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Judges' Consideration of Underage Marriage Dispensation Cases (Study of Decision Number 28/Pdt.P/2023/PA.Pwt)

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ABSTRACT

Marriage can be carried out if it meets the requirements in accordance with Marriage Law Number 1 of 1974 which states that marriage can be carried out if the man is 19 years old and the woman is 16 years old. But if in the event that a marriage will be carried out under this age, it is necessary to have a marriage dispensation from the authorized party, namely the court. A judge is asked for the discretion to decide on a marriage dispensation case either granting or refusing accompanied by strong considerations and reasons. An application for marriage dispensation is submitted by both male and female parents to the Religious Court for those who are Muslims in the area where they live. Judges as one of the pillars in the judicial process and law enforcement in the judicial area, namely receiving, examining, deciding and resolving cases that enter the court. This article is part of research that has been conducted in a normative juridical manner based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research and the problem to be studied is the consideration of judges in religious courts related to underage marriage dispensation cases. It is concluded that dispensation to enter into underage marriage is the absolute competence of the Religious Court for people who are Muslims. On the basis of the judge's consideration, the panel of judges will reject or grant the application in the form of a decision.

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I. INTRODUCTION

Marriage is "the inner and outer bond between a man and a woman as husband and wife with the aim of forming a family, a happy and eternal household based on God Almighty" according to Law Number 1 of 1974 concerning Marriage article 1. Meanwhile, in the Compilation of Islamic Law (KHI) article 2, it is explained that marriage is "a very strong contract or mithāqan ghalīzan to obey the commands of Allah and carrying it out is an act of worship".[1]

In Indonesia, since the enactment of Law Number 1 of 1974, the community has used this law as a guideline for marriage. One of the principles adopted by the Indonesian marriage law is that the prospective husband and wife must be mature in terms of their psychology and body to be able to enter into marriage. Actually, children who have reached the age of marriage in the Marriage Law contained in Article 7 paragraph (1), namely 19 years for men and 16 years for women, are considered adults and are able to act and can determine their own choices. Therefore, for those who are still under the age of 16 (male or female), permission from parents is required. If the

[1] Ardila, A. (2014). Penolakan Dispensasi Nikah Bagi Pasangan Nikah Sirri Di Bawah Umur. *The Indonesian Journal of Islamic Family Law*, 327.

parents are absent, then permission is obtained from the guardian, the person who maintains or the family in the straight line of descent upwards. However, permission can be obtained from the court, if there is some reason why permission cannot be obtained from the guardian, caretaker or family.[2]

The definition of underage marriage is a marriage or contract that can guarantee that a man and a woman have each other and can have conjugal relations and the marriage is carried out by someone (prospective husband / prospective wife) whose age has not reached the age specified by the current law in Indonesia which has been determined by the government.

The definition of marriage dispensation is a concession granted by the Court to prospective husband and wife who have not reached the lowest age limit in order to enter into marriage. The application for marriage dispensation is voluntary, the product is in the form of a determination. What is called a determination is a court decision on a petition case. And its purpose is only to determine a certain condition or status for the applicant. [3] In examining and adjudicating a marriage dispensation case, the judge must really have and consider the case from various aspects, be it justice, maslahat and benefits for the child far into the future. Because a marriage besides requiring biological maturity is also psychological. So in the General Elucidation of the Marriage Law it is stated that the prospective husband and wife must be mature in body and soul to be able to enter into marriage so that they can realize marriage properly without ending in divorce and get good and healthy offspring.

This article is prepared using normative juridical methods and the research specifications are descriptive analytical, in this study explaining the consideration of judges of the Purwokerto Religious Court to provide marriage dispensation for a person whose age is not sufficient to be able to marry in accordance with the regulations of Law Number 1 of 1974 Article 1. There are several previous studies on the consideration of judges related to underage marriage dispensation cases including: the first is Rohmat Saripudin, 2019. Accompanied by the title, Dispensation of Marriage for Minors (Analysis of the Decision of the Pandeglang Religious Court Number 33/Pdt.P/2017). This study explains the procedures that must be followed to apply for marriage dispensation at the Pandeglang Religious Court. Although both studies are related to marriage dispensation in religious courts, the author discusses more about the procedure if you want to apply for marriage dispensation in a religious court.[4] The second is Nurmilah Sari, 2011. Accompanied by the title, Dispensation of Marriage Under Age (Case Study of Tngerang Religious Court in 2009-2010). This study explains the consideration by the Judge based on deciding the case or allowing underage marriage based on the authority of the Religious Court to handle the type of case that is the power of the Religious Court.[5]

II. RESEARCH PROBLEMS

Why did the judge of the Purwokerto Religious Court grant the application for dispensation of marriage to a minor?

III. RESEARCH METHODS

This article is prepared using the normative juridical method and descriptive analytical research specifications based on secondary data consisting of primary, secondary and tertiary legal materials reinforced with primary data. Through this article, it will be discussed further about the consideration of judges in granting marriage dispensation in terms of civil procedural law.

Normative legal research is a scientific research procedure to discover the truth based on scientific logic from the normative side. The normative side here is not limited to laws and regulations. Normative legal research refers to the concept of law as a rule with a doctrinal-nomological method that focuses on the rules of teaching that govern behavior. Types of legal philosophy studies, types of pure legal studies and types of America sociological jurispudance studies are included in this part of the research.[6]

The normative juridical approach is an approach that is carried out based on the main legal material by examining theories, concepts, legal principles and legislation related to this research. This approach is also known as the literature approach, namely by studying books, laws and regulations and other documents related to this research.

IV. RESULT AND DISCUSSION

Court Dispensation for Underage Marriage Applications

In Indonesia, there is a maximum age limit for marriage as stipulated in the UUP. The UUP is a unification of law in the field of marriage, while in Indonesia the provisions of customary law and religious law also apply in

[2] Agus Khalimi, T. S. (2021). Dispensasi Nikah dalam Perspektif Maslahah. *Al-Hukkam: Journal of Islamic Family Law*, 175.
[3] Hakim, I. R. (2017). Pertimbangan Hakim Terhadap Penetapan Dispensasi Kawin Di Pengadilan Agama Pacitan Pada Tahun 2016. *Institut Agama Islam Negeri (IAIN) Ponorogo*.
[4] Saripudin, R. (2019). *Dispensasi Nikah Anak Dibawah Umur (Analisis Putusan Pengadilan Agama Pandeglang)* hlm 22.
[5] Sari, N. (2011). Dispensasi Nikah Dibawah Umur . hlm 17-20.
[6] Bambang Sunggono, Metodologi Penelitian Hukum, Jakarta:PT.RajaGrafindo Persada, 2007, hal.27-28

terms of marrying. When referring to the provisions of various provisions of customary law in Indonesia and religion, there are no rules regarding the minimum age limit for marriage.[7]

The phenomenon of young marriage is still rampant in Indonesia, with various driving factors such as out-of-wedlock pregnancy, economy, culture, and education causing this to happen. In the UUP there is a regulation regarding the age of marriage, but in another article, namely Article 7, there is an exception, namely marriage can be carried out if there is dispensation from the court. This dispensation is in the form of permission as a basis for the Office of Religious Affairs (KUA) or Civil Registry to marry the prospective husband and wife.

Dispensations are submitted in the form of a petition. As is known, a request gives birth to a stipulation and the basis for its submission is because there is no dispute between the parties, therefore the parties may consist of 1 (one) person. An application for dispensation is not related to a claim of right, but is processed through the court, in other words, the position of the applicable civil procedural law is in the form of legal regulations that determine how to ensure the implementation of material civil law, in this case marriage law.

All courts throughout the territory of the Republic of Indonesia are state courts regulated by law. Article 18 of the UUKK states that judicial power is exercised by a Supreme Court and the judicial bodies subordinate to it within the general judicial system, religious judicial system, military judicial system, state administrative judicial system, and by a Constitutional Court.

Referring to Articles 49 and 50 of the Religious Courts Law, it is the Religious Courts for Muslim parties and the District Courts for non-Muslim parties that have absolute competence to receive and decide and determine dispensation applications. Therefore, the Religious Court as part or extension of the Supreme Court in charge of receiving, examining and adjudicating certain cases, in handling the issue of marriage dispensation still refers to the process and procedures of the applicable legislation. Seeing the phenomenon that occurs in society from year to year, more and more teenagers want to marry young and apply for marriage dispensation in the Religious Courts and District Courts, so the problem of marriage dispensation needs special attention to avoid unwanted things and in the context of law enforcement.

Regarding law enforcement, Soerjono Soekamto provides an understanding of law enforcement in a broad sense including activities to implement, apply, and take legal action against any violations or deviations from the law committed by legal subjects either through judicial procedures or other procedures. As for the narrow sense of law enforcement, it involves enforcement actions against any violations or deviations from laws and regulations.[8] There are essential elements in law enforcement, namely legal structuring, legal implementation, legal enforcement, and dispute resolution, while the factors that influence law enforcement consist of legal factors themselves, law enforcement factors, supporting facilities and facilities, community factors, and cultural factors. Speaking of law enforcement issues, one of them is through the process in court in terms of marital problems.

The authority of the Religious Court or District Court to grant dispensation for underage marriage is the absolute authority of the judicial body. Theoretically, the judicial system in Indonesia recognizes two types of authority. Based on these two types of authority, the authority of courts in Indonesia to accept cases is limited to certain issues that do not overlap with each other. The two authorities are absolute authority and relative authority.

Procedurally, the implementation of dispensation for underage marriage in court is required for prospective grooms who are not yet 19 years old and prospective brides who are not yet 16 years old. As specified in the UUP that marriage is only permitted if the man reaches the age of 19 years and the woman has reached the age of 16 years In the event of deviation from paragraph (1) of this article, a request for dispensation may be made to the court or other official, appointed by both parents of the male and female parties An application for marriage dispensation is submitted by the parents of the man or woman to the religious court with jurisdiction over their place of residence. The Religious Court, after examining the case in court, and believing that there are circumstances that make it possible to grant such dispensation, grants marriage dispensation in a decree. In this case the application for marriage dispensation must be from the parents or guardians of the bride and groom, so not the bride and groom as in the case of a marriage license application for those who are not yet of age.

Judges' Considerations and Stipulations on Dispensation of Marriage under Age

Dispensation of marriage age occurs when there is a request from the guardian of one of the male and female parties who are not old enough to marry in the UUP, for men at least 19 years old and for women at least 16 years old, requesting permission from the Religious Court for Muslims or the District Court for non-Muslims. In examining and deciding the application, the judge is bound by the principles in civil procedural law, among others:

1. The Judge is Waiting

[7] Sonny Dewi Judiasih, S. S. (2017). Dispensasi Pengadilan: Telaah Penetapan Pengadilan Atas Permohonan. *Jurnal Hukum Acara Perdata*.

[8] Soerjono Soekamto, 1986, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, Rajawali, Jakarta, h 3

The principle of civil procedural law stipulated in the HIR is that the initiative to file a claim of right is left entirely to the interested party. Whether there will be a process or not, whether a case or claim of rights will be filed or not is entirely left to the interested party, so there is a pameo that if there is no claim of rights or prosecution, then there is no judge (wo kein klanger ist, ist kein richter; nemo judex sine actore). Thus, the claim for rights is filed by the interested party, while the judge is waiting for the right claim to be submitted to him (iudex ne procedat ex officio). This arrangement can be seen in Article 118 HIR and Article 142 Rbg).

2. Passive Judge
   Judges in examining civil cases are passive in the sense that the scope or subject matter of the dispute submitted to the judge for examination is basically determined by the parties to the dispute, not by the judge. The parties can freely end their own disputes that have been submitted to the court, while the judge cannot prevent it. This can be in the form of peace or withdrawal of the case as stipulated in Article 130 HIR and 154 Rbg. However, the judge as the presiding judge must actively lead the examination of the case. The judge has the right to give advice to both parties and show legal remedies and provide information to the parties as stipulated in Article 132 HIR and Article 156 Rbg. Based on this, the HIR and Rbg systems differ from the Rv which basically contains the principle of "passive judge".
3. Hearing Both Parties
   The principle of hearing both parties is known as the principle of audi el alteram portem or Eines Mannes Rede ist keines Mannes Rede, man soll sie horen alle beide which means that the judge may not accept the testimony of one party as truth, if the opposing party is not heard or not given the opportunity to express his opinion. This is regulated in Article 132a, 121 paragraph (2) HIR and Article 145 paragraph (2), 157 Rbg. In this case, the judge hears the reasons from one of the parties, namely the applicant, what is the basis or reason for the application for dispensation.
4. Judgment Must Be Accompanied by Reasons
   All court decisions must contain reasons for the decision on which they are based. The reasons or arguments are intended as a form of accountability of the judge for the decision he made to the community and the parties (Article 184 paragraph (1), 319 HIR and Articles 195, 618 Rbg).
5. Fees for litigation
   Fees for litigating in court are set out in Articles 121(4), 182, 183 HIR and Articles 145(4), 192-194 Rbg. This fee covers the cost of the registry, the cost of the summons and notification of the parties and the cost of stamp duty. In addition, if you request the assistance of a lawyer (Advocate) then you must also pay a fee.

The judge's consideration is also based on existing evidence. Proof is the presentation of evidence that is valid according to the law to the judge who examines a case in order to provide certainty about the truth of the events presented. Sudikno further explains the purpose of proof. If the purpose of scientific proof is solely to draw conclusions, the purpose of juridical proof is to make a definitive decision, which is a definite decision, and has no doubt and legal decision. Court decisions must be objective so that no party feels too low the level of justice of the other party. [9]

The factors that influence the basis of the judge's consideration and the decision granting or refusing marriage age compensation are that the judge is not only based on written and unwritten law but can also make legal discoveries with the consideration that if the law stipulates certain things for certain events, it means that the regulation is limited to certain events.

The current evidentiary law in Indonesia still adheres to certain types of evidence. The parties involved in the trial (judge-defendant-plaintiff) are not free to accept-submit evidence in the process of case settlement. The law has determined enumeratively what is valid and valuable as evidence, in other words, the law of evidence that applies here is still closed and limited. Judges are bound by valid evidence, which means that judges can only decide cases through evidence that has been predetermined by law. The tools of evidence mentioned by the law are: written evidence, evidence by witnesses, suspicions, confessions and oaths (Art. 164 HIR, Art. 1866 Civil Code).

The prohibition of underage marriage is not explicitly found in the UUP although the age limit for marriage requirements has been set, but at the practical level its application is flexible. This means that if in a casuistic manner it is very urgent or an emergency in order to avoid damage / mafsadah must take precedence over maintaining goodness / maslahah, then the judge, apart from basing it on the provisions of positive law, also needs to consider maslahat mursalah (ijtihad method in Islamic law based on public benefit).[10]

Judges prioritize the concept of maslahat murshalah, which is the consideration of goodness and rejecting damage in society and efforts to prevent harm. Maslahat

[9] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Liberty, Yogyarakarta, h. 132- 133
[10] Zainuddin Ali, 2006, *Hukum Perdata Islam di Indonesia* Jakarta: Sinar Grafika, Jakarta, h. 135.

mursalah is a maslahah that is essential and general in nature, in the sense that the granting of dispensation of marriage age to children who are not old enough to marry can be accepted by common sense that it really brings benefits to the prospective bride and groom and their respective families.

The judge's consideration as one of the bases for a decision whose dictum is declarative, either granting or rejecting the application, is also based on the legal objectives of justice, legal certainty and expediency. The justice that is coveted by society is justice in accordance with what is felt and what applies in the country where the community is located.

Justice is essentially treating someone or another party in accordance with their rights. It is the right of every person to be recognized and treated in accordance with their dignity, equal status, and equal rights and obligations, regardless of ethnicity, descent, and religion.

Legal certainty requires the creation of general rules or methods that apply generally. In order to create a safe and peaceful atmosphere in society, these rules must be enforced and implemented firmly. For that purpose, the legal methods must first be known with certainty. It can be said that in essence, legal certainty is a situation where human behavior, whether individuals, groups, or organizations, is bound and within the corridors that have been outlined by the rule of law. The three pillars in realizing legal certainty can be divided into legal certainty from the elements of legislation, institutions and legal institutions, which are realized in institutional decisions. Thus it can be concluded that, a decision or determination of a judge is a statement made in writing by a judge as a State official authorized to do so which is pronounced in front of a trial in accordance with existing legislation which becomes law for the parties which contains an order to a party to perform an act or not to perform an act that must be obeyed.

For the creation of legal certainty, an important condition to be met is the existence of laws or regulations that are clear and not multi-interpretive. The emphasis on the principle of expediency is more nuanced to the economic aspect, with the premise that the law exists for humans, so that the purpose of the law must be useful for many people. It can be a consideration that the application can be granted or rejected by looking at which benefits can be caused.

For example in Stipulation Number 28/Pdt.P/2023/PA.Pwt. in this case the applicant is the parent of a girl aged 17 years and 9 months. The applicant plans to marry but the Pekuncen Sub-District Religious Affairs Office, KUA refuses to marry her because she is not old enough according to the UUP, which is not yet 19 years old. According to the Applicant, she has known the prospective groom and has been in a love relationship for quite a long time (dating) and the relationship has been very close so that if she does not get married immediately, she is worried that adultery will occur which is prohibited by law and religion, that the will to marry is based on the consent of both parties without any threat or coercion from any party, that the two prospective brides are both Muslims, there is no mahram relationship either because of ancestry and hereditary ties or because of marital ties, that her party, although not old enough but already baligh, is physically and mentally ready to live a married life.

Based on the testimony of the witnesses and in conjunction with the arguments in the applicant's petition, the panel of judges considered that the applicant's son was deemed fit to be married off to his prospective wife in order to avoid unwanted matters, because both of them already liked and loved each other. In such a case, the judge could not refuse to grant dispensation of marriage age because it was feared that if the application was rejected the consequences would be greater. So, in order to avoid damage / mafsadah, the good /maslahah must take precedence, so the prospective bride and groom must be married immediately. If the application for dispensation of marriage is not granted, it is feared that there will be an extraordinary impact, for example, the child is desperate to have intercourse and then becomes pregnant before marriage. This will be a disgrace to the family. The family will receive punishment from the social environment in the form of despicable gossip.

In granting this stipulation, the judge did not only base the age limit on the male party aged 19 years and the female party 16 years but the judge was progressive in that the judge prioritized the greater human interest rather than interpreting the law from the point of logic and regulations. Determination/beschikking A determination is made in relation to a petition, namely in the context of so-called "voluntair jurisdiction".

Determination from the court is one of the conditions for the validity of a person who wants to marry a minor and if the KUA / KCS wants to legalize by marrying the prospective couple without court permission, the marriage is considered invalid or null and void or certain parties can prevent marriage as stated in Articles 16 and 20 of the UUP because one of the conditions for marrying a minor is the permission of both parents and the determination of the permissibility of marriage by the local court and the existence of the necessary evidence.

V. CONCLUSION

Law No. 1/1974 sets a maximum age limit for entering into marriage, but it is also possible to ignore this provision through the dispensation procedure to enter into marriage through an application to the Religious Court or District Court in accordance with the religion of the applicant. Therefore, it is the absolute competence of the Religious Courts and District Courts to receive, examine, and determine dispensation as a form of permission and requirement to marry for couples where one of them is underage. The determination is formulated by the judge

based on the evidentiary process and legal considerations. In addition to considering the principles of legal certainty, justice, the main thing is expediency based on both written and unwritten law. The judge's determination is a form of declarative decision to grant or not grant the dispensation application. The judge's consideration as one of the bases for the decision whose dictum is declarative, either granting or rejecting the application, is also based on the objectives of the law, namely justice, legal certainty and benefit. The justice that is coveted by society is justice that is in accordance with what is felt and what applies in the country where the community is located.

REFERENCES

Soerjono Soekamto, 1986, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, Rajawali, Jakarta.

Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Liberty, Yogyarakarta.

Zainuddin Ali, 2006, *Hukum Perdata Islam di Indonesia* Jakarta: Sinar Grafika, Jakarta.

Agus Khalimi, T. S. (2021). Dispensasi Nikah dalam Perspektif Maslahah. *Al-Hukkam: Journal of Islamic Family Law*, 175.

Ardila, A. (2014). Penolakan Dispensasi Nikah Bagi Pasangan Nikah Sirri Di Bawah Umur. *The Indonesian Journal of Islamic Family Law*, 327.

Hakim, I. R. (2017). Pertimbangan Hakim Terhadap Penetapan Dispensasi Kawin Di Pengadilan Agama Pacitan Pada Tahun 2016. *Institut Agama Islam Negeri (IAIN) Ponorogo*.

Musyarrafa, Nur Ihdatul . 2020. Batas Usia Pernikahan Dalam Islam. Jurnal Shautuna,

Vol. 1, No. 3, September 2020.

Saripudin, R. (2019). *Dispensasi Nikah Anak Dibawah Umur (Analisis Putusan Pengadilan Agama Pandeglang)* hlm 22.

Sari, N. (2011). Dispensasi Nikah Dibawah Umur . hlm 17-20.

Sonny Dewi Judiasih, S. S. (2017). Dispensasi Pengadilan: Telaah Penetapan Pengadilan Atas Permohonan. *Jurnal Hukum Acara Perdata*.

Undang-Undang Nomor 3 Tahun 2006 Tentang Peradilan Agama

Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan

KHI Pasal 15 ayat (1)