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Response to Law Number 16 of 2019
Concerning Amendment to law Number
1 of 1974 Concerning Marriage (the
Concept of Maslahah Mursalah in
Marriage Dispensation Cases)

By Suraya Attamimi

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Implementation of Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 as a Response to Law Number 16 of 2019 Concerning Amendment to Law Number 1 of 1974 Concerning Marriage (the Concept of *Maslahah Mursalah* in Marriage Dispensation Cases)

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ABSTRACT

Marriage is the nature of all living things, including humans. Islam, as a divine religion and *rahmatan lil alamin*, provides a way of life for its followers, including guidelines for carrying out marriage. In Islam, even though there is no order for the registration of marriages, the purpose and maintenance of lineage, as a general concept in *maqashid sharia*, can be defined as an order to register marriages as part of the implementation of the *maqashid sharia*.

This paper discusses the amendments to Law Number 1 of 1974 concerning Marriage, regarding the sudden discussion and ratification at the near-end period for members of the Indonesian House of Representatives (DPR RI) for the 2014-2019 period. This paper discusses the amendments to Law Number 1 of 1974 concerning Marriage. The discussion and ratification were suddenly undergone at the near-end period for DPR RI members for the 2014-2019 period. Thus, when the president promulgated and included it in the state gazette, many citizens did not know or were not ready to implement it. As a result, many planned marriages cannot be registered because the change in the law hinders them.

One solution is to file a marriage dispensation case in religious court which by law is authorized to receive, examine and resolve the case. Regulation of the Supreme Court Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage

dispensation is a technical reference for judicial officers examining the case. The method used by the author in compiling the paper is the library method, by taking data from the literature and supporting data from several religious courts after the law

passed.

With the implementation of Law Number 16 of 2019 as an amendment to Law Number 1 of 1974 concerning marriage, the facts and phenomena in society, as well as the increasing number of marriage dispensation cases in religious courts, are evidence that the community's readiness to accept and make minimum age adjustments for Bridal couples, especially the bride, still needs time.

1. Introduction

In Islam, the concept of *maqashid sharia* is generally known as the estuary of all concepts and practices of Islamic teachings. One of the concepts in *maqashid sharia* is to maintain lineage. The implementation of maintaining this lineage in Islamic teachings is to carry out marriages whose pillars and conditions follow the provisions in the Qur'an and the hadith.

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Regarding marriage, Islam does not mention the provisions regarding the minimum age for marriage. In contrast to the obligation to perform prayers, Islam has determined that a woman's puberty is marked by menstruation (usually at the age of 13), while a man has a 'wet dream' (usually 14 years). However, these two signs are not the only signs which allowed them to marry.

The *fiqh* books also do not discuss the appropriate age for marriage, even allow marriage between children, which is stated clearly or indirectly every *fiqh* book mentions the authority of *wali mujbir* to marry off young children or virgins (Amir Syarifuddin, 2006). This permissibility is because no verse in the Qur'an and hadith mentions the minimum age limit for marriage. Therefore, in determining the age of marriage, it must first be seen what social rules apply in society.

Amendments to Law Number 1 of 1974 concerning Marriage were ratified by the President of the Republic of Indonesia on October 14, 2019, and promulgated on October 15, 2019. It means that when it has been promulgated and added to the state gazette, all citizens of the Republic of Indonesia are automatically considered to know the laws and regulations.

Problems arose in the community when they were already preparing to marry off their daughter and still thought that the minimum age of marriage is 16 years for the prospective bride. It happened in early October 2019 when they had not registered their marriage plans with the registrar. As a result, the marriage is not eligible for registration.

The Supreme Court of the Republic of Indonesia, as a judicial institution holding judicial power, by law, is given the authority to settle cases in the field of marriage, including marriage dispensation cases (UU No. 3 Tahun 2006). From the explanations, the questions seek to answer in this paper are:

- a. What are the essential points contained in Law Number 16 of 2019 regarding amendments to Law Number 1 of 1974 concerning Marriage?
- b. How is the response of the judiciary, in this case, the Supreme Court of the Republic of Indonesia and the judicial bodies in relation to these changes?

In writing this paper, the author used a library research method guided by interviews with several sources that helped to complete the data in this paper.

2. Discussion

Everyone seeks happiness, and marriage is one way to achieve that purpose. However, as a citizen, the provisions regarding marriage have been regulated by separate rules, namely Law Number 1 of 1974 concerning Marriage.

Marriage itself is one of the worships that is carried out over a long period of time because the Sharia has regulated it, as in the Quran surah Ar-Rum verse 21:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَعْقُرُونَ

"And one of His signs is that He created for you spouses from among yourselves so that you may find comfort in them. And He has placed between you compassion and mercy. Surely in this are signs for people who reflect". (Ar-Ruum:21)

The verse above explains that marriage is a significant and sacred thing. In marriage, certain norms must be obeyed to create a comfortable and peaceful life, full of love (*akinah mawaddah wa rahmah*). In a marital relationship, there should not only be an outer bond in the sense that a man and a woman live together as husband and wife in a formal bond, but both must also develop an inner bond. Without a solid inner bond, the outer bond can be easily separated because both marital bonds become a solid foundation for building and fostering a happy and eternal family (Muhammad Daud Ali, 2002).

Islam has 24 determined the requirements for people who will get married. Some conditions and pillars must be met. However, in Islam, there are no specific provisions regarding the minimum age limit for marriage, both for men and women.

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In general, the fuqaha' do not agree on the minimum age limit for marriage. However, they believe that baligh for a person does not necessarily indicate that he is an adult, for reasons of several schools of thought. Syafi'i and Hambali said that the age of puberty for children was 15 years, Maliki set the age of 17 years. Meanwhile, Hanafi said that puberty is 18 years for boys and 17 years for girls (Dedi Supriadi, Mustofa, 2009).

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Atha' Mudzar said there are four kinds of Islamic legal products that have developed and are known in the history of Islamic law: fiqh books, ulama's fatwas, court decisions, and legislation in Muslim countries (Atha' Mudzar, 1998).

2
Regarding the applicable positive law, on September 16, 2019, the DPR RI and the government agreed to ratify Law Number 16 of 2019 concerning marriage, amendments to Law Number 1 of 1974. Thus, there was a change in the marriage age for prospective brides.

5
In this new law, members of the Council and the government focus more on the content of the amended articles, namely article 7 and the addition of Article 65A of the Marriage Law. Article 7 paragraph (1) of Law No.1 of 1974, as amended by Law no. 16 of 2019, concerning marriage, is only permitted if a man and a woman have reached the age of 19 (Undang-undang Nomor 16 Tahun 2019)

2
Amendment to Law Number 1 of 1974 concerning Marriage is a mandate from the Constitutional Court to accommodate the decision of Constitutional Court no. 22/PUU-XV/2017. This decision confirms that the marriage age limit of 16 years for women and 19 years for men is discrimination. Therefore, the Constitutional Court declared the provisions of Article 7 paragraph (1) null and void. The Constitutional Court also ordered the DPR and the Government to amend the Marriage Law no later than three years after the verdict was read.²

23
However, there is another decision of the Constitutional Court ignored by the government and the House of Representatives, namely the decision of Constitutional Court No. 46/PUU-VIII/2010.³ Long before the decision regarding the minimum age limit for marriage, the Constitutional Court had stated that Article 43 paragraph (1) of the Marriage Law was contrary to the 1945 Constitution and had no binding law. This article states, "Children born out of wedlock only have a civil relationship with their mother and their mother's family".

9
The DPR and the government only accommodated the order of the Constitutional Court with decision number no. 22/PUU-XV/2017, and there is no clarity on the decision of Constitutional Court Number MK No. 46/PUU-VIII/2010.

14
Regarding the post-ratification of Law No. 16 of 2019, there have been various responses from the community, especially those who have not received information and are not ready for change, because, for decades, the public has known that the minimum limit for their daughters to marry is 16 years. So as a solution so that the planned marriage can still take place, namely by submitting a marriage dispensation case to the religious court, a state (judicial) institution that is authorized by law to receive, examine and resolve marital cases, including marriage dispensations.

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The arguments above are in accordance with the significant increase in the number of marriage dispensation cases after the ratification of Law Number 16 of 2019, as shown in the following table:⁴

16
² See the preamble to Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, in letter c

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2
³ The Constitutional Court's decision confirms that an illegitimate child has a blood relationship with his or her biological father as long as it can be proven based on science and technology, so it should not be treated as intended by Article 43 of Law no. 1 of 1974 concerning Marriage.

⁴ Data source from Palu Religious High Court

Table 1. Data on Marriage Dispensation Cases After the Amendments

NO	NAMA PENGADILAN AGAMA	2019				2020		
		SEPTEMBER	OKTOBER	NOPEMBER	DESEMBER	JANUARI	PEBRUARI	MARET
1	PENGADILAN AGAMA PALU	0	2	4	8	8	8	2
2	PENGADILAN AGAMA DONGGALA	0		7	6	14	6	5
3	PENGADILAN AGAMA LUWUK	2	1	16	13	16	9	5
4	PENGADILAN AGAMA POSO	0		4	3	1	2	4
5	PENGADILAN AGAMA TOLITOLI	4	2	11	6	4	8	10
6	PENGADILAN AGAMA BANGGAI	3	1	3	2	6	16	4
7	PENGADILAN AGAMA BUNGKU	1	3	4	3	6	5	4
8	PENGADILAN AGAMA BUOL	0	5	14	9	6	10	7
9	PENGADILAN AGAMA PARIGI	2	2	13	2	8	7	4
10	PENGADILAN AGAMA AMPANA	0	1	3	0	4	1	
	JUMLAH	12	17	79	52	73	72	45

Article 7, paragraph (1) of Law Number 16 of 2019 says, "marriage is only allowed if the male party has reached the age of 19 and the female is 19 years old as well". The age limit provision is also stated in the compilation of Islamic law (KHI) article 15 paragraph (1), which states that "marriage may be carried out if the male is 19 years old and the female is 16 years old" based on the benefit of the family and the marriage household. This is in line with the principle of the law that the prospective husband and wife should have matured physically and mentally so that marriage can be realized in a good and healthy manner. Therefore it is necessary to prevent marriage for underage.

In this case, it has been determined that marriage will only be permitted for those who have met the age requirements. For those who do not meet the age requirements, marriage can be carried out if the Court has given a marriage dispensation in accordance with the legislation.

The process of adjudicating applications for marriage dispensation has not been regulated in detail and explicitly in laws and regulations. Therefore, for the smooth administration of justice, the Chief of the Supreme Court of the Republic of Indonesia has stipulated Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Dispensation for Marriage. This regulation was enacted on November 20, 2019, and promulgated on November 21, 2019, to be known and applied to all levels of society.

The purpose of establishing guidelines for adjudicating applications for marriage dispensation is to:⁵

- Apply the principles as referred to Article 2, namely the principle of the best interests of the child, the principle of the right to life and development of the child, the principle of respect for the opinion of the child, the principle of respect for human dignity, the principle of non-discrimination, gender equality, the principle of equality before the law, the principle of justice, the principle of expediency and the principle of legal certainty;
- Ensure the implementation of a justice system that protects children's rights;
- Increase parental responsibility in the context of preventing child marriage;
- Identify whether or not there is coercion behind the submission of a marriage dispensation application; and
- Realize the standardization of the process of adjudicating applications for marriage dispensation in courts.

⁵ Article 5 Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation

Furthermore, how does the concept of *Usrah Fiqh* (Family Jurisprudence) see the age limit for marriage contained in the legislation? Several concepts of Family Jurisprudence cannot be applied in our country, and there is the application of marriage rules that apply in this country, but no discussion in Family Jurisprudence, one of which is the issue of marriage dispensation. The term Marriage Dispensation only exists in positive law.

Marriage dispensation can be undertaken if someone wants to get married but does not meet the requirements specified in Law no. 1 of 1974, as amended by Law no. 16 of 2019, so someone will apply for a Marriage Dispensation.

For this reason, the middle way to this problem is to apply the concept of *maslahah mursalah*, which is the most fertile *ijtihad* for establishing laws that do not have texts, and many scholars consider *maslahah mursalah* as evidence of the *Sharia*. Therefore, judges are free to find and explore the law in a decision/determination so that the *maslahah mursalah* method is part of *Istinbat* (excavating/finding) the law. It has been explained in the previous chapter that in using the *maslahah* method, the following conditions must be met:

- a. *Maslahah* must be in accordance with the intent of *syara'*
- b. *Maslahah* must be a rational (reasonable) *maslahah*, which is certain, not doubtful or suspected.

Maslahah must benefit the majority of humankind in general, not *maslahah*, which only benefits some people or only some groups. This third condition minimizes mistakes made by certain parties that make *maslahah mursalah* a method of extracting law to justify their private interests (Yudian Wahyudi, 2007).

3. Conclusion

The ratification of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage was carried out very briefly. It seems to be undertaken in a hurry by members of the DPR. In addition, most citizens are not ready for the implementation of the minimum age of marriage, especially for women.

Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage also does not accommodate all decisions of the Constitutional Court. The decision of the Constitutional Court Number 46/PUU-VIII/2010 is not included in the amendment.

The steps taken by the Supreme Court of the Republic of Indonesia as a judicial institution and the judicial bodies have been appropriate in issuing the Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation. With this regulation, the wave of filing for marriage dispensation cases can be suppressed and must meet several requirements that other government agencies also provide. Granting permission to marry underage for those who have passed the marriage dispensation trial facilitates child marriage and their future interests with the concept of *maslahah mursalah*.

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