

The Judge's Refusal of The Application for Marriage Dispensation

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ABSTRACT

A phenomenon revealed that there is a conflict between the objectives of the *maqashid syari'ah* and the decision of the Pangkajene Religious Court judge No.0228/PDT.P/2020/PA.PKJ in the case of a marriage dispensation application. The purpose of *maqashid syari'ah* in the dispensation of marriage is to avoid adultery that enters the maintenance of religion (*Hifz al-Din*). The marriage dispensation was proposed by the parents as applicants because their children have often gone out together and even had intercourse as husband and wife but this was rejected by the judge. The problem above is the goal to explain legal considerations by the judge of the Pangkajene Religious Court in the application for marriage dispensation and *maqasid al-syari'ah* review of the decision of the judge in the application for marriage dispensation. This research used a library research method by citing the contents of the judge's determination files and books related to the problem under study and the data used is in the form of secondary data, namely in the form of decisions of the Religious Courts. The fact is that in this stipulation the judge rejected the application for marriage dispensation by not considering the immoral acts that had been committed by the prospective groom and prospective bride. Furthermore, the purpose of maintaining religion in this determination is not fulfilled where the judge uses the method of avoiding *mafsadah* taking precedence over bringing *maslahah* as if contrary to the stipulation in which the judge rejects the proposed marriage dispensation application.

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1. INTRODUCTION

Marriage dispensation is compassion given by the Religious Courts to prospective brides who will enter into a marriage since they have not reached the required age of marriage based on Article 7 paragraph (1) of Law Number 16 of 2019 concerning amendments to the Marriage Law Number 1 year 1974 that is 19 years (Iqbal & Rabiah, 2020). In general, a request for dispensation of marriage will be granted by the judge if it is "very urgent" such as having been dating for years, having had sexual intercourse or even being pregnant (Ilma, 2020). Because in the Qur'an Allah has said which means "And marry the unmarried among you and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is all-Encompassing and Knowing".

However, in the judge's decision No.0228/PDT.P/2020/PA.PKJ, having seen all of the applicant's reasons that the applicant's child had been dating for about two years and even had intercourse, but the Pangkajene Religious Court rejected it. In the legal considerations used by the judge, the applicant's child was only 13 years old, which was very far from the stipulated marriage age limit, namely 19 years, and the applicant's child was not pregnant. Based on these provisions the judge considers the dangers and risks of child marriage under the age of 19 are far greater, so they decided to reject the application.

2. METHODS

This study was compiled by using library research methods (Zed, 2004) with descriptive-analytic in nature by going through the process of collecting data, compiling data and explanations for analysis under existing data, analyzing and concluding from the data collected in this study in the form of decisions of the Religious Courts which then compiled basic assumptions about maqasid al-shariah and interpreted by the author based on his thoughts. Bogdan and Taylor in Lexi J Moeleng define that, a qualitative approach is a research procedure that produces descriptive data in the form of written or spoken words from people and observed behavior (Moleong, 2021). The data collection technique was carried out by reviewing and quoting the contents of the determination file of the judge who tried the application and books related to the problem under study and using the data analysis technique used in this research is the content analysis method (White & Mars, 2006).

3. RESULTS AND DISCUSSION

3.1. Marriage Dispensation

According to KBBI, a dispensation is "the general exemption from the imposition of obligations; special application; exceptions to actions based on a law which state that laws and regulations do not apply to a particular matter". Dispensation of marriage or underage marriage is a marriage that occurs if one or both of the prospective bride and groom are below the standard age limit for marriage that has been determined by applicable law (Habibah, 2022). Marriage dispensation is an exception given by the Religious Courts to prospective brides who are not old enough to get married under Article 7 paragraph (1) Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning marriage states that marriage is only permitted if the man and woman have reached the age of 19. Then Article 7 paragraph (2) states that if there is a deviation from the age requirement, the parents of both men and women are allowed to submit a marriage dispensation to the Court for urgent reasons and accompanied by supporting evidence (Ilma, 2020).

Regarding the age limit for marriage, as explained above, the age of 19 is considered mature physically and mentally to be able to get married, also to slow down the birth rate and reduce the risk of maternal and child mortality as well as optimize the fulfillment of children's rights to their growth and development and to be able to provide access to children for their education as high as possible (Aristoni, 2021). There are rules regarding the minimum age limit for marriage because marriage is an engagement agreement between a man and a woman as husband and wife, so this must be done by those who are mature enough both in terms of psychology and biology. This is done to realize the goals of marriage and also to prevent marriage at a young age which is prone to divorce and unhealthy offspring later (Zainuddin Alanshori, 2017).

Explanation of the legal dispensation of this marriage if examined further, there are no verses in the Qur'an that regulate the age limit for marriage itself, but there are several verses that are more directed to the eligibility of a person to marry as in QS An-Nur verse 32 and An-Nisa' verse 6 correlates with baligh age, especially in the words shalihin and rushdan. Al-Maraghi as quoted by Dedi Supriyadi interprets the word wassalihin in QS An-Nur verse 32 above to mean men or women who can marry and exercise the rights of husband and wife, such as being able-bodied, having assets, and so on. other. Thus, it can be understood that a person's mental health is closely related to age. People who are mentally healthy and logically mature are people who are older than children or can be said to be psychologically and mentally mature. Thus, the word shalihin itself gives a clue if marriage in Islam has conditions even though it is still general in nature, it is also the forerunner in the process of determining the age of puberty for a marriage (Supriyadi, 2011).

While explained in the interpretation Al-Misbah (Husien & Khisni, 2017; Nashirudin, n.d.) the basic meaning of the word rushdan is the accuracy and straightness of the road. Rushd for humans is the perfection of mind and soul. Al Maraghi interprets adulthood (*rushdan*), that is if a person understands well how to use wealth and spend it, while balighu an-marriage is when the age is ready to marry. That means that immature people should not be burdened by certain problems. According to Rasyid Ridha, the sentence balighu al-nikah shows that a person's age to get married, that is until he dreams. At this age, a person has been able to give birth to children and provide offspring so he is moved to get married. He was also charged with religious laws such as worship, muamalah, and the implementation of hudūd. Because of this, rushdan is a person's decency in tasarruf and bringing benefit.

3.2. The Concept of *Maqashid Shari'ah*

The word "*maqasid*" is taken from Arabic مقاصد (*maqasid*) which is the plural form of the word مقصد (*maqsad*), which contains the meaning of purpose, goal, principle, intent, goal, and final goal. These maqasid are several good goals pursued by Islamic law by allowing or prohibiting something. While the word sharia means the way to a water source (Bakri, 1996) or have an understanding, namely the laws of Allah which are used as guidelines to achieve happiness in life in this world and the hereafter. The word sharia according to Sheikh Al-Azhar, Mahmoud Syaltout are rules created by Allah to be guided by humans in regulating relationships with God, with humans both fellow Muslims and non-Muslims, nature, and all of life (Syaltout, 1966). In other words, shari'ah is a set of God's laws given to mankind to get happiness in life both in this world and in the hereafter (Bakri, 1996).

Al-Syathibi, as quoted by Asafri Jaya Bakri in his book, concludes that maqashid al-shari'ah in the sense of benefit exists in legal aspects as a whole. This means that if there

are legal problems where the benefit dimension is not found, it can be analyzed through *maqasid al-shari'ah* which is seen from the spirit of *shari'ah* and the general goals of the *hanif* Islamic religion (Bakri, 1996).

Concerning its principle, *maqasid al-shari'ah* has 5 principles, namely maintaining religion (*Hifz al-Din*), maintaining the soul (*Hifz al-Nafs*), maintaining the mind (*Hifz al-Aql*), maintaining offspring (*Hifz al-Nasl*), maintaining property (*Hifz al-Mal*).

3.3 Maqashid Syari'ah on Marriage Dispensation

In determining the dispensation of marriage, it cannot be separated from Islamic law. In Islamic law, there is the term *maqasid syari'ah* whose main objective is to create benefits and reject *mafsadatan*. The term dispensation of marriage comes along with the development of social life in society and also influences human welfare (Muzaiyanah & Arafah, 2021).

The purpose of enacting this marriage dispensation law itself is to avoid adultery because the couple has had such an intimate relationship, this goes into maintaining religion (*Hifz al-Din*). Next is protecting the offspring (*Hifz al-Nasl*) in the case of a marriage dispensation given due to pregnancy, this is none other than protecting the offspring so that later the baby's lineage is clear for its benefit in the future (Khoiri, 2021). In a marriage caused by pregnancy, it is to give responsibility from the man to the woman. Thus, at the level of *maqasid al-shari'ah* it is called *maqasid al-dharuriyyat*.

In terms of providing convenience in marriage dispensation, for instance, a couple who wants to apply for this marriage dispensation already has a job, one of them or both, so they can not be separated, and if they do not get married immediately it will cause a separate disgrace for the family, so a marriage dispensation can be provided. This goes to the level of *maqashid al-hajiyyat*.

Providing for the needs of children in undergoing marriage, even though the child is capable to fulfil his/her needs as a habit of parents in Indonesia, this is in the state of *maqashid al-tahsiniyyat*.

Maqasid marriage achieved using the perspective of Imam Syatibi quoted from Dieta Mellaty Hanafy (2020) is to provide the benefit of marriage. Since the dispensation of marriage itself is a form of concern for the guardians of their children in today's promiscuity. This benefit is taken because if there is no agreement it will cause other harm.

3.4 Review of Maqasid al-Syari'ah on the Determination of the Pangkajene Religious Court No. 0228/PDT.P/2020/PA.PKJ in the Marriage Dispensation Application.

In the case that the author examined regarding the judge's rejection of the application for a marriage dispensation, applicant I and applicant II wanted to marry off their biological child aged 13 years with a son who was 21 years old when the application was submitted and worked as a fisherman. In this case, the marriage was very urgent to be carried out because the children of the applicant and the prospective groom had been in a dating relationship for approximately 2 years and had often gone out together, also had intercourse between husband and wife with the prospective groom so that the applicants feel ashamed and worried if they are not married immediately.

Based on the information above, the judge rejected this application based on considerations because the husband or wife of a young underage couple was not yet ready physically and mentally to carry out household responsibilities, face and solve very complex household problems, and also impact a maternal death during pregnancy or

childbirth due to their young age. This decision of the judge is not in line with the opinion of An-Nawawi regarding the age limit for marriage which interprets البَاءة as the ability to perform *jima'*.

The ability to do *Jima'* is not only seen from the male side but also must be seen from the female side so that in the future they can give birth to quality offspring. The benefit that the judge wants to achieve in this case is not under the aim of *maqashid al-shariah* to avoid *mafsadah* which is more important than bringing about *maslahah* according to *fiqh* rules:

دَرْءُ الْمَفَاسِدِ أَوْلَى مِنْ جُلْبِ الْمَصَالِحِ

Meaning: Avoid *mafsadah*(damage) is prioritized over bringing *maslahah* (benefit).

This rule explains that if we are faced with a choice, then refusing damage is as important as achieving benefit because the main goal of *maqasid sharia* according to *fiqh* scholars is to achieve benefit in the world and in the hereafter. Referring to the judge's considerations to reject the application for a marriage dispensation permit, this does not comply with the principles of *maqasid al-shari'ah* which aims to achieve benefits in protecting offspring (*Hifz an-Nasl*), which is the main goal of marriage itself.

This determination is because the judge has not fulfilled the objective of *maqasid al-shari'ah*, namely the benefit of the spouse. After all, it is very clear that the spouse may bring great harm if they are not married (*Hifz al-Nasl*).

Other *fiqh* rules also explain the prohibition to do something harmful, namely:

لَا ضَرَرَ وَلَا ضِرَارَ

Meaning: Do not do anything dangerous.

الضَّرَرُ يُزَالُ

Meaning: Disadvantage must be removed.

Based on this rule it is explained that a person may not inflict a hazard or harm to others. Thus, we have to reconsider the risks that will occur if the applicants do not grant the request for the reasons stated above.

The judge uses the method of avoiding *mafsadah* taking precedence over bringing about this problem as if it contradicts the stipulation in which the judge rejects the proposed marriage dispensation application. Because the *mafsadat* avoided is the act of adultery which could be carried out again by the prospective spouse if they are not married immediately, as well as the status of the child who will be born from the act of adultery rather than prioritizing the *maslahah* in terms of protecting the psychology of them when applying for a marriage dispensation at 13 years old. Therefore, it concluded that the judge has not fulfilled the principle of *maqasid al-syari'ah* in determining the rejection of the Religious Court Decree No.0228/PDT.P/2020/PA.PKJ regarding marriage dispensation.

4. CONCLUSION

A marriage dispensation can be requested from the court if the prospective spouse is less than 19 years old as stipulated by law. In stipulation No.0228/Pdt.P/2020/PA.PKJ, a judge rejected the application for a marriage dispensation, in which the marriage was very urgent to be carried out because the spouse had been in a dating relationship for approximately 2 years and had often gone out together, also had a husband-and-wife relationship. However, the judge rejected the request from the perspective of *maqasid al-shariah* because he prioritized protecting the psychology (*Hifz al-Nafs*) of the spouse over protecting religion (*Hifz al-Nasl*). If the request is not granted and adultery occurs

between them which causes a pregnancy, then in this case the purpose of preserving religion is not fulfilled by this stipulation. The use of rejecting mafsada takes precedence over bringing about maslahah which is used by judges as if it contradicts the stipulation that has been issued.

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