

Reconstruction of Responsive Legal Theory in Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications in Indonesia: (*Maslahah Mursalah* Approach)



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ABSTRACT: This study aims to discuss changes in the age of marriage determined in the marriage law which has implications for society which is the object of law in the marriage law. In Law Number 16 of 2019 concerning Marriage, there is a change in the minimum age of marriage for prospective brides from the original age of 16 to 19 years. The research method used is normative legal research with the type of library research. Primary data sources include laws and regulations, opinions of scholars, works of Muslim scholars in the form of journals and books. Data analysis was carried out through the content analysis method with the stages of data collection, data reduction, presentation and drawing conclusions. The results of this study indicate that in the new marriage regulation there is a strong relationship between responsive legal theory and *maslahah mursalah*. With this relationship, the relationship can realize justice as the purpose of the law. The law turns into a social institution so that the application of marriage dispensation is not only seen from a legal perspective, but also has a social good side (*maslahah mursalah*). Responsive legal theory, which is a modern legal theory, is connected to the theory of *maslahah* which is a classical Islamic theory. This research contributes to law makers and enforcers not to ignore legal theory in the preparation of legislation or in the application and enforcement of the law. This research also offers a responsive legal theory as a theory that places law not only as *ius constitutum*, but a way to achieve *ius constituendum*, namely the desired justice.

KEYWORDS: marriage age dispensation, Islamic marriage, Islamic law. Government law

I. INTRODUCTION

The amendment or change in the age of marriage in Law Number 16 of 2019 is considered by most groups to be very appropriate. Given the rapid flow of global information and digitalization, the change in the 2019 marriage law can reduce the negative impact on children's mental growth, this policy is also expected to improve children's basic rights to protection from violence and discrimination, civil rights, health rights, education rights and social rights of children which are often neglected and difficult to fulfill due to marriages carried out at an early age (Murni, 2020). This consideration is what some groups consider that changes to the marriage law need to be made.

Community groups that support changes to the age of marriage view that carrying out marriages under the age of 18 is categorized as child marriage. Marriage at the age of 18 actually has risks for the child, ranging from physical and mental health risks. Specific risks that only occur and are experienced by women (Nisa, 2018). Changes to the minimum age of marriage have not been properly socialized because there are still many registrations of underage marriages being carried out and the local religious affairs office must reject them. The rejection was because the marriage to be carried out did not meet the minimum age requirements as regulated by Article 7 of Law Number 16 of 2019 concerning Changes to the Age of Marriage.

This condition is certainly a phenomenon in itself, moreover, after four years since it was enacted, there are still married couples who will get married but still do not meet the minimum age requirement. This is indicated by the many rejections of marriages made by religious affairs offices, and these rejections will certainly end up in religious courts, as one of the institutions authorized by law to accept and resolve cases related to marriage age limit dispensations. Based on these social facts, the Supreme Court of the Republic of Indonesia responded to the changes to the marriage law by issuing Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications in just one month. Implicitly, although the Supreme Court did not mention the legal theory used in issuing the regulation, researchers assess that the responsive legal theory is the theory that is the spirit in issuing the regulation in Indonesia (Pompe & Otto, 1990).

Reconstruction of Responsive Legal Theory in Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications in Indonesia: (Maslahah Mursalah Approach)

Philippe Nonet and Philip Selznick, provide an explanation of the classification of law that exists in society, namely law in its form as a servant of repressive power, law as a separate institution that avoids repressive nature and protects its integrity, and law as a facilitator and liaison of various responses to social needs and aspirations needed by society or responsive law (Lieberman, 2019). In this study, the researcher will explain that responsive legal theory is a legal character and product that reflects the fulfillment of the conditions of society and the empirical facts of legal compliance that exist in them, both as individuals and in the form of social groups as objects of law, so that with this responsive legal theory it reflects and also fosters a sense of justice in society (John, Edmeades, & Murithi, 2019).

In addition, the researcher will also describe and discuss the role of responsive legal theory which can explain the rigidity of the law that occurs in order to bring up a new understanding of law in the midst of the current digital era (Muslih, Nurdin, & Marzuki, 2020). These changes have an impact on the application of law that is in accordance with current conditions. The emergence of this responsive legal theory was motivated by conditions in the 70s where American law experienced a crisis that occurred among academics to practitioners.

Responsive law initiated by Nonet and Selznick can realize a new nuance of responsive law, namely becoming a connector, a reinforcement that in the application of responsive law there is a unification of multidisciplinary law, between general legal theory (Lieberman, 2019; van Seters, 2010). The responsive law is often associated with the responsive theory of Islamic law, namely *maslahah mursalah* (benefit) in the Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Age Dispensation. For this reason, in this study, researchers will discuss the responsive legal theory initiated by Nonet and Selznick and its relationship to marriage law in Indonesia. The legal interconnection is the relationship between two major legal theories, namely the *Maslahat* Theory and the Supreme Court regulations on marriage age dispensation. With this legal interconnection, the multidisciplinary elements, as well as interdisciplinary elements between different geographical and era legal elements, have been successfully united in a theory which is then implemented in a state regulation to find a solution to repressive laws but society is unable to implement them.

II. LITERATURE REVIEW

A. Marriage Concept in Islam

Marriage is a sacred event whose implementation is often associated with religion and holy books, any religion, especially in Islam (Marks, 2005). The sanctity of marriage in Islam, is not only because it is God's command, but is one way to maintain the existence of human values that naturally make marriage a basic need. The basic need for the desire to get married is a natural instinct and biological need, this need is then regulated through existing norms, both religious norms, customary norms and social norms. This basic need for marriage is the *sunnatullah* which is needed and carried out by all creatures of Allah SWT, both humans, animals and plants. With this regulation, the concept of marriage carried out by humans becomes more meaningful than the original concept which was only a biological need, increasing into a social bond and worship that adds to the value of the marriage bond (Adamczyk & Hayes, 2012). In Islam, marriage is not only something sacred, but is part of worship, because it is part of worship, its implementation is regulated by religious provisions (Alghafli, Hatch, & Marks, 2014). In the capacity of humans as *zoonpoliticon* (social beings), namely creatures who are equipped with the instinct to live together with others to live regularly.

In terms of language, marriage comes from Arabic, namely an-nikah, other words that are also used are *zawwaja* (زَوَّجَ) and the word *nakaha* (نَكَحَ). These two words are also found in the Qur'an in defining marriage which is associated with Muslims. In terms of language, *nakaha* means to gather, while *zawwaja* means couple, thus, in terms of language, marriage can be interpreted as bringing together two people into one. With the unification of two different types of people, in Islamic literature it is also commonly called a couple (*zauj* and *zaujah*). In Islam, the term marriage is often used to refer to marriage, by taking the transliteration directly from the original source, namely Arabic (نَكَحَ). So in terms of terminology, marriage means carrying out an agreement that has a bond and connection between a man and a woman.

B. Marriage in Indonesia Government law

Before describing the marriage law in Indonesia, the researcher will first briefly describe the background and birth of the 1974 marriage law. Due to the increasingly urgent need for marriage regulations, 29 years later, the Government/President of the Republic of Indonesia ratified Law Number 1 of 1974 concerning Marriage (Pompe, 1988). The ratification of this law is very appropriate because the old marriage law only regulated marriage for people who are Muslim and only applies in the regions of Java and Madura. The 1974 marriage law applies throughout the Republic of Indonesia and applies to all Indonesian citizens, all religions. The marriage law is a state effort to create happiness as a basic right for its citizens who want to form a happy family in accordance with applicable laws and regulations and to guarantee one of the basic human rights to achieve happiness. This arises because of the increasing public awareness to do everything within the corridor of law and religion. The birth of the marriage law is a long journey of a political process in Indonesia, especially by women. The political process of the emergence of the marriage

Reconstruction of Responsive Legal Theory in Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications in Indonesia: (Maslahah Mursalah Approach)

law is a long and winding process, therefore, researchers need to briefly describe the political and legal processes that occurred until the marriage law was passed in 1974. The marriage law is a process of pros and cons against the contents of the marriage law due to the political situation and configuration that occurred at that time.

During the Dutch colonial period, the marriage law in force in Indonesia was the Christian Marriage Ordinance (Huwelijk Ordonantie Christen Voor Indonesiers/HOCI), this regulation was limited to residents who were Christian (Grijns & Horii, 2018). As for Indonesians, Europeans and foreign Easterners, the provisions contained in the BW (Burgerlijk Wetboek Voor Indonesia) book applied. Although the Supreme Court itself considered that the BW was not a binding source of law as the laws and regulations made and ratified by the government, the BW was a reference for a type of unwritten law that was private in nature.

As for residents who were Muslim, with the guidance of the ulama, they used material law sourced from classical fiqh books written by previous ulama, while for non-Muslim natives only customary law applied, this condition lasted until the end of the colonial period, the Dutch failed to complete the formulation of marriage law that applied to the entire community as a whole and to all religions. Some people believe that the absence of marriage law for Muslims was deliberately done by the Dutch Colonial, so that indirectly, in addition to using classical fiqh books in the implementation of their marriages, Muslims also returned to implementing customary law with the aim of hindering the development of Islamic law as a living law in society. The above efforts have paid off, with the occurrence of Muslim marriages without any formal rules governing them, because the absence of formal family law rules has resulted in the standard of legal behavior of indigenous Muslim communities becoming loose in the field of family law.

Marriage law in Indonesia refers to Law Number 1 of 1974 concerning Marriage. Therefore, discussing marriage from the perspective of applicable positive law will certainly discuss the marriage law, namely Law Number 1 of 1974 concerning Marriage, this law applies to all religions and beliefs. This regulation on marriage is the second regulation to be ratified and recognized by the state, after previously, namely after independence, Law Number 22 of 1946 concerning Marriage Registration, Divorce and Reconciliation was ratified. However, this law only applies in Java and Madura, for outside Java and Madura, according to Article 6 paragraph (2) it is regulated by other laws and regulations. The emergence of Law Number 22 of 1946 concerning Marriage Registration, Divorce and Reconciliation was inseparable from the turmoil at that time, namely the 5th Indonesian Women's Congress (KOWANI) held in Madiun on June 14-16, 1946. This congress aimed to create a marriage regulation that guaranteed equal rights in households and marriages. They also demanded the elimination of forced marriages and underage marriages, as well as many practices of polygamy and arbitrary divorce carried out by men.

With the enactment of Law Number 22 of 1946 concerning the Registration of Marriages, Divorces and Reconciliation, the government has attempted to prevent illegal marriages or marriages that are not reported to the government. In fact, in this law, the government, in addition to emphasizing the registration of marriages, also regulates that divorces that occur are recorded in the registration book, as regulated in Article 2 paragraph (1) of Law Number 22 of 1946 concerning the Registration of Marriages, Divorces and Reconciliation. Thus, the importance of registering marriages in the law above, Article 2 paragraph (2) also regulates that the party registering the marriage, must be given a quote for the registration. Violation of the provisions on the registration of this marriage contract will be subject to sanctions in the form of a fine of Rp. 50,- (fifty rupiah), a not insignificant amount of money at that time, this is regulated in Article 3 paragraph (1).

The ratification of Law Number 22 of 1946 concerning Marriage Registration, Divorce and Reconciliation apparently did not satisfy all parties. Because, the Government through the Minister of Religion of the Republic of Indonesia (RIS) at that time, KH. Wahid Hasyim established/formed the Investigating Committee for Marriage Law Regulations, Divorce and Reconciliation. The task of this committee is to review all regulations related to marriage and to re-draft the concept of marriage law in accordance with the development of the times. On November 24, 1952, a number of women's organizations held a congress, which then resulted in several demands, one of which was to urge the government to draft and ratify a new marriage law. This phenomenon emerged because society, especially women, considered that the existing marriage law did not sufficiently accommodate the interests of women.

III.METHODOLOGY

The research method used by the researcher is normative legal research with the type of library research. Primary data sources include laws and regulations, literature of classical scholars, works of Muslim scholars both in the form of journals and other writings (Ermawati & Nurdin, 2023). Data analysis is carried out through the content analysis method with the stages of data collection, data reduction, presentation and data conclusion (Nurdin Nurdin & Sagaf Sulaiman Pettalongi, 2022). In this study, the researcher views the problem of marriage dispensation from different perspectives, namely the perspective of customary law, state law and Islamic law. Thus, the use of normative legal research methods is appropriate in this study. The researcher uses secondary data derived from primary legal materials sourced from laws and regulations, both government regulations and regulations derived from Islamic law, and also data from studies of various literature relevant to the study (Nurdin Nurdin & Sagaf S Pettalongi, 2022). The data is analyzed using a thematic approach as explained by Strauss and Corbin (Corbin & Strauss, 1990). Themes are

Reconstruction of Responsive Legal Theory in Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications in Indonesia: (Maslahah Mursalah Approach)

built based on an inductive approach extracted from data derived from content analysis of government regulations and laws. The themes found in the content analysis are then explained according to the theoretical constructs used in this study.

IV. RESULTS AND DISCUSSION

A. Age Limit Marriage in Islamic law

Researchers have tried to find several references related to the age of marriage in Islamic literature and classical fiqh, but researchers have not found a clear age limit for the minimum age of marriage that can be used as a reference. It is not an exaggeration if researchers argue that the influence of religion is very strong in child marriage, especially in areas with strict religious nuances and entering the realm of customary law and cultural practices. Because religion does not explicitly provide a minimum age limit for marriage, the practice of underage marriage in the name of religion is something that we commonly encounter. In Islam, especially in the text of the Qur'an, it only suggests that to carry out a marriage the minimum limit is not age, but the ability and readiness of the person who will undergo it, there is no text of the verse of the Qur'an that clearly mentions the minimum age limit for marriage and there is no hadith of the prophet that directly mentions the minimum age limit for carrying out marriage. Therefore, in determining the age of marriage, we must first look at what social rules apply in society.

The verse that commands marriage but does not specify the minimum age for marriage is in Surah An Nur (22): 32 as follows:

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ

Translation:

"And marry those who are still single among you, and also those who are worthy (to marry) of your male and female servants. If they are poor, Allah will empower them with His grace. And Allah is All-Encompassing (His gifts), All-Knowing"

In classical fiqh books, the appropriate age for marriage is also not discussed, even fiqh books allow marriage between young men and women, whether the permission is stated clearly or indirectly as each fiqh book mentions the authority of the guardian mujbir to marry off young children or virgins. The scholars of the Salaf (classical era) also have different opinions regarding the age of puberty in Islam. According to Imam Malik, puberty is marked by the absolute release of semen in a state of daydreaming or sleeping, or is marked by some hair growth on the limbs. According to Imam Shâfi'i, the limit of puberty is 15 years for men and 9 years for women. According to Hanbali, for men it is marked by dreams or the age of 15, while for women it is marked by menstruation.

Islamic law generally includes five principles, namely protection of religion, soul, descendants, property, and reason. Of these five universal values of Islam, one of them is that religion maintains the lineage or lineage. Although not directly related, the minimum age limit outlined by the Imams of the Schools is not explicitly stated in numbers, but provides limitations and definitions of puberty, with the term *balig* as the minimum limit. The scholars of the schools agree that menstruation and pregnancy are proof that a woman has reached puberty. Pregnancy occurs due to the process of fertilization of the ovum by sperm after sexual intercourse between a man and a woman, while menstruation has the same status as releasing sperm for men. Shafi'i and Hambali state that the age of puberty for boys and girls is 15 years, while Maliki sets it at 17 years. Meanwhile, Hanafi determines the age of puberty for boys is 18 years, while for girls it is 17 years. Hanafi's opinion regarding the age of puberty is the maximum limit, while the minimum age is 12 years for boys and 9 years for girls, because at that age a boy dreams of ejaculating sperm, impregnating and ejaculating semen (outside of dreams), while girls can get pregnant and menstruate.

As for the written law that has been associated with Islamic law, it is the interpretation of scholars for the benefit of the law that will be applied in a country. Like Indonesia, the age limit related to the application of this dispensation, in addition to being regulated in the marriage law, is also regulated in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law. The researcher has explained in the previous chapter that the Compilation of Islamic Law is the unification and affirmation of fiqh law from Islamic law sources in classical times from the salaf scholars to be used as a source of law that represents the legal interests of Muslims.

B. Law Towards Marriage Age Dispensation in Indonesia

After the amendment to Law Number 1 of 1974 concerning Marriage, which was amended into Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage, which is the decision of the Constitutional Court on the judicial review lawsuit against Article 7 of the Marriage Law which regulates the minimum age limit for marriage for men and women. The Supreme Court of the Republic of Indonesia as a judicial institution that receives, examines and decides cases in the field of family law for people who are Muslim, responded quickly and issued Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications. The response of the Supreme Court of the Republic of Indonesia is a legal anticipation of the symptoms of the surge in handling of marriage dispensation cases. Marriage dispensation cases are not new cases in religious courts, but old types of cases that have also been mentioned in Law Number 1 of 1974

Reconstruction of Responsive Legal Theory in Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications in Indonesia: (Maslahah Mursalah Approach)

concerning Marriage. The response of the Supreme Court of the Republic of Indonesia by issuing PERMA regulations, is only as a form of uniform guideline for general courts and religious courts to handle marriage dispensation cases that will be submitted. Dispensation is an exception to the provisions of legal regulations or laws that should apply formally. Marriage dispensation is an exception to the provisions of Article 7 paragraph 1 of Law No. 1 of 1974 concerning the minimum age limit for marriage for prospective men and women who have not reached the minimum age for marriage due to several things or in certain circumstances. The emergence of dispensation in the Indonesian legal system, one of the reasons is because religious references influence and contribute to child marriage. So that the minimum age limit for marriage as determined in the law, is often ignored on the grounds that religion does not explicitly limit it. This also happens because religion, especially Islam, does not provide a reference to the minimum age limit for marriage. The change and equalization of the age of marriage from 19 years for men and 16 years for women to the same age, namely 19 years, is seen by various groups as the ideal minimum age for marriage.

The age of marriage regulated in the Law states that the age allowed for marriage is 19 years for both men and women. In the current context, this age is considered quite ideal. However it will raise problems if the marriage is done too young, especially health problems. Other factors can be in the form of psychological problems, education, economy and others.

After the amendment to the marriage law, especially Article 7 paragraph (1), and the immediate enactment of the law, the institutions involved in handling marriages began to busy themselves with this matter. Article 65A, which is an additional article in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, states that the prospective bride and groom who have registered their marriage and then the law is passed, then remain with the old age provisions, namely 19 years for men and 16 years for women. If we examine Article 7 paragraph (1) and paragraph (2) and observe that the age of marriage is something that can affect the harmony of a household. This consideration begins with the recognition that getting married at a young age can have various negative impacts, including emotional instability, lack of maturity of thought, increased health risks, lack of sense of responsibility for the duties of a partner, economic instability, and other detrimental impacts.

The phenomenon of changes in the minimum age of marriage indirectly causes social effects in society. The legal awareness of society clashes with the interests of their families, their consistency in obeying the law is tested. The filing of marriage dispensation cases that "flood" the courts is motivated by various factors, starting from marriage preparations that can no longer be postponed, the existence of "coercive" conditions and family dignity must be maintained, as well as other factors that certainly accompany the change in the minimum age of marriage.

C. Implementation of Supreme Court Regulation Number 5 of 2019 concerning Guidelines for Adjudicating Marriage Age Dispensation Applications

The Supreme Court is a High State Institution in the judiciary and a primary constitutional organ in the Indonesian constitutional system, which makes the Supreme Court have the authority and functions mandated by the 1945 Constitution. One of the authorities of the Supreme Court is the authority to create and issue laws and regulations (Regelende Functie), which forms a product of legal norms (Rule-Making Power) the laws and regulations referred to are called Supreme Court Regulations. The Supreme Court Regulations are binding rules for judicial institutions internally and these rules are guidelines in procedural law. However, in its application, there are also Supreme Court Regulations that relate to other subjects outside the organization and other institutions related to carrying out legal acts. Examples of other institutions that are bound by the Supreme Court Regulations are the police in conducting investigations and inquiries, the prosecutor's office in conducting investigations and prosecutions, and of course the judicial institutions under the Supreme Court in receiving, examining and deciding cases. All of these institutions are connected to the judicial system or often called the Integrated Justice System. The outlet for police investigations and inquiries is the courts, and likewise for the prosecutor's office, the outlet for their prosecution and defense as State Attorneys will be connected to the courts.

The existence of the Supreme Court regulation is an effort by the Supreme Court to fulfill the gap in procedural law that sometimes occurs, so that law enforcement runs quickly and is not hampered by procedural law that has not been ratified by higher regulations. The Supreme Court Regulation that is issued also meets the standards for ratification of legislation, namely being recorded and promulgated in the State Gazette of the Republic of Indonesia, recording in the State Gazette has the aim that the Supreme Court Regulation (is considered) known by the community and the public, thus the principle of legal fiction, namely a legislation that has been promulgated, then at that time every citizen is considered to know and must obey (presumption iures de iure), so that no citizen later says that he does not know and is not obliged to obey, and will not be free from legal demands (Ignorantia iuris non excusat).

V. CONCLUSIONS

The results of the study revealed the fact that in the PERMA Marriage Dispensation, there is a strong interconnection between the responsive legal theory and maslahah mursalah. With this interconnection, the theory can realize justice as the purpose of the law. The law has become a social institution so that the application of marriage dispensation is not only seen from a legal perspective,

Reconstruction of Responsive Legal Theory in Supreme Court Regulation Number 5 of 2019 Concerning Guidelines for Adjudicating Marriage Dispensation Applications in Indonesia: (Maslahah Mursalah Approach)

but also has a social good side (masalah mursalah). The responsive legal theory, which is a modern legal theory, is connected to the theory of maslahah which is a classical Islamic theory. This study contributes to law makers and enforcers not to ignore legal theory in the preparation of legislation or in the application and enforcement of the law. This study also offers a responsive legal theory as a theory that places law not only as *ius constitutum*, but a way to achieve *ius constituendum*, namely the justice that is aspired to

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