

THE POSITION OF SUPREME COURT REGULATION NUMBER 5 OF 2019 REGARDING GUIDELINES FOR ADDITIONING APPLICATIONS FOR MARRIAGE DISPENSATION POST THE REVISION OF THE MARRIAGE LAW

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Abstract

The birth of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Dispensation of Marriage is certainly a legal instrument as a means of achieving justice, certainty and benefits for justice seekers, especially as a condition for marriage under the minimum age limit for marriage after the revision of the marriage law. The purpose of this study is to examine the position of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Dispensation of Marriage. This research uses normative method. The background findings of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trying Marriage Dispensation Applications to complete the legal vacuum after the revision of the Marriage Law in providing a legal umbrella for the process of adjudicating applications for marriage dispensation which so far have not been clearly regulated in laws and regulations. Position of Supreme Court Regulation Number 5 of 2019 Regarding Guidelines for Adjudicating Applications for Marriage Dispensation, judges must ensure that children's statements are heard in court as an effort to prevent violations of children's rights.

Keywords: Court; Dispensation; Marriage.

A. INTRODUCTION

Dispensation of marriage or dispensation of marriage is the granting of the right to a person to marry even though he has not reached the minimum age of 19 years.¹ In principle, a man and a woman are allowed to marry if they are over 19 years of age. If it turns out that circumstances so require, the marriage can take place even if one of the partners or both have not reached the said age. This means that the parties can waive the minimum age requirement for marriage. According to changes to the Marriage Law,² namely Act No. 16 of 2019 states that deviations can only be made by submitting an application for dispensation by the parents of one or

1 Sudarsono, *Kamus Hukum*, Rineka Cipta, Jakarta, 1992, page. 102.

2 Ibnu Elmi A. S. Pelu and Jefry Tarantang, *Hukum Perkawinan (Politik Hukum-Legislati Rancangan Qanun Aceh)*, K-Media, Yogyakarta, 2021, page. 38.

both parties of the prospective bride and groom. For couples who are Muslim, the application is submitted to the Religious Court³ or adherents of other religions submitted to the District Court.

Article 7 paragraph (2) Act No. 16 of 2019 concerning Amendments to Act No. 1 of 1974 concerning Marriage confirms that marriage can be granted for urgent reasons. The Marriage Law explains that what is meant by reasons is a situation where there is no other choice and it is very forced to have a marriage.⁴ The reason for urgency cannot be just a claim.⁵ There must be sufficient supporting evidence. According to Act No. 16 of 2019 concerning Marriage, explains that sufficient supporting evidence is a statement proving that the age of the bride and groom is still under the provisions of the law and a statement from a health worker supporting the parents' statement that the marriage is very urgent to carry out.

The new Marriage Law also emphasizes that the granting of dispensations 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 resulting impacts. In this regard, the new Marriage Law obliges the Government to conduct outreach and guidance to the public in order to prevent early marriage, the dangers of free sex, and prevent marriages from not being registered.

Moving on from the revision of the marriage law, the Chief Justice of the Republic of Indonesia responsively stipulated Supreme Court Regulation (Perma) Number 5 of 2019 concerning Guidelines for Trialing Applications for Dispensation of Marriage. This Perma was stipulated on November 20 2019 and promulgated on November 21 2019 to be known and enforced by all levels of society. The purpose of establishing guidelines for adjudicating applications for marriage dispensation is to apply the principles referred to in Article 2, namely the principle of the best interests of the child, the principle of the right to life and development of the child, the principle of respect for the opinion of the child, the principle of respect for human dignity and worth, the principle of non-discrimination, gender equality, the principle of equality before the law, the principle of justice, the principle of benefit and the principle of legal certainty. Guarantee the implementation of a justice system that protects children's rights. Increasing parental responsibility in the context of preventing child marriage. Identify whether or not there is coercion behind the submission of a marriage dispensation application. Realizing the standardization of the process of adjudicating applications for marriage dispensation in court.⁶

3 Jefry Tarantang, *Advokat Mulia (Paradigma Hukum Profetik Dalam Penyelesaian Sengketa Hukum Keluarga Islam)*, K-Media, Yogyakarta, 2018, page. 140.

4 Ahmad Muqaffi, Rusdiyah Rusdiyah, and Diana Rahmi, Menilik Problematika Dispensasi Nikah Dalam Upaya Pencegahan Pernikahan Anak Pasca Revisi UU Perkawinan, *Journal of Islamic and Law Studies*, Vol. 5, No. 3, 2022, page. 365

5 Imam Syafi'i and Freede Intang Chaosa, Penetapan Dispensasi Nikah Oleh Hakim (Studi Komparatif Hukum Islam Dan Hukum Positif), *Jurnal Mabahnya*, Vol. 1, No. 2, 2020, page. 16.

6 Peraturan Mahkamah Agung Republik Indonesia Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kawin (n.d.), Article 3.

The meaning of Marriage Dispensation according to Supreme Court Regulation Number 5 of 2019 is the granting of a marriage permit by the court to prospective husbands/wives who are not yet 19 years old to enter into marriages. With the issuance of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Dispensation of Marriage, of course it becomes a legal instrument as a means of achieving justice, certainty and benefits for justice seekers, especially as a condition for marriage under the minimum age limit for marriage after the revision of the marriage law.

B. RESEARCH METHODS

This research was normative research,⁷ with a conceptual approach,⁸ and a statutory approach that emphasizes secondary data, namely by studying and studying legal principles, especially legal principles which were analyzed qualitatively.⁹

C. RESULT AND DISCUSSION

1. The Background of Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Applications for Dispensation of Marriage

Dispensation Applications for Marriage application for marriage dispensation according to the requirements in Indonesian law. An analysis of Australia Indonesia Partnership for Justice (AIPJ2) decisions found that 35% of applications for dispensation from marriage were filed by parents for their daughters, and 65% by parents for their sons. In 2018, the Religious Courts received 13,880 requests for dispensation from marriage. UNICEF estimates that there were 190,533 girls in Indonesia aged between 20-24 who were married under the age of 16 during 2018. This data shows that around 5,000 cases of dispensation of marriage in 2018 (35% of 14,000 cases) were brought to court by parents who proposed dispensation of marriage for their daughters, a figure that represents only 3% of girls under 16 who are expected to marry in 2018.¹⁰ UNICEF data shows that social norms that accept marriage are influential at all economic levels in Indonesian society. Marriage is sometimes used as an outlet for the stigma associated with

7 Ibnu Elmi Achmat Slamet Pelu and Jefry Tarantang, Fatwa Majelis Ulama Indonesia Sebagai Solusi Permasalahan Umat Islam Di Indonesia, *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. 14, No. 2, 2020, page. 309;

8 Ibnu Elmi Acmad Slamet Pelu et al., The Combination of Legal System: Reconciliation of Divorce Cases in Dayak Ngaju Customary Law and Positive Law Systems, *Jurnal Akta*, Vol. 9, No. 1, 2022, page.3-4

9 Jefry Tarantang, Teori Dan Aplikasi Pemikiran Kontemporer Dalam Pembaharuan Hukum Keluarga Islam, *Transformatif*, Vol. 2, No. 1, 2018, page. 29;

10 Kelompok Kerja (POKJA) Perempuan dan Anak Mahkamah Agung Republik Indonesia, *Buku Saku Pedoman Mengadili Permohonan Dispensasi Kawin*, Jakarta, Mahkamah Agung Republik Indonesia bersama Indonesia Judicial Research Society (IJRS) dengan dukungan Australia Indonesia Partnership for Justice 2 (AIPJ2), 2020), 25.

women's sexual experiences outside of marriage, including the consequences of sexual harassment and early pregnancy.¹¹

The presence of Act No. 16 of 2019 concerning Marriage legally must have legal synchronization, namely by issuing regulations regarding the dispensation of marriage for the Supreme Court as legitimacy for the validity of Act No. 16 of 2019 concerning Marriage which has legal validity in statutory regulations that is to regulate the authority of the Supreme Court to examine and adjudicate marriage dispensation through Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Marriage Dispensation.

In addition, the presence Regulation Supreme Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation is a form of legal synchronization in the *United Nations Convention on the Rights of the Child* (UNCROC) / UN Convention on the Rights of the Child, this convention emphasizes that in all actions involving children, whether exercised by public or private social welfare agencies, courts, government authorities or legislative bodies, the best interests of the children should be a primary consideration. Participating countries, including Indonesia, must respect and guarantee the rights of every child within their jurisdiction without discriminating in any form whether it be race, skin color, sex, language, religion, political belief or other opinion, nationality, ethnic origin or social status, wealth, incapacity/disability, birth or other status of the child/parent/legal caregiver.¹²

Participating countries must also guarantee the child's right to express his views freely in all matters concerning the child which are considered appropriate to the age and maturity of the child concerned. Children will also be given the same opportunity to have their opinions heard in the judicial process and all administrative matters concerning children, either directly or represented. In addition, Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Marriage Dispensation is a synchronization of law and justice that is to be achieved in the *Convention on the Eliminations of All Forms of Discrimination against Women* (CEDAW)/Convention on the Elimination of All Forms of Discrimination against Women, this Convention states that participating countries, including Indonesia, are obliged to make appropriate regulations to eliminate discrimination against women in all matters related to marriage and family relations on the basis of equality between men and women.¹³ This is to guarantee that women have the same rights to enter marriage, choose husbands freely and enter marriage only with the full and free consent of the

11 Kementerian PPN/BAPPENAS dan United Nations Children's Fund, *Achieving the SDGs for Children in Indonesia: Emerging Findings on Trajectories For Reaching The Targets* (Jakarta: BAPPENAS dan UNICEF, 2019).

12 United Nations Convention on the Rights of the Child (n.d.), Pasal 2 Angka 1 Konvensi Hak-hak Anak.

13 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)" (n.d.), Article 16 Number 1 letter a and b.

woman concerned. The state is also required to set a minimum age for marriage, accompanied by the obligation to register marriages at the civil registration office.¹⁴

Apart from that, in Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications Marriage Dispensation, judges must consider the two UNCROC and CEDAW conventions in addition to what is regulated in laws and regulations which are a form of international commitment in efforts to protect children and women. It has regulated the obligations of participating countries to guarantee rights and protection for children and women without any discrimination.¹⁵

With the ratification of these two international conventions, Indonesia must apply the values contained in the conventions and take concrete steps to guarantee and provide protection for children, including in cases of dispensation from marriage.¹⁶ The judge in determining the dispensation of marriage must pay attention to the best interests of the child. Not only because of the urgent factors stated in the application for marriage dispensation,¹⁷ but the Judge must also look carefully at whether the child is ready to build a household both physically, psychologically, and economically.¹⁸ The judge must also consider the conditions that may occur after marriage and if necessary, the judge can ask for other views regarding the child's condition, for example from psychologists, social services, UPTD PPA, health agencies, and other related parties.¹⁹

2. The Position of Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Applications for Dispensation of Marriage After the Revision of the Marriage Law

Of course, the presence Regulation Supreme Number 5 of 2019 concerning Guidelines for Trialing Applications for Marriage Dispensation is a protection for children's rights which must be protected by all parties, not only by country, but also by all levels of society. The state has ratified international conventions and put them into various laws and regulations. This right for children has also been regulated, one of which is Act No. 23 of 2002 concerning Child Protection as amended by Act No.

14 The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Article 16 Number 2.

15 The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Article 1 and 2.

16 Faida Hilyasani, Agus Moh Najib, and Reiki Nauli Harahap, Analisis Kontemporer Dimensi Pernikahan Dini Menurut Berbagai Aktor Di Kabupaten Bantul D.I Yogyakarta, *Jurnal Hukum Dan Pranata Sosial Islam*, Vol. 4, No. 1, 2022, page. 141.

17 Undang-Undang Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan" (n.d.), Article 7 paragraph (3).

18 Peraturan Mahkamah Agung Republik Indonesia Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kawin, Article 14.

19 Peraturan Mahkamah Agung Republik Indonesia Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kawin, Article 16 letter h.

35 of 2014 concerning Amendments to Act No. 23 of 2002 concerning Child Protection.²⁰

The forts to provide justice through Supreme Court Regulation Number 5 of 2019 concerning Guidelines for adjudicating applications for marital dispensation can be seen in the examination of marital dispensation cases, the judge must guarantee that no child's rights have been violated. For example, before the Judge gives a stipulation of marriage dispensation, the Judge must first hear the statement of the child.²¹ If the child has difficulty communicating, the Judge may order a translator/sign language interpreter to make it easier for the child to give his statement.²² The judge can also ask for information from a psychologist to make sure the child is not in a depressed condition, or the judge can ask for information from the health service provider regarding the child's physical condition.

There is a complete correlation between the applicant's reasons and the judge's legal considerations in deciding the application for a marriage dispensation that boils down to one essence of the purpose of marriage, namely to form a happy and eternal family (Article 1 of Act No. 16 of 2019 concerning Marriage). This is solely carried out on the basis of considerations of benefit, which means that if the marriage is not immediately held for the prospective bride and groom, there will be fears that an act will occur that violates legal norms, ethical norms, moral norms and regulations that apply in society. The intended benefit is to provide greater benefits not only to the applicants but also to the community.²³

The practice of marrying underage children through the process of legalizing marriage through an application for a marriage at the Religious Courts also raises a concern, one of which is promiscuity that is increasingly rife and the potential for divorce can occur. In this research, the panel of judges said that underage child marriage could be one of the factors causing divorce due to a lack of harmony in the household, especially in terms of economic readiness.²⁴ The marriage dispensation is a legal solution because the perpetrators of the marriage dispensation are mostly those who do not have formal legality to get married, so they then take legal action so that the marriage can be recognized.

Based on the provisions of Article 7 paragraph (2) of the Marriage Law, if there is a deviation from the marriage age requirement mentioned above, a new marriage can take place after receiving a

20 Misbah Khusurur Muslihun, Pandangan Hakim Terhadap Dispensasi Nikah Dan Relevansinya Dengan Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak, *Al Wasith: Jurnal Studi Hukum Islam*, Vol. 2, No. 1, 2017, page. 89

21 Undang-Undang Nomor 16 Tahun 2019 tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, Article 7 paragraph (3).

22 Peraturan Mahkamah Agung Republik Indonesia Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kawin, Article 15 letter e.

23 Safrin Salam, Dispensasi Perkawinan Anak Di Bawah Umur: Perspektif Hukum Adat, Hukum Negara, Dan Hukum Islam, *Pagaruyuang Journal*, Vol. 1, No. 1, 2017, page. 122.

24 Salam, 122.

dispensation from the court. Parents or guardians of the prospective bridegroom and/or woman,²⁵ who have not yet reached the age of marriage submit a request for dispensation from marriage to the court, the Religious Court for those who are Muslim and the District Court for those who have other religions.²⁶ Articles (2) and (3) of the UUP Revision, it is stated that the parents or guardians of the prospective groom and/or woman can apply for dispensation from marriage to the court based on urgent reasons accompanied by sufficient supporting evidence. After listening to the opinions of the two prospective brides who are about to marry, the court grants a dispensation for marriage that must be based on the spirit of preventing child marriage with considerations of morals, religion, customs and culture, psychological aspects, health aspects, and the resulting impacts.²⁷

The presence of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Marriage Dispensation anticipates disparities in the handling of cases for applications for marriage dispensation, because laws and regulations have not yet regulated explicitly and in detail the process of adjudicating marriage dispensation cases. The regulation stipulates that judges adjudicate marriage dispensation cases based on the principles of: The best interests of the child; Right to life and development of children; Appreciation for children's opinions; Respect for human dignity; Non-discrimination; Gender equality; Equality before the law; Justice; Benefits; and legal certainty.

The Supreme Court responded quickly to the revision of Act No. 16 of 2019 concerning Marriage by issuing Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Dispensation of Marriage in order to realize the examination of cases of dispensation of marriage which is oriented to the interests of the child by considering aspects of morality, religion, custom and culture, psychological aspects, health aspects, and the impacts. The Supreme Court's policy is a concrete manifestation of its seriousness in anticipating child marriage.

In general, Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Marriage Dispensation as a complement to Act No. 16 of 2019 concerning Amendments to Act No. 1 of 1974 concerning Marriage which regulates how the process of examining applications for marriage dispensation in court begins from the scope of administrative requirements, examination of applications, matters that must be carried out and considered by judges, to the criteria for judges who can adjudicate cases of dispensation of marriage.

25 Jefry Tarantang, Relevansi Hadis Tentang Wali Nikah Di Zaman Modern, *AHKAM Jurnal Hukum Islam*, Vol. 10, No. 1, 2022, page.8

26 Jefry Tarantang, *Buku Ajar Hukum Islam (Paradigma Penyelesaian Sengketa Hukum Islam Di Indonesia)*, K-Media, Yogyakarta, 2020, page. 16–17.

27 Fahadil Amin Al Hasan and Deni Kamaluddin Yusup, Dispensasi Kawin Dalam Sistem Hukum Indonesia: Menjamin Kepentingan Terbaik Anak Melalui Putusan Hakim, *Al-Ahwal: Jurnal Hukum Keluarga Islam*, Vol. 14, No. 1, 2021, page. 91.

In examining marriage dispensation cases, the judge must give advice to the parties before making a determination, namely advice related to the risks of marriage, such as the possibility of stopping children's education, reproductive health, the economic, social and psychological impacts of children and the potential for violence in Household.²⁸

In order to create justice and the best interests of children, the judge in his stipulation formulates legal considerations regarding these interests based on laws and regulations, unwritten law in the form of legal values, local wisdom, a sense of justice that lives in society, as well as conventions and/ or international agreements related to child protection. Of course, before this rule was issued, the standard used by the court to evaluate applications for marriage dispensation was not strictly regulated. This causes each court to examine it in a different way. For example, there are judges who ask for statements from children whose testimony is heard in court, but there are those who only hear their parents. It could also be when a dispensation is requested due to pregnancy,²⁹ not all judges ask for a doctor's statement. With the existence of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, judges must ensure that children's statements are heard in court as an effort to prevent violations of children's rights in determining marriage dispensation.

D. CONCLUSION

Background to Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trial of Marriage Dispensation Applications to complete the legal vacuum after the revision of Marriage Act No. 1 of 1974 concerning Marriage to Act No. 16 of 2019 concerning Marriage in providing a legal umbrella for marital dispensation, so that So far, this has not been clearly regulated in laws and regulations. Position of Perma No. 5 of 2019 Concerning Guidelines for Trialing Applications for Marriage Dispensation After the Revision of the Marriage Law Perma No. 5 of 2019 Concerning Guidelines for Trialing Applications for Dispensation of Marriage Judges must ensure that children's statements are heard in court as an effort to prevent violations of children's rights in determining marital dispensation.

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29 Muhammad Iqbal and Rabiah, Penafsiran Dispensasi Perkawinan Bagi Anak Di Bawah Umur (Analisis Beberapa Putusan Mahkamah Syar'iyah Aceh), *El-Usrah: Jurnal Hukum Keluarga*, Vol. 3, No. 1, 2019, page. 108.

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