

JUDGE'S DILEMMA IN MARRIAGE DISPENSATION IN THE RELIGIOUS COURT

Hasyim Sofyan Lahilote*

Institut Agama Islam Negeri Manado

Jl. Manguni Raya, Malendeng, Kec. Tikala, Kota Manado, Sulawesi Utara, Indonesia 95000

*email: hasyim.lahilote@iain-manado.ac.id

A.A. Miftah, Yuliatin, Rahmi Hidayati

Universitas Islam Negeri Sulthan Thaha Saifuddin Jambi

Jl. Raya Jambi - Muara Bulian KM. 15 Simpang Sungai Duren, Kec. Jambi Luar Kota,
Kab. Muaro Jambi, Prov. Jambi, Indonesia 36361

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Abstract: Judges experience various dilemmas when adjudicating marriage dispensation cases in Religious Courts. In particular, there are difficulties associated with applying the principles laid out in the provisions of Article 2 PERMA no. 5 of 2019, which guide such decisions. This study analyzes how judges consider various legal theories when making decisions regarding marriage dispensations using the normative judicial method. The results showed that the judges of Religious Courts primarily rely on the *maslahah* theory when making decisions on marriage dispensation cases, in spite of the existence of PERMA no. 5 of 2019 as a potential reference for maximizing aspects of justice and legal certainty.

Keywords: Marriage Dispensation, Judge, Religious Court

Abstrak: Berbagai dilema dialami hakim saat mengadili perkara dispensasi nikah di Pengadilan Agama. Secara khusus, ada kesulitan terkait dengan penerapan prinsip-prinsip yang diatur dalam ketentuan Pasal 2 PERMA no. 5 tahun 2019, yang memandu keputusan tersebut. Penelitian ini menganalisis bagaimana hakim mempertimbangkan berbagai teori hukum dalam mengambil keputusan mengenai dispensasi perkawinan dengan menggunakan metode yuridis normatif. Hasil penelitian menunjukkan bahwa hakim Pengadilan Agama terutama mengandalkan teori *mashlahah* dalam mengambil keputusan perkara dispensasi nikah, meskipun telah ada PERMA no. 5 Tahun 2019 sebagai acuan potensial untuk memaksimalkan aspek keadilan dan kepastian hukum.

Kata Kunci: Dispensasi Perkawinan, Hakim, Pengadilan Agama

Introduction

Since the revision of Law no. 1 of 1974 concerning Marriage into Law no. 16 of 2019, which, among other things, increased the marriage age for women from 16 to 19 years, there have been many submissions of Marriage Dispensation cases in several Religious Courts. The most recent data indicates that there has been a sharp increase in the number of applications for marriage dispensations in the Religious Courts since the enactment of the Law.¹ The Religious Courts have come under criticism for allegedly facilitating early marriages and for being insensitive to the Family Planning Program.² On the other hand, the community feels that implementing the law has curtailed their ability to carry out marriage according to the Indonesian society, favoring Islamic law.³

The international community has long recognized the importance of protecting children's rights. In 1989, the United Nations ratified the Convention on the Rights of the Child, which codified the principles of child protection into law.⁴ Indonesia, a member of the United Nations, has ratified the regulation. The Indonesian government has a long history of protecting children's rights in marriage reg-

ulations. This is evident from the country's ratification of the Convention on the Rights of the Child. This can be seen in Law no. 16 of 2019 jo. UU no. 1 of 1974 stipulates that the ideal age for marriage is 21 years. This is in line with the human rights of every child to marry as protected by Law no. 39 of 1999 concerning Human Rights and Law no. 23 of 2002 on child protection. The 2018 data from the Central Statistics Agency (BPS) shows that 1 in 9 girls aged 20-24 got married before the legal age of 18, commonly referred to as child marriage.

The community still has a tradition of marrying off their children contrary to the age required by law. According to Grijn and Horry,⁵ Islamic conservatives are opposed to the practice of underage marriage, which is contrary to the law. Welbourne and Dixon assert that countries continue to place importance on child and parenting norms shaped by longstanding social attitudes, often supported and reinforced by traditional culture and informed by religion.⁶ On the other hand, Boyden stressed that delaying the age of marriage until 18 could increase the likelihood of more illicit sex outside of marriage.⁷

Bagya Agung Prabowo's⁸ study indicated that the Islamic Law Compilation (KHI) is

- ¹ Lia Amaliya, "Dispensasi Kawin Anak di Bawah Umur Sebelum dan Pasca Revisi UU no. 1 Tahun 1974 tentang Perkawinan (Studi Kasus di Pengadilan Agama Karawang)," *Prosiding Konferensi Nasional Penelitian dan Pengabdian Universitas Buana Perjuangan Karawang* 1, no. 1 (2021): 1165.
- ² Melda Sufri, "Pertimbangan Hakim Terhadap Dispensasi Kawin pada Pengadilan Agama Sidenreng Rappang (Analisis Sosio Yuridis)" *PhD Thesis*, IAIN Parepare, 2021, 73.
- ³ Fitria Devi Wulandari dan Musakir Salat, "Perlindungan Hukum dalam Perkawinan di Bawah Umur pada Tradisi Merarik Suku Sasak," *Privatelaw* 1, no. 3 (2021): 374.
- ⁴ Raissa Lestari dan Yuli Fachri, "Implementasi Konvensi Internasional Tentang Hak Anak (Convention on the Rights of the Child) di Indonesia (Studi Kasus: Pelanggaran terhadap Hak Anak di Provinsi Kepulauan Riau 2010-2015)" *Journal eArticle*, Riau University, 2017, 2, <https://www.neliti.com/publications/200146/>.

- ⁵ Mies Grijns dan Hoko Horii, "Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns," *Asian Journal of Law and Society* 5, no. 2 (November 2018): 463, <https://doi.org/10.1017/als.2018.9>.
- ⁶ Penelope Welbourne dan John Dixon, "Child Protection and Welfare: Cultures, Policies, and Practices," *European Journal of Social Work* 19, no. 6 (November 2016): 4, <https://doi.org/10.1080/13691457.2015.1084273>.
- ⁷ Jo Boyden, Alula Pankhurst, dan Yisak Tafere, "Child protection and harmful traditional practices: female early marriage and genital modification in Ethiopia," *Development in Practice* 22, no. 4 (2012): 510-22.
- ⁸ Bagya Agung Prabowo, "Pertimbangan Hakim dalam Penetapan Dispensasi Perkawinan Dini Akibat Hamil di Luar Nikah pada Pengadilan Agama Bantul," *Jurnal Hukum IUS QUIA IUSTUM* 20, no. 2 (2013): 300-317, <https://doi.org/10.20885/iustum.vol20.iss2.art7>.

used as the basis for judges' considerations when determining a marriage dispensation case involving pregnancy out of wedlock, in addition to the legal implications of this determination.

The study conducted by Lia Amalia entitled "Dispensation for Marriage for Minors Before and After the Revision of Law No. 1 of 1974 Concerning Marriage" (Case Study at the Karawang Religious Court) indicates that there has been an increase in applications for marriage dispensation in the religious court after the enactment of Law No. 16 of 2019.

In religious courts, many judges accept marriage dispensation cases based on the rules in Islamic law. They legitimize their decisions by analyzing the *maslahah* theory, based on the fiqh rule that "rejecting harm takes precedence over carrying out the benefit." This allows them to grant a dispensation permit against deviations from the provisions of Law no. 1 of 1974. According to Marganing, many judges' decisions in the Religious Courts rely on this argument to determine their decision to accept the application for a marriage dispensation.⁹

On the other hand, there are several principles set forth in PERMA no. 5 of 2019, in Article 2 of the provision, including the principles of the best interests of the child, the right to life and development of the child, respect for the opinion of the child, non-discrimination, gender equality, equality before the law, justice, benefit, and legal certainty, which should also be the primary reference in handling the marriage dispensation case that the Supreme Court has issued through PERMA. Applying these principles in marriage dispensation cases in the Religious Courts will result in a different perspective, particularly regarding the psychological well-being of children who are not ready to take on the responsibilities of managing a household and family economy.

⁹ Santi Ayuk Marganing, "Pemberian Dispensasi Kawin Ditinjau dari Masalah Mursalah (Studi Kasus di Pengadilan Agama Karanganyar tahun 2019)" *PhD Thesis*, IAIN SURAKARTA, 2020, 75.

The importance of judicial wisdom in adjudicating applications for marriage dispensation in religious courts is therefore significant and warrants further discussion and analysis using legal theory, including the philosophical basis of decision-making, as a reference for other judges presiding over similar cases.

This study aims to investigate the problems judges face when resolving marriage dispensation cases in Religious Courts, particularly regarding the implementation of the principles outlined in PERMA no. 5 of 2019 on Guidelines for Adjudicating Marriage Dispensations.

This is a normative juridical study that looks at the consideration of the decisions of the Religious Court judges in the settlement of marriage dispensation cases related to the implementation of PERMA no. 5 of 2019. The primary data source for this study is the judges' decision on a marriage dispensation application at the Bitung Religious Court in 2021. Subsequently, the secondary data sources include relevant regulations, books, and other reference materials to support the analysis of existing problems.

Discussion

1. The Problem of a Single Judge in Settlement of a Marriage Dispensation Case

In theory, the judge's decision is a concretization of law and justice which plays a crucial role in law enforcement efforts in society. Monteiro¹⁰ stated that a judge's ruling must take into account all legal precepts to achieve the objectives of legal certainty, justice, and expediency. Soerjono Soekanto emphasized for judges to make fair decisions, they must look at the legal reality thriving in society, including people's habits and unwritten provisions that continually develop.¹¹

¹⁰ Josef M. Monteiro, "Putusan Hakim dalam Pene-gakan Hukum di Indonesia," *Jurnal Hukum Pro Justitia* 25, no. 2 (2007): 138.

¹¹ Soerjono Soekanto, *Fungsi Hukum dan Perubahan Sosial* (Alumni, 1981).

The role of judicial institutions in a state's legal system can both enable and constrain law enforcement. Yahya Harahap underlined that no other body or power has the position to enforce law and justice against disputes in society other than the judiciary.¹²

The provisions of Article 11 paragraph 1 of Law no. 48 of 2009 state a court that hears and decides cases shall, unless otherwise provided by law, be composed of a panel of at least three judges, chaired by a judge who presides over the panel unless other provisions require the trial process to be carried out by one judge. According to Silaban,¹³ Another provision that can present one judge in a trial is regulated by Law no. 11 of 2012 concerning the juvenile criminal justice system, rapid criminal proceedings for minor crimes, and violations regulated by the Criminal Procedure Code, as well as Article 31 of Law no. 37 of 2004 concerning Bankruptcy and suspension of debt repayment obligations.

Article 1 paragraph 11 of PERMA no. 5 of 2019 concerning Guidelines for adjudicating marriage dispensations explains that a single judge carries out the trial process for marriage dispensation cases. It is contrary to Article 1 of Law no. 48 of 2009 concerning judicial power. The existence of a single judge in the trial of civil suits by Ferevaldy¹⁴ is contrary to the provisions of judicial power, which should be the basis of reference in every case trial in the Court. Other provisions should be used as a reference when applying the provisions of Law no. 48 of 2009. These provisions should be in the form of legislation and not in the form of PERMA, which incidentally is under the

Act. According to Via Puspasari,¹⁵ having a single judge in voluntary cases is a common practice in district courts, while it is new in the scope of religious courts. Fauzan suggests that any regulation issued by the Supreme Court of Indonesia, in the form of a Supreme Court Regulation or a Circular, can be considered an act of the Supreme Court which serves as a guide in filling legal voids.¹⁶

In examining a marriage dispensation case, a judge must be observant to explore and analyze the various applicable rules and norms related to the case. The judge must then link the existing regulations and norms to the facts of the trial to gain a clear understanding of the situation. In reviewing this matter, it is considered that the analysis carried out by the panel of judges consisting of three people is more representative of legal objectivity than by a single judge who only has one perspective in looking at the existing problems. The single-judge system creates a potential for bias, as judges may be influenced by a limited range of perspectives when making decisions. This can become a chronic problem in the court system, making it difficult to resolve cases fairly. Indeed, a judge's decision must reflect objectivity in making decisions. Asshiddiqie¹⁷ revealed that the principle of objectivity should be inherent and reflected in examining cases in court for the judge's decision to be considered a legal solution for all litigants.

An excellent legal judgment always reflects the purpose of the law. The greatness of the

¹² M. Yahya Harahap, *Kekuasaan Mahkamah Agung: Pemeriksaan Kasasi dan Peninjauan Kembali Perkara Perdata*, Cet. 1 (Jakarta: Sinar Grafika, 2008), 8.

¹³ Nova Yanti Silaban, "Kedudukan Hakim Tunggal dalam Penyelesaian Gugatan Sederhana" *PhD Thesis*, Universitas Pendidikan Ganesha, 2020.

¹⁴ Adisti Pratama Ferevaldy, "Kedudukan Hakim Tunggal dalam Gugatan Sederhana (Small Claim Court)," *ADHAPER: Jurnal Hukum Acara Perdata* 3, no. 2 (2018): 224.

¹⁵ Puspa Sari Via, "Pertimbangan Hakim Tunggal dalam Memutus Perkara Dispensasi Kawin Menurut PERMA no. 5 tahun 2019 (Analisis Penetapan Pengadilan Agama Purwokerto Nomor 0420/Pdt. P/2020/PA. Pwt)" *PhD Thesis*, IAIN Purwokerto, 2021, 77.

¹⁶ H. M. Fauzan, ed., *Peranan Perma & Sema sebagai Pengisi Kekosongan Hukum Indonesia Menuju Terwujudnya Peradilan yang Agung*, Cetakan ke-1 (Rawamangun, Jakarta: Kencana, 2013), 7.

¹⁷ Jimly Asshiddiqie, *Pokok-pokok Hukum Tata Negara Pasca Reformasi* (Jakarta: Buana Ilmu Populer, 2006), 524.

judge's decision, according to Susanto,¹⁸ is reflected when it contains three elements of legal objectivity, including justice, legal certainty, and expediency, to support the axiological dimension of the decision. However, Arto¹⁹ emphasizes that in every case in court, the application of the aspect of justice is a relative and subjective value. It is relative because there is no definite measure, and it often applies universally. Besides, it is subjective because the sense of justice differs from person to person.

It is essential to consider both the objective and subjective aspects when making a decision in a marriage dispensation case. The ideal proportion of these considerations must be determined to make a fair and just decision. Therefore, a judge must be wise and have the genius-level intellect to make the right decision in such cases. This is achieved by increasing the knowledge aspect of judges by studying philosophical problems and legal theory. Those approaches aim to produce acceptable findings for the community and fulfill a sense of justice for litigants. This can be done by looking at existing cases from a broader perspective.

The use of a single judge to examine marriage dispensation cases is a practice that began with voluntary cases in the District Court and was later adopted by the Religious Courts. The Supreme Court's PERMA no. 5 of 2019 is a breakthrough for the effective and efficient implementation of voluntary cases, including marriage dispensation. It is consistent with the principles of straightforward, speedy, and inexpensive justice as outlined in Article 2 paragraph 4 of Law no. 48 of 2009 concerning Judicial Power.

2. Problems with Judge's Considerations in Examining Marriage Dispensation Cases

The Indonesian civil justice system always upholds the Rule of Law as the mandatory benchmark for judges in their decision-making process. The court must adhere to the mainstream rules in the cases before it in any particular instance. The application of Article 7 paragraph 1 of Law no. 1 of 1974 in conjunction with Law no. 16 of 2019 stipulates that the minimum marriage age for prospective brides must be 19 years old, as ordered by the Constitutional Court decision no. 22/PUU-XV/2017. Suppose the case at hand pertains to a deviation from the mandated procedures for obtaining a marriage dispensation from the court, as set forth in Article 7, paragraph 1 of the law. In that case, the court must first consider the provisions contained in Law no. 23 of 2002 in conjunction with Law 35 of 2014 concerning Child Protection, with due regard for the provisions of Law no. 39 of 1999 on Human Rights, as supplementary guidance in this instance.

Elucidation of Article 7 of Law no. 16 of 2019 requires the existence of "very urgent reasons," which in this provision is defined as a situation when there is no other choice but to marry forcefully. Further exploration is needed to fully understand the implications of underage marriage and unregistered marriages to help mitigate the negative consequences that may result from such arrangements.

In the existing procedures for settling cases of marriage dispensation in the Religious Courts, judges must adhere to the provisions contained in PERMA no. 5 of 2019. Consequently, judges must follow specific procedures when examining cases relating to the principles stipulated in Article 2 of the PERMA. Furthermore, Article 14 of the PERMA dictates that the presiding judge must take into account the psychological and health conditions of the child, as well as their readiness to enter into marriage. Article 15 allows judges to

¹⁸ Nur Agus Susanto, "Dimensi Aksiologis Dari Putusan Kasus 'St,'" *Jurnal Yudisial* 7, no. 3 (2014): 214.

¹⁹ A. Mukti Arto, "Redefinisi Fungsi Pengadilan sebagai Penegak Hukum dan Keadilan: Kajian Teoritis dan Pragmatis Penyelenggaraan Peradilan Guna Membangun Paradigma Baru," *Varia Peradilan*. Jakarta: IKAHI Mahkamah Agung Republik Indonesia, 2011.

seek opinions or recommendations from psychologists, doctors, and other professional workers in ascertaining the health condition of children in marriage. In Article 16, judges must consider the psychological, sociological, and cultural conditions in which children live to protect children's interests. This is a prerequisite to implementing the provisions in the Convention on the Rights of the Child, as ratified by the Government.

Prabowo²⁰ highlights a dilemma that affects judges in religious courts when they are trying to grant marriage dispensations, mainly if the marriage in question was accidental. In such cases, the judges have a duty to uphold the law or make rulings based on the facts of the case, even if society demands that the couple gets married first. If the provisions of articles 14, 15, and 16 of PERMA no. 5 of 2019 are followed, the process of examining a marriage dispensation case will be lengthy and expensive. Therefore, it is feared that the litigants would be unable to fulfil the requirements. The primary reason for the lack of time provided to handle the marriage dispensation case is the "married by accident" factor. This requires the court to issue a marriage permit as soon as possible, considering the gestational age of the applicant's woman. The pressure from the community to resolve the situation requires the immediate marriage process to be carried out according to local customs.

Mubasyarah noted that various underlying factors contribute to the problem of early marriage cases received by Indonesia's Religious Courts. These include economic, parental, and accidental marriages, as well as perpetuating relationships, family traditions, and local customs.²¹

The ongoing adolescent promiscuity is attributable to the lack of preventive measures taken by the government, parents, and community. To adequately address these issues, judges must consider both the objective and subjective aspects of current societal conditions and material trial facts, even if the facts only pertain to civil proceedings that focus on formal aspects. A comprehensive examination of various mainstream regulations surrounding marriage dispensation in light of various relevant legal theories is needed to perfect the judge's judgment and formulate a decision that aligns with a sense of community justice for those who are party to the litigation.

3. Analysis of the Application of the Principles in Article 2 PERMA no. 5 of 2019 in the Decision of the Bitung Religious Court Judge

The Bitung Religious Court is a class II Religious Court located in North Sulawesi Province. The Court has jurisdiction over Bitung City and 8 surrounding Sub-Districts, comprising 69 Urban Villages. The number of cases at the Bitung Religious Court from January to November 2021 totaled 350, consisting of 236 lawsuits and 114 petition cases.²² Out of the 114 application cases, 88 were marriage dispensation cases. This constituted 25.1% of the total cases received by the Court. Whereas, based on the overall number of applications received by the Bitung Religious Court, 77.1% are for marriage dispensations. In contrast, the judges assigned to the Bitung Religious Court are only four people.²³

From every case examined through the decision of the Bitung Religious Court it is clear that the basis for the judges' consideration in making decisions always refers to the provisions of Article 2 of Law no. 1 of 1974 in conjunction with Law no. 16 of 2019 concerning Marriage. This emphasizes that a valid Marriage is carried out according to the respective

²⁰ Prabowo, "Pertimbangan Hakim dalam Penetapan Dispensasi Perkawinan Dini Akibat Hamil di Luar Nikah Pada Pengadilan Agama Bantul," 302.

²¹ Mubasyaroh Mubasyaroh, "Analisis Faktor Penyebab Pernikahan Dini dan Dampaknya bagi Pelakunya," *YUDISIA: Jurnal Pemikiran Hukum dan Hukum Islam* 7, no. 2 (2016): 400-402.

²² "Pengadilan Agama Bitung," accessed on 14 November 2021, <https://www.pa-bitung.go.id/>.

²³ "Bitung Religious Court."

religion of the bride and groom. For those who are Muslim, this is conducted under the provisions of Article 4 of the Compilation of Islamic Law (KHI).

To examine the judge's deliberations in the Dispensation of Marriage at the Bitung Religious Court, this paper will focus on the marriage dispensation case no. 157/Pdt.P/2019/PA Bitg. This particular case has been selected as the material for analysis because it does not involve a marriage dispensation case related to pregnancy outside of marriage. As such, the expected analysis in the judge's deliberations can see the ideal situation in applying the principles of principle in PERMA no. 5 of 2019, without being burdened with the issue of pregnancy out of wedlock. It implies "Rejecting damage takes precedence over benefit," which has become one of the judges' primary considerations in "accepting" the application for dispensation for marriage submitted by the applicant in the court decision.

Based on the analysis of the judges' considerations above, Islamic law is still influential, and a point of reference for judges in the Religious Courts expected to decide cases of marriage dispensation at the Bitung Religious Court. They should prioritize the concept of *maslahah* for prospective brides who apply for marriage dispensation. According to Imam Ghazali, the concept of *maslahah* itself, as quoted by Ulum, is intended to benefit and avoid harm. Based on the terminology, *maslahah* is a benefit that Allah SWT wants for his servants with different levels from one another.²⁴ This concept needs to be implemented in the related community. When examined further, the concept of *maslahah* has similarities to utilitarianism in the legal theory proposed by Jeremy Bentham.

²⁴ Arrizal Daqiul Ulum, "Analisis Maslahah terhadap Argumentasi Hakim dalam Penetapan Dispensasi Nikah (Studi Kasus Putusan Perkaran Nomor: 006.pdt. P/2018/PA. Ngawi)" (PhD Thesis, IAIN Ponorogo, 2020), 30.

Jeremy Bentham's concept of legal utilitarianism was born in response to the abstract and metaphysical form of the philosophy of natural law. This concept sees the good or bad of a law based on whether the law causes happiness for humans or not.²⁵ According to Bentham, for a legal system to be effective, it must go beyond simply punishing people for breaking the law; instead, it should provide a positive incentive for people to obey the law. All legal rules are imperative, permissive, and often not shown or permanently displayed in a descriptive form.²⁶ The basis of the judge's consideration focuses on the principle of expediency as stipulated in article 2 (i) of PERMA no. 5, 2019.

Additionally, Case No. 157/Pdt.P/2019/PA Bitg lacks the inclusion of other principles, including the principles of justice, legal certainty, and the right to life and development of children in the PERMA 5 of 2019. It should be the formal basis for judges' decisions compared to the theory of *maslahah*, a doctrine born from Islamic law.

When examining the Stufenbau approach, it is clear that Hans Kelsen's theory of rules posits that a rule set by one body must adhere to the rules established by a body above it to create a strong foundation. According to Ariani Hans Kelsen, who quotes Maria Soeprapto, legal norms are always tiered in position and layered in an arrangement, meaning that lower norms always originate from higher-level norms.²⁷ In light of this, judges should give more thought to matters regulated by law rather than relying solely on the various legal

²⁵ Miftakur Rohman, "Modernisasi Peradilan Melalui E-Litigasi dalam Perspektif Utilitarianisme Jeremy Bentham," *MIYAH: Jurnal Studi Islam* 16, no. 2 (2021): 293.

²⁶ Antonius Cahyadi dan E. Fernando M Manullang, *Pengantar ke Filsafat Hukum* (Jakarta: Kencana, 2007), 63.

²⁷ Nita Ariyani, "Kedudukan Ketetapan MPR dalam Teori dan Praktik Ketatanegaraan di Indonesia," *Jurnal Justiciabelen* 1, no. 2 (2019): 272.

doctrines set out in the rules of procedural law.

Furthermore, case no. 157/Pdt.P/2019/PA Bitg fails to explain more comprehensively what sort of damage or *mafsadah* the prospective bride should avoid when requesting a marriage dispensation. This is premised on the assumption that the individual in question has not conducted anything to undermine the community's social order, such as becoming pregnant outside of marriage. The judge must carefully consider the facts of each case to determine whether or not to grant a dispensation for marriage. Without knowing the specific circumstances that led to the request for dispensation, it would be challenging to decide in the best interest of all parties involved. In order to address this issue, judges must have a comprehensive understanding of the issue at hand. Only then can they provide a more thorough analysis.

Conclusion

Judges presiding in Religious Courts face a dilemma when deciding cases of marriage dispensation, as they must balance several principles in their deliberations. The strong influence of Islamic legal theory in the application of *masalah* is still evident in marriage dispensation cases. However, it ignores other legal principles stated in one of the sources of procedural law that have been formally enforced and have a stronger position at the legal level events in court.

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