

Reconstructing the Legal Limits of *Itsbat Nikah*: Dissenting Opinion, Child Marriage, and Doctrinal Development in Indonesian Islamic Family Law

Rekonstruksi Batas Hukum Itsbat Nikah: Pendapat Berbeda Hakim, Perkawinan Anak, dan Pengembangan Doktrin Hukum Keluarga Islam di Indonesia

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Abstract. Unregistered Muslim marriage in Indonesia creates a persistent tension between religious validity and state legal recognition, especially when the marriage was conducted while one party was underage and no prior marriage dispensation was obtained. This article examines Religious Court of Pasangkayu Decision No. 143/Pdt.P/2021/PA.Pky by positioning the dissenting opinion as the main doctrinal entry point for reconstructing the limits of *itsbat nikah*. The study uses normative legal research with statutory, case, and conceptual approaches. The court decision is treated as primary legal material containing legal facts, evidentiary assessment, judicial reasoning, interpretation of norms, majority reasoning, dissenting opinion, and legal conclusions. The article finds that the majority opinion reflects a post-factum protection model grounded in Islamic validity, marital continuity, administrative necessity, and children's civil status. However, the dissenting opinion provides the article's central novelty by formulating a preventive legality model that challenges the use of *itsbat nikah* as a retroactive substitute for marriage dispensation. The dissent shows that underage unregistered marriage cannot be treated as a mere registration defect because it implicates statutory safeguards against child marriage. Building on this dissenting reasoning, the article proposes a five-criteria doctrinal standard: Islamic validity, statutory legality, administrative necessity, child protection, and mafsadah-maslahah moral-hazard assessment. The article concludes that dissenting opinion can function as a source of doctrinal development in Islamic family law by limiting *itsbat nikah* without abandoning protection for vulnerable family members.

Keywords: Child Marriage, Dissenting Opinion, Islamic Family Law, Marriage Dispensation, *Itsbat Nikah*.

Abstrak. Perkawinan Muslim yang tidak tercatat di Indonesia menimbulkan ketegangan antara keabsahan menurut hukum Islam dan pengakuan hukum negara, terutama ketika perkawinan dilakukan pada saat salah satu pihak masih di bawah umur dan tidak didahului dengan dispensasi kawin. Artikel ini mengkaji Penetapan Pengadilan Agama Pasangkayu Nomor 143/Pdt.P/2021/PA.Pky dengan menempatkan dissenting opinion sebagai pintu masuk doktrinal utama untuk merekonstruksi batas-batas *itsbat nikah*. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan, pendekatan kasus, dan pendekatan konseptual. Putusan pengadilan diperlakukan sebagai bahan hukum primer yang memuat fakta hukum, penilaian pembuktian, penalaran hakim, interpretasi norma, pertimbangan mayoritas, pendapat berbeda, dan kesimpulan hukum. Artikel ini menemukan bahwa pendapat mayoritas mencerminkan model perlindungan hukum pasca-peristiwa yang bertumpu pada keabsahan perkawinan menurut hukum Islam, keberlangsungan relasi perkawinan, kebutuhan administratif, dan status keperdataan anak. Namun, dissenting opinion menjadi kebaruan utama artikel ini karena menawarkan model legalitas preventif yang mengkritik penggunaan *itsbat nikah* sebagai pengganti retroaktif atas dispensasi kawin. Pendapat berbeda tersebut menunjukkan bahwa perkawinan bawah umur yang tidak tercatat tidak dapat dipandang semata-mata sebagai cacat administratif, karena berkaitan langsung dengan perlindungan hukum terhadap anak dan pencegahan perkawinan anak. Berdasarkan penalaran dissenting tersebut, artikel ini menawarkan standar doktrinal lima kriteria: keabsahan menurut hukum Islam, legalitas perundang-undangan, kebutuhan administratif, perlindungan anak, serta penilaian mafsadah-maslahah dan risiko moral hazard. Artikel ini menyimpulkan bahwa dissenting opinion dapat berfungsi sebagai sumber pengembangan doktrin hukum keluarga Islam dengan membatasi penggunaan *itsbat nikah* tanpa mengabaikan perlindungan terhadap anggota keluarga yang rentan.

Kata Kunci: Pernikahan Anak, Dissenting Opinion, Hukum Perkawinan Islam, Dispensasi Perkawinan, *Itsbat Nikah*.

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INTRODUCTION

Unregistered Muslim marriage in Indonesia reflects a persistent tension between religious validity and state legal recognition. A marriage may be regarded as valid under Islamic law when its essential pillars and requirements are fulfilled, yet it may remain legally vulnerable when it is not registered before the competent state authority. This gap affects not only administrative recognition but also the civil status of spouses and children, including access to marriage certificates, birth certificates, inheritance claims, and other family-related legal rights. Within this context, *itsbat nikah* functions as a judicial mechanism for confirming the legal status of an unregistered marriage before the Religious Courts. However, when *itsbat nikah* is requested for a marriage involving an underage party, the issue becomes more complex because the court must balance post-factum family protection with the statutory framework on marriage registration, minimum age of marriage, and marriage dispensation.¹

Recent scholarship consistently identifies *itsbat nikah* as the principal mechanism through which Religious Courts legalize marriages that have been conducted according to Islamic law but lack official registration.² Through this judicial determination, couples may obtain a marriage certificate and secure access to population administration, including family cards and birth certificates.³ Scholars therefore view *itsbat nikah* as a crucial instrument of legal certainty because unregistered marriages are often treated as legally invisible under state law, leaving spouses and children without enforceable civil status.⁴ Its protective function is particularly evident where women and children are deprived of maintenance, inheritance, marital property rights, legal

¹ Daffa A. Utama, Endah Pujiastuti, and Dian Septiandani, “Penerbitan Kartu Keluarga Bagi Pasangan Nikah Siri Dan Akibat Hukumnya Terhadap Para Pihak,” *Jurnal Usm Law Review* 5, no. 2 (2023): 819–31, <https://doi.org/10.26623/julr.v5i2.5922>; Euis Nurlaelawati and Stijn C. v. Huis, “The STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA: INTERACTIONS BETWEEN ISLAMIC, ADAT, AND HUMAN RIGHTS NORMS,” *Journal of Law and Religion* 34, no. 3 (2019): 356–82, <https://doi.org/10.1017/jlr.2019.41>.

² Lathifah Munawaroh, Ahmad Munif, and Ahmad Rofiq, “Disharmony in Sirri Marriage Registration Regulations on Family Cards: A Study of Ministry of Home Affairs Regulation No. 9/2016,” *Fiat Justisia Jurnal Ilmu Hukum* 17, no. 1 (2023): 91–106, <https://doi.org/10.25041/fiatjustisia.v17no1.2851>.

³ Dian Mustika and Siti Marlina, “Integrated Marriage *Itsbat*: Analyzing the Polemics Behind Its Implementation,” *Mazhabib*, 2019, 44–75, <https://doi.org/10.21093/mj.v18i1.1344>.

⁴ Andi Zainuri, Ahmad Muslimin, and Ahmad Mukhlisin, “Problems of Sirri Marriage and Prisoners: A Case Study in Sukadana, East Lampung, Indonesia,” *El-Usrab Jurnal Hukum Keluarga* 6, no. 2 (2023): 335, <https://doi.org/10.22373/ujhk.v6i2.17487>.

paternity, and access to civil documentation.⁵ However, this remedial value generates a serious doctrinal dilemma when *itsbat nikah* is used for underage unregistered marriages. Although Law No. 16 of 2019, following Constitutional Court Decision No. 22/PUU-XV/2017, equalized the minimum marriage age for men and women at nineteen as a legislative response to gender equality and child protection concerns,⁶ scholarship shows that this reform has been followed by a sharp increase in marriage dispensation applications before Religious Courts.⁷

Indonesian family law constructs minimum-age rules, marriage dispensation, and marriage registration as interconnected preventive mechanisms against child marriage. The minimum-age requirement establishes the substantive threshold for marriage, while dispensation functions as a judicially supervised exception intended to assess urgency, the best interests of the child, and potential risks before an underage marriage is allowed.⁸ However, this preventive architecture becomes vulnerable when underage couples marry informally and later seek *itsbat nikah* as a retroactive legalization pathway. Previous studies show that the availability of *itsbat nikah* may weaken compliance with the dispensation requirement and create incentives to bypass statutory safeguards, particularly where communities regard unregistered marriage as a practical alternative when formal authorization is difficult, delayed, or refused.⁹ This problem is not merely administrative, because child marriage has

⁵ Agustin Hanapi and Edy Yuhermansyah, “Urgency of Marriage Registration for Women and Child Protection in Gayo Lues District,” *Samarah Jurnal Hukum Keluarga Dan Hukum Islam* 4, no. 2 (2020): 528, <https://doi.org/10.22373/sjkh.v4i2.7942>.

⁶ Nasrullah Nasrullah, Wawan Andriawan, and Musawar Musawar, “The Character of Legal Products in Indonesia: A Study of Changes to the Marriage Law From a Political-Law Perspective,” *Samarah Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 1 (2024): 602, <https://doi.org/10.22373/sjkh.v8i1.17302>.

⁷ Daud Rismana et al., “The Controversy on the Minimum Age for Marriage in Indonesia: Factors and Implications,” *Jsdri* 2, no. 1 (2024): 53–66, <https://doi.org/10.53955/jsdri.v2i1.21>.

⁸ Rifqi K. Wazzan et al., “Itsbat Nikah: Legalizing Marriage Outside the Record in Indonesia,” *International Review of Social Sciences Research* 4, no. 2 (2024): 29–45, <https://doi.org/10.53378/353057>.

⁹ Nurul I. Idrus, “Problematizing the Minimum Age of Marriage: The State and Local Perspective on Marriage Dispensation in South Sulawesi,” *Jurnal Humaniora* 34, no. 2 (2022): 159, <https://doi.org/10.22146/jh.73661>; Abdul H. Syawqi et al., “Law Omission in Muslim Society: Inquiring Citizen Rights in the Administration of Islamic Family Law in Madura Indonesia,” *Samarah Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 3 (2023): 1757, <https://doi.org/10.22373/sjkh.v7i3.20048>.

broader implications for gender equality, education, health, and the civil protection of women and children.¹⁰

Previous studies provide important foundations but remain limited in several respects. Much of the literature frames *itsbat nikah* primarily as a restitutive mechanism to protect women and children from the civil consequences of unregistered marriage.¹¹ Another body of scholarship focuses on marriage dispensation after Law No. 16 of 2019, especially the rise of applications, judicial discretion, and the weakness of PERMA No. 5 of 2019 in defining “urgent reasons”.¹² A further strand discusses the socio-legal drivers of child marriage and unregistered marriage, including legal pluralism, patriarchal structures, and administrative barriers.¹³ Yet these studies rarely integrate *itsbat nikah*, underage marriage, absence of prior dispensation, and judicial dissent into a single doctrinal analysis. This article addresses that gap by examining Religious Court of Pasangkayu Decision No. 143/Pdt.P/2021/PA.Pky as a judicial research object.

This article uses the dissenting opinion as a doctrinal entry point to reconstruct the limits of *itsbat nikah* in underage unregistered marriage cases. The dissent is not treated merely as a procedural disagreement with the majority, but as a reform-oriented judicial argument that exposes the risk of transforming *itsbat nikah* into a post-factum substitute for statutory child-marriage safeguards. From this perspective, the majority opinion remains important as a contrasting model of post-factum legal protection, while the dissenting opinion becomes the central analytical basis for examining how preventive legality, minimum-age regulation, marriage dispensation, and child protection should limit judicial legalization. The novelty of this article therefore lies in

¹⁰ Nuruddin Nuruddin, Aisyah W. Jannah, and Dwi Martini, “Evaluating the Effectiveness of Age Restriction on Marriage in Indonesia,” *Volksgeist Jurnal Ilmu Hukum Dan Konstitusi*, 2023, 313–30, <https://doi.org/10.24090/volksgeist.v6i2.9844>.

¹¹ Ramdani W. Sururie and Dio A. Wicaksana, “Legal Protection of Women in Unregistered Inter-Citizen Marriage,” *Al-Adalah* 16, no. 2 (2020): 355–74, <https://doi.org/10.24042/adalah.v16i2.5361>.

¹² Haniah Ilhami, Destri B. Nugraheni, and Tata Wijayanta, “Child Protection Post the New Marriage Law: How Indonesian Religious Court Interpreting the Urgency in Child-Age Marriage,” *Jurnal Ius Kajian Hukum Dan Keadilan* 11, no. 1 (2023): 75–95, <https://doi.org/10.29303/ius.v11i1.1054>.

¹³ Mies Grijns and Hoko Horii, “Child Marriage in a Village in West Java (Indonesia): Compromises Between Legal Obligations and Religious Concerns,” *Asian Journal of Law and Society* 5, no. 2 (2018): 453–66, <https://doi.org/10.1017/als.2018.9>.

repositioning dissenting opinion as a source of doctrinal development in Indonesian Islamic family law and as a basis for formulating more precise limits on *itsbat nikah*. Accordingly, this article aims to examine how the majority opinion constructs the legal basis for granting *itsbat nikah* in an underage unregistered marriage, assess the contribution of the dissenting opinion in defining the doctrinal limits of *itsbat nikah*, and formulate a doctrinal standard for Religious Courts in adjudicating underage unregistered marriage cases.

METHODOLOGY

This study employs normative legal research, because it examines legal norms, judicial reasoning, and the doctrinal implications of a court decision within Indonesian Islamic family law. This article applies statutory, case, and conceptual approaches. The statutory approach examines the relationship between the Marriage Law, the Compilation of Islamic Law, Religious Court jurisdiction, marriage registration, minimum-age regulation, and marriage dispensation. The case approach reconstructs the reasoning of the Religious Court of Pasangkayu in Decision No. 143/Pdt.P/2021/PA.Pky, while the conceptual approach evaluates legal certainty, substantive justice, preventive legality, child protection, and administrative recognition.

The principal primary legal materials consist of Religious Court of Pasangkayu Decision No. 143/Pdt.P/2021/PA.Pky and statutory regulations relevant to marriage validity, marriage registration, marriage dispensation, Religious Court jurisdiction, and child protection. These include Law Number 1 of 1974 concerning Marriage, as amended by Law Number 16 of 2019 concerning the Amendment to Law Number 1 of 1974 concerning Marriage; Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage; Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law; Law Number 7 of 1989 concerning Religious Courts, as amended by Law Number 3 of 2006 and Law Number 50 of 2009; Supreme Court Regulation Number 5

of 2019 concerning Guidelines for Adjudicating Marriage Dispensation Applications; and Law Number 23 of 2002 concerning Child Protection, as amended by Law Number 35 of 2014. These materials provide the normative basis for examining whether *itsbat nikah* may serve as a corrective mechanism for administrative non-registration or whether, in underage marriage cases, it risks bypassing the statutory framework on marriage dispensation and child protection. These materials were collected through document study and legal literature review, then analyzed qualitatively through content analysis and case-based judicial reasoning.

RESULT AND DISCUSSION

Judicial Reasoning on *Itsbat Nikah* Between Post-Factum Protection and Preventive Legality

1. Majority Reasoning and the Logic of Post-Factum Legal Protection

The majority reasoning in Decision No. 143/Pdt.P/2021/PA.Pky demonstrates a judicial logic that may be described as post-factum legal protection: the court did not merely examine whether a marriage had been formally registered, but reconstructed whether an existing marital relationship, already socially and religiously performed, deserved state recognition in order to prevent further civil vulnerability. The applicants had married religiously in 2016, when the female applicant was fifteen years old, and later sought *itsbat nikah* in 2021 to obtain a marriage certificate and related civil documents. The majority granted the petition after finding that the marriage had fulfilled the Islamic pillars and conditions, that no prohibited relationship existed between the parties, that the parties had continued living together as husband and wife, and that two children had been born from the union. The ratio decidendi therefore rests on a remedial legal construction: where the court is convinced that a marriage was valid under Islamic law and continues to exist in social reality, *itsbat nikah* may function as a judicial bridge between religious validity and state administrative recognition.

The majority's construction of legal facts also reveals a specific evidentiary logic. The court relied on the applicants' statements, documentary evidence, and two witness testimonies to establish the occurrence of the marriage, the identity of the parties, the role of the wali, the presence of witnesses, the amount of mahar, the absence of blood, marital, or fosterage impediments, and the continuity of the relationship. This fact construction is significant because *itsbat nikah* adjudication is declaratory rather than constitutive: the court declares that a valid marriage has existed, rather than creating a new marriage. Gani and Nisrina similarly describe *itsbat nikah* as the ratification of a marriage already held according to Islamic sharia, while Munthe and Hidayani note that the implication of a granted petition is that the marriage status acquires legal force. In this sense, the majority's legal reasoning is not primarily forward-looking but retrospective: it validates a pre-existing legal-religious status and translates it into state-recognized civil status.¹⁴

A central element of the majority's reasoning is the doctrine of marital continuity. The court invoked the Islamic legal maxim attributed to Abdul Wahab Khalaf: whoever knows that a woman is the wife of a man, the husband-wife relationship is presumed to remain as long as there is no evidence of its dissolution. This reasoning corresponds to the doctrine of *istishab*, or the presumption of continuity of an established legal state. Maula et al. identify the same doctrine in the Wamena Religious Court's *itsbat nikah* reasoning, where the court presumed the continuity of the marital relationship once the original Islamic marriage had been established.¹⁵ Nur et al. similarly distinguish between the religious dimension of marriage and the national-law dimension of registration, arguing that the absence of registration does not retroactively invalidate a marriage that was substantively valid at the time of conclusion. In the Pasangkayu

¹⁴ Burhanuddin A. Gani and Nisrina Nisrina, "Keengganan Pasangan Suami Istri Dalam Melakukan Itsbat Nikah (Studi Kasus Di Kecamatan Bandar Baru, Kabupaten Pidie Jaya)," *Media Syari Ab Wahana Kajian Hukum Islam Dan Pranata Sosial* 20, no. 1 (2020): 1, <https://doi.org/10.22373/jms.v20i1.6505>; Riswan Munthe and Sri Hidayani, "Kajian Yuridis Permohonan Itsbat Nikah Pada Pengadilan Agama Medan," *Jupiiis Jurnal Pendidikan Ilmu-Ilmu Sosial* 9, no. 2 (2017): 121, <https://doi.org/10.24114/jupiiis.v9i2.8240>.

¹⁵ Ismatul Maula et al., "Istishab Analysis of the Decision on Istbat Nikah as an Integrated Service of Mobile Session in Wanemana Religious Courts," *Ijsse*, 2024, 43–58, <https://doi.org/10.53639/ijsse.v2i1.19>.

decision, *istishab* operates as the jurisprudential link between the past marriage ceremony and the present judicial declaration of validity.¹⁶

The majority also gave normative weight to the continuity of marital life. The fact that the applicants had lived together harmoniously, had never divorced, remained Muslim, and had two children was not treated as incidental; it became part of the court's legal-moral justification for granting protection. This reasoning parallels Rismantika et al., who show that courts often consider the continuation of marital life and the realization of the objectives of marriage – *sakinah*, *mawaddah*, and *rahmah* – as equitable reasons for legalization, even in cases involving underage marriage.¹⁷ Al-Hamidy et al. likewise demonstrate that courts may grant *itsbat nikah* where a marriage was conducted according to Islamic law and the couple's marital life confirms the substantive reality of the relationship. The novelty in the Pasangkayu decision lies in the fact that this continuity logic was applied despite the underage status of the female applicant at the time of marriage, thereby intensifying the tension between remedial family protection and preventive statutory legality.¹⁸

The strongest normative basis of the majority's approach is the protection of family civil status. Without *itsbat nikah*, the wife and children would remain exposed to legal uncertainty regarding marital status, birth registration, inheritance, maintenance, and other civil rights. The literature consistently identifies these consequences as the primary harms of unregistered marriage.¹⁹

The majority's reasoning can also be explained through a multi-layered theoretical framework combining substantive justice, legal certainty, *maslahah*, and responsive

¹⁶ Nazar F. Nur, Azhari Yahya, and Efendi Idris, "Maqashid Shariah Study on the Recording of Unregistered Marriage in the Family Card," *Jurnal Penelitian Hukum De Jure* 22, no. 3 (2022): 411–22, <https://doi.org/10.30641/dejure.2022.v22.411-422>.

¹⁷ Dinada J. Rismantika, Djanuardi Djanuardi, and Rai Mantili, "Itsbat Nikah Terhadap Perkawinan Di Bawah Umur Tanpa Dispensasi Kawin Ditinjau Dari Undang-Undang Perkawinan Dan Hukum Islam," *Syntax Idea* 4, no. 10 (2022): 1447–62, <https://doi.org/10.46799/syntax-idea.v4i10.1927>.

¹⁸ Abu D. Al-Hamidy et al., "Eksaminasi Terhadap Putusan Pengadilan Agama Bangkalan Nomor 1399/Pdt.G/2021/PA.Bkl Tentang Permohonan Perkara Itsbat Nikah Kontensius," *Ma'mal Jurnal Laboratorium Syariah Dan Hukum* 3, no. 6 (2022): 487–506, <https://doi.org/10.15642/mal.v3i6.144>.

¹⁹ Rizky A. Fathia and Dian Septiandani, "Dampak Penolakan Itsbat Nikah Terhadap Pemenuhan Hak Anak," *Jurnal Usm Law Review* 5, no. 2 (2022): 606–17, <https://doi.org/10.26623/julr.v5i2.5681>; Novi N. Solekah and Siti Zulaicha, "Implikasi Penolakan Itsbat Nikah Terhadap Status Anak," *Sakina* 8, no. 1 (2024): 135–49, <https://doi.org/10.18860/jfs.v8i1.5706>.

adjudication. Progressive law theory helps explain why judges may prioritize substantive justice over strict procedural compliance where rigid formalism would produce greater social harm.²⁰ Radbruch's theory of legal purpose – justice, certainty, and expediency – also illuminates the majority's reasoning: the court attempted to produce legal certainty through judicial recognition, while simultaneously serving the expediency of family administration and the justice of protecting spouses and children.²¹ From the perspective of Islamic jurisprudence, the majority's approach is grounded in *maslahah mursalah* and *maqasid sharia*, particularly the protection of lineage and family rights.²² These frameworks explain why the court treated legalization as a protective act rather than merely an administrative correction.

Nevertheless, the majority reasoning is not free from normative difficulty. Its greatest weakness lies in the limited engagement with the preventive function of the minimum-age rule and the marriage dispensation mechanism. By emphasizing Islamic validity, marital continuity, and the civil interests of children, the majority reduced the significance of the fact that the female applicant had been fifteen years old when the marriage was performed and that no prior dispensation had been obtained. This is precisely the point at which post-factum protection risks becoming post-factum normalization. The literature warns that granting *itsbat nikah* for marriages that bypassed statutory safeguards may approve and justify conduct that deviated from the law, thereby weakening the deterrent effect of marriage registration and dispensation requirements.²³ Fanani also cautions that unregistered marriage may generate more harm than benefit when it undermines the protection of wives and children, even if it is religiously valid. Thus, the majority's protective reasoning is

²⁰ Fadhliya Fadhliya, "The Legal Reasoning of Judges Behind Determination of Marriage Itsbat Proposal for Siri Marriage Cases (A Study at the Shariyya Court of Banda Aceh)," *Media Syari Ab Wabana Kajian Hukum Islam Dan Pranata Sosial* 23, no. 2 (2021), <https://doi.org/10.22373/jms.v23i2.9386>.

²¹ Nadia Agustina, Prahasti Suyaman, and Temmy F. Alfiany, "Legal Certainty of the Implementation of Mass Itsbat Nikah in Minimizing Marriages Without Certificates in the Religious Court of Sukabumi City," *RJL* 1, no. 1 (2023): 35–41, <https://doi.org/10.55849/rjl.v1i1.309>.

²² Moh Hidayatullah, "Analisis Masalah Mursalah Terhadap Isbat Nikah Terpadu Di Pengadilan Agama Situbondo," *Rechtstudent* 3, no. 1 (2022): 106–15, <https://doi.org/10.35719/rch.v3i1.99>.

²³ Aldianto Ilham and Zainal Azwar, "Penolakan Permohonan Itsbat Nikah Oleh Hakim Di Pengadilan Agama Kelas 1A Padang," *Al-Qisthu Jurnal Kajian Ilmu-Ilmu Hukum* 20, no. 1 (2022): 77–96, <https://doi.org/10.32694/qst.v20i1.1741>.

doctrinally powerful but incomplete unless it expressly explains why the need for remedial protection outweighs the preventive value of statutory compliance.²⁴

This analysis shows that the majority opinion embodies a distinctive model of post-factum legal protection. Its ratio decidendi does not simply validate an unregistered marriage; it converts religious validity, evidentiary proof, marital continuity, and family civil vulnerability into a judicial basis for state recognition. The distinctive contribution of this finding is the identification of the majority's reasoning as a layered remedial model that simultaneously advances legal certainty and substantive justice, while leaving unresolved the preventive legality problem created by underage marriage without prior dispensation. Therefore, the majority reasoning answers the first research problem by showing how *itsbat nikah* was granted through a protective logic centered on Islamic validity, continuity of marital life, and children's civil status; yet it also prepares the ground for the next discussion, namely whether such protection can be justified when it potentially weakens statutory safeguards against child marriage.

2. Dissenting Opinion and Preventive Legality

The dissenting opinion in Decision No. 143/Pdt.P/2021/PA.Pky provides the most important doctrinal counterweight to the majority's post-factum protection approach. While the majority treated the fulfillment of Islamic marriage pillars, continuity of marital life, and the civil interests of children as sufficient grounds for granting *itsbat nikah*, the dissenting judge reframed the case as a matter of statutory circumvention. The core of the dissent is that an underage marriage conducted without prior judicial dispensation should not be legalized retroactively through *itsbat nikah*, because such legalization would weaken the preventive architecture of Indonesian marriage law. The dissent therefore does not merely disagree with the result; it reconstructs the legal issue from a different normative starting point. For the dissent, the decisive problem is not

²⁴ Zaenal Fanani, "Nikāh Sirri and Its Impact: The Perspective of Maqashid Ash-Shari'ah of Imam Asy-Syathiby," *Jurnal At-Tabdzib* 12, no. 2 (2024): 171–81, <https://doi.org/10.61181/at-tahdzib.v12i2.455>.

whether the marriage existed religiously, but whether a court may validate a marriage that bypassed the legal mechanism specifically designed to prevent child marriage.

As a judicial instrument, dissenting opinion performs a distinctive function in Indonesian Islamic family law adjudication. The literature explains that dissenting opinions allow minority judges in a collegial court to express disagreement with the majority's factual findings, legal reasoning, or normative conclusions.²⁵ Although civil law systems historically privileged the unified voice of the court, Indonesian judicial practice has increasingly accommodated dissenting opinions as legitimate expressions of judicial independence and accountability.²⁶ This function is especially significant in Religious Court adjudication, where judges work within plural normative sources: statutory law, the Compilation of Islamic Law, classical fiqh, maqasid sharia, and constitutional principles. In this context, dissenting opinion may preserve a doctrinal alternative that the majority underemphasizes, and may also expose the legal risks of expansive judicial discretion.

The dissenting opinion in the Pasangkayu decision is doctrinally important because it identifies the limit of *itsbat nikah* in cases where the original marriage was affected by a statutory legal impediment. The dissent accepted that *itsbat nikah* may serve as a legal exit for marriages that were religiously valid but administratively unregistered. However, it rejected the idea that this mechanism may cure a marriage conducted when one party was below the legal marriage age and no dispensation had been obtained. This reasoning reflects the statutory sequencing argument developed in the literature: marriage dispensation is not an optional formality, but a mandatory precondition for underage marriage authorization.²⁷ Where that sequence is

²⁵ Ana A. Furqan, Alfitri Alfitri, and Akhmad Haries, "The Difference of a Child (Walad) Concept in Islamic Inheritance Law and Its Implications on the Decisions of the Religious Courts in Indonesia," *Mazabib*, 2019, 119–45, <https://doi.org/10.21093/mj.v17i2.1212>.

²⁶ Ahmad Ridwan, Siskha P. Sayekti, and Eva Faridah, "Sharia Actualization: Realizing the Indonesian Islamic Jurisprudence," *Hikmatuna Journal for Integrative Islamic Studies* 9, no. 2 (2023): 203–18, <https://doi.org/10.28918/hikmatuna.v9i2.1398>.

²⁷ Abidin Abidin, Basofi Sudirman, and Marzuki Marzuki, "The Existence of Marriage Dispensation After the Revision of the Marriage Law at the Religious Court of Donggala, Central Sulawesi," *International Journal of Contemporary Islamic Law and Society* 4, no. 1 (2022), <https://doi.org/10.24239/ijcils.vol4.iss1.38>.

bypassed, later legalization through *itsbat nikah* risks turning a curative remedy into a mechanism for validating non-compliance.

The dissent's ratio decidendi rests on four interconnected legal propositions. First, minimum-age regulation is a substantive legal safeguard, not merely an administrative requirement. Second, when an underage party seeks to marry, the law provides a specific judicial pathway through marriage dispensation. Third, where the parties deliberately or negligently avoid that pathway and proceed with an unregistered marriage, the resulting marriage contains a legal defect that cannot automatically be remedied by *itsbat nikah*. Fourth, protecting children and family administration should not require the court to validate the legally problematic marriage itself, because alternative remedies, such as a petition for child origin, may protect children's civil interests without legitimizing the circumvention of statutory safeguards. This reasoning directly challenges the majority's assumption that the fulfillment of Islamic pillars and the existence of children are sufficient to justify judicial validation.

The dissent also engages the problem of regulatory disharmony. Previous scholarship has shown that the interaction between the Marriage Law, the Child Protection Act, and the KHI creates doctrinal instability in underage marriage cases.²⁸ Law No. 16 of 2019 raises the minimum marriage age to nineteen as part of a child-protection reform, while the KHI provides a mechanism for validating unregistered marriages through *itsbat nikah*. If the KHI's *itsbat nikah* provisions are applied without regard to the minimum-age rule and prior dispensation requirement, the child-protection function of the Marriage Law may be undermined. The dissenting opinion is therefore best understood as an attempt to harmonize the legal system by preventing the general remedial mechanism of *itsbat nikah* from overriding the specific preventive mechanism of marriage dispensation.

This point may be further explained through the principle of *lex specialis derogat legi generali*. The dispensation mechanism is the specific legal pathway for authorizing

²⁸ Sandio A. A. Putra and Mas A. T. Fitriyah, "Implementation of the Marriage Dispensation: Exploring the Legal and Social Complexities in Preventing Early Marriage," *Al-Adalah Jurnal Hukum Dan Politik Islam* 9, no. 1 (2024): 24–39, <https://doi.org/10.30863/ajmpi.v9i1.4592>.

underage marriage, whereas *itsbat nikah* is a general remedial pathway for proving and registering an already existing marriage. Scholars argue that, in underage marriage cases, dispensation should be treated as the *lex specialis* because it contains child-protection safeguards absent from ordinary *itsbat nikah* proceedings.²⁹ Grijns and Horii note that, in cases involving underage children, parties cannot simply arrange *itsbat nikah* because the same court should first have been asked to grant dispensation. This reasoning supports the dissent's view that *itsbat nikah* should not be allowed to bypass the legal process specifically designed to assess urgency, consent, maturity, and the best interests of the child.³⁰

The dissenting opinion also reflects the Islamic legal principle of *sadd al-dhariah*, namely blocking pathways to harm. While the majority's reasoning is closer to *maslahah* in the sense of protecting an existing family from civil vulnerability, the dissent asks whether granting *itsbat nikah* in this type of case may create broader harm by incentivizing future underage unregistered marriages. Mustika and Marlina warn that easy access to *itsbat nikah* may create opportunities for the increase of unregistered marriages, while Sumarkan and Choiroh show how communities may manipulate administrative processes and treat legal requirements as obstacles to be circumvented. Nisa similarly argues that the state's ambiguous position—requiring registration while providing retroactive legalization—creates institutional incentives to bypass formal marriage procedures. The dissent therefore shifts the analysis from the private benefit of one family to the public harm of weakening preventive legal norms.³¹

The dissent's preventive logic is also supported by the moral hazard argument. If a court validates an underage unregistered marriage through *itsbat nikah*, communities

²⁹ Muhammad F. Faiz, Zezen Z. Ali, and Muhammad Taufiq, "Underage Widows and Widowers Before the Law: Problem, Contestation and Legal Certainty in Marriage Dispensation," *Juris (Jurnal Ilmiah Syariah)* 22, no. 2 (2023): 223, <https://doi.org/10.31958/juris.v22i2.9097>.

³⁰ Grijns and Horii, "Child Marriage in a Village in West Java (Indonesia): Compromises Between Legal Obligations and Religious Concerns."

³¹ Mustika and Marlina, "Integrated Marriage Itsbat: Analyzing the Polemics Behind Its Implementation"; Eva F. Nisa, "The Bureaucratization of Muslim Marriage in Indonesia," *Journal of Law and Religion* 33, no. 2 (2018): 291–309, <https://doi.org/10.1017/jlr.2018.28>; Sumarkan Sumarkan and Ifa M. Choiroh, "Political Culture of Madurese Community in Marriage Law: From the Perspective of Utilitarianism and Structuration Theories and Maqasidi Interpretation," *Al-Daulah Jurnal Hukum Dan Perundangan Islam* 12, no. 1 (2022): 26–50, <https://doi.org/10.15642/ad.2022.12.1.26-50>.

may learn that prior dispensation is unnecessary as long as religious marriage can later be legalized. Idrus documents that when marriage dispensation is rejected, marriage often still occurs through *nikah sirri*, implicitly positioning *itsbat nikah* as a later legalization step.³² Syawqi et al. similarly observe that the normalization of both marriage dispensation and *itsbat nikah* may create a cycle in which violations of the legal marriage age are absorbed into routine judicial administration. From this perspective, the dissent's refusal to validate the marriage is not a denial of social reality, but a judicial attempt to preserve the deterrent and educative function of family law.³³

The dissenting opinion further contributes to judicial accountability. By articulating reasons for refusing the petition, the dissent exposes the majority's underdeveloped engagement with the underage element of the case. The majority treated the applicant's underage status as a fact that explained non-registration, but did not fully analyze whether absence of prior dispensation constituted a legal barrier to *itsbat nikah*. The dissent fills this analytical gap by insisting that judicial protection cannot be detached from statutory discipline. This accountability function is consistent with scholarship that views dissenting opinions as mechanisms for making judicial disagreement visible, preserving minority reasoning, and subjecting majority conclusions to normative scrutiny.³⁴ In this case, the dissent makes visible the preventive legality dimension that the majority's remedial approach tends to obscure.

Table 1. Dissenting Opinion as a Doctrinal Framework for Limiting *Itsbat Nikah*

Analytical Element	Dissenting Construction	Legal Concept	Implication for <i>Itsbat Nikah</i>
Core issue	The case concerns circumvention of marriage dispensation, not merely absence of registration	Preventive legality	<i>Itsbat nikah</i> should not cure the absence of mandatory prior dispensation

³² Idrus, "Problematizing the Minimum Age of Marriage: The State and Local Perspective on Marriage Dispensation in South Sulawesi."

³³ Syawqi et al., "Law Omission in Muslim Society: Inquiring Citizen Rights in the Administration of Islamic Family Law in Madura Indonesia."

³⁴ Baudouin Dupret et al., "Filling Gaps in Legislation: The Use of Fiqh by Contemporary Courts in Morocco, Egypt, and Indonesia," *Islamic Law and Society* 26, no. 4 (2019): 405–36, <https://doi.org/10.1163/15685195-00264p03>.

Norm hierarchy	Minimum-age rule and dispensation procedure limit the use of general <i>itsbat nikah</i> provisions	<i>Lex specialis derogat legi generali</i>	Dispensation is the specific pathway for underage marriage authorization
Islamic legal reasoning	Legalization may open a pathway to future harm by normalizing child marriage	<i>Sadd al-dhariah</i>	Courts should block legal routes that incentivize unlawful underage marriage
Child protection	Children's interests may be protected without validating the defective marriage	Best interests of the child and alternative remedies	Child-origin proceedings may protect children while preserving legal discipline
Judicial function	Dissent exposes the limits of majority reasoning and preserves doctrinal alternatives	Judicial accountability and doctrinal development	Dissent may guide future reform of <i>itsbat nikah</i> standards

The novelty of this analysis lies in treating the dissenting opinion not as a secondary procedural note, but as the article's main doctrinal resource for defining the limits of *itsbat nikah*. The dissent offers a preventive legality model that complements and corrects the majority's post-factum protection model. It does not deny the importance of protecting women and children; rather, it argues that such protection must be pursued through legally appropriate mechanisms that do not validate the very conduct the law seeks to prevent. This is a significant contribution to Islamic family law scholarship because it transforms dissenting opinion into a source of legal reform: a minority judicial argument that can help formulate clearer standards for future cases.

The dissenting opinion showing how the absence of prior marriage dispensation may be constructed as a doctrinal limit to *itsbat nikah*. Its reasoning reveals that the legal issue in underage unregistered marriage is not simply whether the marriage was religiously valid, but whether judicial legalization would undermine the preventive structure of family law. The dissent therefore advances the central thesis of this article: *itsbat nikah* must be balanced between remedial protection and preventive legality,

and courts should not allow post-factum legalization to become a substitute for the statutory safeguards designed to prevent child marriage.

Toward a Five-Criteria Doctrinal Standard

The majority and dissenting opinions in Decision No. 143/Pdt.P/2021/PA.Pky reveal that Indonesian Religious Courts require a clearer doctrinal standard for adjudicating *itsbat nikah* petitions involving underage unregistered marriages. The majority opinion demonstrates the strength of post-factum protection: judicial legalization may prevent the wife and children from remaining trapped in administrative invisibility. The dissenting opinion, however, exposes the danger of allowing *itsbat nikah* to become a retroactive substitute for marriage dispensation. The central doctrinal problem is therefore not whether *itsbat nikah* is necessary or unnecessary, but how courts should distinguish between legitimate remedial protection and impermissible legalization of statutory circumvention. This section argues that a coherent standard must integrate Islamic validity, statutory legality, administrative necessity, child protection, and moral-hazard assessment into a structured judicial test.

The need for such a standard has been identified in recent scholarship. Abidin et al. argue that the spirit of preventing child marriage is degraded when the regulation of marriage ratification in Article 7 of the Compilation of Islamic Law enables the legalization of underage marriages.³⁵ Fausi and Asmuni similarly emphasize the need for judicial caution in both marriage dispensation and marriage recognition cases involving underage marriage, because the current framework does not provide judges with structured criteria for balancing religious validity, positive law, administrative needs, and child protection.³⁶ Wazzan et al. confirm that Religious Courts must determine whether a marriage satisfies Islamic law and positive law, and whether any legal or syar'i obstacle prevents recognition. These studies indicate that *itsbat nikah*

³⁵ Abidin, Sudirman, and Marzuki, "The Existence of Marriage Dispensation After the Revision of the Marriage Law at the Religious Court of Donggala, Central Sulawesi."

³⁶ Achmad Fausi and Asmuni Asmuni, "Determination of the Minimum Age Limit for Marriage: Balancing Legal Supremacy and the Objectives of Sharia in Indonesian Marriage Law," *Mazahib* 23, no. 1 (2024): 117–54, <https://doi.org/10.21093/mj.v23i1.7611>.

adjudication is inherently multi-criteria; the weakness lies not in the absence of relevant norms, but in the absence of an integrated doctrinal method for applying them.³⁷

Table 2. Five-Criteria Doctrinal Standard for Adjudicating Underage *Itsbat Nikah* Cases

Doctrinal Criterion	Core Judicial Question	Required Analysis	Possible Judicial Response	Reform Implication
Islamic validity	Were the Islamic pillars and conditions fulfilled?	Verification of wali, witnesses, mahar, <i>ijab qabul</i> , consent, and absence of prohibited relationship	Reject if Islamic validity is not proven	Prevents <i>itsbat nikah</i> from validating substantively invalid marriages
Statutory legality	Was prior marriage dispensation obtained when a party was underage?	Assessment of minimum-age rule, dispensation requirement, and legal impediment	Treat absence of dispensation as a serious legality deficit	Preserves the preventive role of Law No. 16 of 2019
Administrative necessity	Is full marital legalization necessary to protect civil documentation and family status?	Proportionality assessment between full legalization and alternative remedies	Grant only if no adequate narrower remedy exists	Prevents administrative need from becoming automatic legalization
Child protection	Does validation serve the best interests of the underage party and children?	Assessment of welfare, consent, education, health, vulnerability, and future rights	Prioritize child-origin determination or conditional validation	Aligns <i>itsbat nikah</i> with child protection norms

³⁷ Wazzan et al., "Itsbat Nikah: Legalizing Marriage Outside the Record in Indonesia."

<i>Mafsadah-maslahah balance</i>	Would granting the petition create moral hazard or normalize circumvention ?	Weigh immediate family protection against systemic harm to marriage-law compliance	Require explicit reasoning on deterrence and social impact	Strengthens consistency and reform-oriented adjudication
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This five-criteria standard can be operationalized through a graduated judicial response. First, where the marriage fails Islamic validity requirements, the petition must be rejected because there is no valid marriage to declare. Second, where the marriage satisfies Islamic validity but involved an underage party without prior dispensation, the court should conduct a strict statutory legality and child protection assessment. Third, where children's civil rights can be protected through child-origin determination rather than full marital legalization, the court should prioritize that narrower remedy. Fourth, where full legalization is indispensable to prevent serious injustice to vulnerable family members, the court may grant *itsbat nikah* conditionally, but only after explicitly recording the statutory violation, applying retrospective dispensation criteria, and explaining why protection outweighs deterrence in that specific case.

The distinctive contribution of this section lies in proposing a doctrinal standard that does not force courts into a binary choice between granting and rejecting *itsbat nikah*. The standard recognizes the majority's concern for post-factum protection, but incorporates the dissent's insistence on preventive legality. It therefore transforms the conflict in Decision No. 143/Pdt.P/2021/PA.Pky into a constructive adjudicative model. Instead of asking only whether an underage unregistered marriage was religiously valid, courts should ask whether legalization is doctrinally justified after considering statutory compliance, administrative necessity, child protection, and moral hazard. This approach offers a more precise contribution to Indonesian Islamic family law because it prevents *itsbat nikah* from becoming a blanket curative mechanism while preserving its role as a remedy for genuine civil vulnerability.

CONCLUSION

The Decision No. 143/Pdt.P/2021/PA.Pky reveals a fundamental doctrinal tension in Indonesian Islamic family law between post-factum legal protection and preventive legality. The majority opinion justified the granting of *itsbat nikah* by treating Islamic validity, evidentiary proof, continuity of marital life, and the civil status of children as sufficient grounds for judicial recognition. This reasoning reflects a remedial model of adjudication that seeks to prevent women and children from remaining legally invisible. However, the dissenting opinion demonstrates that the absence of prior marriage dispensation cannot be treated as a minor administrative defect. It marks a legality deficit because the dispensation mechanism is the specific legal safeguard designed to prevent underage marriage. The main finding of this article is therefore that *itsbat nikah* in underage unregistered marriage cases should not be understood as an ordinary legalization mechanism, but as a contested judicial remedy that must be carefully limited by child protection, statutory compliance, and the prevention of legal circumvention.

The article proposes a five-criteria doctrinal standard for future Religious Court adjudication: verification of Islamic validity; assessment of statutory legality, especially prior dispensation; proportional examination of administrative necessity; application of child protection as the paramount norm; and a *mafsadah-maslahah* test that considers moral hazard and systemic impact. This framework contributes to legal scholarship by integrating majority and dissenting reasoning into a constructive model for Islamic family law reform. For legal practice, it suggests that judges should no longer grant or reject *itsbat nikah* in underage marriage cases solely on the basis of religious validity or administrative need. Courts should explicitly record the statutory violation, assess whether alternative remedies such as child-origin determination are sufficient, and grant full legalization only where it is indispensable to protect vulnerable family members without undermining the preventive function of marriage-age regulation. At the policy level, the Supreme Court and legislature should consider issuing clearer guidelines or revising the relevant provisions on *itsbat*

nikah so that marriage recognition, child protection, and marriage dispensation operate as an integrated system rather than as competing legal pathways.

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COMPETING INTEREST

The author declares that there is no conflict of interest in the publication of this article.

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