

Legal Analysis of Judge's Determination on Marriage Dispensation Applications After the Issuance of the Supreme Court Regulation of the Republic of Indonesia Number 5 of 2019

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ABSTRACT

Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Trialing Applications for Marital Dispensation after it is enacted, clearly describes the procedures and conditions for applications, how to settle cases, and submitting legal remedies. The purpose of this study is: to analyze the law on judge decisions and to understand the judge's considerations in taking the dispensation of marriage after the birth of Perma Number 5 of 2019 in Determination Number 28/Pdt.P/2021/PA.Pso at the Poso Class II Religious Court. The method used is because it is a type of empirical legal research; it uses a qualitative approach because the problems relate to humans, which fundamentally depend on observations whose research design uses field research by conducting observations, interviews, and documentation to the parties at the research location. The results of this study indicate that the judge used the legal analysis in case Number 28/Pdt.P/2021/PA.Pso uses maqashid al-Syari'ah and statutory regulations that are interconnected and sorted according to degree and year of publication.

Regarding the judge's consideration in deciding case Number 28/Pdt.P/2021/PA.Pso used psychological considerations, and there was no compelling reason that what the Petitioner wanted so that his request was granted turned out to be rejected because of these considerations. The implication is that judges at the Poso Class II Religious Court are encouraged to attend training/guidance as Juvenile Judges so that they are more progressive in demonstrating their capacity to understand Islamic Law by matching it with statutory regulations in analyzing cases of the dispensation of marriage. Parents are advised to play an important role in providing supervision and attention to children in order to avoid things that deviate due to promiscuity and the government's role in socializing the age limit for marriage.

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1. Introduction

The validity of a marriage is regulated in accordance with legal and religious principles (Bhattacharyya, 2020). The marriage must meet the applicable pillars and requirements. One of the requirements for a valid marriage in Indonesia is to comply with the provisions regarding the minimum age limit for marriage when registration is carried out (Yunus, Rusli, & Abidin, 2020). Suppose there is negligence regarding the provisions regarding the age limit for marriage. In that case, it is highly

recommended that the parents or guardians of the child who will be asked for a marriage dispensation submit a marriage dispensation application to the Religious Court for Muslims or to the District Court for non-Muslims.

The regulations regarding marriage dispensation in Indonesia have been specifically regulated in the Supreme Court Regulation (Perma) Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications (F Nisa, 2018). The birth of this Supreme Court Regulation provides new guidelines for the Court in resolving marriage

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dispensation cases. In Article 1, paragraph (5) of Perma Number 5 of 2019, it is stated that Marriage dispensation is the granting of marriage permission by the Court to prospective husband/wife who are not yet 19 (nineteen) years old to get married.

It is understandable, based on the regulation above, that if there is a deviation between the marriage age of the prospective bride and groom who will be married. Still, suppose the minimum age limit is not reached. In that case, a marriage dispensation application can be submitted to the first-level Court by the parents/guardians of the prospective bride and groom. The bride and groom can get married if they have obtained permission from the first-level Court. It is stated in the Compilation of Islamic Law (KHI) Article 68 that:

Marriage registrars are not allowed to conduct or assist in conducting a marriage if they are aware of any violation of the provisions of Article 7 Paragraph 1, Article 8, Article 9, Article 10 or Article 12 of Law Number 1 of 1974 even though there is no prevention of marriage.

According to the regulation above, marriage registrars are prohibited from assisting or conducting a marriage if the prospective bride and groom violate the provisions and regulations in force in Indonesia. Several basic concepts in the Supreme Court Regulation (Perma) Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation have been stipulated in the procedural law for examining applications for marriage dispensation which has never been stipulated before. The main thing in this Perma is to examine the procedures for marriage dispensation cases that apply in the General Court and Religious Court, starting from the registration stage, examination, case resolution, to legal efforts. Therefore, the existence of regulations that regulate the process of adjudicating applications for marriage dispensation in a firm and detailed manner is a necessity. Thus, the public's perception of the Religious Court that the Court is the party responsible for underage marriage can be avoided.

This Supreme Court Regulation provides additional new insights regarding the marriage dispensation that we once knew, that early

marriage is in an emergency in Indonesia. The results of the author's initial observations and pre-research interviews with one of the informants revealed that: "Since the enactment of Perma Number 5 of 2019, namely on November 20, 2019, to December 31, 2021, there have been 28 (twenty-eight) cases of marriage dispensation caused by economic factors, culture, dating, and pregnancy first. The cases that were granted were 20 (twenty) cases, those that were rejected were 3 (three) cases, those that were revoked were 4 (four) cases, and those that were dropped were 1 (one) case.

The consequences of early marriage are very concerning, especially for women. Based on Law Number 16 of 2019 and Supreme Court Regulation (Perma) Number 5 of 2019 concerning the minimum age limit for marriage, women are the most affected. This is due to the psychological, physical, and health demands that women must meet to undergo the marriage cycle, including the role of a mother and facing the pregnancy process (Mahoney et al., 1999). Therefore, women's readiness in these aspects must be truly mature and adult.

Likewise, men who wish to marry must have reached adulthood, one of the main indicators of which is age. It is important to pay attention to the minimum age limit for marriage because men have great responsibilities as heads of families. They must be mentally, physically, economically, and socially ready to start and guide a household.

Marriage is not just romance but also a necessity to build a nation's civilization. This responsibility cannot be imposed on children who still need protection and assistance in their growth and development process (Malhotra, 1997).

After examining the meaning of Supreme Court Regulation Number 5 of 2019, the examination of marriage dispensation is very concerned with the needs of the child as a prospective husband and wife. Then, the judge, in making a decision in Court, must pay more attention to these considerations. Since Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation was enacted, the regulation clearly describes several things related to marriage dispensation, namely, marriage dispensation application procedure,

requirements when applying for marriage dispensation, trial method and settlement of marriage dispensation cases, to filing legal efforts. However, one of the interesting things related to this research is the settlement of marriage dispensation cases after the enactment of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications. There are several differences in the procedure for resolving marriage dispensation cases from the previous regulations and after the issuance of Perma Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications.

2. Literature Review

2.1 Marriage Dispensation

Marriage dispensation grants marriage permission from the Court to a prospective husband or wife to conduct a marriage who is not yet 19 (nineteen) years old. Marriage dispensation can be interpreted as a reduction in a limitation because to carry out a legal marriage, those who are not yet old enough (under 19 years old) must submit negotiations to the Religious Court to obtain permission to carry out the marriage (Hajnal, 1953).

Law Number 1 of 1974 concerning Marriage functions to handle the legal regulation system for marriage so that all Indonesian society, especially Muslims, obeys it. Among them are Article 6 of Law Number 1 of 1974 concerning Marriage, which regulates the age limit for prospective husbands and wives, and Article 7 of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

The minimum age limit for carrying out marriage, as regulated in the law, aims to allow people who are going to get married to think maturely and be mentally and physically prepared. Thus, when they are married, they can face various challenges that may arise. The readiness of both parties, both husband and wife, is expected to reduce the risk of divorce because they are ready to face all situations together (Nobles & Bутtenheim, 2008). However, early marriage is still possible. This is in accordance with Law Number 16 of 2019 Article 7 paragraph

(2), which states that a person who has not reached the minimum age limit (under 19 years) can get married in certain very urgent conditions, accompanied by supporting evidence. In cases like this, parents can apply for a marriage dispensation to the Court. People get married at a young age (under 19 years) for several reasons. Some do it because they have a serious intention to get married, while others are driven by free-sex behavior, which results in pregnancy before marriage.

A problem arises when a widow wants to remarry but is not yet 19 (nineteen) or 18 (eighteen) years old. Do the parents or guardians of the widow have to apply for a marriage dispensation first? The answer to this question can be found in Article 47 paragraph (1) and Article 50 paragraph (1) of Law Number 1 of 1974 concerning marriage.

The conclusion of the two articles is that children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents, as long as the parent's custody rights are not revoked. If the child is not under the authority of the parents, then he is under the guardian's authority. However, if someone has married even though he is not yet 18 (eighteen) years old, according to the law's criteria, the person concerned is no longer included in the category of children.

In addition to being regulated in the law regarding the obligation to obtain a marriage dispensation, this provision is also explained in the Supreme Court Regulation (Perma) Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. The marriage dispensation should be accompanied by statements from the parties concerned and supported by decisive reasons for getting married. To apply for a marriage dispensation, several administrative requirements that must be met have been outlined in Article 5 of the Perma.

1. The requirements for submitting an application for marriage dispensation are:
 - a. Application letter.
 - b. Family Card (KK) in photocopy form.
 - c. The identity card (KTP) of both parents/guardians is in photocopy form.
 - d. Identity Card (KTP) or Child Identity Card or child's birth certificate in photocopy form.

- e. Identity Card (KTP) or Child Identity Card or birth certificate of prospective husband or wife in photocopy form, and
 - f. Certificate of Still in School from the Child's School or the child's last educational certificate in photocopy form.
2. Other documents can be used to explain the identity and status of the child from the identity of the parents/guardians when the requirements, as referred to in paragraph (1), letters b to f, cannot be met.

Based on the article's explanation of the law above, the identity of the parties applying for marriage dispensation can be clearly ascertained before the judge questions them. The application for marriage dispensation can be returned by the clerk to the applicant if they do not meet the requirements as stipulated. This is in accordance with Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation Article 9 paragraph (3), which states that if there is an application for marriage dispensation that does not meet the requirements as referred to in paragraph (2), then the application must be completed immediately. However, if the administrative requirements have been met, the application is then registered in the register after the applicant has paid the down payment for the court costs. If the applicant is unable to do so, he can submit an application for marriage dispensation free of charge. Applications for marriage dispensation can be submitted by several parties, including parents, both parents or one parent who has custody if the parents are divorced based on a court decision, the power of attorney of the parents/guardian if the parents/guardian are unable to attend, or one parent if the other one's address is unknown or has died. In addition, the child's guardian can also submit applications if the whereabouts of both parents are unknown, have died, or their authority has been revoked. Marriage dispensation is submitted to the competent Court with certain provisions. If there are differences in religion between the child and the parents, the competent Court is the Court according to the child's religion. Meanwhile, suppose the prospective husband and wife are under the age limit for marriage. In that case, the competent Court is the Court according to the domicile of

one of the parents or guardians of the prospective husband or wife.

2.3 Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Applications for Marriage Dispensation

In relation to its implementation in Court, Law Number 16 of 2019 is still considered to be less detailed. To provide a stronger legal basis in resolving marriage dispensation cases, Supreme Court Regulation (Perma) Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications was created. The implementation of this marriage dispensation aims to realize the best interests of children who are going to get married by emphasizing the aspect of child development. In handling marriage dispensation cases, judges need to consider various things that can guarantee the child's life in the future. The basis for granting marriage dispensation in this Perma is based on the principles stated in Article 2, namely the best interests of the child, the child's right to life and development, respect for the child's opinion, respect for human dignity, non-discrimination, justice, equality before the law, gender equality, benefit, and legal certainty. Respect for the child's opinion and legal protection for them are the main objectives of the implementation of marriage dispensation. In addition, there is also a guarantee of the implementation of justice that not only protects children but also fosters a sense of parental responsibility for the readiness of children in the future after marriage. This implementation is expected to be in accordance with the standards of service in the courts in order to realize the ideal marriage dispensation. In addition to referring to the law, judges also use Islamic legal arguments as a reinforcement to achieve the best legal justice for the parties in determining court decisions. The case of marriage dispensation uses the following arguments:

المَصَالِحِ جَلْبِ مِنْ أَوْلَى الْمَفَاسِدِ تَرَةً

Meaning:

“Removing difficulties is prioritized to obtain benefits.”

From the above rule, what can be observed is that when there is a conflict between harm and goodness, then harm or prohibition must be prioritized to be avoided. If, simultaneously, someone is faced with a choice

between rejecting harm or achieving goodness, this rule emphasizes that rejecting harm must be prioritized. Because rejecting harm is the same as achieving goodness. Benefit for human life brings benefits, while harm causes harm to human life. What is called goodness has a certain measure among scholars, which, if summarized, is as follows:

- a. The *maslahah* (goodness) must be measured in its accuracy with *maqasid al-Syari'ah*, *kulli* evidence (evidence that covers many legal units), the spirit of teachings, and the *kulliyah* rules of Islamic Law.
- b. The *maslahah* (goodness) must bring benefits, not to a small part of society but to the majority of society.
- c. The *maslahah* (goodness) must be based on accurate, convincing and reliable research so that there is no doubt.
- d. The *maslahah* (goodness) brings convenience, not difficulty, in the sense that it can be implemented.

In the 7th National Conference in 2005, the Indonesian Ulema Council (MUI) in its Decree No. 6/MUNAS/VII/MUI/10/2005 stated the following requirements:

- a. Benefit (goodness) in the view of Islamic Law is the achievement of the objectives of the *sharia* (*maqashid al-syari'ah*) itself, which is manifested in the form of maintaining the five primary needs (*al-dharuriyat al-khams*);
- b. Benefit (goodness) that does not contradict the text (al-Qur'an) is a benefit (goodness) that is justified by *sharia*;
- c. Institutions that have competence in the field of *sharia* are tasked with determining whether or not there is a benefit (goodness) according to *sharia* which is carried out through *ijtihad jama'i* (finding solutions collectively/together).

3. Methodology

This study uses qualitative methods. In qualitative research, the use of theory is only a guide so that the research focus is in accordance with the facts in the field (Nurdin & Pettalongi, 2022; Nurdin, Stockdale, & Scheepers, 2016). The data was collected through direct observation, in-depth interviews, and written document analysis at the research site (Rusli, Hasyim, & Nurdin,

2021; Rusli & Nurdin, 2022). The objective of this research is the determination of judges regarding marriage dispensation requests following the enactment of the Supreme Court of the Republic of Indonesia Regulation Number 5 of 2019 in the Poso Class II Religious Court.

The interviews involved two judges, the secretary of the Religious Court, the court registrar, and the case registration officer at the Poso Class II Religious Court. The results of the transcripts were consulted with the participants to obtain their consent (Nurdin, Scheepers, & Stockdale, 2022). The data analysis technique in this research used a deductive thinking technique, which can be interpreted as a research procedure that produces deductive data from the interviews and field notes. Data analysis was conducted using thematic analysis from Strauss and Corbin (1998). The analysis started with open, axial, and selective coding. The final result of the data analysis is themes found from the data.

4. Results and Discussion

4.1 Legal Analysis of Judge's Determination in Granting Marriage Dispensation After the Birth of Perma Number 5 of 2019 in Determination No. 28/Pdt.P/2021/PA.Pso

When the judge of the Poso Class II Religious Court wants to determine the results of the marriage dispensation application, the legal analysis is used as a guideline for the judges before approving or rejecting the marriage dispensation case, namely by observing, describing, and rearranging an object using legal parameters as a standard in order to conclude the object against the law. A marriage dispensation application is submitted by someone who wants to get married but has not reached adulthood according to Law Number 6 of 2019, which requires permission from the Court. As an applicant, parents must submit a marriage dispensation application to the local Religious Court. The following is the result of an interview with one of the e-court marriage dispensation registration officers at the Poso Class II Religious Court, who said that the registration procedure is almost the same as cases in other Religious Courts in general.

Every marriage dispensation application must be accepted, with the provision that the requirements must be met, and given flexibility

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regarding the time for fulfillment. Rejection from the Religious Affairs Office (KUA) must be done because the prospective bride and groom are not yet old enough, so the application for marriage dispensation is submitted by the parents of the prospective bride and groom based on the rejection. In addition, other requirements that must be met are a letter of application that can be made in two ways, namely through an independent lawsuit or through a legal aid post which is generally provided free of charge by legal institutions such as advocacy (lawyers), the costs of which are borne by the state. In addition, the marriage of the parents of the prospective bride and groom must be valid, meaning that they are legally married, and the parents must have an ID card registered with the Population and Civil Registry Service.

Meanwhile, it is sufficient for children who do not yet have an ID card to use the last diploma as a substitute. Birth certificates of both prospective bride and groom are required, especially if both have not reached the age of majority (Raatikainen, Heiskanen, & Heinonen, 2005). Perma Number 5 aims to prevent early marriage by setting a minimum age limit of 19 years, which takes into account the child's education and reproductive health rights. Costs incurred in Court include summons costs, PNBP costs paid to the state, editorial costs, and process costs. Process costs are used to resolve cases, such as buying paper. Meanwhile, the cost of the call is determined based on the radius of the location, where the further the location is from the Court, the higher the cost. The prodeo program, which is borne by the state, covers costs except for stamp duty, which can be purchased independently. If the prospective bride and groom are pregnant, a doctor's statement, along with an ultrasound scan result, is required as proof.

Regarding case Number 28/Pdt.P/2021/PA.PSO, which was registered at the Poso Class II Religious Court Clerk's Office on February 1, 2021, one of the applicants who live in Jalan Pramuka, Watumaeta Village (near Watumaeta Market), North Lore District, wishes to marry off his biological child. The marriage process will be carried out and recorded before the Marriage Registrar of the Religious Affairs Office of North Lore District, Poso Regency. The legal basis contained in the considerations of the

Poso Class II Religious Court judge in analyzing case Number 28/Pdt.P/2021/PA.Pso, based on the results of interviews with the judge handling the case, qaul fuqaha (opinions of fiqh experts) and state laws and regulations are arranged in order of degree. For example, laws take precedence over government regulations, then sorted by year of issuance.

4.2 Judge's Considerations in Making Marriage Dispensation Decisions Following the Issuance of Perma Number 5 of 2019

One of the informants at the Class II Poso Religious Court stated that in the trial of case Number 28/Pdt.P/2021/PA. Pso, which was carried out as a mobile trial on February 19-21, 2021. The Class II Poso Religious Court went directly to North Lore District, Poso Regency, as part of the trial program which was carried out in the midst of the COVID-19 pandemic, by following the applicable health protocols. He also provided information regarding the marriage dispensation, namely: "Before the sole judge came into effect, the trial was led by one chairman of the panel and two member judges. All judges in the trial were given the opportunity to ask questions, and after that a deliberation was held. If there is a difference of opinion between the judges in a panel, a deliberation will be held to reach an agreement in the consideration and determination of the case. If there is no common ground, then the decision will be taken through voting, which can result in a dissenting opinion, which is a judge's opinion that differs from the majority of judges. Judges sometimes have differences in providing legal considerations on a case. However, after the enactment of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation which stipulates that a single judge decides marriage dispensation cases, judges are given space to decide based on their considerations and beliefs, and this provision has been enforced in the Poso Class II Religious Court. "Judges in examining the condition of children related to marriage dispensation must pay attention to the following: 1) It is recommended that a companion accompany children; 2) Information from children can be heard even if the parents are not present; 3) Other courts or local courts can conduct audio-visual communication examinations to hear

children's statements; 4) Request a certificate from Social Welfare Workers, Midwives or Doctors, Psychologists, or the Indonesian/Regional Child Protection Commission (KPAI/KPAD). As for witness statements, this may be necessary if the judge needs more information to explore the case, with a minimum of two witnesses presented.

The following are the judge's considerations in decision Number 28/Pdt.P/2021/PA.Pso:

1. Considering, that the applicant's application for marriage dispensation is based on the arguments, the main point of which is that the applicant wants to marry his biological child because the applicant's child and the applicant's child's prospective husband have been dating or have known each other for approximately 1 (one) year. It is feared that an act prohibited by the provisions of Islamic Law will occur. The families of both parties have approved the marriage plan and no other party has objected to the marriage plan, but when the applicant registered the marriage, the Marriage Registrar of the KUA, North Lore District, Poso Regency, refused on the grounds that the applicant's child was still not old enough.
2. Considering that, the judge has provided advice and understanding to the applicant, the applicant's child, the applicant's child's prospective husband and the applicant's child's prospective husband's parents regarding the risks that occur if the applicant's child is married off who is not old enough to marry according to the intent of Article 12 of Supreme Court Regulation Number 5 of 2019.
3. Considering that, the applicant's child and the applicant's child's prospective husband and their parents have been present in Court and have provided statements that in essence the applicant's child and the applicant's prospective child still take care of each other in their dating and never go out alone but are accompanied by family.
4. Considering that, based on the statements of the applicant, the applicant's child, the applicant's child's prospective husband, and their parents, the following facts have been found:

- a. That the applicant's child is currently 17 (seventeen) years old, while the prospective Pemohon child is 19 (nineteen) years old.
- b. That the applicant's child and the applicant's child's prospective husband have known and loved each other for approximately 1 (one) year,
- c. That the applicant's child and her prospective husband have never gone out together but are accompanied by family.
5. Considering that, the purpose of the law in setting a minimum age limit of 19 (nineteen) years for prospective brides is closely related to state protection of children in all aspects and the best interests of the prospective bride to undergo a household.
6. Considering, that based on the considerations above, the application is legally groundless to grant a marriage dispensation to the applicant's child to marry, therefore the applicant's application must be declared rejected.
7. Considering that this case was examined by a single judge as stipulated in Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation.
8. Considering, that because this case falls within the field of marriage, then based on the provisions of Article 89 paragraph (1) of Law Number 7 of 1989 as amended by Law Number 3 of 2006 and Law Number 50 of 2009 concerning Religious Courts, the court costs are borne by the applicant.
9. Considering all articles in the applicable laws and regulations and Islamic Law relating to this case.

The Judge of the Poso Class II Religious Court stated that: "The Judge in determining the application for marriage dispensation considers the protection and best interests of the child in the laws and regulations and unwritten laws that exist in society. In case Number 28/Pdt.P/2021/PA.Pso there are several methods of determining the case, the judge looks at it from various aspects so that several methods of finding the law are interrelated to provide a legal basis.

5. Conclusion

The legal analysis used by the judge on the application for marriage dispensation in the

stipulation Number 28/Pdt.P/2021/PA.Pso in terms of its implementation has implemented qaul fuqaha (expert opinion in Islamic jurisprudence) and laws and regulations that are interrelated with each other which are arranged according to the degree and year of issuance (hierarchically) in accordance with the provisions in the regulation, but still need some improvements and enhancements, especially in the training of Child Judges and the addition of existing facilities. Several factors that are the basis for the judge's consideration in the application for marriage dispensation in Number 28/Pdt.P/2021/PA.Pso are psychological factors and the absence of urgent conditions. Here it can be seen that the applicant, the applicant's child and the prospective husband of the applicant's child do not yet know the minimum age limit and the dangers of early marriage. It is also known that their relationships can still protect each other and are accompanied by family so that committing immoral acts can be supervised.

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