

PREGNANT MARRIAGE MASLAHAH PERSPECTIVE

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Abstract: The implementation of Article 53 of the KHI regarding pregnant marriage, its implications, and the judges of the religious courts' analysis of Article 53 of the KHI on pregnant marriage from a masalahah perspective are all discussed in this paper as they relate to pregnant marriage from the perspective of the religious court judge. Pregnant women's matters are not specifically handled by religious courts; instead, cases involving marriage isbat and marriage dispensation are related to pregnant women. The status of the child that the woman is carrying is impacted by her marriage. The lineage of children, inheritance, and guardianship of the children they contain will be maintained by pregnant women and the men who impregnate them by maintaining a marriage. Pregnant mothers and the children they carry stand to gain greatly from the provisions of Article 53 of the Compilation of Islamic Law.

Keywords: KHI, Masalahah, pregnant marriage

Abstract: Tulisan ini membahas tentang kawin hamil menurut hakim pengadilan agama perspektif masalahah dengan mengungkapkan masalah yaitu: implementasi pasal 53 KHI tentang kawin hamil, implikasi pelaksanaan pasal 53 KHI tentang kawin hamil, dan analisis hakim pengadilan agama terhadap pasal 53 KHI tentang kawin hamil perspektif masalahah? Pengadilan Agama secara langsung tidak menangani kasus wanita hamil, adapun kasus yang mempunyai keterkaitan dengan wanita hamil adalah kasus isbat nikah dan dispensasi nikah. Pernikahan wanita hamil berakibat kepada status anak yang dikandung wanita tersebut. Dengan dilangsungkan pernikahan bagi wanita hamil dan laki-laki yang menghamilinya akan menjaga nasab anak, kewarisan dan kewanjian anak yang dikandungnya. Pasal 53 Kompilasi Hukum Islam tentang kawin hamil mengandung banyak kemaslahatan bagi masyarakat pada umumnya terlebih kepada wanita hamil dan anak yang dikandungnya.

Kata Kunci: KHI, kawin hamil, masalahah

Introduction

In Islam, marriage holds a very significant place. The family, which is both the largest and the smallest unit of society, has been governed by marriage law. If a community has strong families and pleasant interpersonal interactions, it will be well-established. This rule is consistent with the character of people as honorable beings. Maintaining human honor requires that relationships between people be built properly and in line with their status as fellow creatures. In order to preserve human honor, it is crucial to have a legal relationship in this situation. The institution of marriage in this instance has the duty and responsibility to establish legal relationships between people in order to carry out the marriage (Qutb, 1987).

However, as time goes on, the institution of marriage will encounter difficulties, even if its survival is in jeopardy due to social issues that attempt to undermine the institution's sacredness. The rise of pregnancy issues that happen outside of marriage is one of these issues. When it turns out that there are many cases in the community in today's social life, this problem only gets worse. The issue now is that it affects not only the perpetrator's adultery and the hudud punishment for his conduct, but also the condition and future of the unborn child while it is still inside the mother. The Prophet Muhammad saw and reared a son named Zaid bin Haritzhah, demonstrating the significance of Nasab in Islamic beliefs. The legitimacy of family relationships based on blood ties as a result of a valid marriage, a fasid marriage, or sexual activity is under question. Nasab is a recognition of syara' for a child's relationship with his father's lineage, making the child one of the family members of the lineage and giving the child privileges as a result of a valid marriage. Legal children are those born from or as a result of a valid marriage, as defined by positive law, including Islamic law in Indonesia. Assuming the mother is a legally married

woman at the time the child is born. Evidently, this nasab relationship is not specifically covered in the Compilation of Islamic Law (Yakin, 2015).

As a result, people hold marriage in high regard. However, if a couple gets pregnant before getting married, things get complicated. Pregnant women without a legal husband are not uncommon. Because the bride was already pregnant when the marriage contract was signed, she gave birth just a few months after completing the ceremony. However, because Article 53 of the Compilation of Islamic Law (KHI), which permits the marriage of pregnant women, exists, Islam, particularly in Indonesia, has made it simple in these circumstances. The article's presence is viewed as providing a chance to improve human life as it relates to children's honor and family history.

In the Compilation of Islamic Law (KHI) article 53 paragraphs (1), (2) and (3) regarding pregnant marriage it is stated (Ministry of Islamic Affairs, 2018):

1. A pregnant woman out of wedlock, can be married to a man who impregnates her
2. Marriage with a pregnant woman referred to in paragraph (1) can be carried out without waiting for the birth of her child
3. With the marriage taking place when the woman is pregnant, there is no need for remarriage after the child is born

The issue in this situation is with how marriage is being performed while a woman is pregnant. There are various viewpoints on how to solve this issue. The marriage was approved by and accepted as legal by Imam Shafi'i. Abu Hanifa shares this opinion, but with the addition of the restriction that pregnant women may marry but not engage in sexual activity prior to giving birth. Imam Malik and Imam Hanbali, who disapprove of the marriage's implementation, hold the opposing viewpoint (Muhdlor, 1995). Likewise, Ibn Taimiyah argued that the marriage of a pregnant woman as a result of adultery was unlawful (Taimiyah, 1997).

The Compilation of Islamic Law explains the legitimacy of marriage for a woman who is pregnant out of wedlock with a guy who impregnates her in article 53. Even though there is an unwed pregnancy, the stipulations in the KHI do not in the slightest bit absolve the culprit of their adulterous status. A legitimate child is one born into a valid marriage connection, according to Law No. 1/1974's article 42 on marriage and Article 99 of the Compilation of Islamic Law. The Compilation of Islamic Law, however, states in Article 100 that children born outside of marriage only have a kinship link with their mother and her family. After the government introduced the Chapter VIII, Article 45, Paragraph 1 of the Applied Law of the Religious Courts for Marriage, which declared that "any pregnant woman outside of marriage can only be wedded to the man who impregnated her," the issue flared up once more. The sole difference between the bill's provisions for pregnancies marriages and the KHI's is the editorial.

The compilation of Islamic law's Article 53 (KHI) is an example of *ijtihad* research conducted by experts. However, in fact, the *ijtihad*'s findings nonetheless present a drawback in the shape of chances for Indonesian Muslims to continue their pervasive practice of adultery. Through the granting of marriage licenses to expectant women, Article 53 of the Compilation of Islamic Law (KHI) indirectly paves the door for the legality of adultery. This is because there is no restriction on the reasons of pregnancy in the article's provisions. Therefore, it is not implausible that the purposeful adultery of a woman and her male companion could result in pregnancy in a woman who would be married in accordance with article 53 of the Compilation of Islamic Law (KHI).

Some of the aforementioned viewpoints demonstrate how contentious and complex marital issues for expectant women caused by adultery are. On the one hand, allowing pregnant women to marry aims to protect the life status and destiny of the child so that, after birth, they get the same rights as children born via legal unions and avoid prejudice. Contrarily, allowing pregnant women to be married can be harmful and is one of the factors contributing to the rise of adulteries that have the potential to disrupt people's lives.

While pregnant marriage is generally permitted under Article 53 of the Islamic Law Compilation, it can also be detrimental to Islamic culture. Judges of religious courts are therefore required to elaborate on the rationale behind Article 53 of the Compilation of Islamic Law's provision. Because it is clear that

the main purposes of Article 53 of the Compilation of Islamic Law are to serve the Islamic Ummah and avoid harm to society.

Materials and Methods

The research presented in this work is qualitative and was conducted utilizing the library research method, which involves gathering and analyzing a variety of literature sources.

Result and Discussion

A. Implementation of article 53 KHI regarding pregnant marriage

A comprimistic view of customary law has largely been abandoned in the Compilation of Islamic Law's definition of whether it is acceptable to marry a pregnant woman. This compromise is seen in light of the fact that *ikhtilafi* in *fiqh* actually occurs and is connected to sociological and psychological elements. (Harahap, 1992).

The marriage of pregnant women outside of marriage is not explicitly addressed in Article 53 of the Compilation of Islamic Law. Only the fact that only those who impregnate them may marry unmarried pregnant women is explained in this article. The article omits discussing the practice of pregnant women being married to partners other than the person who caused their pregnancy. This frequently occurs among persons whose weddings serve mainly to conceal their shame (*Bugis: passampo siri*) and to safeguard the unborn kid (Yakin, 2015).

Rarely do cases directly include unmarried women who are pregnant in religious courts. Because the community typically resolves this rapidly. In order to mask the family's shame, pregnant women instances that arise in the society can be resolved by either requesting the pregnant man to take responsibility or by selecting a relative (closest family) to marry the pregnant woman. As long as the man who covers the scandal is not coerced into the marriage, it is legal. Marriage *isbat* and marriage dispensation cases are those that are most directly related to the case of pregnant women. Since the marriage hasn't been formally registered by the marriage registrar, the *Isbat* marriage is used to determine the status of marriage in front of the judge of the Sengkang religious court. The Religious Court's judge surmised that the fact that the married couple was already expecting a child was one of the reasons the marriage was not legally recognized. In a similar vein, one of the reasons a woman is already pregnant is the marriage dispensation provided to women who are not old enough.

Basically, the permissibility of pregnant marriage in Article 53 of the Compilation of Islamic Law is more or less based on a compromise approach with customary law. In the rules of *fiqh* it is stated that (Dzajuli, 2014):

العادة محكمة

Meaning:

“Customs can be used as legal considerations”

The compromise is based on making the provisions of Islamic law closer to people's lives. Such attitudes and steps can be expressed in an expression: "Islamizing customary law at the same time as bringing customary law closer to Islam" (Harahap, 1999). It is hoped that by fusing the principles of Islamic law and customary law, normative values from a philosophical and sociological perspective, a sense of justice and humanity, as well as modernization and understanding of globalization, will result. These factors are crucial for promoting integrity, balance, harmony, and order in human life in general.

Regarding article 53 of the Compilation of Islamic Law, it does not provide sanctions or punishments for adulterers, but instead provides a solution for someone who is pregnant as a result of adultery to get married immediately. Not infrequently the marriage was carried out when the woman was pregnant because of adultery. The goals also vary, sometimes to cover the disgrace of the woman's family, or also the woman's family is afraid that the man who got her pregnant will run away and be irresponsible. Because not infrequently a man who impregnates a woman out of wedlock will run away to release his responsibilities (Hasan, 2006).

The implementation of article 53 of the Compilation of Islamic Law in the community is a major solution to resolve cases of pregnant women. Psychologically, it is the man who impregnates the woman who is obliged to marry the woman who is pregnant. Because it can show a sense of responsibility for the mistakes that have been made, and make it easier for both of them to make collective repentance (congregational repentance).

Article 53 The Compilation of Islamic Law still needs to be interpreted wisely so as not to cause conflict in society. Article 53 of the Compilation of Islamic Law paragraph (1) states:

"A pregnant woman out of wedlock can be married to a man who impregnates her" (Ministry of Islamic Affairs, 2018).

In the first verse, the word "can" contain two meanings, namely yes and no. This means that a pregnant woman out of wedlock can be married to a man who impregnates her, or not to a man who impregnates her, as is the case in society. Because the word "can" does not contain pressure and must be done. However, it is only a suggestion and suggestion so that cases of pregnant women can be resolved without causing other legal problems (Muhammadong, 2022). Yusuf al-Qardhawi said that an adulteress, whether pregnant or not, may only be married to an adulteress man, whether pregnant or not. This is based on the word of Allah swt in QS Al-Nuur/24: 3.

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ ﴿٣﴾

Meaning:

"A man who commits adultery does not marry but a woman who commits adultery, or a woman who is idolatrous and a woman who commits adultery does not marry but a man who commits adultery or an idolatrous man, and that is forbidden to the believers."

Article 53 of the Compilation of Islamic Law in the first verse can also be interpreted as a necessity and obligation. The word "can" in that verse means obligatory and obligatory for a pregnant woman to be married by the man who impregnated her (Aisyah, 2022). Because to reduce the conflict that will be experienced by society and as a form of responsibility for the man who impregnated the woman.

In article 53 of the Compilation of Islamic Law paragraph 2 it is stated:

"Marriage with a pregnant woman referred to in paragraph (1) can be carried out without waiting for the birth of her child"

This second verse can also be interpreted that the word can is not in the form of absolute necessity. This means that the marriage may be carried out without waiting for the birth of the child or it can be carried out by waiting for the birth of the child. Because there are differences on the issue of iddah among scholars (Muhammadong, 2022).

Imam al-Shafi'i allowed the marriage of pregnant women even without waiting for the birth of the child they were carrying because the pregnant woman did not have an iddah. Imam al-Shafii argues that the iddah is due to a marriage contract. Meanwhile, Imam Hanafi allows the marriage of pregnant women on the condition that they wait for the birth of the child they are carrying because the woman is iddah. Imam Hanafi is of the opinion that iddah is due to mixing (Muhammadong, 2022).

And in article 53 of the Compilation of Islamic Law verse 3 it is stated:

"By having a marriage when the woman is pregnant, there is no need for re-marriage after the child is born"

This third verse is a practical solution, that the marriage performed by the pregnant woman is valid and does not need to be repeated again. However, if you are able and still want to hold a busy wedding, then there is no prohibition against holding the re-marriage.

In Indonesia, previously there was no written law regarding the settlement of pregnant women out of wedlock. The community usually uses a settlement by holding a marriage between the pregnant woman and the man who impregnates her without waiting for the birth of the child to be conceived. This method aims to cover the disgrace so that it is not known to the wider community. As long as the adulterers and

their families are able to keep the secret, then the adulterers and their children will be safe from the public's response (Huda, 2009).

People in responding to adultery usually do exile or isolation, in the Bugis tradition it is called *dipoppangi tana* against adulterers, descendants and even their families. The response of the community certainly does not humanize the perpetrators of adultery, families and even children who should not have committed a sin but must accept the punishment. So that in order to maintain the survival of adulterers and especially their children, a legal umbrella is needed in the form of provisions governing the permissibility of carrying out marriages for pregnant women because of adultery.

In addition, the provisions of Article 53 of the Compilation of Islamic Law can be said to adopt a community settlement by holding a marriage between the adulterous couple. The adoption system is supported by historical realities which show that the products of thought which are often regarded as Islamic law are nothing more than the result of the interaction between legal thought and the socio-cultural or socio-political environment that follows (Mudhzar, 2000). Such legal products can be accepted as positive law and part of the development of *ijithadiyah* law. This adoption system is also supported by the rules of *ushul fiqh* which says: "Customs can become law".

The rules of *ushul fiqh* show the ability to adopt certain customs or habits of the community to be applied as a legal provision. Imam al-Qarafi allows adopting the customs or habits of the community by examining the habits prevailing in the local community, so that the established law does not conflict or eliminate the benefit of the local community (Hasroen, 1996). This ability at the same time stipulates that in the implementation of legal products the principle of *lex specialis derogat legi generali* is applied, which means the application of law that is general in nature. Through this step, the provisions of Article 53 of the Compilation of Islamic Law have a strong sociological basis, so that it will be effectively applied in Indonesian society.

B. Implications of Article 53 KHI regarding pregnant marriage

Every law-making, regulation, and legal provision must be based on a philosophical foundation. A philosophical foundation is absolutely necessary because of its existence to explain the intentions, ideals, or goals of a law, regulation, or provision. If a law, regulation, or provision is not based on this philosophical foundation, then the product of the law, regulation, or provision will be empty and lose meaning due to disorientation.

The same applies to the provisions of Article 53 of the Compilation of Islamic Law. The provisions of Article 53 of the Compilation of Islamic Law have a philosophical basis to protect the survival of pregnant women out of wedlock, as well as to maintain the survival of their children, so that after birth they can carry on their lives normally and do not lose their rights as individual human beings and as members of society (Huda, 2009).

Based on this spirit, the provisions of Article 53 of the Compilation of Islamic Law allow pregnant women out of wedlock to marry men who impregnate them, in order to avoid other negative impacts that will be received especially by women and children as the parties who feel the most consequences. The existence of the provisions of Article 53 of the Compilation of Islamic Law is at the same time a basis for women to demand that men be willing to take responsibility, and this is realized by carrying out marriages and carrying out their obligations as husbands as in a normal family. Furthermore, the philosophical basis will be supported by other foundations, which logically become the basis for the provisions of Article 53 of the Compilation of Islamic Law.

Article 53 Compilation of Islamic Law on pregnant marriage basically aims to save the status of children born as a result of adultery. Because a child should have parents. Because there is often discrimination against children born as a result of adultery in society. The community's view of the child is so low that it can reduce the child's human rights. Therefore, the existence of parents for a child is mandatory (Mathar, 2022).

The child is the basis for showing the relationship of *kemahraman* (*nasab*) with his father. That is what is believed in *Sunni fiqh*. The majority of scholars agree that adulterous children or *li'an* children only have *nasab* with their mother and mother's siblings. It is different from the understanding of the

Shia scholars that the adulterous child does not have a kinship relationship with his adulterous mother or father, therefore the adulterous child cannot inherit both (Rofiq, 1995).

A legitimate child is a child born from a legal marriage between his father and mother. The validity of a child in Islam is to determine whether or not there is a fatherly relationship (nasab) with a man. In terms of the nasab relationship with his father, it is not determined by human will or willingness, but is determined by marriage through a sacred contract.

In Islamic law there is a provision for the birth of a child, namely the minimum limit for the birth of a child from his mother's marriage is 6 (six) months. Based on the word of Allah swt. QS al-Ahqaaf/46: 15:

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ إِحْسَانًا حَمَلَتْهُ أُمُّهُ كُرْهًا وَوَضَعَتْهُ كُرْهًا وَحَمْلُهُ وَفِصْلُهُ ثَلَاثُونَ شَهْرًا حَتَّىٰ إِذَا
بَلَغَ أَشُدَّهُ وَبَلَغَ أَرْبَعِينَ سَنَةً قَالَ رَبِّ أَوْزِعْنِي أَنْ أَشْكُرَ نِعْمَتَكَ الَّتِي أَنْعَمْتَ عَلَيَّ وَعَلَىٰ وَالِدَيَّ وَأَنْ أَعْمَلَ
صَالِحًا تَرْضَاهُ وَأَصْلِحْ لِي فِي ذُرِّيَّتِي إِنِّي تُبْتُ إِلَيْكَ وَإِنِّي مِنَ الْمُسْلِمِينَ ﴿١٥﴾

Meaning:

"We have commanded man to do good to his parents, his mother conceived him with difficulty, and gave birth to him with difficulty (too). Conceiving her until weaning her is thirty months, so that when she is an adult and she reaches the age of forty years she prays: "O my Lord, show me to be grateful for Your favors which You have bestowed on me and my parents and that I may do righteous deeds you are pleased, give me good by (giving goodness) to my children and grandchildren. Verily I have repented to You and indeed I am of those who have surrendered"

Word of Allah swt. in another QS Luqman/31: 14.

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ حَمَلَتْهُ أُمُّهُ وَهْنًا عَلَىٰ وَهْنٍ وَفِصَالُهُ فِي عَامَيْنِ أَنِ اشْكُرْ لِي وَلِوَالِدَيْكَ إِلَيَّ الْمَصِيرُ ﴿١٤﴾

Meaning:

"And We have commanded man (to do good) to his two parents, his mother has conceived him in a state of increasing weakness, and weaned him in two years. Be grateful to Me and to your two parents, only to Me is your return".

The first paragraph above explains that the period of pregnancy and breastfeeding is combined into 30 months. It is not detailed in the verse, how many months of pregnancy and how many months of breastfeeding. The second verse describes the period of breastfeeding for 2 years. This verse is an explanation of the breastfeeding period which is mentioned globally in the first verse above. So it can be concluded that 30 months after deducting 24 months of breastfeeding, the remaining 6 months remain as the minimum period of pregnancy.

According to Soedaryo Soimin that in Islamic law a legitimate child is born at least 6 months (177 days) after the marriage of his parents, it does not matter whether the person was born while his parents were still married or separated due to the death of the husband, or due to divorce. in his lifetime. If the child is born before the 177 days (6 months) period is complete, then the child is only valid for the mother (Soimin, 1992). The majority of schools of jurisprudence, both Sunni and Shia schools agree that the minimum birth limit is 6 months. Meanwhile, in terms of calculating the distance between births and gestational age, there are differences. According to the Hanafi school, it is calculated from the time of the marriage contract. And according to the majority of scholars, it is calculated from the time of the possibility of them having intercourse (Sabrie, 1998).

According to the aforementioned opinion, the man or husband of the woman who gave birth to him cannot be held responsible for the child born from the marriage of a pregnant woman outside of wedlock (a child of adultery) if the child is born less than 6 months after the marriage contract, as in the Hanafi school of thought, or less than 6 months from the time it is possible to have sexual relations, as is the opinion of the majority of scholars. It demonstrates that her husband did not cause the pregnancy. According to Wahbah al-Zuhaili, the pregnancy cannot be blamed on the woman's husband if it occurs fewer than six months after the marriage contract. A child's invalidity to be linked to his mother's spouse suggests that the child is thought to be an illegitimate child, has no lineage, and does not have the same rights to his parents as a child would.

The position of children out of wedlock is divided into two categories, namely as follows (Syarifuddin, 2002):

- a. The fertilized child is not in a legal marriage, but is born in a legal marriage. A child born after 6 months of the marriage of his mother and father, the child is assigned to his father. If the child is born before six months, then the child is assigned to his mother, according to Imam Hanafi. It is different from the opinion of Imam Syafii that the child out of wedlock is still assigned to his father as a legitimate child.
- b. Equal status with adulterous children and wan children, therefore they have the following legal consequences:
- c. There is no kinship with his father. The child only has a kinship relationship with his mother. The father is not obliged to provide for the child, but biologically he is still his son. So the relationship that arises is only human, not legal.
- d. There is no mutual inheritance with his father, because the kinship relationship is one of the causes of inheritance.
- e. Fathers cannot be guardians of children out of wedlock. If the child out of wedlock happens to be a woman and is an adult and will marry, then she has no right to be married off by her biological father.

The Fuqaha claims that although there are disparities in the guardianship status of children born outside of marriage, this rule is the same as the prohibition on marrying pregnant women outside of marriage. According to the Shafi'i school, it is acceptable for a man who commits adultery or another man to marry an unmarried pregnant lady because it is not forbidden for him to do so. This suggests that the man has a kinship connection and the authority to serve as a marriage guardian if the child is a female (Yakin, 2015).

The Hanafi school is of the opinion that it is permissible to marry an adulterous woman with a man who commits adultery on her or another man, but if she is pregnant, it is not permissible to have intercourse with her until she gives birth to a child. If this is related to the guardianship relationship, then the man is not entitled to become a guardian, because after the marriage contract it is not allowed to have intercourse with him, and his guardian is the guardian of the judge.

The Maliki school is of the opinion that it is not permissible to marry an adulteress before she is clean from her adultery with three menstrual periods or after three months have passed after being declared not pregnant. This is the same as the opinion of the Hambali school which also does not allow to marry an adulteress pregnant woman, whether pregnant or not pregnant, with a man who knows her condition, except for two conditions, namely: her iddah period has expired and she has repented. If a conclusion is drawn, then the man who marries her cannot become a guardian, and her guardian's rights pass to the guardian of the judge.

According to Husnul Yaqin, the status of a guardian woman for a child from an adulterous relationship (a child out of wedlock) with her biological father is not valid and only recognizes the relationship between the child and the mother and the mother's family. So the father and his father's family cannot be guardians in the marriage of his biological daughter. Thus, the guardianship moved from the guardian of the lineage to the guardian of the judge.

The Islamic sharia does not acknowledge the existence of blood links between children born as a consequence of adultery with the man who caused their birth and also the family of the guy who is their

biological father. Blood relationship is one of the causes of mutual inheritance. Mutual inheritance between them is prevented by their lack of biological connections. The rationale is that, in accordance with Syara, adultery is not a legitimate means of establishing nasab connections so that they can inherit. In contrast, Islamic law acknowledges that a kid born via adultery has a blood connection to both his mother and her family, giving him the ability to inherit both their property and their mother's inheritance. When a mother passes away, the child is entitled to inherit her property, and when a child passes away, the mother is entitled to inherit the property (Yakin, 2015).

Modern Urf is called *walad ghairu syar'i* (children who are not recognized by religion). As his father is called the father of *ghairu syar'i*. Since the child of adultery, whether male or female, is not recognized as having blood relations with his father, he cannot inherit his father and neither can any of his father's relatives, just as his father could not inherit him. Because there is no cause for mutual inheritance between the two, namely blood relations. Because the adulterous child is recognized as having blood relations with his mother, then he inherits his mother, just as he inherits his mother's relatives, and vice versa. So, if a child who is recognized as a religion dies, leaving his father and mother who are not recognized by religion, then all his inheritance will be given to his mother by way of fard and by way of rad (Muhdlor, 1995).

Based on the inheritance law contained in the Qur'an, it can be concluded that children out of wedlock or adulterous children are not included in the group that can inherit rights from the father and his father's family. In the Qur'an it is said that children or grandchildren are entitled to receive inheritance rights if there is a legal lineage relationship through a marriage contract.

C. Analysis of article 53 of the KHI on pregnant marriage by a judge of the Sengkang religious court with a *maslahah* approach

There are several viewpoints on how to solve the issue of pregnant women. The marriage was approved by and accepted as legal by Imam Shafi'i. Abu Hanifa shares this opinion, but with the addition of the restriction that pregnant women may marry but not engage in sexual activity prior to giving birth. Imam Malik and Imam Hanbali, who oppose the practice of marriage, express the opposing viewpoint. Similar reasoning can be found in Ibn 'Taymiyyah's claim that it is forbidden to marry pregnant women who have committed adultery. In QS al-Nur/24:3 Allah swt says:

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ ﴿٢٤﴾

Meaning:

"A male adulterer may not marry except with a female adulterer or an idolatrous woman and a female adulterer may not marry except with a male adulterer or an idolatrous male and that is forbidden for the believers".

According to the majority of scholars, a girl is pregnant because she has never been married, so they do not have an *iddah* period, at any time she can be married by a man who proposes to her. The opinion of the Shafi'i school was approved by two other schools, namely Hanafi and Maliki with slightly different conditions. According to Syafi'i, all men may marry the pregnant girl, and after marriage they may have sex with her even though the man was not the one who impregnated her. Meanwhile, according to Imam Hanafi, if the one who marries the pregnant girl is not the man who impregnated her, the marriage is valid but it is not permissible to have intercourse with her until the wife gives birth to her womb from another man. According to the Maliki *jumhur*, only a man who got her pregnant can marry her, and when she is married, her relationship is valid like any other husband and wife (no longer commits adultery as was the case before the marriage).

As for the Hanbali school of thought, a pregnant girl should not be married by anyone, including the man who impregnated her. A Regional Ulema Council once issued an official fatwa proclaiming the opinion of this Hanbali school. Of course, this immediately invited a very big reaction either from many scholars or the reaction from the Central Indonesian Ulema Council itself officially to strengthen legal

certainty in Indonesia. In the Compilation of Islamic Law (KHI) article 53 paragraphs (1), (2) and (3) regarding pregnant marriage it is stated:

- a. A pregnant woman out of wedlock, can be married to a man who impregnated her
- b. Marriage with a pregnant woman referred to in paragraph (1) can be carried out without waiting for the birth of her child
- c. With the marriage taking place when the woman is pregnant, there is no need for remarriage after the child is born.

According to the judge of the Sengkang Religious Court, although according to Ulama of different schools of thought it is permissible to marry pregnant women, Ulama and the government have *ijtihad* in the Compilation of Islamic Law that pregnant women can be married to men who impregnate them. Article 53 of the Compilation of Islamic Law is very clear about the benefits for pregnant women, the children they are carrying and society in general.

There are concerns about Article 53 of the Compilation of Islamic Law regarding pregnant marriage which will pave the way for the legality of adultery because of the granting of marriage permits for pregnant women. Even cases of pregnant women will be considered normal by uneducated teenagers because there are articles that regulate the permissibility of pregnant women. However, according to the judge of the Sengkang Religious Court, the purpose of Article 53 of the Compilation of Islamic Law is to save pregnant women and their babies, not to legalize adultery which is a form of abuse of the purpose of the article.

The existence of Article 53 of the Compilation of Islamic Law provides benefits for pregnant women because basically pregnancies that occur outside of marriage are not desired by the woman. Therefore, sometimes feelings of regret and stress and even the desire to commit suicide are experienced by pregnant women. With the permissibility for men who impregnate the woman, the safety of the soul (*hifzu al-nafs*) of pregnant women can be achieved. Likewise with the safety of the child (*hifzu al-nasl*) conceived by the pregnant woman, to get the rights of the child such as inheritance, maintenance and guardianship is to be married to a man who impregnates his mother.

Article 53 Compilation of Islamic Law regarding pregnant marriage can also maintain public safety (*hifzu al-jamaah*). Because the problem of pregnant women can cause a very big conflict in society. These conflicts can be in the form of fights, disputes and even murders caused by the case of pregnant women. This is even more so in the Bugis area, which strongly fights for the values of self-respect in society.

The existence of religion, soul, mind, lineage and property, which are referred to as the five main elements, which are then associated with the ranking groups of *daruriyat*, *hajjiyat* and *tahsiniyyat*, will be used as an analysis of the applicability of the provisions of article 53 of the Compilation of Islamic Law. Thus, the provisions of Article 53 of the Compilation of Islamic Law must be broken down into five main elements (religion, soul, mind, lineage and property) as well as analysis using the three groups of levels (*daruriyat*, *hajjiyat* and *tahsiniyyat*) to describe the purpose of the provisions of the article. 53 Compilation of Islamic Law on pregnant marriage.

First, the maintenance of religion. If the maintenance of religion is related to the provisions of Article 53 of the Compilation of Islamic Law, it means that it is permissible to carry out marriages for adulterous couples, even though they are carried out on the basis of compulsion, it shows evidence of repentance. Thus, the couple stopped committing adultery, and then married to start a new life in a legal marriage bond. However, these efforts have not been able to provide optimal maintenance of religion, because by allowing marriage it can actually result in the legality of adultery. Efforts should be made to maintain in the context of adultery is to optimize prevention efforts (*Sadd al-Zari'ah*). Adultery is an act that violates religious teachings, so its existence must be eradicated and fought. One of the efforts made is to provide sanctions which are expected to be able to provide a deterrent effect, as well as take preventive measures to other people so as not to commit similar violations in the future. Thus, marriage as a worship to maintain religion will always be carried out on the basis of willingness and desire to worship and not based on compulsion and urgency to hide disgrace (pregnancy).

This is in accordance with the purpose of maintaining religion according to Muhammad Abu Zahra that guaranteeing the safety of religion/belief (المحافظة لى الدين) is to avoid the emergence of slander and safety in religion and to anticipate the impulses of lust and actions that lead to full damage.

Second, the maintenance of the soul. The permissibility of getting married for pregnant women out of wedlock has an important meaning for the maintenance of the soul. After the marriage, the woman (and perhaps her children if they are born) will receive a living from the man who impregnated her. Thus, women will be able to fulfill their daily needs, especially those related to primary or basic needs in daily life, in the form of: food, clothing and shelter needs. The opposite condition will occur if it turns out that the man who got pregnant does not want to be responsible or is not allowed to marry her. It is possible, in conditions like this, women will live alone and even become single parents. Meeting the needs of life by working alone will certainly provide difficulties for a woman's life, especially if the condition is caused by the attitude of the male adulterer partner who does not want to take responsibility.

Based on this, it is very in line with the purpose of guaranteeing the safety of life (المحافظة لى النفس) which is a guarantee of safety for the right to an honorable and noble life.

Third, the maintenance of reason. A pregnant woman out of wedlock is very vulnerable to psychological stress. If the pressure is allowed to continue, it is possible that it will affect the health of the mind, especially for women. Although the maintenance of reason here is not carried out through the media of formal education (educational institutions), but by holding a marriage it is enough to save the mind.

This is in accordance with the purpose of guaranteeing the safety of reason (المحافظة لى العقل) which is to ensure the mind from damage that causes the person concerned to be useless in society, a source of crime, or even become public trash. Preventive prevention efforts carried out by Islamic law are actually aimed at avoiding the ability of the mind and guarding it from various harmful things.

Fourth, the maintenance of offspring. The provisions of Article 53 of the Compilation of Islamic Law have a long-term orientation in the form of maintaining offspring. Heredity is a long-term manifestation for parents. Therefore, the existence of offspring (children) must be preserved and saved. Thus, holding a marriage for an adulterous couple is a concrete step to provide clarity of legal status. Because if it is too late, the child will have difficulty in taking care of all his administrative needs as a citizen.

This is in accordance with the purpose of guaranteeing the safety of offspring (المحافظة لى النسل) which is to guarantee the preservation of the human population so that they live and develop healthy and strong, both in character and religion. This can be done through the arrangement of domestic life by providing education and affection to children so that they have a refined character and an adequate level of intelligence.

Fifth, maintenance of property. To maintain property, Islam has introduced ways to maintain and protect property from evil if these efforts are not made. Maintenance in the context of the application of the provisions of Article 53 of the Compilation of Islamic Law, is that marriage will have implications for the maintenance of property, in the form of proper use and distribution of assets. The context of property maintenance in cases of pregnant marriage shows that after the marriage takes place, the use of assets will be limited to activities related to related parties, including those used to support and meet family needs. Apart from that, another important matter that is no less important is related to the right of the child (a child of adultery) to participate in the enjoyment of the property, including the inheritance rights of the child if one day his parents die. Because legally it has been clearly stated as descendant of the owner of the property in question. Based on this, it is very much in line with the purpose of guaranteeing the safety of property (المحافظة لى المال), namely by increasing wealth proportionally through lawful ways, not dominating economic life in an unjust and fraudulent way.

Departing from the analysis of the maintenance of the five elements, when related to the provisions of Article 53 of the Compilation of Islamic Law, a contradiction was found, namely that the maintenance of religion has not been fulfilled. The maintenance of religion is not placed at the daruriyat level as a primary domain that must be maintained. On the other hand, the provisions of Article 53 of the Compilation of Islamic Law actually place the other four elements (soul, mind, lineage and property) in

the daruriyat level for immediate maintenance. The maintenance of religion that is oriented towards achieving the benefit of the world and the hereafter (al-masalih al-duniawiyyah wa al-ukhrawiyyah) seems to be set aside to prioritize the maintenance of the four elements that are merely oriented towards achieving the benefit of the world (al-masalih al-duniawiyyah). If we stop at this analysis, then the provisions of Article 53 of the Compilation of Islamic Law are more oriented towards achieving the benefit of the world. Therefore, further analysis is needed to uncover this problem. The placement of the maintenance of the four elements in the daruriyyah level is more because the adultery has occurred and caused pregnancy. In this context, the basis for the footing is a very urgent condition (daruriyyah), in the form of a woman's pregnancy and the child she is carrying.

This serves as the foundation for giving the maintenance of the other three parts priority above religious maintenance. It is impossible to rule out the possibility that pregnant women and unborn children exist, leading one to prioritize the preservation of religion. Because if maintaining religion is given priority, the lives of unborn children and expectant mothers will genuinely be at danger. The preservation of the four components—soul, property, intellect, and lineage—will be lost as a result. On the other hand, if these four components are preserved, it will be feasible to realize the maintenance of religion on other occasions, specifically the maintenance of religion for future generations of children. Article 53 Compilation of Islamic Law regarding pregnant marriage with various purposes and objectives is in line with the fiqhiyyah rules which say that:

المفاسد لى لب المصالح

Meaning: "*Rejecting mafsadah takes precedence over achieving maslahah*"

Likewise with the basic fiqh rules which say that:

لب المصالح المفاسد

Meaning: "*Achieving benefit and rejecting harm*"

'Izzuddin bin Abd al-Salam in his book Qawa'id al-Ahkam fi Mashalih al-Anam says that all sharia is maslahah, either by refusing mafsadah or by gaining maslahah. Some human work leads to maslahah, some leads to mafsadah. Both maslahah and mafsadah are for worldly interests and some are for ukhrawiyah interests, and some are for worldly interests as well as ukhrawiyah. Article 53 Compilation of Islamic Law regarding pregnant marriage is more directed towards achieving worldly benefits and preventing worldly damage.

Conclusion

The status of the child that the woman is carrying is impacted by her marriage. The lineage of children, inheritance, and guardianship of the children they contain will be maintained by pregnant women and the men who impregnate them by maintaining a marriage. If the union occurs prior to the child's sixth month of gestation, the child and the rights to inherit and become the child's guardian may be given to the man who marries the child's mother. But even when the man who marries it is a man who becomes pregnant, if the marriage occurs after 6 months of gestation, the child is only given to his mother. Therefore, a son who marries his mother does not constitute a kid under the law. Pregnant mothers and the children they carry stand to gain greatly from the provisions of Article 53 of the Compilation of Islamic Law. It can be described as follows if it is connected to maqasid shari'ah: maintaining religion, giving adulterers the chance to turn from their sins and get married legally; In a legally binding union, a woman receives financial support from her spouse, preventing stress and suicide; Maintaining assets, with the marriage of pregnant women, the rights to support and fulfill the needs of pregnant women and their children will be fulfilled. Pregnant women are very susceptible to psychological pressure, and if left unchecked, this pressure can disrupt mental health. Caring for Descendants, with the marriage of pregnant women, the child she is carrying will protect her human rights.

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