

JURNAL HARMONI

ISSN:1412-663X, e-ISSN:2502-8472

MENKKAJI PROSES NEGOSIASI PENOLAKAN PENGAJUAN
DISPENSASI PERNIKAHAN

EXAMINING NEGOTIATIONS PROCESS ON THE REJECTED
MARRIAGE DISPENSATION

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Artikel diterima 6 Juni 2021, diseleksi 5 Desember 2021, dan disetujui 27 Desember 2021

DOI: <https://doi.org/10.32488/harmoni.v20i2.495>

Abstract

Through Law Number 16 of 2019 as an Amendment to Law Number 1 of 1974 concerning Marriage, Indonesia made a breakthrough by setting a higher minimum age for girls who want to marry from 16 to 19 in 2019. Those who wish to marry before the age of 19 must gain permission from the Court. However, the Court granted 97% of the marriage dispensation cases. Existing studies in this issue already analyze why the judges grant marriage dispensations, mainly avoiding the worst possible outcomes for the children. Based on our literature analysis, the acceptance of the marriage dispensation is more prominent because of the Maqosidus Sharia (the purpose of Islamic Law). This context leads to a fewer rejection of applications for the dispensation of marriage. We take a different route by analyzing the rejected applications to understand the Court's negotiation process leading to rejection. We collected 17 rejected marriage dispensation applications from different religious courts between 2018 and 2021 on the Court's online database. Then, we analyzed how the negotiation process occurred between the parties involved in the trial, namely between the Judge, the Petitioner (parents), and the husband/wife candidate

Abstrak

Melalui Undang-Undang Nomor 16 Tahun 2019 sebagai Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, Indonesia membuat terobosan dengan menetapkan usia minimum yang lebih tinggi bagi anak perempuan yang ingin menikah dari 16 menjadi 19 pada tahun 2019. Mereka yang ingin menikah sebelum usia 19 harus mendapatkan izin dari Pengadilan. Namun, data yang ada menunjukkan Pengadilan mengabulkan 97% kasus dispensasi nikah. Penelitian-penelitian terdahulu terkait isu ini sudah menganalisis mengapa hakim memberikan dispensasi pernikahan, di mana alasan utamanya ialah untuk menghindari kemungkinan terburuk bagi anak. Berdasarkan analisis literatur, diketahui penerimaan dispensasi nikah karena alasan Maqosidus Syariah (tujuan syariat Islam). Konteks ini menyebabkan, jumlah penolakan pengajuan dispensasi nikah lebih sedikit dibandingkan yang diterima. Untuk itu, penelitian ini mengambil topik yang berbeda dengan menganalisis pengajuan dispensasi nikah yang ditolak untuk memahami proses negosiasi yang terjadi dalam sidang. Berdasarkan data yang tercantum dalam direktori putusan dispensasi nikah online, kami mengumpulkan 17 permohonan dispensasi nikah yang ditolak dari pengadilan agama antara 2018 dan 2021. Kemudian, kami

(children) as the object of the marriage dispensation stipulation. On the other hand, analysis on the rejected cases found five main reasons for rejection: the immaturity of the husband/wife candidates, the Judge's judgment that the marriage will bring harm to the children, lack of evidence of an urgent need for marriage because of the Judge's advice, and administrative reasons.

Keywords: Child Marriage, Marriage Dispensation, Religious Courts, Negotiation

menganalisis proses negosiasi yang terjadi antara para pihak yang terlibat dalam persidangan, yaitu antara Hakim, Pemohon (orang tua), dan calon suami/istri (anak) sebagai objek dari penetapan dispensasi perkawinan. Hasil dari analisis terhadap kasus yang ditolak ditemukan lima alasan utama penolakan: ketidakdewasaan calon suami/istri, penilaian Hakim bahwa perkawinan akan merugikan anak, kurangnya bukti kebutuhan mendesak untuk menikah karena nasihat Hakim, dan alasan administratif.

Kata Kunci: Pernikahan Anak, Dispensasi Nikah, Pengadilan Agama, Negosiasi

INTRODUCTION

Child marriage strips children of their rights, yet the child marriage trend has only slightly changed in the last decade. Law number 35 of 2014 on Child Protection defines a child as someone under 18 years old who has the right to grow, develop, thus receive education and protection from violence and discrimination. However, a collaborative study between Statistics Indonesia (BPS), the National Development Planning Agency (Bappenas), UNICEF, and the Center on Child Protection and Wellbeing at Universitas Indonesia (PUSKAPA) found that the prevalence of women aged 20-24 years old who marry before the age 18 years old only decline by 3.5% between 2008 and 2018. The girl marriage prevalence was 14.67% in 2008 and 11.21% in 2018 (BPS; Bappenas; UNICEF; PUSKAPA, 2020). The same study also found that the girls' marriage prevalence is higher in rural areas (16.87%) than in urban areas (7.15%). Because real life is composed of different perspective that do not always coalesce, discussing contrary information adds the credibility of an research. Consequently, only 11.76% of

women aged 20-24 years old married before 18 and completed senior high school, compared to 45.56% of women who married after 18 years old. Women who married before 18 also tend to be poorer or come from poor households, 13.76% compared to 10.09% of women married after 18 years old. Other risks of child marriage include medical complications in pregnancy and childbirth, premature birth, infant mortality, and post-natal depression (BPS; Bappenas; UNICEF; PUSKAPA, 2020).

In 2019, Indonesia made a breakthrough by setting a higher minimum age for children (below 18 years old) who want to marry. If they want to get married while their age has not reached the minimum age limit of 19 years old, they must obtain permission from both parents and apply for a marriage dispensation to the Religious Court. Because real life is composed of different perspective that do not always coalesce, discussing contrary information adds the credibility of an research. If the Court grants the marriage dispensation, their marriage is recorded according to the prevailing laws and regulations.

The regulation is the issuance of Article 7 paragraph (1) of Law Number 16 the Year 2019 concerning Amendments to Law Number 1 the Year 1974 concerning marriage (“Law 16/2019”). This regulation is based on the provisions of Article 7 paragraph (2) in conjunction with Article 63 of Law no. 1 of 1974, Article 49 letter (a) of Law Number 7 of 1989 which has been amended by Law Number 3 of 2006 and the second amendment of Law Number 50 of 2009. It stipulates how marriage is only permitted if the husband/wife candidate has reached 19 years old. The provision of a minimum age limit for marriage is intended to be carried out by the prospective husband/wife candidate who is mature in mind and body.

Previously, the minimum marriage limit for women was 16 years and for men 19 years. The main reasons for the new minimum age limit are to increase Indonesia’s human resources and protect children’s rights. Suppose they are already that mature both mentally and physically enough. In that case, it is hoped that the life of the two partners in fostering a household can realize *sakinah, mawaddah wa rahmah* according to the purpose of marriage as written in Article 1 of Law Number 1 the Year 1974 (Alam, 2006). Therefore, when the husband/wife candidates are married, they have adequate education, stable economic conditions, psychological maturity, and good social skills. It is hoped that this Law will later eliminate discrimination by providing better access for girls to higher education and access to employment. By postponing the marriage, the Law will also support the girls’ reproductive health and, to some extent, protect their future from being young widows (Fadlyana & Larasaty, 2016).

However, the marriage dispensation applications cases peaked in 2020. The applications increased sharply from around 23 thousand in 2019 to

more than 64 thousand in 2020 (Komnas Perempuan, 2021). The Court also granted 97% of the marriage dispensation cases (Kementerian Pemberdayaan Perempuan dan Perlindungan Anak, 2021). Rosalin (2021) identifies that the increase is mainly caused by the change in the minimum age of girls to marry from 16 to 19 years old (Rosalin, 2021). Based on Article 7 paragraph (2) Law 16/2019, it is still possible to have deviations from the minimum age requirement. The parents of the husband/wife candidate can ask for dispensation to the Court because they argue that it is a very pressing issue, and they must equip it with sufficient supporting evidence. What is meant by the very pressing issue is that there is no better choice for the husband/wife candidate than marry. In many cases, the judges try to protect the girls from harmful social stigma, especially when pregnant (Horii, 2020). Of course, this phenomenon is contrary to many people’s efforts to prevent early marriage campaigned.

This study takes a different route by analyzing the rejected applications to understand the Court’s negotiation process leading to rejection. There are two research questions:

1. *What are the Petitioner and the Judge’s reasons that eventually led to the rejection of the marriage dispensation application?*
2. *How is the negotiation process between parties involved in the trial, namely between the Judge, the Petitioner (parents), and the husband/wife candidate?*

Literature Review

Previous studies have looked at the sociological aspect of marriage dispensation. One of them is a paper written by Arina Hukmu Adila, the title “Sociological Aspects of Judges in Granting Applications for Marriage Dispensation (Study of Determination

Number: 0038/Pdt.P/2014/PA.Pt)". This research was conducted because many children have a pregnancy out of wedlock. Hence, their parents apply for a marriage dispensation to the Religious Courts. For this reason, Adila (2020) examines how the Religious Courts as an authorized institution have specific considerations in granting applications for dispensation of marriage to comply with the social norms. The research was conducted using the juridical-empirical method. The result examines the reasons for choosing to apply for dispensation of marriage among others: (1) The relationship between the Petitioner's child (parents) and their spouse is already close and difficult to separate, (2) The Petitioner's child is pregnant, (3) The Petitioner is worried that adultery – things that violate Islamic Law – will happen again if they are not married immediately (Adila, 2020).

Then, there is also a study entitled "The Legal Consequences of Determining the Dispensation of Child Marriage underage (Case Study at the Pacitan Religious Court)" written by Wisono Mulyadi and Anjar Sri Ciptorukmi Nugraheni, SH, M.Hum. This research discusses the legal impact of the stipulation Marriage Dispensation at the Pacitan Religious Court. It also examines how the Judges of the Pacitan Religious Court consider granting or rejecting the application for marriage dispensation. This research uses descriptive empirical or sociological legal research by analyzing primary, secondary, and tertiary legal materials. Mulyadi and Nugraheni (2017) found that the Judges of the Pacitan Religious Court grant or reject a marriage dispensation request based on the evidence submitted by the Petitioner. Suppose the evidence presented is sufficient and complete according to the Court, and there is no familial or maternal relationship or other prohibition against getting married. In that case, the Panel of Judges will have no reason to reject

the petition. However, the Judges will reject it when an authorized person does not complete the application. Also, there is insufficient evidence or a prohibition against getting married (Mulyadi & Nugraheni, 2017).

Furthermore, the research entitled "Judges' Considerations in Determining Early Marriage Dispensation Due to Pregnancy Outside of Marriage at the Bantul Religious Court" was written by Bagya Agung Prabowo from the Faculty of Law of the Islamic University of Indonesia. Prabowo (2013) analyzed the Compilation of Islamic Law (KHI) as a basis for judges' consideration in determining the dispensation of early marriage. He highlighted the dispensation of early marriage because of pregnancy outside of marriage and its legal implications in the Bantul Religious Court. Prabowo (2013) found that judges' considerations can be classified into legal considerations and community justice considerations (Prabowo, 2013). Legal considerations mean that it must be per the arguments and legal evidence presented when the Judge makes his decision. Meanwhile, community justice consideration is because marriage is often seen as an alternative solution for solving social problems.

There is also a study entitled "Legal Reasoning for Legitimation of Child Marriage in West Java: Accommodation of Local Norms at Islamic Courts and the Paradox of Child Protection," which Hoko Horii researched. Horii (2020) discussed the challenges of implementing international human rights law through child marriage in Indonesia. Supporting data consists primarily of court decisions and interviews with judges from three Islamic courts in West Java. Results show that the Indonesian pluralistic legal system accommodates human rights norms with religious concerns and customary practices. Therefore, the Judges have

leeway in arbitrating between different types of law. In child marriage, religion-based or traditional laws are favored over the state and international laws. Horii (2020) also found that the Judges do so to protect children from social stigma associated with pregnancy and sexual intercourse out of wedlock (Horii, 2020).

This study takes a different route from the existing literature, namely examining how the negotiation process of the parties involved in the trial by analyzing why the Judge rejected marriage dispensation applications. Negotiations are interpreted as a strategic discussion that resolves an issue that both parties find acceptable. By negotiating, all involved parties try to avoid arguing but agree to reach some form of compromise. And in the matter of determining this dispensation of marriage, what is at stake is the fate of children who are not old enough to prepare for a new life in a marriage relationship.

Stages of Marriage Dispensation Application

The Supreme Court has issued Supreme Court Regulations Number 5 of the Year 2019 Concerning Guidelines for Addressing Applications for Marriage Dispensation (hereafter mentioned as Perma) as the technical rule. The guideline's objective is to fulfill the child's best interest's principle. The principles include: (i) the principle of the right to life and development of children; (ii) the principle of respect for children's opinions; (iii) the principle of respect for human dignity; (iv) the principle of non-discrimination and gender equality; (v) the principle of equality before the Law' (vi) the principle of justice; (vii) the principle of benefit; and (viii) the principle of legal certainty. The main points of the guideline are as follows:

1. Article 1 paragraph (11), the Judge referred to in this Perma is a single judge to examine cases. The marriage dispensation trial does not need to use a panel judge.
2. Article 5 states that apart from the child's birth certificate, other requirements attached to file a marriage dispensation case are the child's last education certificate, identity, and current educational status.
3. Article 7 states that in the case of religious differences between children and parents/guardians, applications for marriage dispensation must be submitted to the Court according to the child's religion.
4. Article 8 explains that if the husband and wife candidates are underage, it is sufficient to file them in the same Court according to one of the parents' locations.
5. In article 9, paragraph (1), it is written that before accepting a case of marriage dispensation, the Registrar must first check the completeness of the administrative requirements. If it is not complete, it must be returned to be completed.
6. In Article 10 paragraph (1), the Petitioner at the hearing is obliged to present the husband and wife candidates who request for dispensation and the parents/guardians of the husband and wife candidates.
7. In Article 10 paragraph (6), if what is mentioned in paragraph (1) cannot be presented, the case is declared unacceptable / NO.
8. Article 11 paragraph (2) explains that Judges and Substitute Registrars who examine cases of marriage dispensation do not use trial attributes. It is an effort to ease the child's psychological burden.

9. Article 13 paragraph (1) states that the information contained in Article 10 paragraph (1) must be heard.
10. Article 13 paragraph (3) reads that if Article 13 paragraph (1) is not implemented, the determination is null and void.

Administrative stage

Another critical point in the marriage dispensation negotiation is that the Petitioners and the husband/wife candidates must follow the administration and present solid evidence. According to the guideline, the first and foremost preparation for a marriage dispensation is an administrative requirement. The Petitioners must prepare the administrative requirement and the evidence needed.

1. All administrative requirements as a condition to apply for a marriage dispensation determination.
2. Evidence of the importance of marriage being carried out. It will be used as evidence to convince the Judge to accept their submission.

If these requirements cannot be met, other documents that explain the identity and educational status of the child and the identity of the parent/guardian can be used. The Clerk of the Court will check the application for Marriage Dispensation. If the administrative requirements are not fulfilled, the Registrar will ask the Petitioner to complete it. Meanwhile, if the application for marriage dispensation has met the administrative requirements, then the application is registered in the register. The Petitioner will also pay for the court fee. If the Petitioner cannot pay, they can apply for dispensation of marriage free of charge (*prodeo*).

Following Article 7, paragraph 2 of Law number 16 of 2019 concerning Marriage Law, The Petitioners must

also give solid evidence. The supporting evidence includes:

- (i) A certificate that proves that the husband/wife candidate's age is still below the provisions of the Law; and
- (ii) A certificate issued by a health worker that supports the parents' statement that the marriage is very urgent for implementation.

Trial stage

The following process after the filing requirements is the trial. The Judge has a Supreme Court Chief Justice Decree as a Child Judge for the marriage dispensation case. They have attended training or technical guidance on Women Dealing with the Law. They must also be certified in the Juvenile Criminal Justice System and have experience adjudicating marriage dispute applications. If there is no judge, as mentioned above, another judge can hear the application for Marriage Dispensation. Then, the Judges examine the application and give advice related to underage marriage.

1. Examine the administrative requirements proposed by the Petitioner.
2. Examine the evidence submitted by the Petitioner.
3. The negative consequences.
4. Investigate the evidence.
5. Interview all parties involved in filing a marriage dispensation.

Afterward, the Judges will decide whether the application for marriage dispensation is accepted or not. The decision is based on the evidence and the results of interviews. The Judges' primary objective is to decide wisely based on administrative requirements' completeness and examination of written and oral evidence. They will base their

judgment on child protection, both physical and psychological, to protect the child's honor in the community.

The Petitioner is obliged to present the three parties at the first trial. First, the child for whom marriage dispensation is requested. Second, a husband/wife candidate is requested. Third, parents/guardians of the husband/wife candidate are requested. If the Petitioner was not present, the Judge will postpone the trial and recall the Petitioner legally. However, if the Petitioner is not present on the day of the second trial, then the application for marriage dispensation is declared "null and void." If the Petitioner cannot present the parties on the third trial, the marriage dispensation request is declared "unacceptable." The Judge will advise the Petitioner, the husband and wife candidates, and their parents/guardians in the trial. Advice is conveyed to ensure all parties understand the risks of child marriage. The advice can include many aspects: morals, religion, customs and culture, psychological factors, health aspects, and others. The advice given by the Judge is considered in the verdict, and if it does not provide advice, the verdict will be "null and void." The determination is also "null and void" if the Judge does not hear and consider the statements of:

1. The child who will be married.
2. The child's husband/wife candidate.
3. The parents/guardians of the child.
4. The parents/guardians of the husband/wife candidate.

The Judge will identify whether the child submitted in the application knows and agrees to the marriage plan during the trial. The Judge will pay attention to the child's best interests by carefully analyzing the Petitioner's petition. The Judge will examine the legal position, background, and reasons for child marriage, dig up information regarding whether or not there are marital obstacles,

digging up information related to the understanding and consent of the child to be married. The Judge will also examine the psychological, sociological, cultural, educational, health, and economic conditions of children and parents to ensure the commitment of parents to take responsibility for children's economic, social, health, and educational issues. The Judge needs recommendations from psychologists, doctors/midwives, professional social workers, social welfare workers, and the integrated service center to protect women and children (P2TP2A) or the Child Protection Commission Indonesia/Regions (KPAI/KPAD). Unfortunately, not all cases can have these supports.

Negotiation in marriage dispensation trial

To know the Petitioner and the Judge's reasons in their negotiation that eventually led to the rejection of the marriage dispensation application, we analyze the background information related to the Petitioner and the candidates based on the 17 rejected marriage dispensation cases (see Table 1). First, almost all Petitioners are the father of the candidates, with few accompanied by their wives. This pattern is because, in Islamic marriage, the father is the guardian (*wali*) of the child candidates. Second, the number of applications is similar for both husband and wife candidates. There are slightly more applications from the wife candidates (10 out of 17) than from husbands candidates (8 out of 17 applications). Nine wife candidates are aged below 16 years old, and the youngest wife candidate was only 12 years old. For husband candidates, the youngest was only 15 years old.

Related to the negotiation point from the Petitioners, we find similarities in the applications' reason. Most Petitioners (14 out of 17 applications) said they want the

husband/wife candidates to marry because they are in an intimate relationship. They are afraid that a prohibited act (*Zina*, sexual intercourse outside marriage) will occur if the candidates do not marry right away. However, this reason does not always fit with reality as there are five applications in which the candidates later admit that they already have sexual intercourse (Case B, C, D, E, Q). Three wife candidates were pregnant, and one pair of candidates already had a child. The two other application reasons are more truthful as they admitted that they already have sexual intercourse. The wife candidate was pregnant in Case M, while the wife candidate was not in Case L. One last application, Case H, gave a different reason. The wife candidate (20 years old) and the husband candidate (18 years old) argued that they have enough income to start their own family. Later, they withdrew the application after hearing the judges' advice. Although it is not stated in the verdict, the Judge possibly asks the candidates to wait until the husband candidate reaches 19 years old because he was already 18 years and 9 months old at the time of the trial.

From the judges' point of view, the judges considered the candidates' immaturity in many cases. In total, the wife candidates in 9 out of 17 applications are still below 16 years old. The youngest wife candidate (Case F) was still 12 years and four months old, yet the husband candidate was already 39 years old. In Case F, the verdict highlighted how she was still very young and did not know about her future husband's income and only cooked simple dishes such as fried eggs and instant noodles. Meanwhile, there are also cases where the judges deemed that the husband candidates were still immature and had no work; hence, they are not ready as the head of the family (Case A, B).

The role of parents in preventing child marriage is also essential to keep the child away from harmful consequences. Some judges highlighted the danger of pregnancy and being a mother in teenage age (Case J) and the importance of education for the child's future (Case L). A judge related how immaturity in marriage could lead to divorce, which will make the child into a young and poor widow (Case L). In the two verdicts (Case F, L), the judges reminded the Petitioners (the parents) that they had an obligation to educate their children about the norm and the risk of early marriage. Parents should not encourage their children to marry at such a young age. There is also a case (Case K) that the candidates said that the marriage was against their will. In Case K, the wife candidate was still 15 years old, and the husband candidate was already 32 years old. Case K raises our concern about forced marriage. If the candidates did not speak up, the judges would not know about it.

Moreover, we find the judges rejected the application because of a lack of evidence or because the Petitioner withdrew the application based on the Judge's advice. Related to the lack of evidence, in Case G, the parents of the wife candidate (15 years old) are afraid that a prohibited act will occur if their child does not marry right away. Yet, it is revealed that both candidates never go out together, and both have good knowledge of religious norms. Hence, the judges deemed no solid argument that the candidates would do prohibited acts. There are also two cases (Case H, I) in which the Petitioners choose to withdraw the applications because of the Judge's advice. Case H and Case I prove the importance of educating the Petitioners and the husband/wife candidates regarding the risk of child marriage.

Regarding administrative cause, the judges resolved that five cases are void for three main reasons. First, in Case M, the Petitioners' incidental representative was not the wife candidate's guardian. Second in Case N, O, P, the Petitioner did not attend the trial. Third, in Case Q, it later revealed that both candidates were already married; hence, the judges deemed that the marriage dispensation was no longer needed. Lastly, there are cases in which the judges take a different perspective regarding which the wife candidate is currently pregnant. Contrary to the general decision, the judges in three cases (Case B, C, D) argued that pregnancy is not mandatory for marriage. We find out that the head judge of those three cases is the same person.

METHODE

This research used descriptive empirical legal research. We gathered the data from three sources. First, we studied Supreme Court Regulations Number 5 of the Year 2019 Concerning Guidelines for Addressing Applications for Marriage Dispensation as the legal foundation. Second, we collected the rejected marriage dispensation applications. We limited the object of this research specifically to marriage dispensation cases under the Religious Court (PA). We analyzed the verdicts between 2018 and 2021 in the High Court's Verdicts online database (<https://putusan3.mahkamahagung.go.id>) available on March 31, 2021. There were 19 uploaded marriage dispensation verdicts, but only 17 verdicts had the complementary document. We adopted the quantitative approach from Horii (2020) in analyzing the verdicts. We looked into the Petitioners' and the husband and wife candidates' backgrounds and the reason for the marriage dispensation's application and rejection. Lastly, we conducted an in-depth interview with a Judge working in the Religious Courts

(Mahkamah Syar'iyah Blangkejeren, Gayo Lues District, Aceh Province). The in-depth interview provides contextual background on marriage dispensation, negotiation, and the reasoning in the Court.

DISCUSSION

By definition, marriage dispensation grants the right to a person to marry even though they have not reached the minimum age of marriage. The definition means that a person may marry outside of these provisions if and only if circumstances desire and there is no other choice (*ultimum remedium*). On the legal basis, Supreme Court Regulations Number 5 of the Year 2019 principles guarantee to implement the justice system protecting children's rights. It increases the responsibility of parents in the context of preventing child marriage, identifies whether or not there is coercion behind the submission of applications for dispensation of marriage, and realizes the standardization of the process for adjudicating requests for dispensation of marriage in Court.

Based on our interview with a Sharia Court Judge, a marriage dispensation is a civil case filed voluntarily (petition). Voluntary cases have attributes that differentiate them from contingent cases (lawsuits). The attributes of voluntary cases are as follows:

1. The problem is of a one-sided interest. The problem is only related to the Petitioner's interests and is not associated with the rights and interests of others.
2. The problems raised are not disputes with other parties.
3. There is only one party (*ex-parte*). Albeit no other person or third party is drawn as an opponent, the Law gives the Religious Courts the authority to examine and decide them.

From this explanation, the negotiation in a marriage dispensation case is integrative. The negotiation between the Petitioner and the Judges is carried out to determine the application for marriage dispensation. According to the Sharia Court Judge, the Petitioner's goal is to acquire the marriage dispensation so that underage couples wishing to marry can be legally registered (Mawaddah, 2021). The Petitioner has two Best Alternative To Negotiated Agreement (BATNA) based on their condition. The first BATNA is to postpone the marriage until they meet the minimum age. The second BATNA is to perform a religious wedding (*nikah Siri*) and later request legal registration (*istbat nikah*). The BATNA can differ case by case.

Table 2.

Main Objective, BATNA, and ZOPA in Marriage Dispensation Negotiation

NEGOTIA- TION	THE PETITIONER AND HUSBAND/ WIFE CANDIDATES	THE JUDGE
MAIN OB- JECTIVE/ GOAL	Acquire the marriage dispensation.	Protect the children.
BATNA	Postpone the marriage until the minimum age, perform a religious wedding, and later request legal registration.	Accept the marriage dispensation request to keep the child's honor.
ZOPA	Protect the children's honor by granting marriage dispensation	

Source: Interview with Mawaddah, a Judge from Religious Courts Blangkejeren, Gayo Lues District, Aceh Province, May 18, 2021, and the authors' analysis.

Meanwhile, the Judge's main objective is to protect the children based on the principle of child protection. The Judge wants to give the best decision for the child. BATNA for the Judge accepts the marriage dispensation request to protect the child's honor. The informant stressed the importance of collaborative work between society members to protect children from early marriage. Therefore, it will be better if society can prevent mar-

riage even though both party's Zone of Possible Agreement (ZOPA) is to protect the children's honor by granting marriage dispensation. The Court is the last resort, but the Judge has limited choice.

Horii (2020) highlighted one Judge's saying that marriage dispensation is the case of marriage by accident. For issues related to pregnancy, many judges deemed it is better to give the dispensation to protect the wife candidate and the unborn baby from social stigma based on *kemaslahatan* sharia law (Horii, 2020). The judges consider two disadvantages for Muslims: harm due to marriage at an early age and *mudharat* if marriage dispensation is rejected. Therefore, the Judges often grant requests for dispensation of marriage by considering that the harm arising from the refusal of the application for dispensation is greater than the harm that occurs as a result of marriage under the minimum age itself. The reason is that the rejection of the dispensation of marriage is more important in its *Maqosidus Sharia* because it is feared that it could damage the offspring (*al nasl*) and honor (*al irdl*) of the two prospective brides. This context makes rejection of applications for the dispensation of marriage minimal (Khisni, 2010). Only 0.83 percent of the total applications are rejected based on uploaded cases.

Another interesting finding is that there is a rejection of the marriage dispensation in which the Judge considers that pregnancy is not a reason for a minor to get married. This rejection is in accordance with the rejection of marriage dispensation by several judges registered in the case at the Supreme Court, such as Case B, C, D, E, Q which the candidates later admit that they have had sexual intercourse, but the Judge rejected the application on the grounds of both husband and wife candidates are still under the minimum age to marry, not yet mature, and both do not have

a job. The judges deemed six months of pregnancy is not a provision for marriage. This reason can be used as a weapon to reject the application for a marriage dispensation. Indeed, parents should be the one who educates their children about religious and social norms and give the proper guidance for the children, not by forcing them to marry.

When viewed from the dangers of early marriage, child marriage is a form of violence against children. Children who are forced to marry will experience negative impacts. Children might lose their access to education, face deterioration in their health and quality of life, and be exposed to violence. This impact does not only stop at the fate of early married couples but rolls like a snowball on the children who will be born and has the potential to cause intergenerational poverty and violence. From *Maqosidus Sharia's* perspective, benefits for humankind (*mashâlih al-'ibâd*), both their worldly affairs and their hereafter affairs, are included in the sharia's implementation objective. The benefits of not having early marriage in the long term are in line with the main of *maqosidus* of sharia, namely *hifdzun ad-diin* (Maintaining Religion), *hifdzun an-nafs* (Protecting the Soul), *hifdzun aql* (Maintaining Intellect), *hifdzun nasl* (Maintaining Descendants) and *hifdzun maal* (Guarding Wealth).

CONCLUSION

Indonesia made a breakthrough by placing a higher minimum age for girls who want to marry from 16 to 19 in 2019. Those who wish to marry before the age of 19 must gain permission from the Court. However, the Court granted 99% of the marriage dispensation cases. Existing studies in this issue already analyze why the judges used to give a dispensation, mainly on the stance to

avoid the worst possible outcomes for the children. From the literature review of existing studies, we found that *Maqosidus Sharia* is the main reason to grant the marriage dispensation. This context leads to a low rejection of applications for the dispensation of marriage. We take a different route by analyzing the rejected applications to understand the Court's negotiation process that leads to the rejection. We analyze 17 rejected marriage dispensation applications from different religious courts between 2018 and 2021 available on the Court's online database.

Based on the findings, it is known that from 17 refusals to apply for a marriage dispensation determination can be categorized into five main reasons: the immaturity of the husband/wife candidates, the Judges' judgment that the marriage will bring harm to the children, lack of evidence of an urgent need for marriage, because of the Judges' advice, and administrative reasons. Using these reasons, the Judges deemed the Petitioners' request to marry their children to avoid prohibited acts unnecessarily. Yet, from the in-depth interview, we know the ZOPA protects the children's honor by granting the marriage dispensation. Hence, this is causing a low percentage of rejected marriage dispensation applications even though it is causing harm to children's future.

RECOMMENDATION

From this research, several things need to be done to minimize early marriage, including:

1. There is a need for socialization regarding Supreme Court Regulations Number 5 of the Year 2019 Concerning Guidelines for Addressing Applications for Marriage Dispensation.
2. It is necessary to prevent the early marriage by providing counseling on

the dangers of free sex for students of all school levels.

3. Even though there is a special judge for children, it is necessary to cooperate with a psychiatrist as a companion for children in a religious court.
4. It is necessary to conduct a massive campaign on the dangers of early marriage.
5. The judge needs to be careful and thorough with the requirements for submitting a marriage dispensation submitted by the applicant.

ACKNOWLEDGMENT

As a form of appreciation for the parties involved in the preparation of the manuscript or research, we thank our lecturers and supervisors at the School of Government and Public Policy Indonesia, Blangkenjeren Syariah Court Judges, and all classmates at SGPP. We also would like to thank board editorial *Harmoni* journal and all reviewer for the opportunity that has been given.

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List of Legal Documents:

Law Number 1 the Year 1974 concerning Marriage.

Law Number 16 the Year 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

Supreme Court Regulations Number 5 the Year 2019 Concerning Guidelines for Addressing Applications For Marriage Dispensation

Attachment

Table 1.
Rejected case, the reason for application, and reason for being rejected

ID	Case number	Petitioner	Wife candidate	Husband candidate	Reason for application	Reason for being rejected by the Court
A	0109/ Pdt.P/2018/ PA.Kab.Kdr [old Law]	50 years old, father of the husband candidate, a seller. 37 years old, mother of the husband candidate, homemaker.	17 years and 8 months old, a private employee.	17 years old, parking attendant, income 750 thousand Rupiah per month.	The candidates were engaged last month and had an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The husband candidate was still a vocational high school student and only had an impermanent job as a parking attendant. He is still under the minimum age to marry and is not mature. The judges deemed the candidate unable to take responsibility as a husband and as the head of the family.
B	0107/ Pdt.P/2018/ PA.Kab.Kdr [old Law]	39 years old, father of the husband candidate, a seller. 34 years old, mother of the husband candidate, a seller.	15 years and 4 months old, unemployed, 6 months pregnant.	15 years old, unemployed.	Since two months ago, the candidates have been engaged and have had an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away. The wife candidate was 6 months pregnant.	Both husband and wife candidates are still 15 years old, under the minimum age to marry, not yet mature, and both don't work. The judges deemed six months of pregnancy is not a provision for marriage.
C	0229/ Pdt.P/2018/ PA.Kab.Kdr old Law]	39 years old, father of the wife candidate, mechanic. 36 years old, mother of the wife candidate, a seller.	15 years and 9 months old, unemployed.	16 years old, construction laborer, income 60 thousand Rupiah per day.	Since two months ago, the candidates have been engaged and have had an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away. The wife candidate was 2 months pregnant.	Both husband and wife candidates are still under the minimum age to marry, not yet mature. The judges deemed 2 months pregnancy is not a provision for marriage.
D	0230/ Pdt.P/2018/ PA.Kab.Kdr old Law]	55 years old, father of the husband candidate, a seller.				

ID	Case number	Petitioner	Wife candidate	Husband candidate	Reason for application	Reason for being rejected by the Court
E	0158/ Pdt.P/2018/ PA.Kab.Kdr [old Law]	35 years old, father of the husband candidate, casual laborer, graduated from junior high school.	17 years old, farmers, income 200 thousand Rupiah per month.	16 years and 7 months old, casual laborer, 200 thousand Rupiah per week.	The candidates have been in a relationship since two years ago and have an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The Petitioner said he wants the candidates to marry to avoid prohibited acts, yet both candidates already have a child. Hence, the judges deemed the Petitioner (parent) should be the one who educates his child (the husband candidate) about the religious and social norms and give the proper guidance for the child's, not by forcing the child to marry.
F	40/ Pdt.P/2018/ PA.Nbr [old Law]	46 years old, father of the wife candidate, farmer, graduated from elementary school	12 years old and 4 months.	39 years old, a chicken breeder, income between 1.5 million to 3 million Rupiah per month, graduated from elementary school.	The candidates are in love, have had an intimate relationship since three months ago, and often go out together. The Petitioners are afraid that a prohibited act will occur if they don't marry right away. It's also to avoid slander that will embarrass the wife candidate's parents.	The wife candidate was very young and could only cook basic food such as rice, egg, and instant noodles. The husband candidate worked as a laborer in someone else's chicken breeding, and the wife candidate did not know the husband candidate's salary. Hence, the judges deemed the Petitioner (parent) should be the one who educates his child (the wife candidate) about the religious and social norms and give the proper guidance for the child's, not by getting the child to marry.

ID	Case number	Petitioner	Wife candidate	Husband candidate	Reason for application	Reason for being rejected by the Court
G	37/ Pdt.P/2018/ PA.Rtu [old Law]	50 years old, father of the wife candidate, farmer, graduated from elementary school 42 years old, mother of the wife candidate, farmer, graduated from elementary school	15 years and 3 months old, student in pesantren (Islamic boarding school), unemployed.	24 years old, graduated from pesantren, waiter	The candidates have been engaged since last year and have an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	Both candidates never go out together, and both have good knowledge of religious norms. Hence, the judges deemed no solid argument that the candidates would do prohibited acts.
H	3/ Pdt.P/2019/ PA.Tas [old Law]	44 years old, father of the husband candidate, farmer, graduated from elementary school.	20 years and 6 months old, shop-keeper.	18 years and 9 months old	The candidates wanted to be married, and they already had enough income for their households.	The Petitioner withdrew the applications after hearing advice from the Judge.
I	541/ Pdt.P/2020/ PA.Smdg [new Law]	43 years old, mother of the wife candidate, homemaker, graduated from elementary school.	16 years and 7 months old, unemployed, graduated from elementary school.	26 year old, self-employed, graduated from junior high school.	The candidates have been in a relationship and want to get married. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The Petitioner withdrew the applications after hearing advice from the Judge.
J	0071/ Pdt.P/2019/ PA.Tsm. [old Law]	51 years old, father of the wife candidate, farmer, graduated from elementary school.	14 years and 4 months old,	20 years old, self-employed, income 6 million per month.	Since six months ago, the candidates have been in a relationship and have an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The wife candidate was very young and not yet mature. Based on medical reasons, if she had sexual intercourse at such a young age, she might be vulnerable to complications in her reproductive organs. If she gets pregnant, she will also cause danger to the fetus and herself.

ID	Case number	Petitioner	Wife candidate	Husband candidate	Reason for application	Reason for being rejected by the Court
K	30/ Pdt.P/2019/ PA.Buol [old Law]	39 years old, father of the wife candidate, seller, graduated from junior high school.	15 years and 2 months old, unemployed, graduated from elementary school.	32 years old, self-employed.	The candidates have been in a relationship since one year and two months ago and want to be married. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The wife candidate was very young, and both candidates stated that their families wanted the marriage, not the candidates.
L	181/ Pdt.P/2020/ PA.Tas [new Law]	39 years old, father of the wife candidate, driver, graduated from elementary school. 64 years old, mother of the husband candidate, homemaker, graduated from senior high school.	14 years and 10 months old, unemployed, graduated from elementary school.	18 years and 9 months old, casual laborer, graduated from elementary school.	The candidates wanted to be married, and they already had enough income for their households. The candidates already had sexual intercourse, although the wife candidate was not pregnant.	Both candidates did not want to continue to junior high school, which means they did not complete the 9 years of compulsory education. There are also many child marriage cases in the district; thus, it is crucial to support the child marriage prevention acts. Parents and society must educate their children. Children who marry with unstable mental and emotional health also have a high risk of divorce, turning the girls into poor young widows. The judges also deemed the application is not urgent, and it would be wrong if the Court legalized children who drop their education to marry.

ID	Case number	Petitioner	Wife candidate	Husband candidate	Reason for application	Reason for being rejected by the Court
M	64/ Pdt.P/2020/ PA.Thn.	55 years old, father of the wife candidate, stone breaker, graduated from elementary school. 48 years old, mother of the wife candidate, homemaker, graduated from elementary school.	17 years old, unemployed, graduated from elementary school.	19 years old university student.	Since last year, the candidates have been in a relationship and have an intimate relationship. The wife candidate was 3 months pregnant.	The Judge deemed the application did not meet the court requirement because the Petitioners' incidental representative was not the wife candidate's guardian.
N	1/ Pdt.P/2018/ PA.Srh [old Law]	52 years old, father of the wife candidate, self-employed, graduated from senior high school.	15 years and 2 months old, unemployed	24 years old university student.	The candidates have been in a relationship since two years ago and have an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The Petitioner did not come to the trial and did not pay for the trial fee. Hence, the judges deemed the application is invalid.
O	46/ Pdt.P/2018/ PA Bitg [old Law]	53 years old, father of the husband candidate, gold seller, graduated from university	18 years and 9 months old, high school student, unemployed.	17 years and 10 months old, high school student, groceries seller.	The candidates have been in a relationship since five years ago and have an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The Petitioner did not come to the trial. Hence, the judges deemed the application is invalid.

ID	Case number	Petitioner	Wife candidate	Husband candidate	Reason for application	Reason for being rejected by the Court
P	6/ Pdt.P/2020/ PA.Thn [new Law]	52 years old, father of the wife candidate, seller, graduated from junior high school. 54 years old, mother of the husband candidate, homemaker, graduated from junior high school.	18 years old, unemployed, graduated from junior high school.	21 years old, seller, graduated from senior high school.	The candidates have been engaged since last month and have an intimate relationship. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	The Petitioner did not come to the trial. Hence, the judges deemed the application is invalid.
Q	18/ Pdt.P/2021/ PA Tas.	40 years old, father of the wife candidate, farmer, graduated from elementary school. 39 years old, mother of the husband candidate, farmer, graduated from elementary school.	17 years and 10 months old, unemployed, graduated from junior high school.	25 years old, farmers/seller, graduated from elementary school, income 3 million Rupiah per month.	Since long ago, the candidates have been in a relationship and have already had sexual intercourse. The Petitioners are afraid that a prohibited act will occur if they don't marry right away.	It later revealed that both candidates were already married; hence, the judges deemed that the marriage dispensation was no longer needed.