

THE JURIDICAL REVIEW OF THE IMPLEMENTATION OF SUPREME COURT REGULATION CONCERNING GUIDELINES FOR ADJUDICATING MARRIAGE DISPENSATION

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Abstract

This reseach aims to know the law enforcement paradigm relating to adjudicating cases of marriage dispensation applications as the implementation of Perma Number 5 of 2019 is part of the litigation task that must be carried out by the judiciary as a form of a case settlement which is a community need for justice seekers for the sake of upholding the law supremacy and justice in Indonesia. Normatively the legal arrangements for the Marriage Dispensation case are Article 7 of Act No. 1 of 1974 concerning Marriage, Act No. 16 of 2019 concerning the First Amendment of Act No. 1 of 1974, Article 7 of the Compilation of Islamic Law, and Regulation of the Supreme Court (PERMA) Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications. This study used a sample of several decision objects in certain Religious Courts in the jurisdiction of the Central Java Religious High Court, through a series of research methods with a sociological juridical or Social legal Research, and data collection techniques through interviews and library studies as well as several Religious Court decisions regarding inkracht (permanent) Marriage Dispensation. In this study, aspects of the examination of the Marriage Dispensation case were revealed by the judges in exploring substantive reasons related to the age of children who are not old enough to marry according to the law. The result shown that the implementation of Perma Number 5 of 2019 regarding Guidelines for Adjudicating Marriage Dispensation Applications in Religious Courts can be formulated in the form of a dictum, "Declaratives" as a court product and what are the legal consequences regarding the stipulation of a Marriage Dispensation by the Court which functions to benefit, justice, and fair legal certainty.

Keywords: *Dispensation; Implementation; Justice; Marriage.*

A. INTRODUCTION

In Indonesia, since the enactment of Act No. 1 of 1974, people have made the law a guide in marriage. One of the principles adopted by the marriage law in Indonesia is that the prospective husband and wife must be mature in terms of both mental and physical to be able to carry out a

marriage.¹ Islamic law does not discuss specifics regarding the age of marriage only stipulates signs and signals, so that it is submitted to the realm of fiqh and the Muslims to determine the best age limit following the terms and signs that have been determined, and adapted to the place where the law will be promulgated.² There are 2 (two) marriage dispensations proposed by the applicant's parents, namely not yet old enough and the bride is pregnant. Meanwhile, the legal basis for the granting of a marriage dispensation application by the Baubau Religious Court judges is based on juridical considerations and psychological considerations.³

Determining the age limit for marriage is very important because, In addition to requiring biological maturity, it also requires psychological maturity. Then the general explanation of the Marriage Law states that the prospective bride and groom must: mature in body and soul to be able to carry out marriage so that the marriage can run without ending in divorce and getting good and healthy offspring.⁴

Supreme Court of the Republic of Indonesia as an effort to improve the quality of justice for justice seekers with a legal protection perspective on November 20, 2019 has issued PERMA Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications, which was legalized on November 21, 2019. State Gazette of the Republic of Indonesia Number 1489 of 2019.⁵

Normatively, the arrangement of the submission process and all legal consequences of the Marriage Dispensation Applications is stated in Article 7 of Act No. 1 of 1974 concerning Marriage, Act No. 16 of 2019 concerning Amendments Act No. 1 of 1974 concerning Marriage, Article 7 of the Compilation of Islamic Law, and PERMA Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications.⁶

Based on the description above, the author conducted an investigation with the title of research on "Juridical Review of the Implementation of PERMA Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications in Religious Courts Based on Justice".

The basis of judges in deciding cases of marriage dispensation is: (1) Act No. 1 of 1974 that in Article 7 paragraph (2) In the case of deviations from paragraph (1) of this article, they may request a dispensation from the court or other officials, appointed by the two parties. parents of men and women, apart from the law, the judge also looks at the factors behind the application for dispensation and the physical condition of the child

1 Trianah Sofiani, Tarmidzi, Dispensasi Nikah dalam Perspektif Masalah Agus Khalimi, *Journal Alhukkam*, Vol.1, No 2, 2021, page 175

2 Suhaila Zukifli, Analisis Yuridis Terhadap Permohonan Izin (Dispensasi) Nikah Bagi Anak Dibawah Umur, *Journal Kaidah*, Vol. 18, No. 2, 2019, page 7

3 Safrin Salam, Dispensasi Perkawinan Anak di Bawah Umur: Perspektif Hukum Adat, Hukum Negara & Hukum Islam, *Pagarayung Law Review*, Vol. 1, No. 1, July, 2017

4 Imam Syafi'i, Freede Intang Chaos, Penetapan Dispensasi Nikah Oleh Hakim (Studi Komparatif Hukum Islam & Hukum Positif), *Journal Mabahnya*, Vol. 1, No. 2, 2020, page 34.

5 Read the State Gazette of the Republic of Indonesia Number 1489 of 2019.

6 Read the relevant articles of the Law.

requesting dispensation, whether it is feasible to marry or not. And the marriage dispensation is relevant to the Law. Child protection.⁷

Public equity consideration deals with fact that a marriage frequently is considered as an alternative solution for the coming social issues. Another consideration of a judge is that the one who will get married is the biological father of the infant conceived. Second, the dispensation of the early marriage needs to be more tightened in consideration to the increasing underage marriage.⁸

The application for marriage dispensation at pregnancy outside of marriage arranged marriages, and reasons to avoid adultery. The considerations made by the judge are through the principle of expediency, the necessity to refuse harm, the interests of the child and baby in the womb, and the legal compliance of the family. From the conclusions obtained, it is recommended that the government and community organizations intensively conduct speeches and counseling about the dangers of early marriage in the community, as well as increase parental and family supervision of the association and development of children.⁹ Marriage dispensation can still be done but only through the courts. This shows that the application for dispensation is more difficult as an effort to minimize the practice of underage marriage in Indonesia.¹⁰

Healthy reproductive age is the age at which a woman can use their reproductive organs so that they can have a safe pregnancy and delivery and get a baby without any risk and continue to return to health within limits normal. Healthy reproductive age is the age of 20 to 35 years old.¹¹

B. RESEARCH METHODS

The method used in this research was Social Legal Research which was conducted by reviewing the normative written legislation and organic regulations related to the implementation of PERMA No. 5 of 2019 concerning Applications for Marriage Dispensation in the field of litigation tasks at the Religious Courts, so as to ensure more legal certainty in accordance with a sense of justice and become a living legal need for the community. Juridical aspect approach was used in an effort to analyze the data by referring to the legal norms set forth in the legislation, while the

7 Muslihun, Misbah Khusurur, Pandangan Hakim Terhadap Dispensasi Nikah & Relevansinya Dengan Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak, *Jurnal Al Wasith: Jurnal Studi Hukum Islam*, Vol. 2, No. 1, 2017, page 85

8 Bagya Agung Prabowo, Pertimbangan Hakim dalam Penetapan Dispensasi Perkawinan Dini Akibat Hamil di Luar Nikah pada Pengadilan Agama Bantul, *Journal Ius Quia Iustum*, Vol. 20, No. 2, April 2013 page 300

9 Andini Asmarini, Pertimbangan Hakim Terhadap Dispensasi Nikah Di Bawah Umur (Studi Kasus Pengadilan Agama Parigi), *Familia: Jurnal Hukum Keluarga*, Vol. 2, No. 2, 2021, page 165

10 Sony Dewi Judiasih, Susilowati Suparto Dajaan, Bambang Daru Nugroho, Kontradiksi Antara Dispensasi Kawin Dengan Upaya Meminimalisir Perkawinan Bawah Umur di Indonesia, *Acta Diurnal, Jurnal Ilmu Hukum Kenotariatan*, Vol. 3, No. 2, Juni 2020, page 12

11 Munadhiroh, Kajian Hukum Terhadap Permohonan Dispensasi Kawin Pada Perempuan Di Bawah Umur Di Pengadilan Agama Semarang (Studi Kesehatan Reproduksi), *Jurnal Idea Hukum*, Vol. 2, No. 1, March 2016 page 21

sociological aspect of this research was to determine the form and implementation of the judiciary regarding the specific reasons of the Applicants as the parents of the prospective bride and groom as applicants for marriage dispensation. These two aspects by the author were then researched and analyzed in the practices in court.

C. RESULT AND DISCUSSION

1. The Principles of Marriage

The definition of marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Almighty God. As for the definition of marriage according to the Islamic Law Compilation, it is stated that marriage according to Islamic law is marriage, which is a very strong contract or *mitsaaqon gholidhan* to obey Allah's commands and perform it is a worship.

In the Islamic Law Compilation (KHI) regarding the pillars and conditions of marriage, it is stated in Article 14: To perform a marriage, the following pillars must be fulfilled: a. Prospective husband, b. Prospective Wife, c. Marriage guardian. d. Two witnesses, e. Offers and acceptance (Ijab and Kabul).

In Article 15 of the Islamic Law Compilation, it is stated: Paragraph (1) For the benefit of the family and household, marriage may only be carried out by the prospective bride and groom who have reached the age stipulated in Article 7 of Act No. 1 of 1974, namely the prospective husband is at least 19 years old and the prospective wife is at least 16 years old. However, based on Act No. 16 of 2019 as an amendment to Act No. 1 of 1974 Article 7 paragraph (1), marriage is only permitted if the man and woman have reached the age of 19 years (nineteen years).

Article 15 of the Islamic Law Compilation paragraph (2) states that: For prospective brides who have not reached the age of 21 years, they must obtain a permit as regulated in Article 6 paragraphs (2), (3), (4) and (5) of Act No. 1 of 1974. Article 16 of the Islamic Law Compilation paragraph (1) of marriage is based on the approval of the prospective bride and groom. Paragraph (2) The form of approval of the prospective bride can be in the form of a clear and tangible statement in writing, verbally, or with gestures.

2. The Dispensation in the Marriage Law

The state guarantees the rights of citizens to form a family and continue their descent through a legal marriage. It guarantees children's rights for survival, growth and development. Child marriage has a negative impact on children's growth and development and it will cause children's basic rights to be unfulfilled, such as the right to protection from violence and discrimination, children's civil rights, health rights, education rights, and children's social rights;

Based on Act No. 16 of 2019 concerning Amendments to Act No. 1 of 1974, Article 7 states:

- a. Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years;
- b. In the event that there is a deviation from the age provisions as referred to paragraph (1), the parents of the grooms and brides may request a dispensation from the Court on the reason of being very urgent with sufficient supporting evidences;
- c. The granting of dispensation by the Court as referred to paragraph (2) must pay attention to the opinions of the prospective brides and grooms who will marry;
- d. The provisions regarding the condition of one or both parents of the prospective brides and grooms as referred to Article 6 paragraph (3) and paragraph (4) shall also apply to the provisions regarding the request for dispensation as referred to paragraph (2) without prejudice to the provisions as referred to Article 6 paragraph (6).

3. Procedure for Submission of Marriage Dispensation Application

The procedure for submitting a marriage dispensation application is started by completing the administrative requirements as stipulated in Article 5 PERMA Number 5 of 2019 as follows:

- a. Application Letter;
- b. Copy of ID Card of both parents/guardians;
- c. Copy of Family Card;
- d. Copy of ID Card or Identity Card / Child's Birth Certificate;
- e. Copy of ID Card or Identity Card of the prospective husband/wife;
- f. Copy of the child's latest education certificate and/or Reference from Attended School.

Furthermore, after the requirements to apply for a Marriage Dispensation, which parties are entitled to submit the application as referred to in Article 6 PERMA Number 5 of 2019 as follows:

- a. Parents are entitled to apply;
- b. If the parents are divorced, it is still submitted by the parents or by one of the parents who has custody;
- c. If one of the parents dies or his/her whereabouts are unknown, it is submitted by one of the parents;
- d. If both parents die or their whereabouts are unknown, it is submitted by the Child's Guardian;
- e. If the parent/guardian is unable to attend, it is submitted by a lawyer based on a power of attorney;

In the event that there is a religious difference between the child and the parent/guardian, the application for Marriage Dispensation is submitted to the Court in accordance with the child's religion (Article 7 PERMA No. 5 of 2019).

Article 9 of PERMA Number 5 of 2019 regulates where the application for Marriage Dispensation is filed as follows:

- a. Application for Marriage Dispensation is submitted to the competent Court;
- b. The registrar shall examine the administrative requirements for submitting the application for Marriage Dispensation as referred to in Article 5, Article 6, Article 7 and Article 8;
- c. In the event that the application for a Marriage Dispensation does not meet the requirements as referred to in paragraph (2), the registrar shall return the application for a Marriage Dispensation to 4) In the event that the application for a Marriage Dispensation has met the requirements as referred to in paragraph (2), the application for a Marriage Dispensation shall be registered in the register, after paying the down payment of court fee;
- d. In the event that the application for a Marriage Dispensation has met the requirements as referred to in paragraph (2), the application for a Marriage Dispensation shall be registered in the register, after paying the down-payment of court fees;
- e. Applicants who are unable to pay court fee for Marriage Dispensation application, are awarded free charge.

4. Dispensation for Marriage and the Best Interests for Children

To get married in Indonesia requires an age requirement where based on the Marriage Law, as has been revised and intensively discussed, finally a limited revision in Act No. 1 of 1974 concerning Marriage regarding the regulation on the legal marriage age limit that was approved as a law according to the mandate of the Constitutional Court No. 22/PUU-XV/2017 dated December 13, 2018, the age limit for marriage based on article 7 paragraph (1) of the Marriage Law states: "Marriage is only permitted if a man and woman have reached the age of 19 years".

As can be seen in Article 26 paragraph 1 of Act No. 23 of 2002 concerning Child Protection as amended by Act No. 35 of 2014 concerning amendments to Act No. 23 of 2002 concerning Child Protection which states "Parents are obliged and responsible answer for: a. nurturing, caring, educating, and protecting children; b. developing children according to their abilities, talents, and interests; c. preventing marriage at the age of a child; and d. providing character education and inculcating character values in children." The above provisions must be a reference for parents and the Panel of Judges who examine the case of the Marriage Dispensation Application.

5. Aspects of Legal Considerations in Decisions or Stipulations

With the issuance of PERMA No. 5 of 2019 as the legal umbrella for litigation, it must be able to provide legal reasoning for the decisions.

The judge's decision is the judge's crown. The decision must contain 3 [three] aspects that are in legal reasoning,¹² as follows:

- a. Juridical aspect, that in the case of Application for Marriage Dispensation, for example, the legal considerations basically do not violate the existing statutory provisions. Besides being supported by PERMA No. 5 of 2019, this is also as referred to in Act No. 48 of 2009 which states that "The court is prohibited from refusing to examine, try, and decide on a case that is submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and try it"¹³
- b. Sociological Aspects, legal considerations in sociological aspects basically emphasize how the law can be accepted by the community which in this case is for the Applicants with the application for Marriage Dispensation.¹⁴
- c. Philosophical Aspects; this aspect emphasizes the suitability of the decision with the philosophical views of the community and in accordance with the principle of justice.¹⁵

The application of the rule of law itself does not escape the basis of philosophical strength which concerns views on the essence or nature of the rule of law in this case in order to ensure justice, order and welfare as well as legal certainty.

6. Juridical Review of The Implementation of Supreme Court Regulation (PERMA) Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications Based on Justice

- a. Substantive reasons for the application for marriage dispensation are indicators of legal considerations so that they can be granted by the Court

It can be explained that the granting of marriage dispensation by the Court is based on the spirit of preventing child marriage, considerations of morality, religion, customs and culture, psychological aspects, health aspects, and the impacts. When considering the indicators of substantive reasons for which a marriage dispensation application is filed in each court, in general, it is almost the same, among others as follows:

- 1) The prospective brides and grooms have long been in a romantic relationship and love each other.
- 2) They are fear of falling into free sex because the bride and groom have often gone out together.
- 3) They are fear of violating social/customary norms where each region has different social/customary norms.

12 Ikatan Hakim Indonesia, *Varia Peradilan Majalah Hukum* of XXXIII No. 391 June 2018, page. 124

13 Article 10 paragraph [1] of Law no. 48 of 2009 concerning Judicial Power.

14 Articles 158 and 160 of the Islamic Law Compilation.

15 L.M. Gandhi Lopian, *Disiplin Hukum yang Mewujudkan Kesetaraan & Keadilan Gender*, Yayasan Pustaka Buku Obor Indonesia, Jakarta, 2012, page.74

- 4) They are fear of violating religious norms which expressly forbid the relationship of affection without legal ties.
- 5) The two brides and grooms have had sexual relations that are not yet bound by a legal marriage.
- 6) The bride-to-be is pregnant.
- 7) The prospective bride and groom are orphans or abandoned by their parents after the divorce whose exact address is no longer known throughout the territory of The Unitary State of The Republic of Indonesia.

In addition to the reasons for applying for a marriage dispensation mentioned above, of course there are still many reasons that may be found to be different in each region. But the end is only one, for the applicant how the dispensation application is granted by the Court.

b. Product Legal Consequences of the Determination of Marriage Dispensation for Justice Seekers

The product of the court for applying for a marriage dispensation is a "Declaration", which is a determination which explains or states what/ something is legal, for example the dictum of a marriage dispensation court stipulates: "Determining to grant a dispensation to the child of the Applicant named to marry a man named".

As stated, the legal consequences of applying for a declarative court product of dispensation for marriage are normative juridical creation of legal certainty and legal standing as husband and wife, fulfillment of concrete needs, legal comfort in a household.

D. CONCLUSION

The law determining the application for a declarative court product marriage dispensation was juridically normative the creation of legal certainty of legal standing as husband and wife in a household, the fulfillment of the concrete needs of legal comfort and inner peace for justice seekers after the application for marriage dispensation was granted, and reviewed from the religious aspect, husband-wife relations were legalized for justice seekers after the application for dispensation for marriage was granted.

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