

Dynamics of Judges' Considerations in the Determination of Marriage Dispensation at the Enrekang Religious Court

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Abstract

This study is the dynamics of judges' considerations in determining the dispensation of marriage at the Enrekang Religious Court. Ideally, the marriage is carried out in accordance with the existing provisions, but there are still opportunities provided by the state for the prospective bride and the family/guardian of the prospective bride and groom who still wish to have an underage marriage. Data in the Enrekang Religious Court that every year there is an increase in cases of marriage dispensation handled in the last 4 years. In 2017, there were 35 cases received, in 2018, there were 36 cases received, but in 2019 there were a surge in cases that were received by 42 cases, this was as a result of the enactment of Law No. 16 of 2019 and in 2020 as of July 10, 2020, 70 cases have been submitted. This type of study is a field research with qualitative research methods through juridical normative and sociological approaches. The results showed that 1) the inconsistency of the applicant's expectations and the marriage dispensation request was not granted in accordance with the Enrekang Religious Court's marriage dispensation decision, indicating that there was a social conflict contained in the stipulation, the petitioner continues to marry off her child to her future husband but is not registered at the Office of Religious Affairs or married in a series which will have a social impact because there is no recognition from the state, constraints in the management of population administration and others; 2) the factors considered by the judge in determining the dispensation of marriage at the Enrekang Religious Court are psychological, health, educational and economic factors, and 3) the dynamics in determining the dispensation of marriage at the Enrekang Religious Court can be seen in the determination of the dispensation of marriage, which differs from one case to another, because sometimes judges differ in giving legal considerations to a case, if there is a difference of opinion in a panel then a vote is made on the case.

Keywords: *Judges' considerations, dispensation of marriage, Religious Court*

1. Introduction

Marriage is a very urgent thing in human life, (Spizhenko, 1997), (Mansari, Fatahillah, Muzakir, Oslami, & Zainuddin, 2020), the main foundation in building a society. Marriage has a very important position in Islamic law (Fikri, Saidah, Aris, & Wahidin, 2019), because marriage is a family life that will be well organized which is the core of community life which is in line with the position of humans as honorable creatures above all other creatures of Allah (Muzzamil & Kunardi, 2014).

Marriage is an order of Allah, and also an example by the Prophet Muhammad saw. a form of worship so that humans can be protected from disgraceful acts (Sham, 2011). Allah created humans in pairs from which they will give birth to the next offspring, in order to maintain human survival. As the word of Allah in Q. S. al-Zariyāh (51): 49, it means; “And We created everything in pairs so that you may remember the greatness of Allah”.

The bond between a man and a woman who is framed in a marriage must be based on an obedience to Allah in an effort to gain His pleasure. Marriage must also be based on the will and willingness of the parties involved, including proposals, consent *qabul*, witnesses, guardians, dowry, and bridal parties (Prihatinah, 2013).

Such a marriage will create a family that is *sakinah* (safe and peaceful), *mawaddah* (love each other) and *rahma* (love each other). The marriage will give birth to honorable offspring as the next generation who will maintain human life in a good, clean and honorable manner (Kasdi, 2019). As Allah says in Q.S. al-Rūm (30): 21, meaning; “And among the signs of His power is that He has created for you wives of your own kind, so that you may tend to and find peace in them, and He has created between you love and compassion. Verily in that are signs for a people who think”.

Law Number 1 of 1974 concerning marriage, applies as a legal product to accommodate the aspirations of the community and is a material legal source of marriage. Law Number 1 of 1974 Article 1 explains that “Marriage 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 the One Godhead” (Pragholapati, 2020). And marriage in Presidential Instruction Number 1 of 1991 concerning KHI states that “Marriage according to Islamic law is a marriage that is a very strong contract or *mitzaqan ghaliza* to obey Allah’s commands and carry it out is worship.”

Marriage cases that can be resolved in the Religious Courts are detailed in the explanation of Law Number 7 of 1989 concerning the Religious Courts, one of which is a marriage dispensation for prospective brides who do not meet the aged standard according to the provisions of Law Number 16 of 2019 concerning Amendments to Law Number 1 1974 Article 7 paragraph (1) whose substance changes are related to the age limit for marriage.

Ideally, the marriage is carried out in accordance with existing provisions, but there are still opportunities provided by the state for the bride and groom and the family/guardian of the bride and groom who still wish to hold a marriage under this age. Based on the data we obtained from the Enrekang Religious Court, every year there has always been an

increase in cases of marriage dispensation handled in the last 4 years. In 2017 the number of cases received was 35 cases, then in 2018, 36 cases were received. However, in 2019 there was a spike in cases that entered as many as 42 cases, this was as a result of the enactment of Law Number 16 of 2019 as we obtained data from the Religious Courts that the number of cases that were entered after the enactment of the regulation was 17 cases (mid-October-December 2019). In 2020 (as of July 10, 2020) 70 cases have been received.

The judge before making a decision must consider what is in the evidence through the evidence submitted by the litigating parties and the judge must also listen to the statements of the parties because the judge must not only listen to one party but all parties must have their statements heard. Judge's consideration is very necessary in order to achieve a decision that has a proper legal basis and reflects the values of justice, truth, mastery of the law, facts, ethics, and morals of a judge. Evidence and conclusions in examining applications for dispensation of marriage are very important as judges consider in making decisions.

The dynamics of the judge's consideration in the marriage dispensation decision at the Enrekang Religious Court, consists of three problems as follows; 1) How is the social conflict in changing the marriage dispensation law?; 2) What factors are considered by the judge in determining the marriage dispensation?, and 3) What are the dynamics of judges' considerations in determining marriage dispensation?

2. Methods

This study was conducted in a field study, while the method used in this study was a qualitative research method. The approach method used is a normative juridical approach and a sociological juridical approach which aims to obtain legal knowledge empirically by going directly to the object, namely knowing social conflicts in changing the law on determining marriage dispensation cases, what factors are considered by judges in deciding cases. marriage dispensation, and the dynamics of judges' considerations in determining the marriage dispensation case at the Enrekang Religious Court. The paradigm used in this study is construction because this study uses several theories as reference materials that enrich the study knowledge gained in the community, in order to obtain an overview of the dynamics of judges' considerations in determining marriage dispensation at the Enrekang Religious Court.

This study has two data sources, namely 1) Primary Data is data obtained directly from the first source related to the problems to be discussed (Amiruddin, 2004). Thus, primary data is data obtained directly at the Enrekang Religious Court in the form of application and determination of marriage dispensation as well as information from judges through in-depth interviews, and 2) Secondary data in this study comes from scientific books, accredited journals, theses, dissertations and documents related to the object of study (Bungin, 2007).

3. Results and Discussion

3.1. Social Conflict in Amendment to the Law on the Determination of Marriage Dispensation

Conflict can arise from the condition of the plurality of the structure of society and conflict is a phenomenon that often occurs throughout the process of human life. Conflict cannot be separated from social life. Human life in reality wherever and whenever there are always differences in attitudes, opinions, behaviors, goals, and needs that are always contradictory so that such a process will lead to a change (Utsman, 2009).

In general, conflicts are motivated by differences. While the difference itself is an inseparable part of the reality of human life. Differences can be potential or vice versa can be a problem. It becomes potential if it is well understood and managed constructively in order to enrich the meaning of human life. It can become a problem if it later develops into a form of settlement by means of violence and or in a way that is not in line with the applicable rules. Conflict can also have a positive value, when conflict can be managed wisely and wisely, here conflict can give color to the social process and is constructive for social change and does not bring violence, so that conflict can be interpreted as a source of change (Wahab, 2014).

Conflict can be born from differences brought by each individual in an interaction. These differences include physical characteristics, intelligence, knowledge, customs, beliefs, and so on. With the existence of individual characteristics that are carried over in social interaction, conflict is a normal situation in every society and there is not a single society that has never experienced conflict between community members or with other community groups, the conflict will only disappear along with the loss of the community itself.

As is the case in regulations relating to marriage, especially those that regulate the age of marriage for prospective married couples. The age limit for marriage is based on considerations of the benefit of the family and household as stated in Article 15 of the

KHI and in the General Elucidation of Law Number 16 of 2019 states that the age limit in question is considered to have matured in mind and body to be able to carry out a marriage in order to realize the purpose of marriage properly without ending in divorce and obtaining healthy and quality offspring. It is also hoped that increasing the age limit higher than 16 years for women to marry will result in lower birth rates and a lower risk of maternal and child mortality. In addition, it can also fulfill children's rights so as to optimize children's growth and development including parental assistance and provide children's access to education as high as possible.

Of course, social facts have many roles in limiting the age of marriage for prospective brides and grooms. The number of cases of early marriages that end tragically is enough to provide aspirations for the urgency of limiting the age of marriage. The age limit provision in Law Number 16 of 2019 amendments to Law Number 1 of 1974 Article 7 Paragraph 1 states that marriage is only permitted if the man and woman have reached the age of 19 years.

Normatively changes to the minimum age of marriage for prospective brides as stipulated in Law no. 16 of 2019 concerning amendments to Law Number 1 of 1974 is 19 years which is equivalent to the marriage age for the prospective groom. Thus, Law Number 1 of 1974 Article 7 paragraph 1 is no longer valid, this is in line with one of the principles of legal preference, namely *lex posterior derogat legi priori*. According to Peter Mahmud Marzuki, that the principle of *lex posterior derogat legi priori*, namely the latest regulations override previous regulations with provisions that confronted are two rules that hierarchically have the same degree (Marzuki & SH, 2021).

The principle of legal preference *lex posterior derogat legi priori* has been applied at the Enrekang Religious Court. This change in law has also led to an increasing number of requests for dispensation from marriage at the Enrekang Religious Court. According to the data we have obtained, the number of marriage dispensation cases from January to July 10, 2020, has reached 70 applications. Very much increased compared to before the enactment of Law Number 16 of 2019, in 2017 as many as 35 cases, in 2018 as many as 35 cases and in 2019 as many as 42 cases (including 17 cases after the enactment of Law Number 16 Year 2019 which began on October 16, 2019).

Contrary to the applicant's expectations, the request for a marriage dispensation was not granted by the Enrekang Religious Court in accordance with the Enrekang Religious Court's Marriage Dispensation Determination, indicating that there is a social conflict contained in the stipulation. With the application not being granted,

the applicant still marries his child with his future husband but is not registered at the District Office of Religious Affairs or is married in a serial manner which will have a social impact on both (husband/wife) because there is no recognition from the state, problems in managing population administration and others.

3.2. Consideration Factors in Determining Marriage Dispensation

Disputes or cases that are examined and tried by judges require appropriate decisions. Judges are required to be able to process and process data and facts at trial, whether in the form of letter evidence, witnesses, suspicions, confessions, or oaths. Thus the decisions taken are truly based on a sense of responsibility, justice, wisdom, professionalism and are objective.

The judge may not make a decision on a case before hearing the statements of the two litigants simultaneously, selecting, saying, and examining the evidence available to each of them. Law Number 48 of 2009 Article 5, states that the judge in deciding cases the most important thing is the legal conclusion on the facts revealed at trial. Thus a judge must explore the legal values and sense of justice contained in society.

The basis of a judge in deciding a case, or a lawyer in conveying his legal views on a case or a legal expert providing information and legal reasoning is the process of searching for reasons known as legal reasoning which can be interpreted as considerations in deciding cases (Isnantiana, 2017). In deciding a case the judge must be based on various considerations that can be accepted by the parties and do not go outside the rules of law.

Based on interviews with several judges at the Enrekang Religious Court Office and the results of interviews with various parties related to the issue of marriage dispensation or early marriage, it can be stated several factors that judges consider in determining marriage dispensation, both those relating to judges who examine and adjudicate cases. the application for a marriage dispensation as well as from the application for a marriage dispensation, namely; psychological factors, health factors, educational factors, economic factors and socio-cultural factors.

Psychological factors of the prospective bride and groom will determine a person's readiness to carry out a marriage. Psychological factors are factors that become the main consideration for a judge in determining whether to reject or grant a marriage dispensation application. Early marriage has an impact on the reproductive health of girls, from a physical point of view the teenager is not yet strong, the pelvic bone is still too small so that it can endanger the delivery process. Girls aged 10-14 are five times more likely to

die during pregnancy or childbirth than girls aged 20-25, while girls aged 15-19 are twice as likely to die.

This is what causes the judge to make the health factor one of the considerations in examining and determining the marriage dispensation case as in the determination of the marriage dispensation of the Enrekang Religious Court. The data and results of interviews and analysis show that the health factor is also a judge's consideration in determining the marriage dispensation case at the Enrekang Religious Court, both of which ended positively or was accepted or negative or rejected.

Early marriage has an impact on the reproductive health of girls, from a physical point of view the teenager is not yet strong, the pelvic bone is still too small so that it can endanger the delivery process. Girls aged 10-14 are five times more likely to die during pregnancy or childbirth than girls aged 20-25, while girls aged 15-19 are twice as likely to die.

The judge made the health factor as one of the considerations in examining and deciding the marriage dispensation case as in the determination of the marriage dispensation of the Enrekang Religious Court. Data and results of interviews and analysis show that health factors are also a consideration for judges in deciding the case of marriage dispensation at the Enrekang Religious Court, whether it ends positive or is accepted or negative or rejected.

The risk of early marriage is the possibility of cessation of education for children who should still be able to continue their education to a higher level which will provide sufficient provisions before marriage for a better future and parents are obligated and responsible for taking care of, nurturing, educating and protecting children and develop children according to their abilities, interests and talents and prevent marriage at an early age. Education is one of the judges' considerations in determining the marriage dispensation at the Enrekang Religious Court.

Financial ability is one of the supporting factors in the harmony of husband and wife in a household. If there is no financial ability, it will become a burden for the head of the family and family members in carrying out their daily lives. One of the sources or triggers of quarrels (a lot of risk of quarreling) is the economic factor. And this factor is one of the judges' considerations in determining the marriage dispensation case at the Enrekang Religious Court.

The description and analysis of the factors considered by the judge in determining the marriage dispensation at the Enrekang Religious Court, as stated above, indicates that the

consideration in terms of *maṣlahah* on the case being handled is very considered by the judges before giving a final determination or decision.

The description above illustrates that the factors considered by the judge in determining the marriage dispensation at the Enrekang Religious Court are psychological factors, health factors, educational factors and economic factors. These four factors are taken into consideration by the judge in determining the marriage dispensation as stated by the judges during the interview and stated in the determination of the marriage dispensation.

3.2. Consideration

Law Number 48 Year 2009 Article 5, states that the judge in deciding cases the most important thing is the legal conclusion on the facts revealed at the trial. Thus a judge must be able to explore legal values and a sense of justice contained in society.

The basis of a judge in deciding a legal case, or a lawyer in conveying his legal views on a case or a legal expert providing information and legal reasoning is the process of searching for reasons known as legal reasoning which means as a consideration in deciding cases. In deciding a case, the judge must be based on various considerations that are acceptable to the parties and do not go out of the way of the law.

Judges must try to mobilize all their abilities so that every decision handed down contains the values of justice, expediency and certainty. Not on the contrary, the judge's decision actually created unrest and chaos in the community, especially for people seeking justice.

The purpose of holding a process before the court is to obtain a judge's decision. The judge's decision, which is usually referred to as a court decision, is something that is highly desired or awaited by the litigating parties to resolve the dispute between them as well as possible. Because with the judge's decision, the disputing parties expect legal certainty and justice in the cases they face (Rasaid, 1996).

Legal reasoning is useful for judges in taking considerations to decide a case they are examining. A judge before making or giving his decision must pay attention to and try as much as possible the decision to be handed down will not lead to new cases. Thus the decision in this case the determination of marriage dispensation as a product of the Religious Courts is expected to be able to fulfill a sense of justice, benefit, and legal certainty for the community.

The judge's decision is the "crown" as well as the "peak" and "concluding deed" as a reflection of the values of justice, truth, mastery of law and facts, ethics, and morals of the

judge concerned which is the judge's vision in deciding cases (Moh & SH, 2009). The decision is the final conclusion taken by the Panel of Judges who are authorized to settle a dispute between the disputing parties and are pronounced in an open session which is for the public (Manan, 2005).

The Panel of Judges is the main axis and plays a central role in making a decision, which in principle is a scientific process. The implementation of the law in the decision of the Panel of Judges refers to a certain framework of thought that is developed systematically. Legal doctrine or theory plays an important role in guiding and directing the Panel of Judges to formulate decisions that are able to accommodate legal objectives and are of high quality, namely justice, certainty, and legal benefit (Ali, 2015).

Court decisions are the product of judges' thoughts on the law, both single judges and panel judges (Riadi, 2011). The handling of marriage dispensation in the Religious Courts after the issuance of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, is only handled by a single judge. This is different from before the Supreme Court Regulation Number 5 of 2019, it was allowed to take the form of a panel of judges. The enactment of the new rules is an effort to reduce the complexity among judges in a panel of judges in handling marriage dispensation cases.

This illustrates that there are dynamics in determining marriage dispensations at the Enrekang Religious Court, judges' considerations in handling marriage dispensations differ from one judge to another. Thus, if there is a difference in considerations between the judges, the process of resolving the marriage dispensation case takes a long time.

As the results of the interviews show that the judges differ in their response to the reasons put forward by the parties in handling marriage dispensation cases. As stated by Mr. Slamet, it is included in his consideration if the applicant has determined the day of his marriage, the money has been submitted, the invitation has been circulated. Meanwhile, according to Mr. Yusuf Bahrudin, he did not take it as a reason was ruled out. It is different with Mr. Naharuddin, he is between the two in the sense that he is still being considered but by exploring and exploring the reasons put forward by the parties.

We can see the difference in other judges' considerations if the person who is applying for a marriage dispensation at the Enrekang Religious Court is already pregnant. This was revealed when the researcher conducted interviews with several judges.

The three judges who have been interviewed by researchers differ in their legal considerations against those who apply for a marriage dispensation if they are pregnant.

As stated by Mr. Slamet, that is included in his consideration to grant a marriage dispensation application if the person requested is pregnant.

Meanwhile, according to Mr. Yusuf Bahrudin, if the person requested for dispensation for marriage is pregnant, he does not immediately grant the request, but many things he considers, including the conditions for which the dispensation is applied for are not possible in terms of health, psychological condition, education, and then the economy. grant the request.

It is different with Mr. Naharuddin who stated that all of the requests that he had handled with urgent reasons or that he applied for a marriage dispensation while pregnant were all granted. Moreover, if it has been corroborated with information from the Puskesmas and the man who made her pregnant is also willing to take responsibility.

Based on the data and data analysis, it can be concluded that there are always dynamics in determining the marriage dispensation at the Enrekang Religious Court, because the determination of the marriage dispensation differs from one case to another. And judges sometimes differ in giving legal considerations to a case. If there is a difference of opinion between the judges in a panel, a vote is carried out on the case by following the majority vote after going through deliberation. However, after the enactment of Supreme Court Regulation Number 5 of 2019 which states that in the settlement of the marriage dispensation case, the judge is the sole judge, the judge has been given the space to decide based on his considerations and beliefs and this provision has been enforced at the Enrekang Religious Court.

4. Conclusion

The discrepancy between the applicant's expectations and the non-approval of the marriage dispensation application in accordance with the Enrekang Religious Court's Marriage Dispensation Determination, indicates that there is a social conflict contained in the determination. With the application not being granted, the applicant still marries his child with his future husband but is not registered at the District Office of Religious Affairs or is married in a serial manner which will have a social impact on both (husband/wife) because there is no recognition from the state, problems in managing population administration and others.

The factors considered by the judge in determining the marriage dispensation at the Enrekang Religious Court were psychological factors, health factors, educational factors, and economic factors. These four factors are taken into consideration by the judge in determining the dispensation of marriage.

There are always dynamics in the determination of the marriage dispensation at the Enrekang Religious Court, because the determination of the dispensation differs from one case to another. If there is a difference of opinion between the judges in a panel, a vote is carried out on the case by following the majority vote after going through deliberation. However, after the enactment of Supreme Court Regulation Number 5 of 2019 which states that the settlement of marriage dispensation cases is a single judge, thereby reducing the complexity in examining and determining marriage dispensations. This provision has been enforced at the Enrekang Religious Court since the date of its stipulation.

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