



Analysis of Article 53 Islamic Law Compilation About Kawin Hamil

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ABSTRACT: *In the Compilation of Islamic Law in article 53 it is explained about the ability to get married for women who are pregnant out of wedlock with the man who impregnates her. Provisions in the KHI did not abort adultery status for the culprit, despite an out-of-wedlock pregnancy. Some of the opinions above show that marital problems for pregnant women due to adultery are controversial and very complicated. On the one hand, the ability for pregnant women to carry out marriage is intended to save the life status and fate of the baby, so that after birth he gets the same rights and avoids him from discriminatory treatment. However, on the other hand, the ability for pregnant women to get married can lead to freedom, which is one of the causes of increasing rates of adultery which can damage the fabric of people's lives. As for the subject matter, is Article 53 Compilation of Islamic Law creates legal uncertainty. Is it true article 53 Compilation of Islamic Law has deviated from the legal provisions in the Qur'an and Sunnah. The method used in this study is a method of normative legal research (doctrinal research) because this legal research is done by examining library materials or mere secondary data. In the view of Islamic law marriage is pregnant outside of marriage is unlawful, in accordance with the Qur'an the letter Al-Isra which explains the prohibition of approaching adultery, but if studied according to the Compilation of Islamic Law (KHI), pregnant marriage outside marriage is permitted, as long as the pregnant married person is married to a man who impregnates her, to avoid other negative impacts that will be received especially by women and children as the party who feels the most consequences. Then it also serves as a basis for women to demand that men be willing to take responsibility, and be realized by carrying out marriages and carrying out their obligations as husbands, as in a normal family. Based on the statement above, the writer tries to give a view that the regulation on pregnant marriage in article 53 of KHI should bring to benefit the Muslim community in general without violating syara rules'.*

KEYWORD: *Pregnant Marriage, Article 53 KHI*

I. INTRODUCTION

Marriage which in religious terms is called 'marriage' is to carry out a contract or agreement to bind itself between a man and woman to justify sexual relations between the two parties, on a voluntary basis and the pleasure of both parties to realize a family life happiness which is covered compassion and tranquility in ways blessed by God.¹

In Law No.1 of 1974 states "Marriage is a physical bond between men and women as husband and wife with the aim of forming a happy and eternal family based on the One Godhead"²

Marriage aims not only to get good and legitimate offspring. But marriage also aims to gain happiness and calm in life, both in the world and the hereafter. So strong and sturdy the relationship between husband and wife, it is not appropriate if the relationship is damaged

¹ Soemiyati, *Hukum Perkawinan Islam Dan Undang – Undang Perkawinan*, (Yogyakarta: Liberty, 1989), hlm. 8.

² Pasal 1 Undang-Undang No. 1 tahun 1974 tentang perkawinan



and underestimated. Every effort to underestimate the relationship of marriage and weaken it is very hated in Islam, because it can damage the good and eliminate the benefit between husband and wife.³

The intrinsic purpose of a marriage is to realize a *sakinah* household *mahligai* which is always decorated with *mawaddah* and *rahmah*⁴

Marriage which is suggested by Islam can be seen from three perspectives, namely: from a legal, social and religious standpoint. From a legal standpoint, marriage is a very strong agreement, "*mitsaaqaan ghallizhaan*", as stated in Qs. Annisa:

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَى بَعْضُكُمْ إِلَى بَعْضٍ وَأَخَذْتُم مِّنْكُمْ مِّيثَاقًا

غَلِيظًا ﴿١١﴾

Meaning: "How will you take it back, even though some of you have been mingling (mixed up) with others as husband and wife. and they (your wives) have taken from you a strong Covenant.

From a social standpoint, marriage is a means to improve one's status in society. People who are already married are more valued than those who are not married. While from the point of Religion, marriage is considered a sacred institution, because married couples are connected by using the name Allah as mentioned in Qs. Annisa:⁵

يَأْتِيهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا
رُؤُوسَهُمْ وَإِنَّ مِنْهَا لِرِجَالًا كَثِيرًا وَنِسَاءً وَاتَّقُوا اللَّهَ الَّذِي تَسَاءَلُونَ بِهِ وَالْأَرْحَامَ

إِنَّ اللَّهَ كَانَ عَلَيْكُمْ رَقِيبًا ﴿١٢﴾

Meaning: "O men, fear your God who created you from one alone, and from him Allah created his wife; and from both of them God breeds many men and women. and fear Allah who by (uses) His name you ask each other, and (maintain) friendship relations. Surely Allah always keeps and watching over you "

Once the importance and purpose of marriage, everything related to marriage is governed by Islamic law and the state in detail and in full. A marriage is legal both according to religious law and state law when it is done by fulfilling all pillars and conditions and does not violate the prohibition on marriage. If a marriage violates a marriage prohibition or does not fulfill one of the pillars and marriage conditions, then the marriage is not valid and can be canceled or decided.

To maintain the honor of human beings, it is necessary to guide the relationship between human beings properly and in accordance with their nature and position as human beings. Therefore, this is where the importance of legal relations is needed to safeguard human dignity. In this case, the marriage institution in charge and responsible for establishing legal relationships between humans in carrying out the marriage.⁶

³ Slamet Abidin dan Aminuddin, *Fiqh Munakahat*, (Bandung: Pustaka Setia, 1999), hlm. 10

⁴ Muhammad Asnawi, *Nikah (Dalam Perbincangan dan Perdebatan)*, (Yogyakarta: Darussalam, 2004) Hlm. 3

⁵ *Ibid*, hlm. 14

⁶ Nurul Huda, *Kawin Hamil Dalam Kompilasi Hukum Islam*, Jurnal *Ishraqi*, Volume 5, Nomor 1, Januari-Juni 2009, hlm. 45



1st INTERNATIONAL HALAL CONFERENCE & EXHIBITION 2019

Today, human life is always tinged with social problems, one of which is a marriage that is pregnant out of wedlock which is greatly increasing. Pregnancy that ends with the birth of the child, there is also an end to the act of abortion or even committing suicide because it is not strong in facing the consequences of its pregnancy, both responsibility for the family, and moral responsibility towards the community. This event is inseparable from the influence of increasingly sophisticated culture and technology which results in increasingly open promiscuity, so that the occurrence of pregnancy outside of marriage is no longer a strange thing to be heard⁷.

Even so, in subsequent developments, marriage institutions will face challenges, even their existence may be threatened when faced with social problems that try to disturb the sanctity of their institutions. One of these problems is the emergence of pregnancy problems that occur outside of marriage. This problem has become increasingly complicated when in today's social life it turns out that this case occurs a lot in the community. The problem now, it turns out, in this case not only concerns the adultery of the perpetrators and the hudud sentence for his actions, but also concerning the status and destiny of the baby's life in the womb.⁸

In this context, the problem is regarding the status of the marriage during the pregnancy. There are several opinions in answering these problems. Imam Shafi'i allowed and considered his marriage valid. Abu Hanifah also argued this way, but by adding to the requirements of permissibility a pregnant woman was married but could not be related before she gave birth. The opposite opinion was given by Imam Malik and Imam Hanbali who forbade the implementation of the marriage. Likewise with Ibn Taymiyah who argued that the marriage of pregnant women from the results of adultery was unlawful.⁹

In the Compilation of Islamic Law in article 53 it is explained about the ability to get married for women who are pregnant out of wedlock with the man who impregnates her. Provisions in the KHI did not abort adultery status for the culprit, despite an out-of-wedlock pregnancy. Some of the opinions above show that marital problems for pregnant women due to adultery are controversial and very complicated. On the one hand, the ability for pregnant women to carry out marriage is intended to save the life status and fate of the baby, so that after birth he gets the same rights and avoids him from discriminatory treatment. However, on the other hand, the ability for pregnant women to get married can lead to freedom, which is one of the causes of increasing rates of adultery which can damage the fabric of people's lives. The two problems above make the basis of the marriage case for pregnant women to be interesting to study. Considering the problem of pregnant marriage including the khilafiyah domain, it does not rule out the possibility of dissent. For that reason, the discussion will be focused in terms of the legal basis used and also the arguments used, because it does not rule out the possibility of expanding the way of reading of the text using a contextual approach. So that there will be an integrative correlation between text and context. Especially if the problem is viewed from the point of view of Maqashid Sharia (the intention or purpose of Islamic law is stated), which is operationally focused on aspects of benefit both in the world and in the hereafter.

In connection with the law of pregnant marriage in this study which is based on the results of ijtihad, Indonesian scholars are one of the dynamics of Islamic law, differences of opinion among Islamic jurists are something interesting to criticize, both the results of ijtihad

Lihat juga <https://publikasiilmiah.ums.ac.id/bitstream/handle/11617/2277/3.%20Nurul%20Huda.pdf?sequence=1&jsAllowed=y>

⁷ Kartini Kartono, *Kenakalan Remaja*, (PT. Raja Grafindo Persada, Jakarta: 2008, hlm 7)

⁸ *ibid*

⁹ Ibnu Taimiyah, *Hukum-Hukum Perkawinan*. Penterj. Rusnan Yahya. (Jakarta:Pustaka al-Kautsar,1997)hlm.197



and methods of approach. This is what is of interest to researchers to explore further about pregnant marriage outside marriage or in terms of KHI called pregnant marriage. Therefore, the author took the title in this study "Analysis of Article 53 Compilsai Islamic Law About Pregnant Marriage"

To facilitate this research, the authors formulated a number of issues that are relevant to this title as follows:

1. Does article 53 Compilation of Islamic Law create legal uncertainty?
2. Is it true article 53 Compilation of Islamic Law has deviated from the legal provisions in the Qur'an and Sunnah?

II. LITERATURE REVIEW

1. Theory of Change in Law.

In the intermediate theory the author uses the theory of legal change. Changing laws and social change is a phenomenon that influences one another. Changes in law in a country can affect social change in society. And vice versa, social change in society can lead to changes in law in a country. On this basis, changes in law in a country are also closely related to social change in the community regarding the provisions of pregnant marriage in Indonesia.

The legal change theory used in the middle theory is the theory of legal change Ibn Qayyim al-Jauziyah he was a great scholar in the Middle Ages and also Islamic law thinkers who explained the theory of change in Islamic law in his work *I'lam al-Muwaqqi'in*.¹⁰

Ibn Qayyim al-Jauziyah stated that the application of the principles and principles of Islamic law in society should be coherent with changes in Islamic law in accordance with the situations and conditions in Muslim society itself. This statement is in accordance with the rule of fiqh (law) which reads: the change in a law should be adjusted to the situation, condition, time and place and refers to the purpose of general Islamic law which is to abolish corruption and prioritize public benefit.

Based on the statement above the author sees that the legal dynamics of Islamic Marriage in Indonesia, especially article 53 which regulates pregnant marriage seems acceptable in modern life as long as it is intended to create good and benefit for pregnant women and their children in the sense of saving women's status get pregnant and the status of children born later.

2. Theory of Mashlahah.

In order to enforce Islamic marriage law among Indonesian Muslim communities, the mashlahah theory can be used as application theory. Among Muslim scholars and thinkers who have introduced the mashlahah theory are Imam al-Syathiby, al-Ghazaly and Abdul Wahab Afif.

The mashlahah theory that I will use is the theory of mashlahah al-Ghazali, he is known as a thinker cleric who has a high awareness that the texts of the Qur'an and the Sunnah of the Prophet were deliberately presented for the purpose of creating benefit for all humanity. Benefit is the goal of Islamic rules. Imam al-Ghazali (d. 1111 H) called it the term *maqashid al-shari'ah*. He also formulated that benefit is divided into five basic principles namely: *hifzh al-din* (nurturing religion), *hifzh al-nafs* (nurturing the soul), *hifzh al-'aql* (nurturing mind / mind), *hifzh al-nasab* (maintaining honor / descendants or reproductive organs), *hifzh al-maal* (maintaining wealth / wealth). According to al-Ghazali, the term *mashlahah* is the original meaning of withdrawing benefits or rejecting harm. However, what is meant by *mashlahah* in Islamic law is every thing that is intended to maintain religion,

¹⁰ Mukhlis Usman, *Kaidah-kaidah Ushuliyah dan Fiqhiyah*, (Jakarta: Gema Insani Press, 2000) hlm. 14



soul, mind, lineage, and wealth. Every law that aims to maintain these five things is called *mashlahah*.

Therefore, al-Ghazali stated that every *mashlahah* that contradicts the Qur'an, Sunnah, or Ijma 'is null and void. Every benefit that is in line with *syara* 'actions must be accepted as a consideration in establishing Islamic law. With this statement, al-Ghazali wants to emphasize that not one Islamic law is contradictory to the benefit or not to be found in Islamic law that miseries and makes humanity worse.¹¹

Based on the theory above, the writer tries to give a view that the regulation on pregnant marriage in article 53 of KHI should bring benefit to the Muslim community in general without violating *syara* rules.

Referring to legal theories above the enforcement of Islamic marriage law for the purpose of *mashlahah*, it should be done through the results of the judges' *ijtihad* in the Religious Court to the Supreme Court which in its decision is in accordance with the provisions of the text.

III. RESEARCH METHODS

It can be seen from the type of this study classified into the type of normative legal research (doctrinal research) because this legal research is carried out by examining library materials or mere secondary data.¹²

While the nature of this research is classified into descriptive, namely to provide an overview accompanied by a systematic explanation of the review of the legal and regulatory aspects of pregnant marriage in the compilation of Islamic Law in Indonesia.

In general, the type of data needed in a legal research is directed at secondary and primary data research. This study uses a type of secondary data source consisting of:

- a. Primary legal material is material that is the main source of research. Primary legal materials are obtained from sources of Islamic law, namely Al-Qur'an, Hadith, Ijma 'and Qiyas.
- b. Secondary legal material is a legal material that has a function to add or strengthen and provide an explanation of primary legal materials, such as legislation in Indonesia which is closely related to the discussion of Islamic marriage law in Indonesia, especially the Compilation of Islamic Law and other legislation and literature - literature related to Islamic marriage law.

Based on the problems examined by the author, the writer uses normative legal research methods. The method of normative legal research or library legal research is legal research conducted by examining library materials or mere secondary data.¹³

In this study using a method of qualitative analysis, namely analysis by describing or describing and then comparing theories that have become references to the provisions of legislation. The stages of analysis begin with collecting data, processing data, and finally presenting data. In this research the author makes conclusions using inductive methods. Understanding the method of inductive drawing conclusions, namely drawing conclusions starting from the data that is of a special nature.

IV. RESULTS & DISCUSSION

¹¹ Habiburrahman, *Rekonstruksi Hukum Kewarisan Islam Di Indonesia*, (Jakarta: Prenada Media Group, 2011) hlm. 33-34

¹² Bambang Sunggono, *Metodologi Penelitian Hukum*, (Jakarta: Rajawali Pers, 2012), hlm. 41-42, dan hlm 86

¹³ Soerjono Soekanto Dan Sri Mahmudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, (Jakarta: Rajawali Pers, 2010), Hlm. 13-14.



1. Analysis of Article 53 KHI in the approach to the Principle of Legal Certainty.

The opinion of the scholars about pregnant marriage needs to be explained first. According to Jumhur Ulama allows the practice of marriage to get pregnant (not having to wait for childbirth). But they differed on who they could marry in a state of pregnancy. Imam Malik and Hanbali argued that pregnant women should only make pregnant. In other words, these two Imams forbid the marriage of a pregnant woman to someone who did not impregnate her. While Imam Shafi'i and Hanafi have the opinion that pregnant women are allowed to marry the person who impregnates her and also with those who do not impregnate her. If a pregnant woman is married to a man who does not impregnate her, then the woman may not be treated first, until the woman gives birth and the expiration period is over.¹⁴

In this case, KHI seems to adopt and tend to the opinions of Malik and Hanbali. Article 53 states that a woman who is pregnant outside of marriage can marry a man who impregnates her. The marriage that is launched is not necessary to be repeated when the woman has given birth to her child. The rule about not needing a partner to remarry after a child is conceived is motivated by the view of the community who assume that a marriage made by a partner whose bride is pregnant must be repeated when the child is born. They see that women who give birth must experience a period of idah and after their dreams are finished they may be married.

Determination of the rules of permission for the marriage of a pregnant woman and only those that result in a pregnant woman are intended, in the writer's view, so that the rules are relevant and in line with the rules of child legitimacy and the rules of the law in KHI. In the view of the classical clerics, the status of pregnant children outside marriage is only to their mother, even though they are married to the man who impregnated her. This is related to the opinion of scholars who stated that children born under 6 months after the marriage of their mother, the child could be denied by his father and his nasab could not be connected with his father. From the point of view of this jurisprudence, it can be explained that there is still a possibility that a child born to a woman who is pregnant outside of marriage is recognized by her father, if a woman is married and she gives birth to a child after they have been married for more than 6 months.

Determination of the 6-month limit in determining child health is based on the understanding that the minimum age for a woman's pregnancy is 6 months. This understanding is taken or interpreted from 2 verses of the Koran (verse 14 of Lukman's letter and verse 233 of the letter Al-Baqarah) which explains the perfect period of breastfeeding and the period of pregnancy. It is stated in Lukman's letter 14 that a mother is hard and hard to conceive and breastfeed a child for 30 months or 2.5 years. While written 233 letters Al-Baqarah explained that the perfect period of breastfeeding is 24 months or 2 full years. On the basis of these two verses the scholars agree that the minimum period of pregnancy is 6 months. However, they disagreed in determining the maximum age for pregnancy. Imam Malik set 5 years as the maximum age of pregnancy, a very old age for a pregnancy. Imam Shafi'i set 4 years and Hanafi Imam 2 years.

KHI validates the connection of the child's nasab with his father if the mother and father impregnate get married according to the rules of article 53 as mentioned. Because the child is considered legitimate by the father who impregnates his mother and then marries her, the father is entitled to be his guardian. In addition, siblings can inherit and inherit.

Marriage is carried out does not have a time limit whenever a child is born of a woman who is married to a man who impregnates her or whenever the woman is married

¹⁴ Asep Saepudin Jahar, Euis Nurlaelawati dan Jaenal Aripin, *Hukum Keluarga, Pidana dan Bisnis*, (Jakarta: Prenada Media, 2013), Hlm. 50



1st INTERNATIONAL HALAL CONFERENCE & EXHIBITION 2019

during her pregnancy the child will have a relationship to her father. For example, a woman is pregnant and she later marries a man who impregnates her and one month later or sooner than one month the child she conceives is born. Because the child is born with a legitimate marital relationship no matter how much the woman is only a month, the child becomes the legitimate child of her father. The legitimacy of the child born from the marriage is in line with the legal stipulations of children listed in article 99 of the KHI and article 42 of the Marriage Law. The article states that legal children are children born to legal marriages and the result of legal marriages. This rule is not in line with what was stated by the Ulama. Regarding the ulama's views on this matter can be explained through their views on the minimum period of gestational age.

Both of these rules later drew criticism and some people wanted to delete it. The reason put forward by this group is the rule that the ability of pregnant marriages to be feared will lead to rampant practices of adultery. Women and men who are carrying out explorations or dating are not able to withstand the turmoil and because of getting married, they will easily take refuge from the rule if the pregnancy occurs in the unmarried partner. If this is really what young people think of, they feel that the rule contributes to the spread of adultery practices. Moreover, the rules regarding the status of legitimate children support the occurrence of these practices. Young people feel that what they are doing will be resolved by the existence of these two rules, they can get married in a state of pregnancy and legalize children born from illegal relationships.

The existence of these criticisms can be seen in several activities, including one of the critic debate activities held by the Ministry of Religion in 2005. Several rules were criticized by several groups of individuals and Islamic law experts individually. One of the objects of criticism is the rules about pregnant marriages and legal status of children. This criticism debate was carried out in the context of reforming and amending several KHI rules and in order to strengthen the legal position of KHI which was planned to be raised rather than the President's instruction to become a Law, the draft of which had been prepared. Observing the draft, found a number of new rules and one of them was related to the rules of pregnancy and the relation to the child's health. The draft added one article after explaining the definition of legitimate children in articles 94 and 95. The article is article 96 which explains that children born in marriage ties recognized as legitimate are only children born after 180 days or 6 months of marriage. Article 96 of the draft states that:

"In the case of the marriage of pregnant women as referred to in articles 47 and 48, the child born in less than 180 days from the marriage contract only has a relationship with his mother and his mother's family."

It is clear that this rule re-accommodates fiqh provisions related to the minimum age of pregnancy, which means that the article in the draft revises the previous rule, that the child can be considered valid if he or she is born with a legal marriage regardless of when and after a long period of marriage.

In the Compilation of Islamic Law, the problem of pregnant marriage is explained as follows:

Article 53

1. A woman who is pregnant outside of marriage can be married to a man who impregnates her.
2. Marriage with a pregnant woman referred to in paragraph (1) can be held without waiting for the birth of her child first.
3. With the marriage being carried out when the woman is pregnant, no remarriage is needed after the child is born.¹⁵

¹⁵ Abdul Rahman Ghazali, *Fiqh Munakahat*, (Jakarta: Kencana, 2003), hlm 128.



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Inheritance of Adultery and Child Mula'anah Children Children resulting from adultery are children born as a result of legal relationships outside the marriage according to religious provisions, and are fingerprints (crime / crime).

While what is meant by the first child is a child born to a woman who is carried out by her husband.

The legal implications of adultery and original children are as follows:

1. Children resulting from adultery do not have a relationship between nasab, guardian marriage, and nafaqah with the man who caused his birth.
2. Children resulting from adultery only have a relationship between nasab, inheritance, and nafaqah with their mother and family.
3. If the li'an is proven, then a child will change his status to an illegitimate child (mula'anah) and his position in the eyes of the law is the same as the child of adultery, where he only has a civil relationship with his mother and his mother's family while towards men those who deny it with li'an have nothing to do with it.

The implication of the absence of a relationship between the child and the father will be very visible in several juridical aspects, where the man who is biologically his biological father has another person, so that he is not obliged to provide a living, even inheritance it is a woman, her biological "father" is not allowed to be alone with her, and the adulterous man is not a guardian in the marriage of his adultery daughters, because there is no connection between the two in Islamic sharia.¹⁶

According to KHI Article 53, paragraph 1 "Actually marriage due to adultery in the 70s is prohibited to do, but after KHI Article 53 paragraph 1 concerning pregnant women stated that a pregnant woman out of wedlock can be married as long as the man who occupies it."¹⁷

In Islamic adultery, including acts of great sin, this can be seen from the sequence of the mention after idolatry and killing without good reason, Allah says: "and those who do not worship other gods and Allah and kill the harmonized soul except with (reasons) true and not adultery"¹⁸ This causes the people to ask, can they be married? What is the law of marriage that is pregnant? etc., therefore the experts expressed their opinions, one of which was the opinion of the Hanafiyyah School, namely:

1. Marriage remains valid, both with men who impregnate it or not
2. Marriage is valid with conditions that must be with a man who is impregnating, and should not be bullied unless he has given birth
3. May be married to someone else, provided that she has given birth
4. May get married as long as it is past menstruation and purity, and when married then it should not be lumped unless it has passed the istibro'¹⁹.

Marriage according to Islamic law is marriage, which is a very strong contract to obey Allah's commands and carry it out is worship. Marriage aims to create a life that is sakinah, mawaddah and rahmah²⁰. But marriage here is not a marriage that is prescribed by Islam, pregnant marriage outside of marriage is a marriage that should not occur in the community and surrounding areas, but in order to prevent unwanted things, the marriage must be carried out, such as loss of responsibility a man who impregnates him, or the fate of the child to be born later, about getting pregnant out of wedlock himself in Islam is known as adultery by

¹⁶ Mardani, *Hukum Kewarisan Islam di Indonesia*, (Jakarta, Rajawali Pers, 2014), hlm 104-105.

¹⁷ KHI (Kompilasi Hukum Islam) Pasal 53 Ayat 1

¹⁸ Lihat Al-Qur'an surat Al-Furqaan ayat 68

¹⁹ Pendapat Para Ahli yaitu Madzhab Hanafiyyah

²⁰ Ahmad Firdaus Al-Halwani, *Hukum Perkawinan Akibat Hamil di Luar Nikah (Studi Perbandingan Imam Asy-Syafi'I dan Imam Ahmad bin Hanbal)*. Skripsi : Universitas Islam Negeri Sunan Kalijaga Yogyakarta 2014



1st INTERNATIONAL HALAL CONFERENCE & EXHIBITION 2019

both the pregnant woman and the pregnant woman, this makes the scholars think that among them are:

1. Syafi'iyah Ulama

The law is legitimate marrying a pregnant woman due to adultery, both those who marry the man who impregnates her, and men who do not impregnate her. Alasanya because pregnant women due to adultery are not included in the female class that is forbidden to marry. They also argued that because the marriage contract was legally valid, the woman he married was halal to be fucked even though he was pregnant.²¹

2. Hanafiyah Ulama

The law is legitimate marrying a pregnant woman if the married man is the one who impregnates her, the reason being that pregnant women due to adultery are not a group of women who are forbidden to marry as contained in QS An-Nisa which means: "And do not marry women has married your father, except (events) in the past. Surely this action is very abominable and despised and as bad as the way (taken)"²²

3. Malikiyah Ulama

Women who commit adultery either on the basis of liking or being raped, pregnant or not, it is compulsory for istibra. For women who are free and not pregnant, her wife has three times menstruation, while for women who are slaves of the fair, there is one period. But if he is pregnant, his wife will give birth Ulama Malikiyah²³.

2. Analysis of Article 53 KHI Viewed from Maqashid Syar'iyah.

The occurrence of women who are pregnant outside of marriage (which is strictly prohibited by religion, norms, ethics and state legislation). Apart from the existence of promiscuity, also because of the weakness (fragility) of the priest on each side. Therefore, in anticipation of these vile and forbidden actions, deep religious education and legal awareness are increasingly needed.²⁴

Maqashid Syar'iyah comes from two words, namely maqashid and syari'ah. Maqashid is the word jama 'from maqsudun which means intent, or purpose. While the syar'iyah in language is the path to the source of the spring. The road to this water source can also be called the path to the source of life.²⁵ While shari'ah in terms of the rules created by Allah to be guided by humans in regulating relations with God, with humans both fellow Muslims and non-Muslims, nature and all life.²⁶

Abu Ishaq Ash-Syatibi has formulated the objectives of Islamic law or al-maqasid asy-syar'iyah, namely to maintain religion, soul, mind, descent, property. Mohammad Muslehuddin added it for the purpose of the sixth Islamic law, namely to maintain self-respect. Self-maintenance of pornographic things and porno-action means the maintenance of the body, which includes the maintenance of the soul, mind, and spirit that unites and manifests in the body of every human being which also means preserving religion, descent, and wealth, and self-respect. Maintenance of the body as a mandate from Allah, according to Islamic teachings, is inseparable from the maintenance of religion (which consists of maintaining aqeedah, sharia, and morals), soul, mind, hunting, wealth, and honor.

Islam teaches that the main purpose of life and human life is to get the blessing of Allah alone, to achieve happiness in the world and the hereafter. In an effort to seek Allah's blessing, Islam teaches about the pillars of faith which consist of believing in Allah, believing

²¹ Pendapat Ulama Syafi'iah

²² Lihat Al-Qur'an Surat An-Nisa ayat 23

²³ Pendapat Ulama Malikiyah

²⁴ Abdul Rahman Ghozali, *op.cit*, hlm 124-128.

²⁵ Amir Syarifuddin, *Pembaharuan Pemikiran dalam Hukum Islam*, (Padang: Angkasa Raya, 1993), hlm. 13

²⁶ Mahmud Syaltout, *Islam; Aqidah wa Syari'ah*, (Kairo: Dar al-Qalam, 1966), Hlm.12



1st INTERNATIONAL HALAL CONFERENCE & EXHIBITION 2019

in His Prophets, believing in the books, Him, believing in His angels, believing in the last day, namely the day of calculation for every human being to account for all his actions during life in the world, including responsibility in treating and utilizing their respective bodies as a mandate of the Most Gracious, Most Merciful, Most Just, Wise, and the last pillar of faith that is faith in qada and qadar Allah SWT.

Pregnant marriage out of wedlock, is a problem that has been discussed by previous scholars, but as time goes on it turns out that this problem is still a problem from ancient times from the time of the Prophet Muhammad to the present and may continue to develop until now in order to find legal solution. On the one hand the ability of pregnant women to embrace marriage is intended to save the life status and fate of the baby they contain, so that after birth they get the same status and rights and avoid discriminatory treatment. But on the other hand the ability for pregnant women outside of marriage to carry out a marriage can sometimes cause disagreement, including being one of the causes of increasing cases of adultery which can damage the order of life in society.

Pregnant marriage due to adultery is a problem that includes the khilafiyah region, so it does not rule out the possibility of differences in thoughts and opinions. The problem of pregnant marriage is viewed from the point of view of maqashid syari'iah which is to mean knowing the purpose and purpose of Islamic law.²⁷

Maqashid syari'iah technically focuses on aspects of benefit both in the world and in the hereafter by considering the five elements that must be maintained, namely: Religion, Soul, mind, lineage and wealth. The use of the maqashid syar'iyah method aims to solve contemporary problems which sometimes are not regulated by the Qur'an and Sunnah. It has been carried out in accordance with applicable Islamic law, even though the marriage still gets a negative view from the people and its surroundings but the marriage must continue to be carried out to reduce or minimize gossip that will later occur when the child is born, the purpose of Islamic law is the law contained in the Compilation of Islamic Law. Based on the Hadith of the Prophet, a pregnant woman may marry a man who adultery her as in the following hadith: "a man who is punished by a volume (whip) will not marry except with the same (woman of adultery)"²⁸ Another hadist also said that the law of a married woman during pregnancy is legal because zina acts that are unlawful do not hinder the conduct of lawfulness, let alone marry. "Acts that are haram (zina) do not cause halal deeds (marriage)"²⁹

The rule about not needing married couples after a child is conceived is born behind the views of the community who consider that a marriage made by a partner whose bride is pregnant must be repeated when the child conceived is born. They see that women who give birth must experience a period of birth and after iddah is finished, they may be married.³⁰

Determination of the rules of permission for the marriage of a pregnant woman and only by causing the pregnant woman to be intended, so that the rules are relevant and in line with the rules regarding the legitimacy of the child or the legal rules and the stipulation in the KHI that is different from the fiqh rules. In the view of the classical scholars, the status of the child of a pregnant woman out of wedlock is only to her mother, even though they are married to a man who impregnates her. This is related to the opinion of scholars who say that children born under six months after the marriage of their mother, the child can be denied by his father and his nasab can not be connected to his father.

²⁷ Fathurrahman Djamil, *Filsafat Hukum Islam*, (Jakarta: Logos Wacana Ilmu, 1999) hlm. 123-134

²⁸ HR. Abu Dawud

²⁹ HR. Ibn Majah

³⁰ Asep Saepudin Jahar et.all, *Op.Cit.*,Hlm. 51



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From this Fiqh view, it can be explained that there is still a possibility that a child born to a woman who is pregnant out of wedlock is admitted to her father if she is married and she gives birth to her child after they have been married for more than six months

This rule has drawn criticism and some circles, the reason stated is that by allowing marriage to be pregnant it is feared that it will lead to rampant adultery practices. This fact is in accordance with the rule of fiqh (law) which reads: the change in a law should be adjusted to the situation, conditions, time and place and refers to the purpose of general Islamic law, namely eliminating kemudharatan and prioritizing public benefit.

Then it is seen from Maqashid Shari'ah to avoid mafsadat both in the world and in the end. Based on the statement above the author sees that the legal dynamics of Islamic Marriage in Indonesia, especially article 53 which regulates pregnant marriage seems acceptable in modern life as long as it is intended to create good and benefit for pregnant women and their children in the sense of saving women's status get pregnant and the status of children born later.

V. CONCLUSION & SUGGESTION

The sound of provisions in Article 53 Compilation of Islamic Law contains uncertainty in the law because in the editorial of the article it is stated that a woman who is pregnant outside of marriage can be married to a man who impregnates her. On the other hand the Compilation of Islamic Law also does not regulate further the status of women who are pregnant out of wedlock due to zina can also be married to men who are not impregnating them. Thus giving rise to an interpretation of uncertainty about the legal status of pregnant women outside of marriage. This means that article 53 of KHI verse 1 contains the meaning of the law of authority and not a necessity.

The purpose of the provision in article 53 of KHI paragraph 1 is to maintain the honor of nasab so that the sperm that fertilizes the woman is not mixed with other male sperm. This reasoning is due to the benefit of the pregnant woman and the baby she contains, especially in terms of guarding or maintaining the offspring (hifz al-nasab) in the hope that if the offspring are preserved, then keep al-Dharuriyat al-Khamsah the other. While the rules regarding the ability to marry men who are not impregnating them as a way out of problems when the man who impregnates him runs away and is not responsible. This is in order to maintain the benefit of self-esteem (hifz al-‘urdh) for the woman and the baby she contains from sustainable fitnah.

The author in this case suggests the need for a review of article 53 Compilation of Islamic Law which can lead to multiple interpretations for the sake of legal certainty. Understanding of the law needs to be deepened again so that there is no mistake in behaving, especially in association between a man and woman. So the need to provide knowledge to the younger generation about Islamic marriage law.

The need for socialization in the form of counseling to the public in general regarding pregnant marriages as well as the dangers or negative impacts carried out by policy makers and law enforcement officials from the Government carried out by the Office of Religious Affairs and Religious Courts and scholars and community leaders and academics in universities.

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1st INTERNATIONAL HALAL CONFERENCE & EXHIBITION 2019

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