

## **MARRIAGE DISPENSATION AT THE BITUNG RELIGIOUS COURT**

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**Abstract:** This research aims to analyze the judges' considerations in deciding the case of marriage dispensation at the Bitung Religious Court in case Numbers 157/Pdt.P/2019/PA.Bitg and 130/Pdt.P/2020/PA Bitg. The research method used is the empirical juridical method with a qualitative-descriptive approach, while the data collection techniques use interview and documentation techniques. Subsequently, the results showed that the judge accepted the marriage dispensation application in case Number 157/Pdt.P/2019/PA.Bitg by considering the close relationship between the applicant's child and prospective husband and determining that a postponement would cause more harm than good. Also, he was determined to be independent, mature, and have a permanent job. Meanwhile, in case Number 130/Pdt.P/2020/PA.Bitg, the judge refused because the prospective husband was not ready to function as the head of the family, in terms of economics and religious knowledge. An acceptance of the marriage was thereby considered more harmful than beneficial, as the husband was feared to be unable to execute his obligations. Therefore, the judges' consideration in deciding the application for marriage dispensation in cases Number 157/Pdt.P/2019/PA.Bitg and 130/Pdt.P/2020/PA.Bitg was based on the harms and benefits to be obtained by both applicants.

**Abstrak: Dispensasi Nikah di Pengadilan Agama Bitung.** Penelitian ini bertujuan menganalisis pertimbangan hakim dalam memutuskan perkara dispensasi kawin di Pengadilan Agama Bitung Nomor 157/Pdt.P/2019/PA.Bitg dan 130/Pdt.P/2020/PA Bitg. Metode penelitian yang digunakan adalah metode yuridis empiris dengan pendekatan kualitatif-deskriptif, sedangkan teknik pengumpulan data menggunakan teknik wawancara dan dokumentasi. Penelitian ini menemukan bahwa dalam perkara Nomor 157/Pdt.P/2019/PA.Bitg, hakim menerima permohonan dispensasi kawin dengan pertimbangan hubungan berpacaran anak pemohon dengan calon suaminya sudah begitu erat. Jika perkawinan ditunda maka mudaratnya lebih besar daripada manfaat. Di samping itu, calon suami telah mandiri, dewasa dan memiliki pekerjaan tetap. Sementara dalam perkara Nomor 130/Pdt.P/2020/PA.Bitg, hakim menolak dengan pertimbangan calon suami belum siap sebagai kepala keluarga, baik dari segi ekonomi maupun pengetahuan agama. Jika perkawinan diterima maka mudaratnya lebih besar daripada manfaat karena dikhawatirkan calon suami tidak dapat menjalankan kewajibannya. Kesimpulannya, pertimbangan hakim dalam memutuskan permohonan dispensasi kawin dalam perkara Nomor 157/Pdt.P/2019/PA.Bitg dan 130/Pdt.P/2020/PA.Bitg adalah mempertimbangkan mudarat dan manfaat yang akan didapat oleh kedua pemohon.

**Kata kunci:** Pertimbangan Hakim; Dispensasi Nikah, Pengadilan Agama Bitung

## Introduction

Marriage, as a legal event<sup>1</sup> and bond in human life,<sup>2</sup> has and causes legal consequences that affect the husband and wife, as well as their offspring, family, and society. Therefore, it should be carefully prepared and conducted according to applicable regulations. In the context of Islamic law in Indonesia, its implementation is inseparable from the provisions of the Marriage Law and refers to positive legal provisions.<sup>3</sup>

One of the important issues prior to the marriage is the application for dispensation. According to Sumner, 14,000 marriage dispensation cases were brought to court.<sup>4</sup> This should be a common concern, especially for policymakers, because the Marriage Law was changed and ratified into Law no. 16 of 2019 Amendments to Law No. 1 of 1974 concerning Marriage.<sup>5</sup> The amendment was based on the Decision of the Constitutional Court Number 22/PUU-XV/2017 concerning the Age Limit for Marriage.<sup>6</sup> Although the section regarding the marriage dispensation was unchanged, an adjustment of the minimum age for the bride and groom was made, from 16 and 19 years for men and women, respectively, to 19 years for both parties. Furthermore, the capacity of both parties' parents to apply for a marriage dispensation in urgent situations by including strong supporting evidence was reiterated.

Marriage dispensation applications at various Religious Courts in Indonesia,<sup>7</sup> especially after the enactment of Law no. 16 of 2019, have increased.<sup>8</sup> For example, 54 out of 62 marriage dispensation cases from January to June 2021 at the Bitung Religious Court were granted by the panel of judges.<sup>9</sup> This figure is quite high compared to the 39 cases from 2016-

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<sup>1</sup> Juliana S. Ndolu, Adi Sulistiyono, and Mohammad Jamin, "The Legal Protection for Breach of the Marriage Promise for Women," in *Proceedings of the International Conference on Environmental and Energy Policy (ICEEP 2021)*, ed. Rohaida Nordin (Atlantis Press, 2021), 205–10, <https://doi.org/10.2991/assehr.k.211014.044>.

<sup>2</sup> Nina Yolanda and Otto Fajarianto, "Juridical Analysis of Currency and Citizenship Status of Children on Divorce in Mixed Marriage," *Review of International Geographical Education (RIGE)* 11, no. 10 (2021): 2039–48, [www.rigeo.org](http://www.rigeo.org).

<sup>3</sup> Barzah Latupono, "The Principles of Marriage Recording in Indonesia," *Journal of Law, Policy and Globalization* 60 (2017): 14.; Akhmad Khisni, "Law Lnto the National Legislation," *Talent Development & Excellence* 12, no. 2 (2020): 1275–81, <http://www.iratde.com>.; Nur Azizah, "The Analysis of Minimum Marriage Age Determination in Indonesia and Other Islamic Countries," *Jurnal Ilmiah Al-Syir'ab* 16, no. 2 (December 26, 2018): 148–60, <https://doi.org/10.30984/jis.v16i2.664>.

<sup>4</sup> Cate Sumner, "Ending Child Marriage in Indonesia: The Role of Courts," Policy Paper, 2020, <https://doi.org/10.46580/124363>.

<sup>5</sup> Sri Murni, "The Marriage Age Limit According to Indonesian Law No. 16, 2019 as Effort to Child Protection," in *Proceedings of the International Conference on Law, Economics and Health (ICLEH 2020)*, ed. Anggraeni E.K et al. (Atlantis Press, 2020), 222–30, <https://doi.org/10.2991/aebmr.k.200513.047>.

<sup>6</sup> Lindi Rohma Octavia and Rifqi Ridlo Phahlevy, "The Existence of Islamic Norms in the Indonesian Constitutional Court Decisions No.22/PUU-XV/2017," *Rechtsidee* 7 (December 23, 2020): 1–14, <https://doi.org/10.21070/jihr.2020.7.720>.; Kadriah, Ishak, and Lia Sautunnida, "The Normative Analysis of Marriage Age After the Constitutional Court Decision No. 22/PUU-XV/2017," in *Proceedings of the International Conference on Law, Governance and Islamic Society (ICOLGIS 2019)*, ed. S Sulaiman (Paris, France: Atlantis Press, 2020), 99–103, <https://doi.org/10.2991/assehr.k.200306.190>.

<sup>7</sup> Isnawati Rais, "Marriage Dispensation Due to Extramarital Pregnancy: The Study on the Decision by the Religious Court of South Jakarta (2010-2011)," *AHKAM: Jurnal Ilmu Syariah* 18, no. 1 (January 12, 2018): 155–76, <https://doi.org/10.15408/ajis.v18i1.7490>.

<sup>8</sup> Mansari Mansari et al., "Concretization of Urgent Reason and Sufficient Evidence in Providing Marriage Dispensation for Children by the Judge," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 20, no. 2 (December 31, 2020): 195–206, <https://doi.org/10.19109/nurani.v20i2.5898>.

<sup>9</sup> "Sistem Informasi Penelusuran Perkara (SIPP) PA Bitung," accessed December 2, 2021, [https://sipp.pa-bitung.go.id/list\\_perkara](https://sipp.pa-bitung.go.id/list_perkara).

2019 at the West Jakarta Religious Court and 28 decisions at the East Jakarta Religious Court.<sup>10</sup>

Following non-adherence to social development, the regulation of the minimum age for marriage and dispensation in the Marriage Law was changed. The ambiguous criteria were prone to creating legal uncertainty with the juridical implications of obscuring the norms of marriage dispensation regulations. Wahyuningrum, Suhariningsih, and Sulistyorini stated the criterion for limiting marriage dispensation requested due to very urgent reasons. Although accompanied by supporting evidence according to Article 7 Paragraph (2) of the Marriage Law and the intentions of the legislators are reflected in Academic Papers, this dispensation was generally inhibited by a vague legal norm. For example, a very urgent reason is the pregnancy of prospective bride, verified by a certificate from a health worker, while the formulation of the norm in Article 7 Paragraph (2) does not mention pregnancy as a condition.<sup>11</sup> In this context, the juridical implications of the unclear norms result in the dispensation of a religious court's decisions.<sup>12</sup>

Consequently, this research was conducted to study two cases regarding marriage dispensation in 2019 and 2020 at the Bitung Religious Court using a qualitative-descriptive approach. The primary data were obtained from the informants, Madjibran Tjebbang, S.H.I. (Vice-Chair), and Uswatul Fikriyah S.H.I, M.H. (Judges), while secondary data were taken from the documents or archives at the Bitung Religious Court. The primary data were obtained from the informants, Madjibran Tjebbang, S.H.I. (Vice-Chair), and Uswatul Fikriyah S.H.I, M.H. (Judges), while secondary data were taken from the documents or archives at the Bitung Religious Court. These data were collected using in-depth interviews with two judges involved in deciding case Numbers 157/Pdt.P/2019/PA.Bitg and 130/pdt.P/2020/PA Bitg. Furthermore, important documents and written media made by the subject concerned were analyzed as a documentation step to attain an overview from this party's perspective. All data collected were analyzed using an inductive model, departed from the court's determination regarding the marriage dispensation cases examined. The inductive analysis was used to determine the judges' considerations at the Bitung Religious Court in making decisions.

Generally, the decision of the religious court on marriage dispensation is inseparable from the deliberations of the panel of judges. Research shows that one of the most common issues is the age limit for marriage.<sup>13</sup> Although the positive law (*ius constitutum*) in Indonesia does not support underage marriage, it opens up opportunities for further phenomena. In the

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<sup>10</sup> Melinda Rahmawati and Heni Ani Nuraeni, "Peran Dispensasi Kawin Dalam Peningkatan Angka Pernikahan Dini Di Wilayah Kotamadya Jakarta Barat," *Al-Istinbath: Jurnal Hukum Islam* 6, no. 1 (May 25, 2021): 1–14, <https://doi.org/10.29240/jhi.v6i1.1578>.

<sup>11</sup> Dyah Retno Wahyuningrum, Suhariningsih Suhariningsih, and Rachmi Sulistyorini, "Jurisdictional Implications Vagueness of Marriage Dispensation Norms in Law Number 16 of 2019," *International Journal of Multicultural and Multireligious Understanding* 8, no. 7 (July 29, 2021): 559–78, <https://doi.org/10.18415/ijmmu.v8i7.2926>.

<sup>12</sup> Amran Suadi, "The Role of Religious Court in Prevention Underage Marriage," *Jurnal Hukum Dan Peradilan* 9, no. 1 (April 3, 2020): 116–31, <https://doi.org/10.25216/jhp.9.1.2020.116-131>.

<sup>13</sup> Arina Hukmu Adila, "Sociological Aspects of Judges in Granting Applications for Marriage Dispensation (Study of Determination Number: 0038/Pdt. P/2014/PA. Pt)," *Walisongo Law Review (Walrev)* 2, no. 2 (2020): 159–67, <https://doi.org/10.21580/Walrev/2020.2.2.6850>; Zendy Wulan Ayu Widhi Prameswari and Erni Agustin, "Indonesian Marriage Law Reform: The Way To Strengthen The Protection of Children's Rights Against Child Marriage," *Journal of Southeast Asian Human Rights* 2, no. 1 (June 30, 2018): 286, <https://doi.org/10.19184/jseahr.v2i1.5353>.

Religious Court, the competent judicial agency is faced with the consideration of two harms in adjudicating matters of marriage dispensation for Muslims. This includes the harms due to early marriage and the rejection of the application. In that context, the role of the judge becomes important in deciding the case.

Previous research examined the marriage dispensation more in terms of existing law, which is considered problematic by many. For example, Wahyuningrum, Suharingsih, and Sulistyorini examined the ambiguity of the marriage dispensation norm in Law No. 16 of 2019.<sup>14</sup> The limits of materialism and idealism regarding the age of marriage were also reviewed in Article 7 Paragraph (1) of this law by Tabroni, Ahyani, and Permana.<sup>15</sup> However, a law necessitating the ensuing settlement in the religious courts was established. This led to the implementation of this research to examine the judges' considerations in deciding the marriage dispensation in case Numbers 157/Pdt.P/2019/PA.Bitg and 130/Pdt.P/2020/PA Bitg in Bitung Religious Court. It is important to study these two cases because they are the same case but produce different decisions from the judges. Thus, this research is expected to be able to show the reasons or the basis for the judge's considerations in deciding the two cases of marriage dispensation at the Bitung Religious Court.

## Discussion

### Description of the Application for Marriage Dispensation

As in the formulation and objectives, this research focused on two cases of application for marriage dispensation at the Bitung Religious Court. Subsequently, the case description aimed to facilitate identification, analysis interests, and obtain comparisons, alongside determining the background of the problems proposed by each applicant.

The first case was Number 157/Pdt.P/2019/PA.Bitg, involving a Protestant-Christian mother who filed a marriage dispensation for her 17-year 7-month daughter and 26-year-old prospective husband. In the application letter, the conditions for performing a marriage according to Islamic and other applicable laws had been fulfilled, except the age requirement of the applicant's child, who was still under 19 years. However, the marriage was very urgent, as the two had been in a relationship from May to December 2019. The applicant and the prospective husband's family had previously applied to the Religious Affairs Office of Matuari Sub-district, Bitung City, for the marriage administration and registration but failed because the applicant's child was below the minimum age. As a result, a request for a marriage dispensation was submitted to the Bitung Religious Court.

Conversely, the second case, Number 130/Pdt.P/2020/PA.Bitg, concerned a Muslim parent (father) who filed a marriage dispensation. This involved his 18 years and 1-month son who had not completed elementary school and his 20-year 11-month prospective wife who had graduated from a vocational school. In the application letter, the conditions for the marriage according to Islamic and applicable laws had been fulfilled, except for the age

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<sup>14</sup> Wahyuningrum, Suharingsih, and Sulistyorini, "Jurisdictional Implications Vagueness of Marriage Dispensation Norms in Law Number 16 of 2019," *International Journal of Multicultural and Multireligious Understanding* 8, no. 7 (July 29, 2021): 559–78.

<sup>15</sup> Imam Tabroni, Hisam Ahyani, and Dian Permana, "Philosophical Review of Materialism and Idealism Limits of Wedding Age in Indonesia; Study of Article 7 Paragraph (1) of Law 16 of 2019 Jo. Law 1 of 1974 Concerning Marriage," *Muttaqien: Indonesian Journal of Multidisciplinary Islamic Studies* 2, no. 1 (2021): 1–20.

requirement of the applicant's child, who was still below 19 years. The urgency of the marriage, in this case, was that the concerned persons had been in a relationship from August 2019 to September 2020. Previously, the applicant and the prospective wife's family had proposed the administration and registration of marriage plans at the Religious Affairs Office of Maesa sub-district, Bitung City. Due to the failure of this proposal caused by the underage boy, a marriage dispensation was requested to the Bitung Religious Court.

### **Judges' Consideration in Cases Number 157/Pdt.P/2019/PA.Bitg and 130/Pdt.P/2020/PA.Bitg**

Law is the basis for judges' consideration, known as the "*ratio decidendi*," which is the legal reason used to arrive at a decision.<sup>16</sup> It is contained in the "weighing" consideration on the subject matter.<sup>17</sup>

The marriage dispensation in case Number 157/Pdt.P/2019/PA.Bitg, proposed by the applicant, was granted by the Bitung Religious Court Judges with legal considerations as follows:

- (a) That the panel of judges recommended the applicant to reconsider her child's marriage because she was below 19 years of age, and reminded the applicant of Article 7 Paragraph (1) of Law no. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage in conjunction with Article 26 Paragraph (1) letter (c) of Law no. 23 of 2002 concerning Child Protection. However, this failed, and the applicant remained in her application.
- (b) That the applicant is the biological mother of the child for whom the marriage dispensation is being requested, is divorced from the biological father of the girl and lives in Kalimantan. Therefore, the judges considered the applicant to have *legal persona standing in judicio*, and her application could be examined and considered further as regulated in Article 6 Paragraphs (1) and (2) PERMA No. 5 of 2019 concerning Marriage Dispensation.
- (c) That the applicant is a Protestant Christian while the child for whom marriage dispensation is being applied for is Muslim. Hence, this case is rightfully filed in the Religious Courts following Article 7 PERMA No. 5 of 2019, which states: "If there is a religious difference between the child and the parent/guardian, the application for a marriage dispensation shall be submitted to the Court following the child's religion."
- (d) That the main reason for the application was obtaining a decision from the Religious Court to grant the applicant's child dispensation to marry a man named Hendy Setiawan bin Hendra Kusuma Herlambang, who both presented their statements for hearing. This is following the intent of Article 7 Paragraph (3) of Law no. 16 of 2019

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<sup>16</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2008).; Anthon Freddy Susanto, "Relation of Power in Ratio Decidendi" 7, no. 10 (2020): 798–807, <https://doi.org/10.18415/ijmmu.v7i10.2458>.; Syabbul Bachri, "Ratio Decidendi of Religious Court Judges on Rejection of Applications for Interfaith Marriage Prevention," *Istinbath: Jurnal Hukum* 18, no. 1 (2021): 1–14, <https://doi.org/10.32332/istinbath.v18i1.3018>.

<sup>17</sup> Rusli Muhammad, *Potret Lembaga Peradilan Indonesia* (Jakarta: Raja Grafindo Persada, 2006).; Dewi Murniati, "Judges' Ratio Decidendi in Marriage Dispensation Case at The Gresik Religious Court Regarding Marriage Age Limit," *NORMA* 17, no. 3 (2021): 15–32, <https://doi.org/10.30742/nlj.v17i3.1089>.

and Article 10 Paragraph (1) letters a and b of PERMA No. 5 of 2019, which obliges the court to hear the opinions of the prospective spouses interested in marriage.

- (e) That in addition to the statements of the couple, the panel of judges advised their understanding of the risks of early marriage. This particularly includes the unpreparedness of the mental, physical, and reproductive organs, and the economic, social, and psychological impacts of the applicant's child, who may still be spoiled by her parents. The unpreparedness mentioned above can also result in disputes and increase the risk of domestic violence. Following the advice and explanation of the panel of judges, the prospective spouses understand and declare their physical and mental readiness to form a good family.
- (f) That from the information given by the couple and their families, as well as the facts at the trial, the panel of judges concluded that the child was physically, mentally, and psychologically ready to become a good wife for her future husband. Moreover, the prospective husband was an adult with a permanent job to support the household economy, as this serves as one of the capital to create a happy atmosphere in a marriage.
- (g) That to strengthen the argument for her application, evidence P.1 to P.5, alongside 2 witnesses to have their statements heard before the trial, were submitted.
- (h) That based on the legal facts contained in the trial, the applicant's child has fulfilled the requirements for marriage following the provisions of Articles 6 and 7 of Law no. 1 of 1974, which were amended by Law no. 16 of 2019 and Article 15 Paragraph (1) of the Compilation of Islamic Law. Besides, there were no obstacles to the marriage between the prospective wife and husband, as stated in Articles 8 to 11 of Law no. 1 of 1974 and Articles 39 to 44 of the Compilation of Islamic Law. The only unfulfilled requirement was the age of the prospective bride, who was below the minimum age limit of 19 years.
- (i) Since the relationship between the applicant's child and her future husband was already so close, the panel of judges considered the marriage as a way to avoid harm. The benefits of postponing the marriage to wait for the applicant's child to reach 19 years should be delayed as intended in the *fiqh* rules, as the harm of rejection takes precedence.<sup>18</sup>
- (j) Considering that according to the law in the juridical-normative and utility reviews, the application should be granted by giving a dispensation to the child, who until this stipulation was 17 years and 7 months old, to marry her prospective husband.
- (k) That the panel of judges needs to highlight the Qur'anic evidence of surat an-Nur verse 32, which reads, "Marry off the single among you and those of your male and female slaves who are fit [for marriage]. If they are poor, God will provide for them from His bounty: God's bounty is infinite, and He is all-knowing."
- (l) That marriage aims for human happiness, as Article 3 of the Compilation of Islamic Law is to realize a household that is *sakinah*, *mawwadah*, and *rahmah*.<sup>19</sup> Also, Qur'an

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<sup>18</sup> H.A. Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah-Masalah Yang Praktis* (Jakarta: Kencana Prenada Media Group, 2006).

<sup>19</sup> Rido Cipta, "Legal Protection of Husband and Wife That Make a Marriage Agreement after Marriage before the Constitutional Court of Destitution No: 69/PUU-XIII/2015 (Study: Against Penvoy East Jakarta District

surah ar-Rum verse 21 reads, "spouses from among yourselves for you to live within tranquility: He ordained love and kindness between you. There truly are signs in this for those who reflect".<sup>20</sup>

Legal considerations in deciding cases are very important for judges and include the detailed purpose and objective of the application contents. The posita in the application is adjusted for truth with the testimony of witnesses, the applicant in court, alongside the primary and subsidiary petitions as a series of descriptions. Another consideration involves the evidence and facts in the trial.

From this case, the fact obtained was that the child applying for a marriage dispensation was a girl of 17 years 7 months old, which is below the age of 19 years set by law. The application for a marriage dispensation was due to the close relationship of the prospective bride with the groom, which began in May 2019 until the application was submitted in December 2019. Hence, the rejection of the application was feared to cause the partners to commit acts that are prohibited by religion.

In case Number 157/Pdt.P/2019/PA.Bitg, the panel of judges listened to the statements of the prospective spouses and advised their understanding of the risks of early marriage. This involved explaining the mental, physical, and reproductive unpreparedness, as well as the economic, social, and psychological impacts, which may be due to being spoiled by their parents. Subsequently, these factors can cause disputes and increase the risk of domestic violence. The panel of judges, besides asking for information and advising the prospective spouses, explained the risks that may be experienced by the marriage minors to the applicant or parents. They also stated that the child may be unable to carry the burdens and responsibilities of a wife, especially when accustomed to being pampered.

Therefore, the application for a marriage dispensation was accepted because her future husband was an adult aged 26 years old. He is well-established with a permanent job, which is expected to support the family economy. This economic stability is important, as it is one of the elements that can create a happy atmosphere in family life.<sup>21</sup> Hence, the prospective husband is believed not to abandon his family or burden both parents.

The grant of the application for marriage dispensation item number 157/Pdt.P/2019/PA.Bitg was to avoid the harm that would arise by the marriage postponement. As stated by a member of the panel of judges, Madjibran Tjebbang, the partners are very close and inseparable, signifying that the disapproval of their application is feared to push the partners to commit acts that are prohibited by religion. Also, it will open up the opportunity of underhand marriage (*sirri*), which will negatively impact the wife and children later.<sup>22</sup> Another judge, Uswatul Fikriyah, stated that refusing the marriage

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Nomor: 2173/Pdt. P/2012 and Number: 459/Pdt/P/2007),” *International Journal of Progressive Sciences and Technologies (IJPSAT)* 18, no. 12 (2020): 10–15, <http://ijpsat.ijst-journals.org>.; Muchamad Coirun Nizar, “The Religious Court’s Decisions on Divorce: A Maqāṣid Sharī’a Perspective,” *Ulumuna* 24, no. 2 (2020): 398–416, <https://ulumuna.or.id/index.php/ujs/article/view/408>.

<sup>20</sup> Documents of Marriage Dispensation Case Number 157/Pdt.P/2019/PA.Bitg at the Bitung Religious Court, 2020.

<sup>21</sup> Alexandra Killewald, “Money, Work, and Marital Stability,” *American Sociological Review* 81, no. 4 (August 1, 2016): 696–719, <https://doi.org/10.1177/0003122416655340>.; James M. Raymo et al., “Marriage and Family in East Asia: Continuity and Change,” *Annual Review of Sociology* 41 (August 17, 2015): 471–92, <https://doi.org/10.1146/ANNUREV-SOC-073014-112428>.

<sup>22</sup> “Interview with Madjibran Tjebbang, The Judge of Bitung Religious Court” (Bitung, 2021).

dispensation impact the couple socially and generate insults, reproach, and gossip due to their close relationship.<sup>23</sup>

Based on the facts of the trial and legal considerations, the panel of judges as the examiners and deciding body of the case followed the rule of law by referring to the procedural law applicable in the trial process and the statutory rules or arguments contained in the Qur'an. The reasons were the form of accountability of his decision to the community, which bestowed an objective value. Therefore, the decision of the Panel of Judges at Bitung Religious Court Number 157/Pdt.P/2019/PA.Bitg regarding the marriage dispensation was objective with the consideration of generating more benefits than harms.

This contrasted with case number 157/Pdt.P/2019/PA.Bitg, which was rejected by the Bitung Religious Court judges with the following legal considerations:

- (a) That the panel of judges suggested the reconsideration of the marriage of his child, who was below the age of 19, and reminded the applicant with Article 7 Paragraph (1) of Law no. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage as well as Article 26 Paragraph (1) letter (c) of Law no. 23 of 2002 concerning Child Protection. However, the applicant remained adamant about his decision.
- (b) That the applicant is the biological father of the child for whom marriage dispensation was applied, the panel of judges regarded the applicant to have *legal persona standing in judicio*, as the applicant and his application can be examined and considered further. This is as regulated in Article 6 Paragraph (1) and (2) PERMA No. 5 of 2019 concerning Marriage Dispensation.
- (c) That the main point of the application was a grant of dispensation from the Religious Court to the applicant's male child, named Abdul Rahman Husain bin Safrudin Husain, for marriage. Both partners were presented at the trial for a hearing, following the intent of Article 7 Paragraph (3) UU no. 16 of 2019 and Article 10 Paragraph (1) letters a and b PERMA No. 5 of 2019.
- (d) That the panel of judges listened to the statements of the prospective spouses and advised their understanding of the risks of early marriage. They described the unpreparedness of the child's mental, physical, and reproductive organs, as well as the economic, social, and psychological impact on the child, who may still be spoiled by his parents. This unpreparedness can lead to disputes and heighten the risk of domestic violence. On the advice and explanation of the panel of judges, the couple understood and declared their physical and mental readiness to form a good family.
- (e) The applicant also presented the parents of the prospective bride, both of whom were asked for their statements regarding their child's desire to marry the applicant's child. Hence, the couple was concluded to wish for marriage without force or the involvement of sharia and statutory barriers to their union.
- (f) That the panel of judges concluded that the prospective wife was physically, mentally, and psychologically ready to become a good wife for her future husband based on the information given by the couple, their families, and the facts from the trial.

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<sup>23</sup> "Interview with Uswatul Fikriyah, The Judge of Bitung Religious Court" (Bitung, 2021).



- (g) That the statements of witnesses 1 and 2 of the applicant were facts seen, heard, and experienced and were relevant to the arguments to be proven by the applicant. Therefore, the witness testimony fulfilled the material requirements as stipulated in Article 308 R.Bg and possessed evidentiary power.
- (h) That based on the statements of the couple and their parents, corroborated by evidence P1, P.2, P.3, P.4, P.5, P.6, and P.7, as well as Witnesses 1 and 2, several legal facts were obtained. These were (1) That the applicant's child named Abdul Rahman Husain was 18 years and 3 months old at the time of submitting this application; (2) That Anisah Isnadia and Abdul Rahman have been in a relationship since August 2019 and are inseparable; (3) That there is no prohibition between Anisah and Abdul Rahman against the marriage due to kinship, semenda, sesusuan, or marriage to other people; (4) That Anisah and Abdul Rahman's desire to get married was not due to the coercion of their parents or any other party but purely their will; (5) That based on legal facts, particularly Articles 6 and 7 of Law no. 1 of 1974, which were amended by Law no. 16 of 2019 and Article 15 Paragraph (1) of the Compilation of Islamic Law, the applicant's child fulfilled the requirements for marriage. Also, there were no barriers to marriage between the couple, as stated in Articles 8 to 11 of Law no. 1 of 1974, in conjunction with Articles 39 to 44 of the Compilation of Islamic Law. The only unfulfilled condition was the age of the groom, which was below 19 years old.
- (i) That the underage applicant's child was considered unfulfilling of the requirements for marriageable age by the panel of judges. In addition, based on the examination at the trial, the applicant's child is still encouraged to learn about household readiness in terms of financial, mental, and religious knowledge. Based on the testimony at trial, he was unable to recite the Qur'an or carry out the 5 daily prayers in full. Hence, waiting until he was 19 years old while studying religious knowledge was advised to allow the child to become an imam and a good head of the household for his wife.
- (j) That the prospective wife has a higher education and is older than the applicant's child. Therefore, the panel of judges advised restraint from her desire to marry until her partner was up to 19 years old and could better protect himself from prohibited acts.
- (k) That Article 7 Paragraph (2) of Law no. 16 of 2019 amendments to Law no. 1 of 1974 concerning Marriage explains that following a deviation from the age provisions referred to in paragraph (1), the parents of the male and/or female parties may request a court dispensation on the grounds of urgency, accompanied by sufficient supporting evidence.
- (l) That based on the examination at the trial, the panel of judges found no urgent reasons to grant a marriage dispensation to the applicant's child. Although the parents, including the applicant and those of the prospective wife, seemed to prefer the marriage, the applicant's child seemed able to wait several months until he was 19 years old and ready to marry. Therefore, the element of 'urgent reasons' was not fulfilled in this case.
- (m) That based on the statement of the prospective wife, the applicant's child was not forced by his partner to get married immediately. Therefore, the panel of judges advised the postponement of the marriage for several months until the applicant's child was 19 years old.

- (n) In terms of employment, as stated by the applicant's child, parents, and witnesses at trial, he was a fish seller and joined his parents in the market. Hence, the panel of judges stated that he was not financially independent even though he had a job and income and suggested he learn to sell personally in the market while waiting to reach the age of 19.
- (o) That concerning the minimum age of the applicant's child and the many consequences of underage marriages, such as the potential for divorce due to lack of financial, physical, mental, religious knowledge, etcetera, the panel of judges considered the best step to avoid harm. As a result, the benefits of postponing the marriage for the next few months until the applicant's child reached 19 years old was regarded better, as stated in the *fiqhiyah* rules/ Islamic legal theory, which reads: "Rejecting damage takes precedence over attracting benefit."
- (p) That the juridical-normative and utility reviews of the law stipulate the rejection of the application.
- (q) That without prejudice to the intent of all items of consideration, the jury considered clarifying certain matters that would arise by law, supposing the marriage occurred. A legal marriage leads to the establishment of a civil and inheritance relationship, among others, between the husband and wife. The husband is obligated to provide financial support and religious knowledge for his wife and children born from the marriage. In addition, the wife should serve her husband and avoid marriage with relatives and testimonies for non-divorce cases in court. Marriage also allows civil relations between the husband, wife, and children.<sup>24</sup>

In connection with case number 130/Pdt.P/2020/PA.Bitg, the panel of judges listened to the statements of the prospective spouses and advised them to understand the risks of early marriage, including the mental, physical, and reproductive unpreparedness. They also urged their consideration of the economic and social impacts, which could cause disputes and increase the risk of domestic violence.

The panel of judges conveyed the potential risks of allowing the marriage of minors to the applicant, as he would be unable to carry the burden and responsibilities of a husband. Also, the applicant's son, as a potential husband, earns 50,000 per day as a fish seller working with his father and is considered unable to meet his family's needs.

Therefore, this application for marriage dispensation was rejected because the prospective groom was still a minor of 18 years and 1 month. He was also proven unfit to build a household because his income as a fish seller accompanying his father was insufficient for his family's financial needs. This economic stability is very important, as it is one of the elements that can create a happy atmosphere in a family. He was also lacking from a religious perspective due to his inability to recite the Qur'an and pray five times a day. Meanwhile, Madjibran Tjebbang stated that another reason for the rejection was the proof that his parents wanted their two children to marry immediately, not exactly because of the child's desire. This was because the children were willing to postpone their marriage until the groom was 19 years old. The parents' urge to marry off their children was understandable because of the

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<sup>24</sup> Documents of Marriage Dispensation Case Number 130/Pdt.P/2020/PA.Bitg at the Bitung Religious Court, 2020.

relationship between the children. They observed that though the prospective bride was still a virgin, their relationship was very close and their constant togetherness was feared to cause slander.<sup>25</sup>

According to Uswatul Fikriyah, the marriage dispensation was not granted because the prospective husband seemed unready to assume the economic and religious responsibility as the head of the family. He was still very far from the expectation and could not carry out his obligations as the head of the family.<sup>26</sup>

Based on all the facts of the trial and the legal considerations stated above, the panel of judges who examined and decided the case followed the applicable legal rules. This was conducted by referring to the applicable procedural law in the trial process and the laws and regulations or the arguments contained in the Qur'an.

In this case, the panel of judges did not find any compelling reason to grant a marriage dispensation to the applicant's child. The reason was that the panel of judges considered the parents of the couple to prefer the marriage, while the children seemed capable of waiting until the prospective groom was 19 years old and ready to marry. Therefore, the element of "urgent reason" was not fulfilled.

### **Analysis of the Judges' Considerations in the Marriage Dispensation Cases**

The chairman of the panel of judges had legal considerations towards granting the marriage dispensation, namely, first, the application in case Number 157/Pdt.P/2019/PA.Bitg and parents or guardians were regarded as correct. Although the applicant, that is, the prospective bride's parents was a Protestant Christian and divorced from her Muslim husband, her child was a Muslim. This corresponded to Article 7 of PERMA (Supreme Court Regulations) Number 5 of 2019, which reads, "If there is a difference in religion between the child and the parent/guardian, the application for a marriage dispensation is submitted to the court following the child's religion." This indicates that the applicant was capable of submitting an application. However, this was not a problem in case Number 130/Pdt.P/2020/PA.Bitg because the applicant was a Muslim parent. This led the panel of judges to consider the applicant to possess a legal persona and standing in *judicio*, and further examine and consider her application.

Second, the reasons stated in the trial were obtained from the child, not the parent as the applicant. The goal was to match the reasons between the child and the parent in order to avoid early marriage for very urgent reasons that were based on the parents' desires, rather than the children. For case Number 157/Pdt.P/2019/PA.Bitg, where the marriage dispensation was granted by the panel of judges, the reasons presented in the application letter are similar to those stated by the prospective couple. Although the prospective bride was still below the age of 17 years 7 months, they had been in a relationship from May to December 2019 and were inseparable.

Conversely, the application for a marriage dispensation was not granted in case Number 130/Pdt.P/2020/PA.Bitg because of the differences in the application letter and the information presented regarding the prospective groom's age. In the application letter, he was

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<sup>25</sup> "Interview with Madjibran Tjebbang, The Judge of Bitung Religious Court."

<sup>26</sup> "Interview with Uswatul Fikriyah, The Judge of Bitung Religious Court."

18 years and 1 month, but the information presented contrasted by stating 18 years and 3 months, while for other reasons, the content of the letter submitted by the applicant and the child were similar. Furthermore, the trial proved that the wish to marry immediately was the will of the parents, while the children did not intensely crave the union, as the groom responded with just 'want' when asked by the panel of judges. This strong desire was caused by the fear that the children will commit acts prohibited by religion after observing their relationship, where they often go out together and are inseparable. The third reason was related to the existence of obstacles against marriage. In cases Number 157/Pdt.P/2019/PA.Bitg and Number 130/Pdt.P/2020/PA.Bitg, there were no obstacles to marriage between the groom and the bride, as neither were related by blood, marriage, or breastfeeding.

Fourth, the consideration of benefits and harms of the marriage dispensation. In case Number 157/Pdt.P/2019/PA.Bitg, the panel of judges granted the marriage dispensation because there were more benefits than harm. By using the rule of jurisprudence that "rejecting damage is more important than attracting benefits," alongside Surah al-Nur verse 32 and Surah al-Rum verse 31, the panel of judges accepted the marriage dispensation submitted by the applicants. According to the panel, rejecting the application will cause more harm due to the close courtship relationship that may trigger slander in the community. The benefits were understood by considering the maturity of the prospective groom as a 26-year-old adult with a permanent job as an employee of PT Pertamina Persero and a monthly salary of IDR 5,000,000 plus other income from business trips between IDR 3,000,000 to IDR 10,000,000 per month. Also, the prospective husband was a widower and ready to shoulder and carry the responsibilities as the head of the family as well as be a good parent for his future children.

For case Number 130/Pdt.P/2020/PA.Bitg, the application was ungranted because the son was 18 years 1-month-old, though the prospective wife was 20 years 11 months old. The rejection was regarded as more beneficial than an acceptance because the prospective husband's job of selling fish in the market with his parents earned a fixed daily income of IDR 50,000. Hence, the panel of judges decided that the prospective groom should work independently and separate from his parents. According to the panel of judges, this income is insufficient to cover the household needs, meaning he cannot build a household because economic insufficiency will trigger fights and commotions that can end in divorce. Furthermore, the prospective groom was lacking in the religious aspect, as his inability to recite the Qur'an and pray was proven in the trial. This is very important because the man heads the family, guiding his wife and children. The family is the earliest and first place to instill religious values and parents are role models for their children. This denoted that the failure of the parents to properly practice religion will prevent the appropriate education of their children, leading to the birth of generations that are weak in terms of religion. As a result, the panel of judges suggested that the prospective husband sells independently from his parents, and while waiting to reach the age of 19, he should study religion more deeply to properly become a priest and head of the household.

Law no. 16 of 2019 Article 7 explains that following a deviation from the age provisions, the parents of the male or female can apply a dispensation to the Court on the

grounds of urgency, accompanied by sufficient supporting evidence.<sup>27</sup> However, this law does not explain the constituents of a very urgent reason. The State Gazette of the Republic of Indonesia of 2019 No. 186 concerning the Elucidation of Law no. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage stated that the "very urgent reason" is a situation where there is no other option and marriage is required to occur. The sufficient supporting evidence includes a certificate proving that the ages of the bride and groom are still under the provisions of the law, as well as a certificate from a health worker confirming the parents' statement of urgency.

Since the urgent reasons are not regulated clearly and unequivocally in the law and rules of explanation, the application for a marriage dispensation should be granted. Therefore, the panel of judges was guided by the *fiqh* rule of "rejecting damage takes precedence over attracting benefit" as well as the court evidence in examining the application for marriage dispensation.

Harm should be eliminated and, in the process, should not lead to other forms of harm, either lighter or heavier. Supposing the harm cannot be eliminated except by causing another harm, then the lesser one should be preferred to previous consequence. This will result in the rejection or acceptance of the application for a marriage dispensation, depending on the panel of judges' consideration of the harm.

Meanwhile, *Maslahah al-Mursalah* is the most fertile *ijtihad* to establish a law that has no nash. This led to its consideration as a legal ruling by the majority of scholars, and its embodiment as a benefit that is not supported or canceled by the *syara'*. Al-Thufi, as quoted by Haroen, stated that *maslahah* is an independent proposition that occupies a strong position in establishing the law, despite the support or opposition of Islamic law.<sup>28</sup> Hence, the judge can find and dig the law on a matter filed by the applicant. Wahyudi also mentioned three conditions of *maslahah* that can be used as a method in digging the law, namely correspondence to the will of sharia', the existence of rationality and definition, and the perception of the benefits by many.<sup>29</sup> This last requirement can reduce the likelihood of errors in formulating the law.

The panel of judges also bases their decisions on the evidence presented at the conference. In this evidence, the applicant submits sufficient reasons to the panel examining the case to certify the truth of the events in the letter of application. The legal consideration should follow the arguments and submitted legal evidence, which is required to strengthen the proposition of the application according to the law. These pieces of evidence are, first, a photocopy of the applicant's Identity Card (KTP), the last education of the applicant's child, the Family Card (KK), Birth Act, and the original Letter of Rejection from KUA (Religious Affair Office). The second is witness evidence, where testimony is provided based on facts seen, heard, and experienced by the witness, as well as other occurrences relevant to the propositions that the applicant wishes to prove.

Therefore, the judges' presumption should exist on the application of marriage dispensation besides considering the evidence in the trial. Supposing the *mafsadat* is

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<sup>27</sup> Murni, "The Marriage Age Limit According to Indonesian Law No. 16, 2019 as Effort to Child Protection."

<sup>28</sup> Nasrun Haroen, *Ushul Fiqh* (Jakarta: Logos, 1996).

<sup>29</sup> Yudian Wahyudi, *Maqashid Syari'ah Dalam Pergumulan Politik* (Yogyakarta: Nawesea Press, 2007).

considered greater than the maslahat after the application is granted, the judge's verdict does not grant the application. Such judgment is required to ensure the welfare of a minor, as there are concerns that the permission to marry will impede the household from functioning appropriately due to inadequate care of the household. This especially occurs when the child is still of school age or should still be in school but is burdened with the responsibility as the head of the household or a housewife. Furthermore, the child will be considered unable to solve the problems in their household, which may lead to domestic violence and early divorce.

## Conclusion

The acceptance or rejection of the application for a marriage dispensation by a panel of judges is due to various considerations. In the two cases examined, the judge used the concepts of maslahat (benefits) and mudarat (harms) and only accepted the application when the benefit attained was greater than the harm or vice versa. The judgment was based on the rules of jurisprudence, which is that "rejecting damage takes precedence over attracting benefits," alongside the Qur'an Surah al-Nur verse 32 and al-Rum verse 21. In case Number 157/Pdt.P/2019/PA.Bitg, the marriage dispensation application was accepted with the considerations that the applicant's child had a close relationship with her future husband, the prospective husband had reached adulthood and had a permanent job. Hence, the marriage was to be postponed until the applicant's child reached the age of 19. In contrast to case Number 130/Pdt.P/2020/PA.Bitg, the panel of judges rejected the application with the consideration that the child was not financially independent despite having an income. Therefore, he should learn to sell independently in the market, as a permanent job will support the family economy to create a happy atmosphere in his household. The panel of judges also considered the child unprepared to take economic and religious responsibility as the head of the family and regarded his capabilities as still very far from the expectation.

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