

RECONSTRUCTION OF EXAMINATION OF MARRIAGE DISPENSATION AS A EFFORT TO PROTECT CHILDREN

*(Juridical Study of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for
Adjudicating Applications for Marriage Dispensation)*

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Abstract

Marriage dispensation is one of the problems that is still unfinished to be discussed where there is a lot of debate that the marriage dispensation is a legality of underage marriage on the grounds that the provision of marriage dispensation is not based on child protection even some decisions of the Religious Courts have become a material for criticism where the consideration of the judges' decisions is still considered "not properly constructed both in terms of examination procedures and in terms of substantial legal considerations, therefore the Supreme Court as the highest institution within the scope of the Judiciary has issued Supreme Court Regulation Number 5 of 2019 as a regulatory framework for the judges of course to determine the granting of marriage dispensation to the prospective bride and groom whose age is still below the age of marriage with reference to child protection efforts such as in the absence of coercion, psychological maturity, reproductive health and sexuality, as well as economic and educational readiness of the prospective bride and groom which are seen as factors that must be considered so that child protection efforts can be achieved.

Keywords: *Reconstruction, Examination, Marriage Dispensation, Children Protect.*

A. Introduction

The discourse of dispensation for marriage has always been a polemic in terms of child protection. Where some of the child protection organizations always criticize the granting of marriage dispensation to children who are not old enough because they are considered to violate children's rights. The

criticism is directed at state institutions as one of the stakeholders in the instrument of power in order to protect and prosper all the people who are sovereign to them. Stakeholders who are in the vortex of *trias politica* have tried their best to overcome these problems.

One of the state institutions that often draws criticism is the judiciary, especially the Religious Courts, which also have the authority to grant marriage dispensations to minors and the courts which examine and adjudicate the most cases of marriage dispensations. 13251 dispensation cases were decided, the majority of which were given dispensation by judges to marry children who were not of sufficient age as stipulated in Law no. 1 of 1974.¹

Although in deciding the case of marriage dispensation, the judges certainly have sufficient grounds and considerations, but they still receive criticism that the judge "legalizes underage marriage" by rejecting all of the judges' arguments because they consider there is no formal and structured construction in providing the basis and considerations for granted the dispensation of marriage submitted to him.

Therefore, to provide a structured and well-constructed argument against this problem, the Supreme Court of the Republic of Indonesia as one of the supreme courts or the highest institution in the judiciary issued Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, which regulates the provisions of the examination process. cases by judges in granting marriage dispensation to children who are not yet of sufficient age based on the provisions of the Marriage Law which are stricter, structured, and oriented towards child protection. This construction will later be described further in this paper by comparing the juridical aspects of the previous provisions, which one is more oriented towards child protection. Which later can answer the criticisms and problems in the case of the marriage dispensation.

B. Theoretical Framework

There are several theoretical studies that researchers use in this study. The first is the theory of legal reconstruction where in this case the researcher looks at the renewal of the form of order in the examination of cases of marriage dispensation. Second, the theory of child protection is seen from the side of things related to child protection efforts as a form of purpose for the legal reconstruction of provisions for examining cases of marriage dispensations and the three comparative theories, namely researchers analyzing child protection efforts before and after the provisions of the Supreme Court

¹ 2018 Annual Report of the Directorate General of Religious Courts p.5

regulation number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. Furthermore, the three theories according to the researcher are considered relevant to the topic of this research as an analytical knife, so that they can help researchers to analyze legal issues in this study.

C. Research Methods

This research is normative juridical, namely research that is focused on examining the application of positive legal rules. In this regard, it includes Supreme Court regulation number 5 of 2019 concerning guidelines for adjudicating marriage dispensation cases.

Normative legal research is a scientific research procedure to find the truth based on the logic of legal scholarship from the normative side. Steady scientific logic in normative legal research is built on scientific disciplines and the workings of normative legal science, namely the science of law whose object is the law itself.²

This research then uses 2 (two) approaches. Some of these approaches include a statutory approach, a conceptual approach and a case approach. The statutory approach is carried out by examining the laws and regulations relating to the legal issues under study, namely the Supreme Court regulation number 5 of 2019 concerning guidelines for adjudicating marriage dispensation cases, which does not only examine statutory regulations. However, it also examines the material content, studying the ontological basis for the birth of legislation, the philosophical basis of legislation and the ratio legis of legislation.³ And The conceptual approach is carried out by examining the views and doctrines that develop in the science of law, so that it can be a basis for building legal arguments when solving legal problems being studied. Furthermore, the study will clarify ideas by providing legal understandings, legal concepts, and legal principles that are relevant to the problem.⁴

Concepts are defined as abstract elements that represent classes of phenomena in a field of science which sometimes refer to universal things that are abstracted from particular things. The function of the concept is to bring

² According to Peter Mahmud Marzuki, legal science has the characteristics of a prescriptive and applied science. As a prescriptive science, jurisprudence examines the purpose of law, values of justice, validity of the rule of law, concepts of the rule of law and legal norms. The prescriptive nature of this law is something substantial in the science of law. Meanwhile, as an applied science, legal science places standard procedures, provisions and signs in implementing the rule of law. See Peter Mahmud Marzuki, *Legal Research*, Jakarta: Kencana, 2009, p. 22-25.

³ See Peter Mahmud, p. 96

⁴ See Peter Mahmud,....

up objects that attract attention from a practical point of view and from the point of view of knowledge in the mind and certain attributes.

D. Overview of Marriage Dispensation

Marriage dispensation can be understood from two basic words, namely the meaning of dispensation and the meaning of marriage, in the big Indonesian dictionary the meaning of dispensation is an exception from general provisions for a special situation.⁵ according to C.S.T. Kansil and Christie S.T. The meaning of dispensation is a determination which states that a provision is no longer valid for someone who has been special.⁶ While the meaning of marriage is based on Article 1 of Law no. 1 of 1974 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 God Almighty.⁷

So from the definition above, the writer concludes that the Marriage Dispensation is the granting of legal access to someone who is not old enough to carry out the marriage bond by an institution that has the authority to provide legal access.

The legal basis for the dispensation of marriage is contained in the provisions of Article 7 paragraph (1) of Law no. 16 of 2019 amendments to Law no. 1 of 1974 concerning Marriage, marriage is only permitted if the male and female parties have reached the age of 19 (sixteen) years.⁸ and the provisions of Article 7 paragraph (2) of Law no. 16 of 2019 amendments to Law no. 1 of 1974 concerning Marriage, in the case of deviations from paragraph (1) of this article, you can request a marriage dispensation to the Religious Court or other authorized official appointed by one of the parents of both the male and female parties to request a dispensation from the Court on the grounds that it is very urgent, accompanied by evidence. sufficient supporting evidence.⁹

The provisions mentioned above make the Marriage Dispensation an Absolute Competence of the Religious Courts based on the provisions of the Elucidation of Article 49 of Law No. 7 of 1989 as amended by Law no. 3 of 2006 and the second amendment with Law no. 50 of 2009 concerning Religious Courts. Where in this case the Religious Courts are given the authority to grant marriage dispensation to children who are not yet old

⁵ <https://kbbi.web.id/dispensasi> accessed on 03 December 2019 at 22:23 WIB

⁶ C.S.T Kansil and Chistine S.T Kansil, *Kamus Istilah Aneka Ilmu*, (Jakarta: Surya Multi Graphics, 2001), p. 52.

⁷ See Article 1 of Law Number 1 of 1974 concerning Marriage

⁸ See Article 7 paragraph (1) of Law Number 16 of 2019 amendments to Law Number 1 of 1974 on Marriage

⁹ See Article 7 paragraph (1) of Law Number 16 of 2019 amendments to Law Number 1 of 1974 on Marriage

enough based on the provisions of Law No. 16 of 2019 amendments to Law no. 1 of 1974 concerning marriage.¹⁰

Even though the Religious Courts have absolute competence in granting marriage dispensations, they still have to consider the urgency of granting marriage dispensations, namely the benefit of the household later in order to be able to realize the purpose of marriage, namely the creation of peace in the household based on affection (*sakinah mawaddah wa rahmah*). This goal will be difficult to realize if the maturity of the soul and body of the prospective bride and groom has not been fulfilled to enter marriage.¹¹

The factors that make the number of applications for marriage dispensation in the religious courts on average are because they are pregnant before marriage. Because during adolescence, many teenagers experience changes both physically and psychologically, resulting in changes in attitudes and behavior, such as starting to pay attention to their appearance, becoming interested. opposite sex, trying to attract attention and the emergence of feelings of love for the opposite sex and will cause sexual urges which are then justified to do things that are prohibited by religion to have sex even though they are not tied to marriage beforehand so that it triggers doing negative things that are not justified. In addition, another reason that is often used as a dispensation is because they are too close in touch or in love (dating), if the marriage is not carried out immediately, it is feared that they will fall into the path of immorality, this concern can come from the party who is getting married or from the two candidates. the bride and groom.¹²

E. The process of examining marriage dispensation: comparative study before and after the Supreme Court regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation

The process of examining cases of previous marriage dispensations is explicitly only regulated in Book II of the 2013 Guidelines for the Implementation of the Duties and Administration of Religious Courts.¹³ There are no detailed and structured provisions related to the examination process as a form of protection for children, until the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for

¹⁰ See Elucidation of Article 49 of Law Number 7 of 1989 as amended by Law Number 3 of 2006 and the second amendment to Law Number 50 of 2009 concerning Religious Courts

¹¹ This is stated in the word of Allah SWT in Surah Ar-rum verse 21 which implies the word mawaddah wa rahmah as a guide to achieving a sakinah family goal. See Muhammad Hasbi Ash-Shidieqy, Tafsir Al-Qur'an Majid An-Nur (Semarang: Pustaka Rizki Putra, 2000) p. 370

¹² Marilang, Dispensasi Kawin Anak Dibawah Umur, (Journal al-daulah : Vol 7/No. 1/2018) p. 151.

¹³ Supreme Court of the Republic of Indonesia, Directorate General of Religious Courts, Guidelines for Implementing Duties and Administration of Religious Courts in 2013, p. 138.

Marriage Dispensation, which regulates the detailed and structured process of examining cases of marriage dispensations. Here the author will describe the differences in the process of examining cases of marriage dispensation in book II of the guidelines for implementing the duties and administration of religious courts in 2013 and the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation with the following table;

Book II Guidelines for the Implementation of Duties and Administration of Religious Courts in 2013	Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation
Administrative requirements are not explicitly regulated	Administrative requirements are strictly regulated in Article 5 paragraphs (1) and (2)
The examining judge is the judge of the assembly	Single judge examining judge
The nominating party by the prospective groom and bride or the parents of the prospective bride and groom	Parent/guardian applicant
There are no provisions regarding the use of language, and still using the trial attribute	Language that is easy for children to understand and does not use trial attributes
There is no giving advice to the Petitioner, children, prospective husband/wife and parents/guardians	Giving advice to the Applicant, children, prospective husband/prospective wife and parents/guardians who are included in the consideration and if the determination is not implemented by law
Must listen to information from parents, close family or guardians	Must listen to information from parents, close family or guardians as outlined in the considerations and if not carried out the determination is null and void
There is no identification related to elements of psychological, physical, sexual or economic coercion against children	identification of elements of psychological, physical, sexual or economic coercion against children must be considered

<p>There are no provisions related to the judge being able to examine by hearing the child's statement without the presence of the parents, hearing the child's statement through audio-visual equipment, suggesting that the child be accompanied by a companion, requesting recommendations from psychologists or doctors/midwives, Social Workers, TKS, P2TP2A, and KPAI/KPAD.</p>	<p>The judge examines by hearing the child's statement without the presence of the parents, hearing the child's statement through audio visual devices, suggesting that the child be accompanied by a companion, asking for recommendations from psychologists or doctors/midwives, Social Workers, TKS, P2TP2A, and KPAI/KPAD.</p>
<p>There is no provision that judges are obliged to examine with the orientation of the best interests of children and pay attention to international treaty conventions related to child protection</p>	<p>Judges must examine with the orientation of the best interests of children and pay attention to international treaty conventions related to child protection</p>
<p>There is no classification regarding examining judges</p>	<p>Child judges must be prioritized, have followed the certification of Women in conflict with the law, or are certified in the Juvenile Criminal Justice System, have experience in adjudicating applications for marriage dispensation, and if there is no judge as referred to above, a judge can be appointed. marriage dispensation</p>

(Table.1)

Broadly speaking, it can be seen that there are differences in the process of examining marriage dispensation cases before and after the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensations. Where the construction examination of the marriage dispensation case in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation is more regulated in detail and neatly structured so that it better reflects efforts in child protection which the author will describe in a special sub-chapter related to this matter.

In addition, the positive aspect of the process that has been regulated in detail and in a structured manner will strengthen judges' considerations in granting dispensations so that criticism from outside parties stating that judges only grant dispensations without seeing the protection of children's rights will be

easily countered by itself if seen from the aspect of the examination process which is really oriented to the aspect of child protection.

F. Child Protection Efforts in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation

Child protection is all efforts made to create conditions so that every child can carry out his rights and obligations for the development and growth of children naturally, physically, mentally and socially. Child protection is the embodiment of justice in a society, thus child protection is sought in various fields of state and social life. Child protection activities have legal consequences, both in relation to written law and unwritten law. The law is a guarantee for child protection activities.

Stakeholders of state power who are in the vortex of trias politica have the obligation and responsibility to respect and guarantee the human rights of every child regardless of ethnicity, religion, race, class, gender, ethnicity, culture and language, legal status of children, birth order of children and physical and/or mental condition. The state and government are also obliged and responsible to provide support for facilities and infrastructure in the implementation of child protection. Arrangements regarding the obligations and responsibilities of the state and government are contained in the provisions of Article 21 and Article 22 of the Law on Child Protection.¹⁴

Therefore, here the Supreme Court of the Republic of Indonesia as one of the Stakeholders of State power in the judicial field issues Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation as a form of protection for children.¹⁵ There are several aspects of the protection of children as contained in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, namely as follows:

1. Protection Efforts by Avoiding the Elements of Coercion

As is known in the science of child psychology is considered unable to provide informed consent¹⁶ so the judge must really consider the element of coercion either in the form of persuasion from someone such as parents, family, or

¹⁴ See Articles 21 and 22 of Law Number 35 of 2014 Amendment to Law Number 23 of 2002 concerning Child Protection

¹⁵ See Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation

¹⁶ According to the Regulation of the Minister of Health number 290/MenKes/Per/III/2008 and Law no. 29 of 2004 Article 45 and the KKI Medical Action Approval Manual in 2008. Informed Consent is the approval of medical action given by the patient after receiving a complete explanation of the medical action to be performed on the patient.

others. Thus, in Article 6 paragraph (1) of Law Number 1 of 1974: marriage must be based on the consent of both the bride and groom, because a marriage is a sacred act with burdens and responsibilities as a life partner so heavy to realize the purpose of marriage itself.¹⁷

1. Protection Efforts by considering Psychological maturity

Psychic Maturity of the child is the main factor influencing marriage where someone who is psychologically mature will be able to adjust the effective needs of the household by knowing the strengths and weaknesses of each so as to create a harmonious family. In this case, the judge is required to see the readiness and psychological maturity of a child, either by being assisted by psychology or just looking at the behavior of the child's personality in the trial process, therefore the dispensation is only really given to the child who is ready and psychologically mature so that he can fulfill his needs. the purpose of marriage.

2. Protection efforts by considering reproductive health and sexuality

Apart from psychological factors, judges are also required to consider the reproductive and sexual health of children, readiness and maturity of reproductive organs and sexuality to determine household welfare in marriage. The impact of reproductive organs and good sexuality is to make them free from all diseases and defects in the system related to the reproductive organs and can enjoy their sexual life in a healthy and safe manner. In addition, it also encourages some wisdom of the existence of marriage so that the purpose of marriage can be achieved.

3. Protection efforts by considering economic and educational problems

The success of a marriage is also strongly influenced by economic problems. Based on the results of research, it is stated that 55% of divorces are caused by household economic factors. Therefore, here the judge must consider this as well as look at the commitment of the parents/guardians in ensuring the interests of the child, one of which is the economic problem of the child to carry out domestic life. In addition, in terms of education as a child's right, it must still be carried out with guaranteed by the parents/guardians so it is also necessary to consider the commitment of the parents/guardians in ensuring the education of the child.

G. Conclusion

1. Marriage dispensation is the granting of legal access to a person who is not yet old enough to enter into a marriage bond by an institution that has the authority to grant such legal access. Differences related to the process of

¹⁷ See Article 6 paragraph (1) of Law Number 1 of 1974 on Marriage

examining cases of marriage dispensation before and after the Supreme Court regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. Where the construction examination of marriage dispensation cases in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation is more regulated in detail and neatly structured so that it better reflects efforts in child protection.

2. Several aspects of the protection of children contained in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation are, (1) Protection Efforts by Avoiding Coercion (2) Protection Efforts by considering Psychological maturity (3) Protective Efforts taking into account reproductive health and sexuality (4) Protection measures taking into account economic and educational issues

H. Recommendation

1. With the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, it is hoped that judges in the Courts, especially the Religious Courts, can implement and implement absolutely so that efforts to protect children can be achieved and can contribute to protecting children may not have been stated in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation.
2. There is socialization related to the application of the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation so that the intent and purpose of these provisions can be understood and implemented properly.

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