

Research Article

Judges' Considerations in Agreeing to Marriage Dispensation *Maqā'id Syarī'ah* Perspective

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Abstract.

In the case of the marriage age limit stated in Law Number 1 of 1974 which has been amended by Law Number 16 of 2019, where the marriage age limit was changed to 19 years for men and women. The minimum age requirement for marriage has been widely applied for dispensation at the Sukadana Religious Court due to increases in applications every year. The rise in the number of requests for dispensation is largely due to pregnancies outside of marriage. In granting or adjudicating a marriage dispensation case, the judge considers several provisions based on legislation and Islamic Compilation Law (KHI) in terms of *maqā'id syarī'ah*. The aim of granting a marriage dispensation is to provide benefits for the applicants. This type of research is qualitative. Data collection were done by conducting field research interviews with descriptive analysis. Data sources used were primary and secondary. In terms of results, the judge considers the application for marriage dispensation based on Law Number 7 of 1989 concerning Religious Courts, which was amended by Law Number 3 of 2006. Law Number 1 of 1974 which has been changed to Law Number 16 of 2019 Concerning Age Change, PERMA Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications, and Compilation of Islamic Law (KHI) in granting marriage dispensation from a *maqā'id syarī'ah* perspective, prioritizing benefits and avoiding harm that will be caused if the application for marriage dispensation is granted or not and reviewed from *maqā'id syarī'ah*. The judge's consideration in granting the marriage dispensation is appropriate and includes elements of *maqā'id syarī'ah*.

Keywords: judge's considerations, dispensation of marriage, *Maqā'id Syarī'ah*

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1. Introduction

Marriage is a necessity of life and an important aspect of human life and becomes a normal relationship so that human life does not feel empty and imperfect if there is no marriage between humans and the opposite sex because marriage is a worldly need. [1] A marriage is considered valid if it complies with statutory provisions and legal rules and is carried out in accordance with each other's beliefs and is registered at an authorized institution according to statutory law.

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A marriage is considered sacred in human life, so marriage has several types, namely unregistered marriage, contract marriage, and early marriage, a phenomenon that very often occurs in villages, namely early marriage which is the most common case in rural areas, which is motivated by several factors such as: economics, educational factors, and social factors that cause parents to give permission for their children to marry at an early age. [2]

The age limit for marriage is very good because it prevents the practice of early marriage which often occurs in rural areas as a result of something negative. [3] In the Child Protection Act Number 35 of 2014 Article 1 it is explained that a child is someone who has not reached the age of 18 years Article 26 paragraph (1) point (c) which is about parents having the obligation and responsibility to prevent early marriage, but in Indonesia The age limit for marriage is relatively low in practice. Marriages often occur in children who are underage due to non-compliance with parents regarding age in marriage. [4]

In dispensation cases, the government gives full authority to religious court judges. The judge is the owner of authority in giving a decision and must exercise fair *ijtihad* in deciding this case. Early marriage which will later be permitted by a panel of judges who have requested a marriage dispensation at the religious court in accordance with the objectives of *shari'ah* or Islamic law. [5]

Maqā'id syarī'ah was explained by Imam Al-Syatibi that the *syari'at* aims to realize the benefit of human life in this world and in the hereafter. To realize this benefit, there must be clear evidence or arguments. [6] *Maqā'id syarī'ah* includes the wisdom behind the law, *maqā'id syarī'ah* is also the good goals to be achieved by Islamic law, by opening the means to good or closing the means to evil.

The purpose of Islamic law is to create benefit, humans are required to always try to explore knowledge in order to be able to find out the meaning of *syari'at* (*maqā'id syarī'ah*), because various legal provisions have specific goals, as well as humans are required to try to find reasons or *'illat* from a law, so that the benefit achieved is the actual benefit as required by the *Shari'ah*. [7]

Based on the level of urgency Al-Syatibi divides *maqā'id syarī'ah* into three levels, namely:

1.1. Daruriyyat

A goal that is *darūriyyāt* is a goal that must exist to realize benefit or is called a primary need, namely maintaining religion, preserving the soul, maintaining the mind, maintaining offspring and maintaining property.

1.2. ʿĀjiyyāt

Goals that are *ʿājiyyāt* are secondary levels, which are needed by humans, in other words, *ʿājiyyāt* eliminates difficulties with the law of leniency.

1.3. Taʿsīniyyāt

Taʿsīniyyāt goal is a level of need that, if not fulfilled, does not threaten the existence of any of the five points above and does not cause difficulties.

In order to protect these three things, things that can maintain their existence must also be maintained, and vice versa for things that can cause the five *uḥūl al-khamsah* to be disturbed, they must be avoided and eliminated so that they do not damage or disturb the *uḥūl al-khamsah*.

1.4. Maintaining Religion

Hifẓu ad-dīn or maintaining religion is the main thing that must be maintained so that *maqāʿid syarīʿah* can be achieved.

1.5. Nurturing the Soul

Hifẓu an-nafs or guarding the soul is maintaining the right to live in an honorable manner and preserving the soul so that it is protected from acts of persecution.

1.6. Nurturing Mind

Hifẓu al-ʿaql or guarding the mind is intended so that humans can use their minds like humans, away from the bad qualities of animals because roughly it can be said that humans are animals that think.

1.7. Preserving Offspring

Hifḷu al-nasl or protecting offspring or honor is maintaining the preservation of human species and fostering the mental attitude of the next generation to avoid wars between humans.

1.8. Maintaining Property

Hifḷu al-māl or guarding property is one of the purposes of shari'ah law in the field of mu'amalah and jinayah, guarding property is protecting property from actions that can damage the lawfulness of property and safety.

With regard to dispensation in the realm of marriage, that Law of the Republic of Indonesia Number 16 of 2019 amendment to Law Number 1 of 1974 concerning Marriage has determined the age limit for marriage, namely when the prospective bride and groom are 19 (nineteen) years old In *maqā'id*-based ijihad , using the Koran and al-hadith as the primary sources of Islamic law is a necessity.

The role of the judge in dispensation cases is very important, because the culmination of solving the case in the form of a decision is all in the hands of the judge. Then in making a decision there is a basis for consideration for the common good. The number of requests for dispensation is very high according to data obtained from the Sukadana Religious Court, the number of applications for dispensation every year is above 30 applicants, more precisely in 2019 there were 40 applicants, in 2020 there were 64 applicants, and in 2021 there were 67 applicants.

Several studies that have been traced by the author show that there has been no research that specifically discusses the stipulation of the Sukadana Religious Court Number: 146/Pdt.P/2021/PA.Sdn concerning granting a marriage dispensation from a *maqā'id syarī'ah perspective* . The difference with the research that will be conducted by researchers is that in this study departs from existing problems regarding the dispensation of marriage at the Sukadana Religious Court, especially the request for dispensation which was granted from the *maqā'id syarī'ah perspective* . In addition to this, the researcher will emphasize the review of the judge's views in granting the marriage dispensation case from the *maqā'id syarī'ah perspective* on the decision of the Sukadana Religious Court Number: 146/Pdt.P/2021/PA.Sdn whether it is in accordance with the elements of legal justice and legal certainty.

2. Methods

This type of research is qualitative which is meant by qualitative research is research on research that is descriptive in nature and tends to use analysis. Qualitative research is research that conducts interviews in the field (*field research*). [8] Using primary data sources obtained directly from judges as informants and secondary data obtained from official documents, books, research results.

3. Results and Discussion

C.S.T Kansil and Christine S.T Kansil, dispensation is a declaratory ruling, which states that the decision is a valid situation according to the law. Meanwhile, Subekti and Tjitrosubodo in the Legal Dictionary define briefly that dispensation is a deviation or exception from an order. So nikah is the permissibility of underage marriage by submitting an application to the court accompanied by acceptable reasons and based on the discretion of the judge.[9] Dispensation is an exception to the provisions of legal regulations or laws that should formally apply. Marriage dispensation is an exception to the provisions of Article 7 paragraph (1) of Law No. 1 of 1974 concerning the limitation of the minimum age of marriage for prospective men and women who have not reached the minimum age of marriage due to certain circumstances.

In Article 2 of Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage, emphasizing a very urgent situation, a person can apply to the court for marriage dispensation accompanied by sufficient supporting evidence and has obtained permission from parents. The Religious Court that grants marriage dispensation has the aim of realizing benefit and avoiding harm.[10]

The judge's consideration is one of the most important aspects in determining the realization of the value of a judge's decision that contains justice (*ex aequo et bono*) and contains legal certainty, in addition it also contains benefits for the parties concerned so that the judge's consideration must be addressed carefully, well, and carefully. If the judge's consideration is not thorough, good, and careful, then the judge's decision derived from the judge's consideration will be canceled by the High Court / Supreme Court (MA).

3.1. Judges' Consideration in Granting Marriage Dispensation Stipulation Number: 146/Pdt.P/2021/PA.Sdn

Considering, that the case of an application for dispensation of marriage is the absolute competence of the Religious Court. This is in accordance with the provisions of the Explanation of Article 49 paragraph (2) number (3) of Law Number 7 of 1989 as amended by Law Number 3 of 2006 and Law Number 50 of 2009 and Article 7 paragraph (2) of Law Number 1 of 1974 as amended by Law Number 16 of 2019.

Considering, that the applicants request that the judge grant dispensation to the applicants' child named Fitri Tesa Prasetyo bint Mujianto, aged 17 years, to enter into marriage with a man named Yoga Pratama Yudistira bin Danu Suhendrik, aged 19 years, on the grounds that the applicants' child has not met the minimum age for marriage, which has been amended by Law Number 16 of 2019, namely 19 years of age.

Considering that based on the provisions of Article 12 of Supreme Court Regulation Number 5 of 2019, the judge has attempted to advise the applicant, prospective wife, prospective husband and parents of the prospective husband to understand the risks of underage marriage. The judge provided advice so that the parties could suspend their marriage plans until the minimum age of marriage. To the prospective wife, the judge advised her to consider the marriage plan because medically the applicants' children were too young to marry and there was a risk that they would have to give birth at a young age. To the husband-to-be, the judge advised the husband-to-be to be physically and mentally responsible for his household. To the parents of the prospective wife and the prospective husband, the judge advised them to take responsibility for the continuity of their children's household if the marriage was to take place.

Considering, that the applicants' child Fitri Tesa Prasetyo bint Mujianto stated in court that she was ready to marry a man named Yoga Pratama Yudistira bin Danu Suhendrik, and she was ready to take responsibility as a wife.

Considering, that the prospective husband of the applicants' child, Yoga Pratama Yudistira bin Danu Suhendrik, stated in court that he was ready to marry Fitri Tesa Prasetyo bint Mujianto, and was ready to take responsibility physically and mentally, as a husband when he got married.

Considering, that the parents of the prospective husband of the applicant's child, Danu Suhendrik bin Suryana, stated at the trial that they approved of the marriage plan and also stated that they were ready to help the continuity of their son's household with Fitri Tesa Prasetyo binti Mujianto.

Considering, that the evidence in the form of written evidence (P.1-P.11) and 2 (two) witnesses presented by the petitioners to prove the arguments of their petition, have fulfilled the formal aspects of proof, while materially considered hereinafter.

Considering that Exhibit P.1 is an authentic deed in the form of a photocopy of a rejection certificate, which has been sufficiently stamped, the contents of which explain that the applicants' children, Fitri Tesa Prasetyo bint Mujianto and Yoga Pratama Yudistira bint Danu Suhendrik, have had their marriage plans rejected by the local Religious Affairs Office (KUA) because the applicants' children are not yet 19 years old.

Considering, that Exhibits P.2, P.3, and P.5 are authentic deeds in the form of photocopies of identity cards and family cards, which have been sufficiently stamped, the contents of which explain the domicile of the applicants and the prospective wife within the jurisdiction of the Sukadana Religious Court.

Considering, that Exhibit P.4 is an authentic deed in the form of a photocopy of the marriage certificate which has been sufficiently stamped, the contents of which explain the relationship between the applicant and a man named Mujianto bin Tukiran and Nurbaiti bin Kusin as husband and wife, and therefore the applicants are interested parties in this case.

Considering that Exhibit P.6 is an authentic deed in the form of a photocopy of a birth certificate, which has been sufficiently stamped, the contents of which explain that the girl named Fitri Tesa Prasetyo (born on December 1, 2003) is the biological child of the applicants. The evidence shows that the applicants' child is not yet 17 years and 10 months old.

Considering that Exhibit P.7 is an authentic certificate in the form of a photocopy of a diploma, which has been sufficiently stamped, the contents of which explain that the girl named Fitri Tesa Prasetyo has attended formal education at the elementary school level. Although in fact the applicants' child already has a secondary school certificate.

Considering, that Exhibit P.8 is an authentic deed in the form of a photocopy of a family card, which has been sufficiently stamped, the contents of which explain the domicile of the parents of the applicant's future husband who is within the jurisdiction of the Sukadana Religious Court.

Considering, that Exhibit P.9 is an authentic certificate in the form of an extract of a birth certificate, which has been sufficiently stamped, the contents of which explain the prospective husband of the applicants' child named Yoga Pratama Yudistira (born on May 7, 2002). The evidence shows that the prospective husband of the applicants' child is 19 years and 5 months old, thus meeting the minimum age of marriage, and is fit to marry the applicants' child.

Considering, that Exhibit P. 10 is an authentic certificate in the form of a photocopy of a diploma, which has been sufficiently stamped, the contents of which explain that the prospective husband of the applicants' child named Yoga Pratama Yudistira has attended formal education at the senior high school level.

Considering, that regarding the certificate from a health worker supporting the parents' statement that the marriage is urgent, in the case a quo the applicant has presented Exhibit P. 11, which basically explains that Fitri Tesa Prasetyo binti Mujianto is 6 months pregnant.

Considering the circumstances and the position of the applicants' witnesses Juremi bin Kamiso and Septian Ade P bin Mujianto, each of whom is a relative of the applicants, the judge is of the opinion that it is reasonable that the witnesses knew of the marriage plan of the applicants' child Fitri Tesa Prasetyo binti Mujianto with a man named Yoga Pratama Yudistira bin Danu Suhendrik, and the witnesses knew that the families of both parties had approved of the marriage plan, even though the child Fitri Tesa Prasetyo binti Mujianto was not yet 19 years old. These witnesses saw that the applicants' child was ready to get married, and the testimony of these witnesses has been described in full in the sitting of the case.

On this basis, the judge is of the opinion that the testimony of the witnesses a quo is true and in accordance with each other and in line with the arguments of the petitioners. Thus based on the provisions of Article 171 paragraph (1) and Article 172 HIR, the testimony of the witnesses can be used as valid evidence to support the arguments of the petition of the petitioners named Fitri Tesa Prasetyo binti Mujianto with a man named Yoga Pratama Yudistira bin Danu Suhendrik, although the child of the petitioners is not yet 19 years old.

Considering that from the evidence submitted by the applicants, namely written evidence and 2 (two) witnesses, the judge is of the opinion that the arguments of the applicants have been proven.

Considering, that from the evidence, legal facts are found which are basically as follows:

- 3.1.a That the applicants have a child named Fitri Tesa Prasetyo binti Mujianto, aged 17 years and 10 months.
- 3.1.b That the applicants' child will enter into marriage with a man named Yoga Pratama Yudistira bin Danu Suhendrik, aged 19 years
- 3.1.c That the applicants' daughter Fitri Tesa Prasetyo binti Mujianto is currently 6 months pregnant

3.1.d That the applicants' daughter is ready and responsible to become a wife

3.1.e That the families of both parties have agreed to the marriage plan

Based on the aforementioned facts, the judge is of the opinion that although the applicants' daughter Fitri Tesa Prasetyo bint Mujianto is not yet 19 years old, she deserves to be granted dispensation to enter into marriage with a man named Yoga Pratama Yudistira bin Danu Suhendrik who is considered mature enough and able to take responsibility as a wife. In addition, the judge was of the opinion that the marriage could not be postponed, as the marriage plan had been timed and everything had been prepared. Thus, deviation from the provisions of Article 7 paragraph (1) of Law Number 1 of 1974, which has been amended by Law Number 16 of 2019, can be justified by law as long as the reasons used are for the interests and benefits concerned. This is in accordance with the provisions of Article 7 paragraph (1) of Law Number 1 of 1974, which has been amended by Law Number 16 of 2019 concerning Marriage.

Considering that the judge needs to mention the following provisions of Islamic law:

Al-Qur'an surat an-Nūr [24] verse 32:

وَأَنْكِحُوا الْأَيْمَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ فَضْلِهِ ۗ وَاللَّهُ وَسِعَ عَلِيمٌ

"And marry those who are alone among you, and those who are worthy (of marriage) of your male servants and your female servants. If they are poor, Allah will enable them by His grace. And Allah is vast (in His provision) and All-knowing."

Hadith narrated by Bukhari::

يَا مَعْشَرَ الشَّبَابِ مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وَجَاءٌ

"O young men, whoever among you is able (materially and immaterially) to do so, should do so, and whoever is not able to do so should fast, for fasting will be a fortress for him". (Bukhari, Shohīh al-Bukhārī, Hadith No. 5065)" [11]

3.2. The maqā'id syarī'ah perspective in the judge's consideration in granting marriage dispensation in determination number: 146/Pdt.P/2021/PA.Sdn

Maintaining Religion can be seen in terms of the needs of human nature, marriage is also an act of worship to protect individuals from immorality, adultery and forbidden immoral acts, marriage is also considered as half of religion (*hif'u ad-din*), so that those who have married are considered to have completed their religion. If not allowed to marry, it will increase the sin for the applicant's child and her prospective husband, because both of them have committed acts prohibited by religion, namely adultery,

while the two prospective brides are not yet related by a legal marriage. This is one of the efforts to protect religion.

If the marriage is not performed, it is feared that there will be neglect of the child who has been born to the prospective wife because the intention of responsibility on the part of the prospective husband has been rejected by the Court. This is an effort to protect the soul and protect offspring.

If a marriage license is not granted, it has an impact on the psychological aspect and what is very feared is that one of the prospective brides will commit an act beyond reason such as suicide because he cannot bear the shame he carries. This is one of the efforts to protect the mind.

If not married, the child born outside marriage or adultery only has a nasab relationship with his mother and his mother's family, and has a continuing consequence in which the child only has an inheritance relationship with his mother and his mother's family. Because legally the child does not have a legal relationship with the biological father, the biological father also cannot be a guardian for his daughter. So by marrying off the prospective bride is an effort to protect property.

4. Conclusion

Reviewed with the *maqā'id syarī'ah* theory which has good goals that Islamic law wants to achieve, by opening the means to goodness or closing the means to badness. So in granting a marriage dispensation case, the judge, in addition to considering based on statutory provisions, also considers the benefits and harms that will result from the determination of a case. In granting marriage dispensation, the judge sees the benefits in the continuity of marriage.

So the author argues that in marriage dispensation case number: 146/Pdt.P/2021/PA.Sdn, the judge in granting marriage dispensation in terms of *maqā'id syarī'ah* is in accordance with the elements of *maqā'id syarī'ah* because in the decision many children's rights are protected both from religion, soul, mind, offspring and property. The judge in granting marriage dispensation has considered based on the elements of *maqā'id syarī'ah*, for example when the child is already pregnant, preserving/maintaining offspring and maintaining the honor of the child. Referring to some of the above, the judge in granting the marriage dispensation application was deemed appropriate because he looked at the impacts arising from whether or not it was granted, as well as referring to the existing law and *maqā'id syarī'ah*. The decision

is in line with the principles of benefit in the judge's decision and the principles of Islamic law, namely the protection of religion, soul, offspring, property and reason.

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