



REVIEW OF SUPREME COURT REGULATION NUMBER 5 OF 2019 ON THE CONSIDERATION OF THE JUDGE REJECTING DISPENSATION OF PREGNANT MARRIAGE (ANALYSIS OF DECISION NUMBER 85/Pdt.P/2023/PA.Pn)

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Abstract

This study is motivated by the rejection of a request for dispensation of marriage by the judge of the Painan Religious Court with the condition that the child who applied for dispensation of marriage was pregnant outside of marriage due to her intimate relationship with her prospective husband. The judge's consideration rejected the application because the applicant's child and husband candidate were not ready for marriage and free sexual behavior was increasingly rampant. This case is a dilemma considering the emergency situation of the pregnant the applicant's child, where the judge is faced with two potential harms in granting or rejecting the petition. The purpose of this study is to determine the legal basis for the judge's consideration in rejecting the application for dispensation to marry the case and to find out the review of Supreme Court Regulation Number 5 of 2019 on Guidelines for Adjudicating Marriage Dispensation Applications against the judge's consideration. This type of research is normative legal research with a case approach. The collection of legal materials is done through document studies and literature studies. The results showed that the legal basis for the judge's consideration was Supreme Court Regulation Number 5 of 2019 as a guide in adjudicating cases, surah at-Tahrim verse 6, hadith about the recommendation to marry for those who are able, the opinion of scholars about the prohibition of marriage of pregnant women, Article 80 paragraph (2) of the Compilation of Islamic Law, and fiqh rules on rejecting harm in assessing the readiness of parties to marry. Based on the review of Supreme Court Regulation Number 5 of 2019 and the judge's consideration that the judge was not too sharp in digging up information, assessing the feasibility of the parties, and considering the social and psychological impact on the the applicant's child and the fetus that is being conceived so that the protection and best interests of the child are not maximally implemented, the judge's rejection of this marriage dispensation application as a form of legal certainty by the judge to provide legal order for the phenomenon of free sex that is rampant in society.

Keywords: Supreme Court Regulation Number 5 of 2019, Judge's Consideration, Marriage Dispensation

Abstrak

Penelitian ini dilatarbelakangi adanya penolakan permohonan dispensasi kawin oleh hakim pengadilan agama painan dengan kondisi anak yang dimohonkan dispensasi kawin tengah hamil diluar nikah akibat hubungan intimnya dengan calon suami. Pertimbangan hakim menolak permohonan karena Anak pemohon dan calon suami belum siap untuk menikah dan semakin merajalelanya perilaku seks bebas. Perkara ini bersifat dilematis mengingat keadaan darurat dari anak pemohon yang tengah hamil, dimana hakim dihadapkan dua potensi kemudahan dalam mengabulkan atau menolak permohonan. Tujuan penelitian ini untuk mengetahui dasar hukum pertimbangan hakim dalam menolak permohonan dispensasi kawin perkara tersebut dan mengetahui tinjauan perma nomor 5 tahun 2019 tentang pedoman mengadili permohonan dispensasi kawin terhadap pertimbangan hakim tersebut. Jenis penelitian ini adalah penelitian hukum normatif dengan pendekatan kasus. Pengumpulan bahan hukum dilakukan melalui studi dokumen dan studi pustaka. Hasil penelitian menunjukkan bahwa dasar hukum pertimbangan hakim adalah dengan perma nomor

5 tahun 2019 sebagai panduan dalam mengadili perkara, surah at-tahrim ayat 6, hadits tentang anjuran menikah bagi yang sudah mampu, pendapat ulama tentang haramnya perkawinan wanita hamil, pasal 80 ayat (2) kompilasi hukum islam, dan kaidah fikih tentang menolak kemudharatan dalam menilai kesiapan pihak untuk menikah. Berdasarkan tinjauan perma nomor 5 tahun 2019 terhadap pertimbangan hakim tersebut bahwa hakim tidak terlalu tajam dalam menggali informasi, menilai kelayakan para pihak, dan mempertimbangkan dampak sosial dan psikologis terhadap anak pemohon dan janin yang tengah dikandungnya sehingga perlindungan dan kepentingan terbaik bagi anak tidak terlaksana secara maksimal, penolakan hakim atas permohonan dispensasi kawin ini sebagai wujud kepastian hukum oleh hakim untuk memberikan ketertiban hukum atas fenomena seks bebas yang tengah merajalela di tengah masyarakat.

Kata Kunci: Perma Nomor 5 Tahun 2019, Pertimbangan Hakim, Dispensasi Kawin

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INTRODUCTION

Marriage is a natural and fundamental thing that everyone wants, regardless of gender. In Indonesia, as in many other countries, there is a national marriage law that regulates its procedures and principles, namely Law Number 16 of 2019 on amendment to Law Number 1 of 1974 on marriage. This law covers religious laws and beliefs, as well as the principles of marriage in accordance with the demands and changes of the times.¹

This law stipulates that the purpose of marriage is to form a happy and lasting family, based on the Almighty God (Article 1, paragraph 1). In addition, the age limit for marriage has been set at 19 years old, with the aim of ensuring that the man and woman getting married have reached sufficient psychological maturity.² However, despite the age limit for marriage, the law also accommodates exceptional situations through marriage dispensation. This dispensation can be applied to the court by the parents of either the male or female party on very urgent grounds, supported by sufficient evidence (Article 7, paragraph 2).

The Supreme Court, through Supreme Court Regulation Number 5 the year of 2019, has also issued guidelines governing the marriage dispensation court process. The purpose of these guidelines is, among other things, to ensure clear standards in adjudicating marriage dispensation cases, which protect the rights of children by applying principles such as the best interests of the child and non-discrimination.³

¹ Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia* (Jakarta: Gema Insani, 1996), 119.

² Ahmad Muqaffi, Rusdiyah, dan Diana Rahmi, "Menilik Problematika Dispensasi Nikah dalam Upaya Pencegahan Pemikahan Anak Pasca Revisi UU Perkawinan," *Journal of Islamic and Law Studies* 5, no. 3 (Desember 2021): 362.

³ Article 2 and 3 Supreme Court Regulation Number 5 of 2019 on Guidelines for Adjudicating Marriage Dispensation Applications.

The Painan Religious Court, as one of the courts hearing marriage dispensation cases, has encountered various cases. One such case involved the applicant's child, an 18 year old girl 4 months pregnant, and husband candidate, a 27 year old. In his ruling, the judge rejected the application for dispensation to marry on the basis that *the applicant's child* and husband candidate had not demonstrated the seriousness and feasibility of living a married life. The judge believed that a person who has committed adultery has very weak spiritual and emotional stability, so it is believed that they are not yet capable of marriage. In addition, free sexual behavior in society is increasingly rampant, so it must be eradicated, one of which is by refusing marriage dispensation for those proven to be adulterous.⁴

This case is a dilemma, given the emergency situation of the pregnant child. The judge is actually faced with two potential harms, namely the potential for domestic disputes and violence if dispensation to marry is granted and the potential for social sanctions for *the applicant's child* because her pregnancy will get bigger and without the presence of a husband, so that it can affect her psychologically and mentally.

This refusal is likely to have a deterrent effect on adulterers who apply for dispensation of marriage to the Painan Religious Court, including the applicant's child and husband candidate, so as to eradicate the promiscuous sexual behavior that is rampant in the community. However, this rejection also indirectly affects the child who is being conceived, the child will lose certain rights, so that it seems to share the sins of both parents.

Therefore, this study aims to find out the legal basis used by the judge in his consideration of refusing the marriage dispensation and then review it with reference to Supreme Court Regulation Number 5 the year of 2019. It is important to ensure that every court decision prioritizes the protection and welfare of the children involved in the marriage dispensation application.

METHODS

The type of research used is normative legal research, namely document studies using sources of legal material in the form of laws and regulations, court decisions and decrees, contracts and agreements, legal theories, and the opinions of scholars.⁵ This research examines how the judge's consideration in the copy of the Painan Religious Court Determination Number 85/Pdt.P/2023/PA.Pn is reviewed based on Supreme Court Regulation Number 5 of 2019. The research approach used is a case approach, namely conducting a review of cases related to the issue at hand that have become court decisions

⁴ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn.

⁵ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 45.

with permanent legal force. The collection of legal materials is done in two ways, namely document studies and literature studies. Legal materials are analyzed using a qualitative analysis method.

RESULT AND DISCUSSION

A. Legal Basis for Judges' Consideration of Refusing Dispensation for Pregnant Marriages Outside of Marriage in Determination Number 85/Pdt.P/2023/PA.Pn

Judges have the responsibility to prioritize legal values and a sense of justice that lives in society. In exercising their authority, judges refer to the law, consider all relevant facts, evidence, and legal reasons, and do not conflict with Islamic law.⁶ Judges can decide cases through *ijtihad* as long as it does not contradict and is not regulated by the law or Islamic law. All that is contained in the consideration of the judge's decision is the basis for the judge's accountability to the community, so that it has an objective value.⁷

The Painan Religious Court has the authority to hear applications for dispensation of marriage based on Law Number 16 of 2019 on Amendment to Law Number 1 of 1974 on Marriage jo. Article 49 paragraph subsection (1) point a and Article 49 paragraph subsection (2) of Law Number 50 of 2009 on the Second Amendment to Law Number 7 of 1989 on Religious Courts. An application for dispensation to marry was filed pursuant to Article 7 paragraph subsection (2) of Law Number 16 of 2019 because *the applicant's child* had not reached the minimum age of marriage.⁸

Based on the trial evidence, including the testimonies of the applicant's child, husband candidate, and the parents of husband candidate, the judge established several juridical facts. THE APPLICANT'S CHILD had been involved in an intimate relationship with husband candidate and the family agreed to marry them off. Currently, the applicant's child is 18 years and 4 months old, and there are no religious or customary impediments to their marriage. Despite this, the Office of Religious Affairs refused to register their marriage because the applicant's child was not of legal age. Applicant I, the biological father of the parties, was prepared to be the marriage guardian. the applicant's child and CALON SUAMI were married of their own free will, without coercion from any other party.⁹

In his legal consideration of the juridical facts, the judge doubted the readiness of the two of them to marry and settle down, especially since the marriage was based on a previous intimate relationship. The judge considered that a person who has committed adultery shows a great lack of spiritual and emotional stability, and such a person is

⁶ Abdul Manan, *Etika Hakim Dalam Penyelenggaraan Peradilan Suatu Kajian Dalam Sistem Peradilan Islam* (Jakarta: Kencana, 2007), 185.

⁷ Mardi Candra, *Aspek Perlindungan Anak di Indonesia Analisis Tentang Perkawinan di Bawah Umur* (Jakarta: Kencana, 2018), 4.

⁸ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn., 18-19.

⁹ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn., 28-29.

believed to be incapable of getting married and carrying out household duties properly. CALON SUAMI is not yet fully capable of being the head of the household, in line with Article 80 paragraph subsection (2) of the Compilation of Islamic Law, as well as in accordance with the Q.S. at-Tahrim verse 6.¹⁰

Although the Compilation of Islamic Law allows the marriage of pregnant women outside of marriage (Article 53 paragraph subsection (1)), judges take the opinion of scholars who prohibit it to prevent other violations, such as the attribution of nasab to the biological father, which is prohibited in the Prophet's hadith. Rejecting risky things must take precedence over achieving benefits. Therefore, the judge refused dispensation to marry for the applicant's child because he was considered not ready to face the responsibilities of marriage and its potential negative impacts. The judge concluded that marriage is not only to form a harmonious family but also to achieve the benefits of the world and the hereafter, in accordance with maqashid sharia. In this case, marriage was not considered the best solution to protect the future of the applicant's child.¹¹

B. Review of Supreme Court Regulation Number 5 of 2019 on the Consideration of Judges Refusing Dispensation for Pregnant Marriages Outside of Marriage in Determination Number 85/Pdt.P/2023/PA.Pn.

In the previous section, the legal basis for the judge's consideration of refusing dispensation to marry pregnant outside of marriage in determination Number 85/Pdt.P/2023/PA.Pn has been described. In this section, the judge's consideration will be reviewed based on Supreme Court Regulation Number 5 of 2019 on Guidelines for Adjudicating Marriage Dispensation Applications, specifically based on Article 2 of the Regulation, which contains the principles used by judges in adjudicating marriage dispensation applications.

1. The Best Interest of the Child Principle

The best interests of the child are all actions that must be considered to ensure the protection, care, welfare, survival, and development of the child.¹² This principle is the normative basis for respecting, protecting, and fulfilling children's rights. In order to realize this, Article 16 of Supreme Court Regulation Number 5 of 2019 has mandated matters that must be considered by judges for the best interests of the child, which the author will examine one by one in the context of the judge's consideration in this marriage dispensation case.

¹⁰ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn., 30-31.

¹¹ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn., 32-34.

¹² Article 1 Point 6 Supreme Court Regulation Number 5 of 2019.

Judges are required to carry out in-depth analysis and study carefully all aspects submitted by the applicant, as mandated in Article 16 of Supreme Court Regulation Number 5 of 2019. The judge has examined the legal standing of the plaintiffs, and proven that they are the biological parents of the parties, so that the plaintiffs have the right (legal standing) to apply for dispensation of marriage based on Article 7 paragraph subsection (2) of Law Number 16 of 2019 and Article 6 paragraph subsection (1) of Supreme Court Regulation Number 5 of 2019. Thus, the judge has fulfilled the provisions of Article 16 point b of Supreme Court Regulation Number 5 of 2019.

The judge also sought information regarding the background and reasons for the child's marriage, whether or not there were any impediments to the marriage, and the child's understanding and consent to the marriage by hearing direct testimony from the parties concerned. From the trial, it was revealed that the reason for the marriage was that the applicant's child and husband candidate had had intercourse twice, and she was one month pregnant. In addition, there were no religious or customary impediments to marriage, and the marriage plan was based on their own volition. Thus, the judge has fulfilled the provisions of Article 16 points c, d, e, and g of Supreme Court Regulation Number 5 of 2019.

Regarding the age difference between the applicant's child and husband candidate, the judge analyzed their age evidence, which showed that the applicant's child was 18 years and 4 months old and husband candidate was 27 years old, with a significant age difference of around 8 years. According to the author, it is important for judges to consider the age difference, because it allows for a connection with the provisions of point i of the same article, namely the presence or absence of elements of psychological, physical, sexual, and/or economic coercion. This is intended so that the provisions of Article 16 point f of Supreme Court Regulation Number 5 of 2019 can be fully implemented.

Furthermore, the judge considered the condition of the child based on recommendations from various parties, such as psychologists and doctors. During the trial, the judge read a certificate from the Social Service, Women's Empowerment, and Child Protection of Pesisir Selatan Regency and the Health Unit of the Air Haji Community Health Center, which stated that the child was in good health. Thus, the judge has considered the child's condition in accordance with the provisions of Article 16 point h and Article 15 point d of Supreme Court Regulation Number 5 of 2019.

In considering whether or not there was psychological, physical, sexual, and economic coercion as well as ensuring the parents' commitment to take responsibility for economic, social, health, and educational matters, the judge requested testimony from the applicant's child, husband candidate, and the parents of both parties, as well as two witnesses. It was found that there was no coercion, and the families were willing to help and guide them. However, it is important for the judge to ascertain the parents' commitment in more detail, as the economic, social, health, and educational aspects of the

child are crucial. If all these aspects are properly ascertained, it will be easier for the judge to make a decision that reflects the principle of the best interests of the child.

2. The Right to Life and Development of the Child

The judge in the trial must identify matters directly related to the child. Supreme Court Regulation Number 5 of 2019 stipulates that the judge must provide advice to the applicant, the child, the prospective husband or wife, and the parents/guardians of the prospective husband or wife regarding the risks of marriage. The advice delivered by the judge includes: a. the possibility of stopping the child's education; b. the continuation of the child's 12-year compulsory education; c. the readiness of the child's reproductive organs; d. the economic, social, and psychological impact on the child; and e. the potential for discord and domestic violence. These five points are closely related to the rights to life, growth, and development of children, and have been conveyed by the judge in the trial of this marriage dispensation case.¹³

The five points of advice above are closely related to the right to life, growth and development of children, and these five points have been conveyed by the judge in the trial of this marriage dispensation case. The author will analyze whether the judge has considered the five points of advice in his considerations, as stated in Article 12 paragraph subsection (3) of Supreme Court Regulation Number 5 of 2019.

Points a and b highlight the impact of marriage dispensation on children's education. In this case, it is known that the applicant's child had stopped school five months before the marriage dispensation application was filed. The author observes that the judge did not consider this in more depth, as the decision to stop school may indicate a significant change in the child's life that requires the decision to be made. Thus, the judge must take a comprehensive look at how the decision will affect the child's life and future as a whole, including the impact on the child's education and development.

Point c emphasizes the importance of the child's physical readiness to face the consequences of marriage. The judge must consider whether the child has reached the physical readiness level to start married life. In this case, the judge considered that the applicant's child was not yet capable of taking responsibility as a wife because she had not yet reached physical, mental, and emotional maturity. However, as she had become pregnant outside of marriage, the judge needed to seriously consider the pregnancy in making his decision. Although pregnancy at a young age has serious health risks, the pregnancy has already occurred, so the judge needs to consider how to minimize the adverse effects that may arise for the child and the fetus.

Points d and e consider the economic, social, and psychological impacts, as well as the potential for domestic disputes and violence. In terms of the economy, it is known that the applicant's child does not work, and husband candidate works as a fisherman with a

¹³ Article 12 paragraph subsection (2) Supreme Court Regulation Number 5 of 2019.

low income. The judge needs to consider whether family support is sufficient to overcome the existing economic imbalance. In addition, social and psychological impacts also need to be considered, including how support from the family and community can help the applicant's child deal with the situation, given that she is pregnant outside of a religiously and state-authorized marriage with the potential for social sanctions in the surrounding environment.

The potential for discord and domestic violence also became a serious concern for the judge in his consideration. The judge considered that the applicant's child and CALON SUAMI did not yet have the mental, spiritual, and economic readiness to marry. However, the judge must balance this consideration with other considerations, so that in taking into account all aspects related to children's right to life, growth, and development can provide the best protection for children.

3. The Principle of Respect for the Child's Opinion and for Human Rights and Dignity

The right to express opinions and to be heard is a right that every child has and is guaranteed by international and national regulations. The principle of respect for children's opinions includes the right of children to participate and express their opinions in decision-making that affects their lives. The state, government, and local governments guarantee children's right to express their opinions in accordance with their age and level of intelligence for the sake of their development.¹⁴

Recognition of children's right to express opinions and be heard is in line with the principle of respect for human dignity. Children are considered a trust and a gift from God that must be safeguarded because of their inherent dignity and rights as human beings. To realize these principles, Supreme Court Regulation Number 5 of 2019 stipulates that judges must hear the testimony of the child for whom marriage dispensation is sought.¹⁵ The judge must also ensure that the child submitted in the application knows and agrees to the marriage plan¹⁶ and can hear the child's testimony without the presence of the parents.¹⁷ If the child's testimony is not considered, the decision may be null and void.¹⁸

In the trial, the applicant's child have submitted their testimony, and the judge has listened to it, thus fulfilling the provisions of Article 7 paragraph subsection (3) of Law Number 16 of 2019 Jo. Article 13 paragraph subsection (1) of Supreme Court Regulation Number 5 of 2019. The judge also considered the testimony in his legal considerations. The judge applied the principle of respect for the child's opinion by considering the testimony of the applicant's child in his legal considerations.

¹⁴ Explanation of Article 2 Law Number 35 of 2014, Article 10 and Article 24 Law Number 35 of 2014 on Child Protection.

¹⁵ Article 13 Point (1) Supreme Court Regulation Number 5 of 2019.

¹⁶ Article 14 Point a Supreme Court Regulation Number 5 of 2019.

¹⁷ Article 15 Point a Supreme Court Regulation Number 5 of 2019.

¹⁸ Article 13 paragraph subsection (2) and (3) Supreme Court Regulation Number 5 of 2019.

The judge's consideration stated that although the applicant's child and the husband candidate acknowledged their readiness to marry and no family objected, this did not necessarily guarantee their readiness to enter into marriage, especially since the marriage plan was based on the reason that they had already had intimate relations as husband and wife. The judge considered that the applicant's child and husband candidate had not shown seriousness, ability, and feasibility to carry out married life.

The judge's assessment that CALON SUAMI was not fully capable of being the head of the household, including in guiding and providing religious education to his wife, was based on Article 80 paragraph subsection (2) of the Compilation of Islamic Law and Surah at-Tahrim verse 6. The judge mentioned that CALON SUAMI's spiritual and emotional stability were very weak because he had committed adultery, so he was not able to carry out household duties properly.¹⁹ The author argues that the judge's assessment is generalized and contains assumptions that are not always true. Various factors can influence a person to commit adultery, and not all of them are related to spiritual or emotional stability.

Assessing a person's suitability for marriage is a serious task. Considering information from those closest to them can provide a deeper insight into a person's character than a judge can gain through direct observation or interviews in court. Judges can also assess eligibility based on their age. the applicant's child is 18 years and 4 months old, and husband candidate is 27 years old, so both have reached the age of puberty, which indicates maturity.²⁰ By considering these matters, the judge will be more likely to apply the principle of respect for the opinion of the child because he has explored more deeply the acknowledgment of his readiness to marry. This will realize respect for human dignity by providing a determination that is fairer and in accordance with the rights of the child.

4. Principles of Non-Discrimination and Gender Equality

In marriage dispensation cases, the principles of non-discrimination and gender equality require that judges ensure that the children involved are treated without discrimination. Decisions should be based on the needs and interests of the child's rights, not gender stereotypes. The principle of gender equality is that equal conditions exist for women and men to obtain opportunities and rights as human beings to express their opinions, and their opinions must be considered in the decision-making process.²¹ Supreme Court Regulation Number 5 of 2019 has regulated this in Article 10 paragraph subsection (1), namely "On the day of the first hearing, the Applicant is obliged to present the Child for whom the Marriage Dispensation is requested", and then Article 11 paragraph

¹⁹ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn., 30.

²⁰ Abdurrahman al-Jaziri, *Al-Fiqh 'ala al-Madzahib al-Arba'ah*, Juz 2 (Beirut: Dar al-Kutub al-Ilmiyyah, 2003), 314-315.

²¹ Kunthi Tridewiyanti, "Kesetaraan Dan Keadilan Gender Di Bidang Politik "Pentingnya Partisipasi Dan Keterwakilan Perempuan Di Legislatif",*" Jurnal Legislasi Indonesia* 9, no. 1 (2012): 77.

subsection (1) and (2), namely "Judges in the trial use language and methods that are easy for children to understand" and "Judges and Substitute Clerks in examining children do not use court attributes."

This is to ensure that children feel comfortable in court and apply the principles of non-discrimination and gender equality. Judges in their considerations, did not differentiate in treating children who applied for marriage dispensation, following existing procedures and regulations. Judges provide the same advice regarding the risks of marriage to all parties without differentiating based on gender, in accordance with Article 12 of Supreme Court Regulation Number 5 of 2019. the applicant's child are given the same opportunity to present their testimony, which has been heard and considered by the judge in accordance with Article 13 of Supreme Court Regulation Number 5 of 2019. Therefore, the judge has applied the principles of non-discrimination and gender equality properly in the trial.

5. The Principle of Equality Before the Law

The principle of equality before the law is the principle that citizens are equal before the law, and the government must uphold the law with no exceptions.²² In this principle, the judge has given all parties the opportunity to apply for a legal settlement through the court, such as the marriage dispensation application filed by the plaintiffs. The court considered the plaintiffs as interested parties in this case (*persona in judicio*) because it was proven that they were the parents of the parties based on written evidence. Thus, the plaintiffs have the right (legal standing) to apply for dispensation of marriage based on Article 7 paragraph subsection (2) of Law Number 16 of 2019 and Article 6 paragraph subsection (1) of Supreme Court Regulation Number 5 of 2019.

The plaintiffs have submitted an application for dispensation of marriage by completing the administrative requirements in accordance with Article 5 of Supreme Court Regulation Number 5 of 2019, which have been examined and analyzed by the judge. The plaintiffs presented the interested parties, namely the child for whom the marriage dispensation was sought, CALON SUAMI, and the parents of the CALON SUAMI, in accordance with Article 10 of Supreme Court Regulation Number 5 of 2019. All parties were given the same opportunity to present their testimony, and the judge also considered their testimony, in accordance with Article 13 of Supreme Court Regulation Number 5 of 2019. The two witnesses presented by the plaintiffs were also given the same opportunity to provide testimony related to this case. The judge considered all information presented by all parties in the trial so as to obtain relevant legal facts. Thus, the judge applied the principle of equality before the law in his trial, because he treated all parties fairly based on their respective legal positions.

6. Principles of Justice

²² Article 27 paragraph subsection (1) The 1945 Constitution of the Republic Indonesia.

Judges are authorized by law to accept, examine, and decide a case fairly. Judges must be able to distinguish the sense of justice according to individuals, groups, and society and must consider all of these things in their decisions.²³ Justice is abstract and relative, making it difficult to determine justice that satisfies both parties. However, what is sought here is justice for the child, so that their rights are still fulfilled and legal order in society is achieved.

The judge's decision to reject the marriage dispensation application in this case emphasizes justice to create legal order in society. The rejection is a form of legal certainty to bring order to society. Justice requires legal certainty to create an orderly society, and legal certainty is meaningless without justice itself.²⁴ The form of legal certainty can be seen in the consideration that free sexual behavior is rampant and must be eradicated in a positive and constitutional manner, including refusing to give permission to marry to couples who are not of age who are proven to have committed adultery before applying for marriage dispensation to the Religious Court.²⁵

As stated by the Chairman of the Pesisir Selatan Regency DPRD in 2022, the current level of juvenile delinquency is very troubling and needs to be of concern to parents.²⁶ This is related to the consideration of the judge who rejected the petition of the applicant's child and husband candidate because they were proven to have committed adultery that led to pregnancy outside of marriage. Although the Compilation of Islamic Law Article 53 paragraph subsection (1) states that a pregnant woman outside of marriage can be married to the man who impregnated her, the judge chose the opinion of scholars who forbid the marriage of pregnant women, namely from the Maliki and Hanbali schools of thought, based on a hadith of the Prophet.

In Islamic law, differences of opinion are considered a blessing, which allows the selection of opinions according to the interests of the time to create benefits in determining the law. In this case, the judge set aside Article 53 paragraph subsection (1) of the Compilation of Islamic Law and took the opinion of scholars who forbid the marriage of pregnant women to adjust to the phenomenon of rampant free sexual behavior and adultery in society. Judges take preventive steps to signal that practices that are contrary to moral and legal norms will not be tolerated, creating a strong basis for maintaining legal and moral order in society, resulting in more solid and sustainable justice.

7. Principle of Benefit

²³ Khoirul Abror, *Dispensasi Perkawinan di Bawah Umur* (Yogyakarta: DIVA Press, 2019), 152-153.

²⁴ Fence M. Wantu, *Pengantar Ilmu Hukum* (Gorontalo: UNG Press, 2015), 5.

²⁵ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn., 30.

²⁶ "Ketua DPRD Pessel, Ermizen: Bendung Kenakalan Remaja Melalui Gerakan Kembali Ke Surau", accessed from <https://berita.pesisirselatankab.go.id/berita/detail/ketua-dprd-pessel-ermizen-bendung-kenakalan-remaja-melalui-gerakan-kembali-ke-surau>, on April 25, 2024, at 08.52 WITA.

Supreme Court Regulation Number 5 of 2019 provides guidance so that children's rights are not violated in marriage dispensation cases. This guidance is contained in various articles, particularly Article 2 and Article 16, which explain the principles and matters that judges must consider to ensure the best interests of the child. In Islam, this principle is regulated in fiqh rules that emphasize the importance of rejecting damage rather than attracting benefits, as reflected in the rule: "Rejecting all harm takes precedence over attracting all that is beneficial."²⁷

In this case, the judge considered that the benefit to be achieved by marrying off the applicant's child was to maintain the social status of those who had had intimate relations as husband and wife. However, granting permission to marry under the age of marriage could lead to several damage, such as discord and domestic violence due to mental, spiritual, and economic unpreparedness.

According to the author, the judge is faced with two potential damages: damage if the marriage dispensation application is granted and damage if it is rejected. The judge considers maintaining the social status of the applicant's child to be benefit, but this also aims to prevent potential damage, such as the psychological burden on the applicant's child due to community assumptions. The condition of the fetus in the womb is also threatened due to the mother's psychological burden. If both options cause damage, then it is permissible to choose the lesser damage, in accordance with another fiqh rule, namely, "If there are two opposite harms, then the heavier harm must be maintained by doing the lighter of the two."

This rule explains that if there are two damages, then choose the lesser damage. Therefore, the role of the judge is very important in exploring the facts and information of this case, as regulated in Article 16 of Supreme Court Regulation Number 5 of 2019, so that the judge's decision provides benefits for the applicant's child who is pregnant outside of marriage, so that the principle of expediency is fulfilled in accordance with Article 2 of Supreme Court Regulation Number 5 of 2019.

8. Principles of Legal Certainty

Legal certainty is something that can be determined by laws in concrete matters.²⁸ The law has a role in creating legal certainty in order to maintain public order in general. This principle ensures that the law can be implemented clearly, which is the main purpose of the law itself.²⁹ Legal certainty is essential to support child protection and prevent abuses that can have negative impacts.

In the context of this case, the judge's rejection of the application for dispensation to marry was based on the consideration that the prospective husband and wife had not

²⁷ Duski Ibrahim, *Al-Qawa'id al-Fiqhiyah (Kaidah-kaidah Fiqih)* (Palembang: CV. Amanah, 2019), 84.

²⁸ Van Apeldoorn, *Pengantar Ilmu Hukum*, Cetakan 24 (Jakarta: Pradnya Paramita, 1990), 24-25.

²⁹ Sudikno Mertokusumo, *Penemuan Hukum* (Yogyakarta: Liberty, 2009), 21.

yet demonstrated their sincerity, ability, and suitability for married life. The judge considered that allowing them to marry could pose a risk of domestic discord and violence, potentially creating more harm than good.

In his reasoning, the judge also emphasized that marriage is not only aimed at creating a harmonious family but also at realizing the benefits of the world and the hereafter in accordance with *maqasid sharia*.³⁰ However, this rejection also presents a dilemma because it may result in the loss of the child's right to the lineage of his biological father, although there is a scholarly opinion that allows lineage in certain cases.³¹ The judge, in his reasoning, took the opinion that prohibits it based on religious considerations.

The author sees that the judge emphasized the principle of legal certainty in an effort to create order and discipline against the rampant phenomenon of free sex and adultery. However, it is important for judges to provide legal certainty for the parties involved in the marriage dispensation application, especially for the protection of the rights of unborn children who may be affected by the decision. This is important to ensure that the principle of legal certainty is fully implemented.

CONCLUSION

At the examination stage, judges refer to Supreme Court Regulation Number 5 of 2019 as a guide in adjudicating applications for marriage dispensation. Then, in assessing the readiness of the applicant's child and husband candidate to marry and settle down, the judge is based on *surah at-Tahrim* verse 6, hadith about the recommendation to marry for those who are capable, the opinion of scholars about the prohibition of marriage of pregnant women, Article 80 paragraph subsection (2) of the Compilation of Islamic Law, and *fiqh* rules on rejecting fads, resulting in a decision to reject the application for marriage dispensation in case number 85/Pdt.P/2023/PA.Pn. Based on the review of Supreme Court Regulation Number 5 Year 2019 and the judge's consideration that the judge was not too sharp in digging up information, assessing the feasibility of the parties, and considering the social and psychological impact on the applicant's child and the fetus that was being conceived so that the protection and best interests of the child were not maximally implemented, the judge's refusal of this marriage dispensation application as a form of legal certainty by the judge to provide legal order for the phenomenon of free sex that is rampant in society.

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³⁰ Copy of the Court Decree of the Painan Religious Court Number 85/Pdt.P/2023/PA.Pn., 34.

³¹ Wahbah az-Zuhaili, *Al-Fiqhu al-Islami wa Adillatuhu*, Juz 7 (Damaskus: Dar al-Fikr, 1985), 148.

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