

Supreme Court Policy on Underage Marriage Dispensation Realizing Legal Certainty

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Abstract : The issuance of Law Number 16 of 2019, Amendments to Law Number 1 of 1974 on Marriage, has given Indonesia a new perspective on the law of marriage. The Supreme Court has issued Supreme Court regulation of Republic Indonesia Number 5 of 2019 concerning adjudicating application guidelines for Marriage Dispensation. The study employed normative research. The findings showed that Supreme Court Regulation Number 5 of 2019 is a special rule made by the Supreme Court to explain the procedural law, applying for marriage dispensation, which has not been clearly regulated in Article 7 of Law Number 16 of 2019. One way to overcome marriage dispensation-related problems is by creating limited rules. Particularly, the reasons for filing such cases. The responsible law enforcers are also expected to tighten the application procedure. Thus, the number of early marriages can be lessened.

Keywords: Marriage, Marriage Dispensation, Standardization

Kebijakan Mahkamah Agung dalam Dispensasi Perkawinan Dibawah Umur Untuk Mewujudkan Kepastian Hukum

Abstrak : Lahirnya Undang-Undang Nomor 16 Tahun 2019 tentang Perubahan atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan telah memberikan arah baru pada hukum perkawinan di Indonesia. Mahkamah Agung telah mengeluarkan Peraturan Mahkamah Agung RI Nomor 5 Tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin. Metode penelitian yang digunakan ini menggunakan penelitian normatif. Hasil penelitian Peraturan Mahkamah Agung Nomor 5 Tahun 2019 merupakan aturan khusus yang dibuat oleh Mahkamah Agung sebagai bentuk penjelasan mengenai hukum acara permohonan dispensasi kawin yang belum diatur secara jelas dalam Pasal 7 UU Nomor 16 Tahun 2019. Salah satu cara yang dapat mengatasi masalah dispensasi kawin tersebut adalah dengan membuat aturan yang bersifat limitatif terhadap alasan pengajuan perkara permohonan dispensasi. Penegak hukum dalam persoalan dispensasi kawin juga diharapkan turut andil untuk memperketat prosedur permohonan dispensasi sehingga dapat meminimalisir angka perkawinan di usia dini.

Kata Kunci: Perkawinan, Dispensasi Kawin, Standardisasi

INTRODUCTION

Humans are legal subjects and supporters of rights and obligations in legal-related matters. Meanwhile, marriage is an institution that greatly affects a person's position in the law. Therefore, the state tries to regulate marriage with a national law that applies to all Indonesian citizens, the promulgation of Law Number 1 of 1974 concerning marriage. It is expected to create legal unification in marriage or family laws. In Indonesia, the law on marriage is regulated in Law Number 1 of 1974 which has now been amended by Law Number 16 of 2019. Such issuance and amendment have given a new perspective to the law of marriage in Indonesia.¹ In addition to the aforementioned laws, the supreme court has issued supreme court regulation of the Republic Indonesia Number 5 of 2019, adjudicating applications guidelines for marriage dispensation. The Perma (Supreme Court Regulation) is inseparable from the supreme court authority. It is legally regulated by delegated

¹ Dwi Idayanti. *Pemberian Dispensasi Menikah Oleh Pengadilan Agama (Studi Kasus di Pengadilan Agama Kota Ambogu)*. Artikel dalam "Jurnal Lex Privatum", Vol. 11 No. 2 Tahun 2014, p. 5

legislation in Law Number 14 of 1985, the supreme court, which has also been amended twice, most recently by Article 79 of Law Number 3 of 2009.

The issuance of this Supreme Court Regulation has stipulated several basic legal concepts, the examination procedure and application for marriage dispensation which have never been stipulated before. This Perma substantially discusses marriage dispensation procedures that apply to the religious courts and general courts. This is starting with the registration process, examination to legal remedies. There are two perspectives that need attention. First, the Perma formally encourages the examination of marriage dispensation cases with one judge (single judge). Second, the Perma substantially requires such examination to be carried out comprehensively. With this Perma, the Supreme Court would like to emphasize the case is not just family law. It also needs various dimensions of judge consideration in decision-making. Therefore, the authors will elaborate on the problematic matters, overcoming underage marriage dispensations based on Perma Number 5 of 2019. Accordingly, the authors formulated the following research questions: What is the judges' role in adjudicating the applications for underage marriage dispensations based on Supreme Court Regulation Number 5 of 2019? What are the must-applied solutions for such cases?

RESEARCH METHODS

The study employed normative juridical research with a statute approach. This study was particularly descriptive-analytical research. The secondary data was collected from primary legal materials such as statutory provisions; secondary legal materials and tertiary legal materials such as previous research articles. The secondary data was obtained by a literature study. Then, this was further processed and analyzed in a qualitative juridical manner.² Normative research is a legal research method by examining library material. This study was conducted by reviewing the laws and regulations that apply to a particular legal problem.³ According to Surjono Sukanto, normative legal research includes research on legal principles, legal systematics, legal synchronization level, legal history, and comparative law.⁴ The literature used was collected by statutory Approach. An approach that is carried out by examining all laws and regulations related to the legal issues being handled.

RESULTS AND DISCUSSION

A. Defining Marriage Dispensation

Etymologically, a dispensation can be defined as an exception from a general rule for a special condition. In other words, it is an exemption from an obligation or prohibition. Marriage dispensation is a special rule that applies to certain conditions, such as preventing a person from marrying according to a predetermined age limit. The age of marriage is the age of a person who is considered to be physically and mentally ready for marriage. The minimum age limit for marriage refers to the minimum age limit for men or women to be allowed to get married.⁵

In this case, marriage is only permitted for those who have met the age requirements. If the requirement is fulfilled, the marriage can be carried out properly. However, if the age requirements are not met, marriage is only granted after the Court gives a dispensation in line with statute regulations.

² Lasmadi, Sahuri, dkk. 2020. *Kebijakan Perbaikan Norma Dalam Menjangkau Batasan Minimal Umur Perkawinan*. Gorontalo Law Review, Vol. 3 No. 1.6

³ Soerjono Soekanto dan Sri Mamudji. 2010. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Rajawali Pers, Jakarta, p.13.

⁴ Soekanto, Soejono. 2005. *Pengantar Penelitian Hukum*. UI-PRESS: Jakarta

⁵ Kamarusdiana. 2020. *Dispensasi Nikah Dalam Perspektif Hukum Islam, Undang-Undang Nomor 1 Tahun 1974 dan Kompilasi Hukum Islam*. Jurnal Sosial dan Budaya Syar'I, Vol. 7, No. 1, p. 50.

The standard competence and person inability to marriage cause the emergence of various interpretations of the provisions governing the marriage.⁶ Therefore, The adjudicating applications of marriage dispensation have not been explicitly and in detail regulated in the laws and regulations. Accordingly, for the smooth administration of justice, the Chief Justice of the Supreme Court of the Republic of Indonesia stipulates Perma Number 5 of 2019, the adjudicating applications guidelines for marriage dispensation. This regulation was enacted on November 20, 2019, and promulgated on November 21, 2019, to be known and applied to all social levels.

The meaning of the marriage dispensation is granting a marriage permit by the court to a prospective husband or wife who is not yet 19 years to get married. A marriage dispensation is submitted by the parties who wish to get married but their age does not meet the minimum standard stipulated in Law Number 16 of 2019. As regulated in Law Number 16 of 2019, the minimum age limit of marriage. The dispensation is needed for prospective brides who are under 19 (nineteen) years old. This means it is not limited to the bride and groom's age. Thus, the dispensation request by a bride under 18 (eighteen) years is inevitable. This is as regulated in the Child Protection Act.⁷ The aims of adjudicating applications guidelines for marriage dispensations are to:

1. Apply the following principles as referred to in Article 2 such as the best interests of the child, the child's right to life and development, respect the child's opinion, respect the human dignity, non-discrimination, gender equality, equality before the law, justice, expediency, and legal certainty
2. Ensure the implementation of a justice system protecting the children's rights
3. Increase parental responsibility preventing child marriage
4. Identify whether the coercion applies behind the submission of a marriage dispensation application.
5. Realize the standardization process of adjudicating applications for marriage dispensation in court.

Subekti stated marriage is a legal relationship between a man and a woman for a long time. Wirjono Prodjodikoro also added marriage is a man and a woman who lives together by meeting certain conditions. Meanwhile, according to Law Number 16 of 2019, The formulation of marriage is forming a happy and eternal family based on the One Almighty God. This indicates marriage must refer to each other's religion and beliefs. Therefore, Article 2 paragraph (1) of Law Number 1 of 1974 along with its explanation states: "Marriage is valid if it is carried out by the law of each religion and belief". From this understanding, it can be concluded the purpose of marriage is to form eternal life. The purpose of marriage is to build a happy and eternal family. For this reason, husband and wife need to help and complement each other. Thus, each individual can shape a personality to help and achieve spiritual and material well-being.⁸ It takes mental and physical maturity to achieve such readiness. Maturity is often identified with age.

Determining the marriage age limit becomes an important issue. This is because the limitation sets as a consideration if somebody has physically and mentally matured for marriage life. A man and a woman who has not reached the age limit, can or are allowed to get married. This is with parents' permission and dispensation request by both parents of the man or woman to the Court

⁶ Marilang. 2018. *Dispensasi Kawin Anak Di Bawah Umur*. Al Daulah: Jurnal Hukum Pidana dan Ketatanegaraan Vol. 7 No 1, p. 146.

⁷ Judiasih, Sonny Dewi, dkk. 2020. *Kontradiksi Antara Dispensasi Kawin Dengan Upaya Meminimalisir Perkawinnya Bawah Umur Di Indonesia*. ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan Vol. 3, No. 2

⁸ **Latifiani Dian.** 2019. *The Darkest Phase For Family: Child Marriage Prevention And Its Complexity In Indonesia*. Jils (Journal Of Indonesian Legal Studies) Vol. 4 (2).

or other official.⁹ Likewise, in customary law, there is no age limit for marriage. "In customary law, a person's maturity is determined by body parts, if a girl has her period (menstruation) and has prominent breast, it means she is an adult. Meanwhile, men can be seen from changes in voice, body posture, and produce sperm or already has a sexual desire."¹⁰ In this case, it is necessary to have a regulation on the age limit for marriage. This is certainly needed to discover whether it is an underage marriage or not.¹¹ Underage marriage culture develops in society tends to ignore the marriage provisions in a country.¹²

B. Background factors of Marriage Dispensation Application.

As an adult, marriage refers to an event occurring post-rational and emotional or mental considerations.¹³ Apart from being accepted by common sense, marriage preparations need mental preparations from the prospective partners. Mental preparation starts from the simplest things, such as knowing and understanding the partner and comprehending the meaning of marriage. In the stage of marriage preparation, it is important to foster and undergo social relationships. Some factors causing dispensation marriage application include pregnancy outside marriage, religion, culture, economic, and education.

- 1) Pregnancy outside marriage. The number of these cases rises due to a lack of parental attention. In addition, adolescent pregnancy is caused by minimum knowledge of reproductive health. Sex education must be given to children once they understand problems related to sex, instinct, and marriage. This is to teach, raise awareness, and explain sexual problems. Meanwhile, family education becomes fundamental in averting free sex among adolescents. Marriage is seen as the right solution for unwanted pregnancies, avoiding sin and gossips on the status of born children.¹⁴
- 2) Religious and cultural factors. The parent's fear of teenage survival in sex-crazed culture encourages early marriage. The local culture believes that early marriage is better than being a spinster. From a religious perspective, there is no minimum age for a woman to get married. This is causing underage marriage in women.
- 3) Economic factors. The parents who apply for a marriage dispensation are poverty-stricken. The economic indigent causes parents to marry off their children at an early age. Thus, they are free from the burden of sending their children to school and paying for their living costs. In general, child marriage is more common in lower-income families, although it is also possible in upper-class families.
- 4) Educational factors. Commonly, parents or children who apply for a marriage dispensation have a lower level of education. Due to higher costs of education, the children prefer to get married than continue their education.¹⁵ The BOS fund (School Operational Assistance Program) should be able to help the poor to send their children to school. Thus, school fees do not become an obstacle. The existing BOS funds only cover non-personnel costs for elementary to the junior high school level. This is due to the 9-year compulsory education for children aged 7-15 years.

⁹ Amelia. *Disharmoni Pengaturan Pemberian Izin dan Dispensasi Melangsungkan Perkawinan dengan Pengaturan Perlindungan Anak atas Kesehatan*. Artikel dalam "Rechtidee Jurnal Hukum", Vol. 9, No. 1, Tahun 2011, p. 1

¹⁰ Dwi Idayanti. *Pemberian Dispensasi Menikah Oleh Pengadilan Agama (Studi Kasus di Pengadilan Agama Kota Ambogu)*. Artikel dalam "Jurnal Lex Privatum", Vol. 11 No. 2 Tahun 2014, p. 7

¹¹ Salam, Safrin. 2017. *Dispensasi Perkawinan Anak di Bawah Umur: Perspektif Hukum Adat, Hukum Negara & Hukum Islam*. Pagaruyung Law Journal, Vol. 1, No. 1

¹² Fauzie Rahman, dkk. 2015. *Kajian Budaya Remaja Pelaku Pernikahan Dini di Kota Banjarbaru Kalimantan Selatan*. Jurnal Media Kesehatan Masyarakat Indonesia Vol. 11, p. 111-112.

¹³ Kunardi, Muhammad & Muzamil, Mawardi. 2014. *Implikasi Dispensasi Perkawinan Terhadap Eksistensi Rumah Tangga Di Pengadilan Agama Semarang*. Jurnal Pembharuan Hukum Vol. 1, No. 2

¹⁴ Djamilah dan Reni Kartikawati. *Dampak Perkawinan Anak di Indonesia*. Jurnal Studi Pemuda, Vol. 3, 2014, p. 12.

¹⁵ Mariyatul, Qibtiyah. 2014. *Faktor Yang Mempengaruhi Perkawinan Muda Perempuan*. Jurnal Biometrika dan Kependudukan, Vol. 3, p. 54

BOS funds should be given to elementary to high school students. Thus, children complete their education at 18 years old. Children who graduated from high school are more ready to work or get married.¹⁶ Generally, some reasons applying for a marriage dispensation are:¹⁷

- a. Engagement;
- b. Parents' concerns on children's social interaction;
- c. Sex outside of Marriage and Pregnancy.

Accordingly, the purpose of marriage is to form a happy and eternal family based on the One God Almighty.

C. The judges' role in adjudicating dispensation application for underage marriage referring to PERMA Number 5 of 2019

In Indonesia, children's rights guarantees are stated in the 1945 Constitution, that every child has the right to survive, grow, and develop and the right to protection against violence and discrimination¹⁸. The children's rights guarantee was reaffirmed by the issuance of Law Number 23 of 2002 concerning Child Protection. It has now been changed to Law Number 35 of 2014. It defines a child as someone who is not yet 18 years old. Meanwhile, on child marriage, Law Number 35 of 2014 explicitly states parents' obligation in preventing underage marriages.¹⁹ The Marriage Law only requires the court to hear parents' statements for a marriage dispensation. For this reason, the Supreme Court Regulation Number 5 of 2019 refers to the Convention on the Elimination of All Forms of Discrimination Against Women, the Law on Child Protection, and the Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Judicial Cases. The Law is very important to ensure the implementation of a justice system that protects children's rights.²⁰

One of the requirements of the guidelines is an applicant must present a child for whom a marriage dispensation is requested, a prospective husband or wife, and parents of a prospective husband or wife. Following the guidelines, judges must ensure to hear their statements directly. If the parties are not present, the trial must be adjourned. In this process, listening to children's statements is highly important. This is in line with the Convention on the Rights of the Child. Children have the right to express their opinions freely without any discrimination, including in the trials. Based on Perma Number 5 of 2019, judges are required to provide advice to parties related to the risk of underage marriage, explore whether the child agrees to the marriage plan and whether any psychological, physical, sexual, or economic coercion is applied. In addition, judges are also encouraged to seek recommendations from psychologists or social workers, the Integrated Service Center for the Empowerment of Women and Children (P2TP2A), as well as the Regional Child Protection Commission (KPAD), and ensure parents commitment to remain responsible for their children.²¹

underage marriage has become a global issue. The government and various parties, such as community members. Particularly, parents are responsible for the prevention. Meanwhile, Judges as justice enforcers can side with the best interests of children. It is expected that this PERMA will not only become a rule on paper. The PERMA regulates new matters and must be a guideline for all

¹⁶ 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 (2016)

¹⁷ Suardini, Dea Agustina & Yunanto. *Pelaksanaan Perkawinan di Bawah Umur. Melalui Dispensasi Pengadilan Agama Kabupaten Indramayu*. Artikel dalam "Diponegoro Law Review", Volume 1, Nomor 2, Tahun 2013, p. 13

¹⁸ UUD 1945 Pasal 28 B ayat (2)

¹⁹ Undang-Undang Nomor 35 Tahun 2014 tentang Perlindungan Anak, Pasal 26 ayat (1) huruf c

²⁰ Gaib Hakiki, dkk. *Pencegahan Perkawinan Anak Percepatan yang Tidak Bisa Ditunda*. (Jakarta: Puskapa: Unicef, 2020)

²¹ Ashila Inatsan. *Mendorong Peran Hakim Dalam Mencegah Perkawinan Anak*. Indonesia Judicial Research Society (2020)

judges in adjudicating marriage dispensation cases. In granting marriage dispensation, the judge of the Religious Courts has several considerations based on evidence and witnesses.²² One of the reasons is due to an urgent situation.²³

To resolve such cases, it is necessary to focus on the child's interest and some rules related to child protection issues. Perma Number 5 of 2019 is expected the Religious Court officials to carefully study and understand this matter. Thus, No errors were detected. Particularly, in receiving and completing the investigation of the case in line with the applicable provisions.²⁴ To meet the demands for responsibility, the judges need the solid support of moral dedication and professionalism to do an honest and clean trial and to bridge the gap between legal justice and moral justice.²⁵ The judges must consider various things to determine the law. They must consider the existing laws and regulations with the facts discovered during the trial.²⁶

D. A Must Applied-Solutions For Marriage Dispensation Case Based On PERMA Number 5 of 2019

Law Number 16 of 2019 does not fancy underage marriages. If this case exists, it should refer to the government policy which determines the age limit. This has undergone various processes and considerations or commonly referred to as dispensation. The Supreme Court also takes this issue seriously. They specifically issued technical instructions for handling marriage dispensation cases. This is in the form of Supreme Court Regulation (PERMA) Number 5 of 2019 concerning Adjudicating Applications guidelines for Marriage Dispensation which was enforced on November 21, 2019. One of the guidelines aims to ensure the standardization process of adjudicating marriage dispensations in courts. Thus, judges could be more serious and careful in examining the case in line with existing guidelines. In other words, PERMA Number 5 of 2019 is a special rule made by the Supreme Court to explain procedural law of applying for a marriage dispensation that not been clearly regulated in Article 7 of Law Number 16 of 2019. From the provisions of the case examination, Perma has detailed process for each stage. It demands the active role of judges in adjudicating marriage dispensation cases. In some articles, it is even stated that the determination will be null and void if the judge does not implement certain provisions contained in those articles. The Supreme Court Regulation Number 5 of 2019 also regulates rigorous examination procedures that must be followed by judges.

The aforementioned provisions, PERMA Number 5 of 2019, show that the dispensation issue must be taken seriously. The judicial process cannot be carried out at the discretion of the judge. The absence of standard considerations for dispensation in the latest Marriage Law and Perma Number 5 of 2019 becomes a nightmare. The underage marriages seem to be legalized through the judiciary. Hal tersebut mengakibatkan ketidakpastian hukum dan akan menimbulkan multitafsir. The no explanation of "compelling reasons" accompanied by sufficient evidence has resulted the permissibility of marriage dispensation being interpreted very broadly. Thus, it is defined by various reasons and backgrounds, including pregnancy out of marriage, concerns on violating religious

²² Ahyani, Sri. 2016. *Pertimbangan Pengadilan Agama Atas Dispensasi Pernikahan Usia Dini Akibat Kehamilan Di Luar Nikah*. Jurnal Wawasan Hukum, Vol. 34, No. 1

²³ Wisono, Mulyadi. *Akibat Hukum Penetapan Dispensasi Perkawinan Anak Di Bawah Umur*. Jurnal Privat Law, Vol. 5, 2017, p. 71.

²⁴ Pengadilan Agama, *Sosialisasi Perma Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kawin Di Pengadilan Agama Sungailiat*, Mahkamah Agung RI Pengadilan Agama Pangkalpinang (2020)

²⁵ M. Yahya Harahap. *Hukum Acara Perdata Gugatan, Persidangan, Penyitaan, Pembuktian Dan Putusan Pengadilan Edisi Kedua*. (Jakarta: Sinar Grafika, 2017)

²⁶ Abdussalam, M. Hizbullah. 2019. *Eksistensi Dispensasi Perkawinan Terhadap Pelaksanaan Perlindungan Anak Di Indonesia*. Jurnal Hawa, Vol. 1, No. 2

teachings, economic problems, to local customs/culture clashes. The judge's legal considerations become the only determinant of the permission.

On this case, law enforcement is intended to tighten the application procedure. Thus, the number of early marriages can be diminished. This aims to make the interested parties do not misused the law. For example, to legalize underage marriage without convincing reasons. Therefore, judges are not only required to be more attentive and cautious, but also to be more selective. PERMA Number 5 of 2019 also meticulously regulates the examination procedures that must be taken by judges. The community is also a factor that is no less important. The community is the subject of law which greatly determines the good and bad of law enforcement. One way to overcome dispensation problem is to create rules that are limiting the reasons for filling such case. The most urgent reason is due to pregnancy out of marriage. However, this reason has the greatest legal impact for the applicant and the child whose marriage is being applied for, and the legal status of the born child, if it is not granted. The dispensation is very urgent for the marriage continuity which will affect the status of the born children. The limited reasons is expected to reduce the number of request. Accordingly, the occurrence of underage marriages can be minimized. Furthermore, legal certainty will be more guaranteed. The judges will have a clear foundation. Thus, diversity or differences opinion among judges inexistent.

In fact, the formulation of appropriate regulations for marriage dispensation is not the only way to reduce the number of underage marriages. The issue of morality is more crucial than that. This covers deviant sexual behavior by teenagers due to insufficient sexual and reproductive health education. In addition, poverty is also a classic problem that triggers the occurrence of underage marriages in Indonesia. Therefore, the prevention of underage marriage is not only the duty of law enforcers and its statutory instruments, but also the duty of the government (making policies and handling measures), and the community to obey the law and all policies. This is made to avoid the impact of underage marriage which harms children a lot.

CONCLUSION

The dispensation arrangement on underage marriage is regulated in Law Number 16 of 2019, the marriage. In this case, marriage is only permitted if the man and woman have reached 19 years old. The age limitation means the Law Number 16 of 2019 does not favor underage marriages. The government has provided a policy through a various process and considerations which is known as dispensation. The Supreme Court Regulation (PERMA) Number 5 of 2019 is a special rule made by the Supreme Court. It is made to explain procedural law of applying for a marriage dispensation which has not been clearly regulated in Article 7 of Law Number 16 of 2019.

SUGGESTION

Numerous factors of underage marriages have resulted in countless dispensation request in court. One way to overcome this problem is to make rules that are limiting the reasons for filling the case. The law enforcers of this case are also expected to take part in tightening its application procedure. Thus, the number of marriages at an early age can be diminished. Accordingly, the marriage dispensation could not misused by interested parties. This includes legalize underage marriage without compelling reason.

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