.

The Ethic of Care, as put forward by Carol Gilligan and Nel Noddings, affirms that morality is inseparable from relational ethics and sensitivity to the concrete needs of the individual. Within this framework, a good moral decision is not the one that is most consistent with abstract rational principles, but rather one that is most concerned with the welfare and security of the parties involved. Thus, the law from the perspective of *care* is not just regulating, but taking care of life.

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<sup>22</sup> Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2008), p.56–60

<sup>23</sup> Yusuf al-Qaradawi, *Maqasid al-Syari'ah al-Muta'alliqah bi al-Usrah wa al-Mar'ah* (Doha: Wizarah al-Awqaf al-Qatariyyah, 2008), p.33–35.

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