

Dispensation of Marriage Age: Istishlah Analysis

Sarkanto 1*, Sukron Mubarak 2, Muhammed Zaki Tamami 3,

^{*1} Institut Islam Nahdlatul Ulama (INISNU) Temanggung, Indonesia;

^{*2} Institut Islam Nahdlatul Ulama (INISNU) Temanggung, Indonesia;

^{*3} Islam Ilimleri, Selçuk Üniversitesi, Türkiye Institut

¹sarkantoedo@gmail.com; ²mubaroksukron2@gmail.com ; ³zaki.tamami11@gmail.com

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ABSTRACT

Marriage that occurs at too young an age can pose certain risks, such as domestic violence. Law Number 1 of 1974 on Marriage stipulates that the minimum age for marriage is 19 years for men and 16 years for women. However, in special situations, such as premarital pregnancy, an age dispensation for marriage may be granted to couples who have not reached the minimum age set by law. This paper aims to examine the istishlah (public interest) perspective on the minimum age for marriage according to positive law and the Compilation of Islamic Law. It also explores the perspective of istishlah on the dispensation of marriage age. The research method used in this paper is library research, where the study is conducted by gathering data or scholarly literature related to the topic. In-depth analysis of the research object is carried out through critical examination of relevant sources, focusing on addressing fundamental issues. Considerations of *maslahah mursalah* (unrestricted public interest), which emphasize benefits and the avoidance of harm, are central. In Islamic law, the minimum marriage age can vary depending on the social and cultural context, as Islam does not explicitly set a minimum age. However, the minimum age in the Compilation of Islamic Law (KHI) is determined based on considerations of public welfare and the prevention of harm. The granting of marriage dispensations prioritizes the avoidance of harm over the pursuit of certain family benefits or welfare.

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Introduction

Marriage that is shari'ate is a form of worship following the Sunnah of the Prophet, which aims to form a family that is *sakinah mawadah wa rhmah* and obtain good offspring so that they can prosper in old age, and also to preserve an offspring and strengthen a relationship between fellow human beings which is the cause of ensuring peace full of affection (Firman Affandi, 2016) there are several hadiths from the Prophet Muhammad PBUH, which encourage Muslims to get married, including: "*Marriage is my sunnah, whoever does not practice my sunnah, is not part of me. Get married, because I feel proud of the number of you in front of all the*

people."

Wedding planning should be done carefully by men and women because in later life there are many problems that result in a messy household, one of the reasons is because of marriage at a young age. The age limit in marriage is not regulated concretely in Islamic law, both which regulates the minimum limit and the maximum limit, especially in religious provisions. (Mardi Candra, 2018) In the Qur'an, it is emphasized that those who want to get married must be people who have sufficient readiness and *capability* (Supyan & others, 2023). The words of Allah SWT in Q.S. *An-Nuur* (24) verse 32: *"And marry those who are still single among you and also those who are worthy (to marry) from your servants, both male and female. If they are poor, God will empower them with His grace. Allah is Vast and All-Knowing"*.

The meaning of the above verse in the meaning of the word "who is fit to marry" according to some scholars means: "who is mentally and sapiritually able to build a household" (M.Quraish Shihab, 2005). The application for marriage dispensation in its implementation is an absolute authority given by law to the Religious Court in examination, deciding and in its settlement. Where this authority is stated in Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts (Hamda Sulfinadia, 2020).

The age of marriage dispensation is given as a legal guarantee for individuals in need, regardless of whether it has negative benefits or risks, so it is situational (Hanif, 2022). An example is a marriage dispensation that is granted when a person has not reached the age limit set by law, but is given as an exception when the age limit will be violated. The granted age of marriage dispensation permit aims to provide clarity in the law for individuals who need it, regardless of whether it has benefits or potential harms, with a more specific and detailed approach (Kamarusdiana & Sofia, 2020).

Method

The writing method applied in this work is literature research or *library research*, where writing is carried out by collecting data or scientific literature related to the topic of writing. With a descriptive analysis approach that aims to illustrate the current situation through the presentation of research findings derived from data or documents (Piter Mahmud Marzuki, 2010).

Results and Discussion

Age Limit According to Positive Law

Marriage in Islam is not just an ordinary civil agreement, but has very important religious value. Therefore, in the Compilation of Islamic Law, it is affirmed as a strong contract (*miitsaqan ghalidhan*) that must be carried out as a form of obedience to Allah's commands, and its implementation is worship. Marriage is one of the religious commandments that can be carried out immediately. This is because marriage can help reduce the chances of sinful acts, such as adultery, and can maintain obedience to religious rules (Rofiq, 2000).

Marriages that are lived with maturity can produce good and healthy offspring, which ultimately contribute to the creation of happiness in marriage. On the other hand, if a person is emotionally and mentally unstable, it can lead to disharmony in the relationship, even leading to divorce between husband and wife. Therefore, it is important for individuals to reach a sufficient level of maturity before deciding to get married. This maturity includes mental and emotional maturity, as well as the ability to deal with various challenges in marriage. Positive law has established the age limit for marriage in Indonesia in accordance with the Law, where the laws governing the age limit for marriage are: a) Law No. 1 of 1974, contained in article 6 paragraph 7 and b) Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. Positive law has set the age limit for marriage in Indonesia in accordance with Law No. 16 of 2019. According to the law, men must be at least 19 years old and women must also be at least 19 years old to be able to marry. This aims to provide certainty and benefits in marriage.

These rules are set for the benefit and interests of individuals and society. Therefore, it is important for people to comply with the applicable laws to avoid negative impacts and problems that may arise from early marriage (Rahmawati, 2020). Compilation of Islamic Law (KHI), Article 15 sets the same age limit for marriage as Law No. 16 of 2019, which is at least 19 years old for men and women. However, the additional reason in Article 15 Paragraph 1 states that this age limit is set for the benefit of the family and household. Thus, both in the Civil Code and the Compilation of Islamic Law, the age limit of marriage has been set to protect the interests of individuals and families (Hilmy, 2018).

Age Restrictions According to the Compilation of Islamic Law

There are 32 verses in the Qur'an that talk about marriage, but there is no verse that specifically mentions the age limit for marriage. One of them is found in Surah Al-Nur verse 32: *"Marry those who are still single among you and also those who are worthy (to marry) from your servants, both male and female. If they are poor, God will empower them with His grace. Allah is Vast and All-Knowing."*

In Ibn Kathir's interpretation, this verse is interpreted as a command to marry, as is the view of some scholars who view that marriage is recommended for those who have the ability. That the word *"washâlihîn"* refers to a man or woman who is able to carry out the responsibilities of husband and wife, including having good health, property, and so on. Meanwhile, according to Quraish Shihab, the interpretation of this verse is that *"washâlihîn"* refers to an individual who has the mental and spiritual readiness to build a family. This means that preparation for marriage does not only involve material factors, but also mental and spiritual readiness for both the future husband and wife-to-be. This is because marriage involves more than just financial readiness, but it also requires emotional and spiritual readiness.

In classical fiqh books, or often known as the "yellow book," young marriage or youth marriage is referred to as *"nikah ash-shaghir"* for men and *"nikah ash-shaghirah"* for women, while the opposite is *"al-kabir"* for men and *"al-kabirah"* for women. However, in contemporary jurisprudence, the term used to refer to young marriage is *"azzawaj al-mubakkir"* or "early marriage" (Muhammad & Kodir, 2001). The term *"shaghir"* or *"shaghirah"* literally means small. However, in this context, the term refers to men and women who have not yet reached puberty. In men, puberty is characterized by *ihtilam*, which is the release of sperm (semen), either in a dream or a conscious state. Meanwhile, in women, puberty is marked by menstruation or menstruation, which in fiqh shafi'i can occur at least at the age of 9 years. The period of puberty for women can also be determined by pregnancy. If there are no such signs, then puberty/puberty will be determined based on age. Abu Hanifah argued that the age of puberty for men is 18 years, while for women it is 17 years. However, according to Husayn Muhammad, groups such as Abu Yusuf, Muhammad bin Hasan, and as-Shafi'i stated that the age of 15 years is a sign of puberty, for both men and women (Muhammad & Kodir, 2001).

In the Tafsir of Ayat al-Ahkam, it is stated that a child is said to be puberty-born if a man has dreamed and ejaculated, as has been agreed by some scholars. For boys, this wet dream is considered a sign that he has reached puberty or adulthood. Meanwhile, for girls, the limit of puberty is marked by two things, namely if she is pregnant or if she has a period (menstruation). (Muhammad Alî al-Shâbûny, 1999). The Qur'an surah an-nisa' verse 6 states: *"Test the orphans (in terms of arranging property) until they are old enough to marry. Then, if according to your judgment they are clever, give them their wealth. Do not eat them (orphans' property) beyond the limits of propriety and (do not haste (spend them) before they are mature. Whoever is able, then let him refrain from eating the orphan's property, and whoever is poor, let him eat it in a good way. Then, when you hand over the property to them, you shall have witnesses. Allah is sufficient as a watchman"*

Based on the interpretation of the above verse, there is a belief that a person's maturity can be shown through dreams (wet dreams) and rusydan (the appearance of hairs in the genital and armpits area). However, it is important to note that rusydan and chronological age are not always in line and are difficult to determine precisely. It is possible that a person who has dreamed does not necessarily have a rusydan that is in accordance with mature and wise actions. The Scientific Dictionary states that maturity (truth) has become clear or real, indicating that in reality, maturity is not just about dreams or rusydan. Maturity involves the mental, emotional, and behavioral maturity that can be observed from a person's actions and attitudes in daily life. True maturity encompasses many aspects and is more determined through the overall observation of a person's behavior and interactions in life (Partanto & Al Barry, 1994).

The limit of maturity (*puberty*) for a child is determined by a certain age, but sometimes it is also marked by certain events. According to the Hanafi view, the sign of puberty for a man is when he experiences dreams and the discharge of semen, while for women, the sign of puberty is when he experiences menstruation (menstruation). However, if there are no such signs, then the limit of puberty for men is when they reach the age of 18, and for women it is when they reach the age of 17. Imam Mâlik's view states that puberty is characterized by the absolute discharge of semen in a state of tranceness or sleep,

or by the growth of some hairs on the limbs. Meanwhile, according to Imam Shafi'i, the limit of puberty is when men reach the age of 15 years and women reach the age of 9 years. The opinion of the Hanbali view states that for men, the sign of puberty is when they have a dream or reach the age of 15 years, while for women, the sign of bâligh is when they experience menstruation (Al Juzairi, n.d.). It is also said that women who have reached the age of puberty can understand the meaning of pleasure and realize that her husband has a role in protecting her. Therefore, if she refuses to eliminate the flaws that exist in her, it can be interpreted that she cares less about her husband and comfort, preferring to remain in her original state. However, in women who are still in infancy, such an understanding has not yet formed, and the responsibility for it lies with the guardian (Al Juzairi, 1981).

The Imamiyah stipulates that the age of puberty for boys is fifteen years and girls for nine, based on the following hadith of Ibn Sinan: *Meaning: "When a girl has reached the age of nine, then her property is handed over to her, her affairs are considered permissible, and criminal law is carried out on her rights and against her in full."*

Based on the explanation above, it can be understood that the age of 15 is considered the beginning of adulthood for boys. At this age, it is common for boys to have had wet dreams or to have a semen leak. Meanwhile, for women, the age of 9 years old in some areas such as Medina is considered the beginning of adulthood. This is based on Aisha's experience when she married the Prophet Saw., which is associated with a hadith that states that there are three signs of adulthood (*puberty*), namely reaching the age of 15 years for men and experiencing menstruation (menstruation) at the age of 9 for women. In this context, it is also noted that the Prophet (peace and blessings of Allaah be upon him) commanded Muslims to educate their children to start praying at the age of seven, and if the child refused to perform the prayer, he could be given a light spanking at the age of ten. It should be noted that this view may differ in different sects and can be influenced by tradition and beliefs (A. Rofiq, 2000).

The fukaha argue that a person's maturity can be determined based on the characteristics of physical changes that indicate that a person is ready to get married. In general, adulthood can be determined based on age and signs. In men, the sign of maturity is when he experiences wet dreams, which are the discharge of semen either consciously or

not. Meanwhile, in women, the sign of maturity is when she experiences menstruation or menstruation, which can occur at the age of 9 years according to the view of Shafi'i fiqh. In addition, women are also considered adults if they are pregnant (pregnant). However, if there are no such signs, then maturity is determined based on age. Signs of a person's maturity can also be seen from the loudness of the voice, the growth of armpit hair, and the growth of coarse hair around the genitals. Usually, maturity in males begins to be seen around the age of 15, and in females around 9 years of age. However, if the age has passed and no signs of maturity have appeared, then for men and women it is expected to wait until they reach the age of 15 years (Dedi Supriyadi, 2011.).

Istislah's View of the Minimum Age of Marriage According to Positive Law

In the Marriage Law, the age limit for marriage has been clearly determined. Previously, in Law No. 1 of 1974, the age limit for marriage for women was 16 years and for men was 19 years. However, changes occurred through Law No. 16 of 2019, where the age limit for marriage was equalized to 19 years for both men and women. This change was triggered by the urgency to remove the age limit distinction between men and women in marriage, because the distinction is considered contrary to the principle of equality in the eyes of the law as stipulated in Article 28 D paragraph (1) of the 1945 Constitution.

In the author's view, if it is related to the concept of *maslahah* theory, the marriage law, whether law no. 1 of 1974 or law no. 16 of 2019, has been included in the realm of *maslahah mursalah*, because it has functioned about the requirements of *maslahah mursalah*, including: it will really bring benefits to reject harm and has referred to the public interest not personal interests (Satria Efendi, 2017). The adjustment of the marriage age to 19 years is in accordance with the principles contained in the Islamic legal theory of *maslahah mursalah*, because it considers human needs in the context of changing times, without violating the principles of Islamic law. Although Islamic law does not outline the minimum age limit for marriage, this religion provides a standard for individuals who will marry, provided that the person has met the status of *mukallaf* (legal ability) (Amrullah Hayatudin, 2021).

Istishlah's View of the Minimum Age of Marriage According to the Compilation of Islamic Law

Setting the age limit for marriage is very important. It is used as a parameter to ensure that each individual has reached the required physical and mental maturity. The concept of the minimum age limit for marriage in the context of Islamic law has different variations. Some scholars say that the minimum age limit for marriage is when a person reaches puberty, which is characterized by wet dreams for boys and menstruation for girls. On the other hand, several other scholars determine the minimum age limit for marriage not only based on physical characteristics, but also emphasize mental and emotional maturity. So, basically, scholars do not establish a rigid minimum age limit for marriage, which means that the age of the bride-to-be is not always an obstacle to the validity of the marriage, even if they have not yet reached puberty (Akhmad Shodikin, 2019).

According to the author's view, the majority of Islamic jurists from the Shafi'i and Hambali' schools, as well as most of the fuqaha', are of the opinion that the age of puberty is 15 years for both men and women. On the other hand, according to Abu Hanifah, the age of puberty for men is 18 years and for women is 17 years. Meanwhile, according to Malik, the age of puberty is 18 years for both genders, both men and women. (Akhmad Shodikin, 2019) Although Islamic law does not explicitly set a minimum age limit for marriage, Islamic law implicitly expects prospective married couples to be mentally, physically, and psychologically ready, and to have reached maturity and an understanding of the meaning of marriage as a form of worship (Mughniyah, 2015). The principles of Islamic law are used to establish new laws that are in accordance with the interests of the ummah. In the context of setting the minimum age limit for marriage, *istishlah* can be a factor in favor of setting the age limit of 19 years. But it should be noted that the establishment of a minimum age limit for marriage is a complex issue that requires consideration of a variety of factors, and *the istish view* is only one aspect of the decision-making process (Nasution, 2019).

Dispensation of Marriage Age in the Perspective of Istishlah

The term "law" comes from the Arabic word "*al-h ukm*," which etymologically means "to decide" or "to determine." (Sumarjoko et al., 2018). Within the framework of Islamic law,

there are several principles or rules related to granting dispensation in certain situations. This means that there are recognized guidelines or guidelines in Islamic law that allow a person to be given permission to do something that might normally be prohibited or strictly regulated.

In this context, "among them" indicates that there are some such principles or rules that can be found in the norms of Islamic law, Therefore, we realize that the issue of Islamic law in this context is a modern problem that needs to be addressed with a realistic approach. In applying ushul fiqh, Islamic law scholars need to have the ability to filter and analyze various references to Islamic law in order to face challenges and answer contemporary problems that arise today and in the future (Sariyekti, 2022). for example, the problem regarding the submission of an application for age dispensation in marriage at the religious court.

The theory of *istishlah* with the concept of *mashlahah mursalah* which is covered in the principles of fiqh and taken as a consideration in granting marriage dispensation is to prioritize the avoidance of harm which is more important than achieving benefits. In other words, when faced with two options between avoiding harm or mafsadat on the one hand and achieving benefit or goodness on the other, the top priority is to avoid harm rather than to take actions that might result in some benefit or goodness.

Legal facts are obtained by the Judge through evidence submitted during the trial, as in the case of dispensation, the evidence used can be in the form of letters, witness statements, or statements from the parties involved. In the case of marriage dispensation after regulation, there is a legal obligation to present all parties involved, including the applicant, the applicant's child, the prospective spouse, and the parents/guardians of the prospective spouse. The purpose of these parties is to advise whether marriage should be postponed until the appropriate age is reached, considering the impact of marriage at a young age, economic issues, and other considerations.

Saat Hakim Pengadilan Agama merumuskan keputusan mengenai permohonan dispensasi pernikahan yang diajukan oleh pemohon, tentu saja dia mempertimbangkan berbagai faktor. Salah satunya adalah menganalisis konsekuensi yang mungkin timbul

apabila permohonan tersebut disetujui atau ditolak. Pertimbangannya melibatkan pertimbangan apakah keputusan tersebut akan memberikan manfaat yang lebih besar (masalahah) atau sebaliknya, akan membawa dampak yang lebih merugikan (madharat). Dalam proses menilai dampak positif dan negatif, Hakim mengumpulkan informasi dari berbagai sumber, termasuk surat-surat dan keterangan dari pihak terkait atau saksi (Rahmah & Ridho, 2023).

This dispensation is absolute is the dimension of its benefits, according to the five principles and objectives of establishing sharia' (*al dlaruriyat al khams*). Under certain conditions, sometimes the fulfillment of *al-dlaruriyat al khams* is still *mujmal*, even seemingly out of sync with each other, for example in the case of premarital pregnancy in a woman under the age of 19, giving a marriage license ruling can be considered as saving the soul (*hifdz al nafs*) For the woman from social stigma that can lead to depression, as well as for the safety of the fetus from potential abortion acts. However, at the same time, giving permission to marry can also be considered to be in conflict with the principle of maintaining religion (*hifdz al din*) because it seems to allow adultery. Ignoring the potential of madlarat as mentioned above is the same as disputing the sharia'. In fact, anticipating madlarat must take precedence (*dar'ul mafasid muqaddamun 'ala jalb al mashalih*), in fact, in the case of marriage dispensation to teenagers around 17 years old who have reached puberty, are educated at the high school level, and can already work to earn a living can be categorized as *mashlahah mu'tabaroh*. This is based on the sociological condition of Indonesian society in general, where teenagers with such ages and criteria can already be responsible in making life decisions.

In the current context, *istishlah* is not only allowed, but must be done so that Islamic law remains relevant and fulfills the five principles and objectives of the determination of Islamic shari'a. The process of observing, weighing, and deciding the level of *mashlahat* and *madlarat* for the prospective bride under the age of 19 according to the context that encompasses it is what is done by the judge, which in fiqh language is called the *istishlah* method (Adila, 2020). The decision to determine the level of *mashlahat* and *madlarat* must be made comprehensively from two sides, namely through the process of deepening the postulates (*istinbath*) by looking at the main references (*dilalah al nash*) that contain the

regulation of age criteria in marriage, as well as through the process of deepening empirical cases (*istiqla'*) by observing the individual condition of the two brides-to-be, the social conditions of the family and the society where the bride and groom live (A. Z. Rofiq, 2021).

Conclusion

The minimum age limit for marriage in KHI is justified because it is based on considerations of benefits and prevention of harm. This age limit is intended to protect the interests of children and prevent the occurrence of various problems that can harm children, except in emergencies, such as: Life-threatening emergencies, Emergencies that threaten honor. An application for a marriage dispensation can be justified if it is necessary to prevent harm such as pregnancy out of wedlock, but the application for a marriage dispensation must be made with careful consideration and based on strong evidence. In other words, granting marriage dispensation prioritizes avoiding harm rather than doing actions that might result in some benefit or good.

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