



The Legitimacy of Marrying a Pregnant Woman from the Perspectives of Islamic Scholars and Legislation in Indonesia

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Abstract

Shotgun marriage is a serious issue that has recently become increasingly common in society. Some men who impregnate women take responsibility and are willing to marry them, while others run away and shirk their responsibility. While some men are willing to marry women who are already pregnant, the perception still exists in some parts of society that those couples must remarry after the children are born and that the children cannot be traced back to the fathers who acknowledge it. This present study aims to answer the following question: what is the legitimacy of marrying a pregnant woman according to Islamic scholars and Indonesian law in the maslahah method? The results of the study reveal that according to Abu Hanifah and his student Muhammad, it is permissible to marry a pregnant woman if the one who marries her is the man who impregnated her. However, the marriage of a pregnant woman to a man who did not impregnate her is still a matter of debate. According to Abu Hanifah and Muhammad, it is permissible, but the man should not have intercourse with her until the child is born. According to Abu Yusuf and Zafar, it is not permissible to marry a woman who is pregnant as a result of zina (fornication) with another man because it is likened to pregnancy without zina. Imam Malik does not allow the marriage of a pregnant woman because of zina and considers such a marriage to be invalid, and the woman must undergo the iddah (waiting) period. Imam Shafi'i, on the other hand, considers shotgun marriage to be valid, regardless of whether the man who marries her is the one who impregnated her or not, and it is permissible for him to have intercourse with her even though she is pregnant because the presence of the fetus does not invalidate the marriage contract. According to the Hanbali scholars, marrying a pregnant woman is not valid unless two things have been done: she has repented and she has waited out the iddah period. Article 53 of the KHI (Kompilasi Hukum Islam/The Compilation of Islamic Law) states that a woman who is pregnant outside of marriage can be married to the man who impregnated her, and the marriage can be solemnized without waiting for the child to be born. However, the KHI should also add a phrase about a man who marries a pregnant woman who is not the one who impregnated her. This permissibility does not mean condoning zina but rather



accommodating the interests of Indonesian society, which is in line with the opinion of Imam Shafi'i.

Keywords: Shotgun marriage, Islamic Law, Islamic scholars' opinions, KHI

Abstrak

Kawin hamil merupakan problematika serius yang akhir-akhir ini sering terjadi di tengah masyarakat. Sebagian laki-laki yang menghamilinya bertanggung jawab dan bersedia menikahnya, ada juga sebaliknya lari tidak bertanggung jawab namun datang laki-laki lain dengan suka rela menikahi perempuan tersebut. Namun persepsi sebagian masyarakat ketika telah lahir anaknya harus dinikahkan ulang kembali dan anak yang dilahirkan tidak adapat dinasabkan ke ayah yang mengakuinya. Untuk itu penelitian ini ingin menjawab dua pertanyaan, bagaimana keabsahan menikahi wanita hamil menurut ulama dan perundang-undangan di Indonesia dengan menggunakan metode maslahat. Hasil penelitian, menurut ulama Hanafiyah dan muridnya Muhammad bahwa hukumnya sah menikahi wanita hamil bila yang menikahnya laki-laki yang menghamilinya. Sedangkan menikahi perempuan hamil oleh laki-laki yang bukan menghamilinya masih menjadi perdebatan, menurut Abu Hanifah dan Muhammad hukumnya sah tetapi tidak boleh mencampurinya sampai anak yang dikandungnya lahir. Menurut Abu Yusuf dan Zafar tidak sah hukumnya menikahi wanita hamil akibat zina dengan laki-laki lain karena diqiyaskan kepada kehamilan tanpa disebabkan zina. Imam Malik tidak membolehkan mengawini perempuan hamil karena zina dan pernikahan tersebut dianggap fasid dan harus menjalani masa iddah. Sedangkan imam Syafi'i menilai kawin hamil sah baik yang menikahi itu laki-laki yang menghamilinya maupun bukan, dan boleh mencampurinya meskipun dalam kondisi hamil karena adanya janin tidak merusak akadnya suatu perkawinan. Adapun menurut ulama Hanabilah bahwa menikahi wanita hamil tidak sah kecuali telah melakukan 2 hal yaitu, bartaubat dan menunggu masa iddah. Sedangkan dalam KHI Pasal 53 menyebutkan seorang wanita hamil diluar nikah dapat dikawinkan dengan pria menghamilinya dan dapat dilangsungkan tanpa menunggu lebih dahulu kelahiran anaknya. Namun seharusnya KHI juga menambah frasa tentang yang menikahi wanita hamil bukan laki-laki yang menghamilinya. Kebolehan tersebut bukan berarti memperluas perzinahan tetapi lebih mengakomodir kemaslahatan masyarakat Indonesia yang sejalan dengan pendapat imam Syafi'i.

Kata Kunci: kawin Hamil, Hukum Islam, Pendapat ulama, KHI.

Introduction

Marriage in Islam is an act of worship and a sacred contract (*mitsaqan gholidhan*) between a man and a woman to fulfill the commandments of Allah,¹ as reflected in the Qur'an, Surah An-Nisa' verse 21, "And they (your wives) have taken a strong covenant from you." The Marriage Law Number 1 of 1974 also describes that marriage is, "A physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family (household) based on the belief in One God." In Article 2 of the Compilation of Islamic Law (KHI/ *Kompilasi Hukum Islam*), it is stated that marriage is a very strong and firm contract, or known as *mitsaqan ghalizhan*, to obey the commands of Allah and to carry them out as an act of worship."

Islam regulates the matter of marriage in detail so that humans live honorably in accordance with their position as caliphs on earth. Marriage is a means of building an Islamic household. With marriage, the relationship between men and women as husband and wife is

¹ Tim Penyusun, *Kompilasi Hukum Islam*, (Bandung: CV. Nuansa Aulis, 2015).15

woven with honor, biological and mental desires are channeled, and emotional satisfaction and happiness can be achieved in accordance with human nature. Marriage has several purposes, such as to meet the physical (biological) and spiritual needs of life as well as to form a family to continue and maintain a clear lineage. This is because Islam strongly guards the purity of lineage², even becoming one of the *maqashid syari'ah* (objectives of Islamic law). In Islam, sexual intercourse is only allowed after the *akad nikah* (marriage contract) between husband and wife. If sexual intercourse occurs without a valid marriage bond, it is strictly prohibited and a great sin, and considered as *zina* (fornication) which can be punished by caning, stoning, and others. Nevertheless, many young people today still engage in forbidden relationships without parental supervision, resulting in premarital pregnancy. According to an online source in 2022, 125 female students in Ponorogo became pregnant outside of marriage, and in Aceh Besar, 54 teenagers had to apply for a marriage dispensation because they were already pregnant.

The issue of marrying a pregnant woman (i.e., shotgun marriage) in Islamic jurisprudence is still a debate among Islamic scholars. Some scholars view it as permissible, but the couple should not have intercourse until after the baby is born. Other scholars do not allow it at all until the woman has repented and the baby is born, because in this case, the woman must observe the *iddah* (waiting) period. However, Indonesian law allows shotgun marriage unconditionally, without waiting for the birth of the baby, as stated in Article 53 of the Compilation of Islamic Law. This has led some people to believe that shotgun marriage is a way to legalize *zina*.

Several studies have discussed about pregnant women with different focuses and scopes from this current study. A study written by Sheila Fakhria entitled "*Pegawai Pencatat Nikah Dan Konservatisme Fikih Keluarga: Pelaksanaan Perkawinan Wanita Hamil di Kantor Urusan Agama Kabupaten Kediri*" examined the rule of the KHI that a pregnant woman can only be married to the man who impregnated her. However, the Hanafi school of thought also allows the woman to be married to a man who did not impregnate her. This study analyzed the implementation of the marriage of pregnant women at the Religious Affairs Office (KUA) in five sub-districts in Kediri Regency. The study found that the marriage registrars (PPN) in the five sub-districts preferred to refer to classical *fiqh* (Islamic jurisprudence) of the Hanafi school in the implementation of the marriage of pregnant women. They argued that a woman who was pregnant outside of marriage could be married to a man who did not impregnate her. Sociological reasons such as *pesantren* (traditional Islamic boarding school) tradition and the influence of *kyai* (Islamic experts) are important reasons for the emergence of this attitude.³

Another study by Sumirahayu Sulaiman entitled "*Perkawinan Wanita Hamil menurut Peraturan Perundang-Undangan*" examined the regulations on the marriage of pregnant women according to the Marriage Law of the Republic of Indonesia Number 1 of 1974, the Civil Code, and the Compilation of Islamic Law. According to the Marriage Law of the Republic of Indonesia Number 1 of 1974 and the Civil Code, the marriage of pregnant women is treated the same as that of other women (who are not pregnant) as long as it meets the requirements of both regulations. However, the lineage of a child of a pregnant woman

² Aladin, "Pernikahan Hamil Di Luar Nikah Dalam Perspektif Kompilasi Hukum Islam (KHI) dan Fiqih Islam di Kantor Urusan Agama," *Masalah-Masalah Hukum* 46, No. 3 (2017): 239-248. <https://doi.org/10.14710/mmh.46.3.2017.239-248>.

³ Sheila Fakhria, *Pegawai Pencatat Nikah Dan Konservatisme Fikih Keluarga: Pelaksanaan Perkawinan Wanita Hamil di Kantor Urusan Agama Kabupaten Kediri*, *Al-Ahwal* 13, no. 2 (2020): 139-152. <https://ejournal.uin-suka.ac.id/syariah/Ahwal/article/view/2259/1669>.

outside of marriage follows the lineage of the mother. The marriage of a pregnant woman can be carried out if it meets the requirements for a valid marriage according to the Marriage Law of the Republic of Indonesia Number 1 of 1974 and the Civil Code, and does not conflict with the religions and beliefs of each person. This suggests that, based on religions and beliefs, the marriage must be in accordance with the provisions of the concerned religious and belief teachings. Hence, a pregnant woman can be married to the man who impregnated her and/or married to a man (other) who did not impregnate her as long as there has been an agreement to carry out the marriage from each party. However, according to the Compilation of Islamic Law, a pregnant woman can only marry the man who impregnated her, as mandated by Article 53 paragraph (1) of the Compilation of Islamic Law, "A woman who is pregnant outside of marriage can be married to the man who impregnated her." Here, based on the Compilation of Islamic Law, the legal status of the marriage of a pregnant woman is valid as long as she marries the man who impregnated her. The Compilation of Islamic Law does not indicate that a pregnant woman can marry a man who did not impregnate her.⁴

A study written by Junawaroh entitled "Wanita Hamil di Luar Nikah Perspektif Hukum Islam (Studi Hukum Menikahi, Mentalaq, dan Masa Iddah)" analyzed whether pregnancy outside of marriage is a disgraceful or immoral act, since *zina* is *haram* (unlawful). There are also implications whether it is *haram* or permissible to marry a pregnant woman. However, it becomes problematic when a pregnant woman is married to either her *zina* partner or someone else, and then gets divorced during the pregnancy period. This is because during the divorced pregnancy period, it is possible to have *iddah* three times of *quru'* (menstruation period) or until giving birth. This study concerned the following issues: the law concerning marrying a pregnant woman out of wedlock, the law on *thalaq* (repudiation of divorce) for pregnant women out of wedlock, and the law on the *iddah* period for pregnant women out of wedlock. The study used library research method, and collected data from books as primary and secondary sources. After analyzing the data, the study concluded the analysis inductively. The results revealed that according to Imam Hanafi and Shafi'i, marrying a pregnant woman due to *zina* is permissible for both the man who impregnated her and another man; however, they have different opinions regarding the permissibility of having sexual intercourse with her. Imam Hanafi only allows sexual intercourse if the person marrying her is the man committed *zina* with her, while Imam Shafi'i allows sexual intercourse with her regardless the man impregnated her or not. On the other hand, according to Imam Maliki and Hanbali, it is not permissible to marry a pregnant woman out of wedlock, whether to a man who impregnated her or not. In terms of *thalaq*, Imam Hanafi and Shafi'i considers *thalaq* for pregnant women is *jaiz* (permissible), whereas Imam Maliki views that giving *thalaq* on pregnant women is *haram*, as he refers such *thalaq* to that during menstruation outside of pregnancy. In the case of *iddah*, the opinion of Imam Hanafi and Syafi'i is that there is no *iddah* for pregnant women out of *zina*, while Imam Maliki and Hanbali require *iddah* for pregnant women out of wedlock.⁵

Research written by Fahrul Fauzi entitled "Tinjauan Kawin Hamil Dalam Perspektif Hukum Islam" explored shotgun marriage from the perspective of Islamic law. In principle, some Islamic scholars perceive that the legal origin of marriage is permissible or *ibahah* if it is

⁴ Sumirahayu Sulaiman, Perkawinan Wanita Hamil menurut Peraturan Perundang-Undangan, *Jurnal Kolaboratif Sains* 6, no. 10 (2023): 1330-1336. <https://jurnal.unismuhpalu.ac.id/index.php/JKS/article/view/4217>.

⁵ Junawaroh, Wanita Hamil di Luar Nikah Perspektif Hukum Islam (Studi Hukum Menikahi, Mentalaq, dan Masa Iddah), *Syaksia* 21, no. 2 (2020): 331-356. <https://jurnal.uinbanten.ac.id/index.php/syaksia/article/view/3847>.

connected to *al-ahkam al-khamsah*. However, marriage as a requirement to fulfill physical life needs (biological needs) is often bypassed. The current reality is that premarital sex is increasingly widespread, leading to pregnancy out of wedlock. The practice in Indonesia is that when a woman becomes pregnant in this circumstance, she will immediately be married off. Shotgun marriage is marriage to a woman who is pregnant out of wedlock, whether married to the man who impregnated her or to the man who did not. There are several differences of opinion in this case between the four Imams of the School, i.e., Imam Shafi'i, Imam Abu Hanifah, Imam Maliki bin Anas, Imam Hanbali, and several others. The Compilation of Islamic Law also regulates marriage with pregnant women. This study also discusses differences of opinion regarding shotgun marriage from the perspective of Islamic law.⁶

While other studies have different focuses, such as the study of Dhiauddin Tanjung on children from shotgun marriages,⁷ this present study focus on examining the law of marriage of pregnant women out of *zina* from the perspectives of *fiqh* and the KHI, as well as its correlation with the problems that occur today. Hence, the study may conclude which opinion and law are more appropriate to be implemented from the aspect of *maslahah* (benefit). This study used the normative legal research method with the conceptual and statutory approach.

Factors Underlying Shotgun Marriage

Premarital pregnancy is highly taboo in Indonesia and is an act of *zina* that deserves punishments by stoning or whipping. When premarital pregnancy occurs, a serious problem will arise, such as disgrace for the family, and thus, the couple is required to marry immediately to protect the family reputation from even greater disgrace. Narulita Dwi Stevani describes several factors that cause children to get pregnant outside of marriage,⁸ one of which is parental education. Parents with low education are more prone to let their children into unwanted negative situations, such as getting pregnant out of wedlock. Most parents lack understanding and mastery of various aspects of their own and other people's behavior, and those with low education are less able to carry out their duties effectively and efficiently due to lack of knowledge. In addition, another factor is adolescent psychology. The emergence of sexual urges in adolescents is triggered by changes in hormonal growth in the genitals as a result of mental and physical maturity. Then, the environmental factor, in this case the modern environment, has led teenagers towards sexual experiments that are out of control. Many media that exploit films and magazines and the internet make it easier for teenagers to access everything they want to know, causing teenagers to be permissive about sex. In fact, recently free sex has increased and is carried out openly and with great pride. As a result, many out-of-wedlock pregnancies occur which cause panic, both for the women concerned and their families. To avoid embarrassment in society, these women are quickly married off while pregnant.⁹

Other reasons that motivate pregnant women to marry because of *zina* found in society are as follows. Shotgun marriage happens to cover the disgrace in the family. Before a woman becomes pregnant, the man proposes the woman he has impregnated to marry,

⁶ Fahrul Fauzi, Tinjauan Kawin Hamil Dalam Perspektif Hukum Islam, *Journal of Islamic Law Studies* 3, no. 2 (2021). <https://scholarhub.ui.ac.id/jils/vol3/iss2/7>.

⁷ Dhiauddin Tanjung, Menikahi Wanita Hamil Di Luar Nikah, *Yurisprudensi* 14, no. 1 (2022): 37-50. <https://journal.iainlangsa.ac.id/index.php/jurisprudensi/article/view/5264>.

⁸ Narulita Dwi Stevani, *Faktor-Faktor Remaja Hamil di Luar Nikah di Kampung Masjid Kelurahan Pesawahan Kecamatan Teluk Betung Selatan*, (Bandar Lampung: UIN Raden Intan, 2018), 49.

⁹ M. Hamdan Rasyid, *Fiqh Indonesia Himpunan Fatwa-Fatwa Aktual*, (Jakarta: PT. Al Mawardi prima), 184.

however, his proposal is rejected for a number of reasons. The reasons may be the woman's parents do not respond due to various factors, or the woman does not want to be bothered with the presence of children and husband, hoping to focus more on work and career, or hoping for a better choice (a better partner). It is likely that at first the man avoid to take responsibility because he is annoyed by the woman's rejection, and maybe he even disappears. However, because it is to cover up the shame and love still exists, the man returns and is willing to marry the woman he impregnated. Men must be responsible for their actions because they have impregnated the woman, even though initially they do not expect this pregnancy to occur. As the couple are often together, undesirable things happen.

The basic reason for someone to marry a pregnant woman out of *zina* is simply to cover the disgrace of the woman and her family. If the disgrace has been covered through a legal marriage, it will indirectly give rise to certain goodness, such as the child's status will be clear and the mother will have her reputation protected.

Preventive actions taken as in the cases above is through the resilience of the family and the environment, meaning that the family must care and pay attention and protect the children from negativity. The family environment is the first environment for children's development, and therefore, moral and spiritual education from parents is very important.

The Law of Marrying a Pregnant Woman According to Islamic Scholars

The marriage of a pregnant woman due to *zina* is a matter of different *fiqh* opinions among Islamic scholars. Some strictly forbid it, while others emphasize resolving the problem without compromising the caution. Abu Hanifah and his student Muhammad view that it is permissible to marry a pregnant woman if the one who marries her is the one who impregnated her.¹⁰ The reason is that a woman who is pregnant due to *zina* is not included in the category of women who are forbidden to marry as stated in the Qur'an, Surah An-Nisa verses 22-24.

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ إِنَّهُ كَانَ فَاحِشَةً وَمَقْتًا وَسَاءَ سَبِيلًا

Meaning: "Do not marry former wives of your fathers – except what was done previously. It was indeed a shameful, despicable, and evil practice." (Surah An-Nisa: 22)

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُمُ مِنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَزَوَّجَاتِكُمُ اللَّاتِي فِي حُجُورِكُمْ مِّنْ نِّسَائِكُمُ اللَّاتِي دَخَلْتُم بِهِنَّ ۖ فَإِنْ لَّمْ تَكُونُوا دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ ۖ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ غَفُورًا رَّحِيمًا -

Meaning: "Also forbidden to you for marriage are your mothers, your daughters, your sisters, your paternal and maternal aunts, your brother's daughters, your sister's daughters, your foster-mothers, your foster-sisters, your mothers-in-law, your stepdaughters under your guardianship if you have consummated marriage with their mothers – but if you have not, then you can marry them – nor the wives of your own sons, nor two sisters together at the same time – except what was done previously. Surely Allah is All-Forgiving, Most Merciful." (Surah An-Nisa: 23)

وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ كَتَبَ اللَّهُ عَلَيْكُمْ وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرِ مُسْلِفِينَ ۖ فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَاضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ ۚ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا

¹⁰ Wahbah az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, (Damascus: Dar al-Fikr, 1989), 6650.

Meaning: “Also ‘forbidden are’ married women – except ‘female’ captives in your possession. This is Allah’s commandment to you. Lawful to you are all beyond these – as long as you seek them with your wealth in a legal marriage, not in fornication. Give those you have consummated marriage with their due dowries. It is permissible to be mutually gracious regarding the set dowry. Surely Allah is All-Knowing, All-Wise.”(Surah An-Nisa: 24)

While the marriage of a pregnant woman to a man who did not impregnate her is still a subject of debate, Abu Hanifah and Muhammad argue that it is valid to do so; however, the man is not allowed to have conjugal relations with his wife until the child is born.¹¹ Their view is based on the hadith of the Prophet Muhammad, “Whoever believes in Allah and the Last Day, let him not spill water (semen) in the field (womb) of another” (Narrated by Ahmad, al-Tirmidhi, and Abu Dawud). However, according to Abu Yusuf and Zafar, it is not valid to marry a woman pregnant from *zina* with another man who did not impregnate her. Their reasoning is based on the *qiyas* (analogy) to pregnancy that is not caused by *zina*. The *illat* (legal reason) is to honor the unborn child who has not committed any sin. The Hanafi scholars reject the argument of Abu Yusuf and Zafar because, in essence, the *illat* is not for the honor of the unborn child, but for the owner of the semen, and there is no honor for someone who commits *zina*.¹²

Regarding the *halal* nature of marrying a woman who commits *zina*, Hanafi scholars rely their opinions on the postulates of the Shafi’i scholars. On the other hand, the argument that it is forbidden to have sexual intercourse with the woman pregnant with someone else is based on the hadith of the Prophet Muhammad.¹³

وَعَنْ رُوَيْفِعِ بْنِ ثَابِتٍ - رَضِيَ اللَّهُ عَنْهُ - عَنِ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ: (لَا يَحِلُّ لِأَمْرِي يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَنْ يَسْتَقِي مَاءَهُ زَرْعَ غَيْرِهِ). أَخْرَجَهُ أَبُو دَاوُدَ، وَالتِّرْمِذِيُّ، وَصَحَّحَهُ إِبْنُ حِبَّانَ، وَحَسَّنَهُ الْبَيْهَقِيُّ.

Meaning: “It is not lawful for a man who believes in Allah and the Last Day to water what another person has sown.”

Nevertheless, the prohibition of the husband having intercourse with the wife pregnant from another man because of a non-permanent barrier that can be removed, such as menstruation and postpartum bleeding, does not invalidate the marriage.¹⁴ Still, the factor of *nasab* (kinship) in Islam is highly significant. Therefore, to avoid confusion of *nasab*, Islam has established *iddah*. The seed that a man plants in a woman cannot be known directly unless after a period of three *quru'*. For a woman who is clearly pregnant, the calculation of her *iddah* period is when giving birth to the baby she is carrying.

Although modern science considers it is not possible for two fertilizations to occur in the same womb at the same time, Islam is very wise in prohibiting a woman who is nurturing the seed of a man from mixing it with the new seed of another man. This implies that the purity of a seed is not only concerned with the material of the seed that grows, but also with the process of its nurture and growth. Medically, it is possible for a woman who has been intimate with several men to know precisely the owner of the seed she is carrying.¹⁵ According to Imam Malik, it is not permissible to marry a woman who is pregnant out of *zina*, and such a marriage is *fasid* (invalid). The reason is that a woman who is pregnant due to *zina* must first undergo a period of *iddah*, which is three menstrual cycles after giving

¹¹ Wahbah az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, (Damascus: Dar al-Fikr, 1989), 6650.

¹² Yahya Abdurrahman Al-Khatib, *Fikih Wanita Hamil*, (Jakarta: Qisthi Press, 2006), 92.

¹³ Ibnu Humam, *Syarh Fath al-Qadir*, Jilid III, (Beirut: Dar al-Fikr, 1995), 242.

¹⁴ Mahyuddin, *Masailul Fiqhiyah*, (Jakarta: Kalam Mulia, 2008), 47.

¹⁵ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: Kencana, 2007), 305.

birth. This is because the child born out of *zina* is not attributed to the man who impregnated the woman.¹⁶

Imam Shafi'i, on the other hand, holds that marrying a pregnant woman is valid and permissible, whether the man who marries her is the one who impregnated her or not. He also holds that it is permissible to have intercourse with her even though she is pregnant, as the presence of a fetus does not invalidate the marriage contract. According to Imam Shafi'i, it is impossible for the *nasab* of the child she is carrying to be tainted by the sperm of her husband.¹⁷ The followers of the Shafi'i school base their opinion on the following verse from the Qur'an:

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ

Meaning: "Marry off the 'free' singles among you, as well as the righteous of your bondmen and bondwomen. If they are poor, Allah will enrich them out of His bounty. For Allah is All-Bountiful, All-Knowing." (Surah An-Nur: 32)

The above argument explains that a person who commits *zina* falls into the category of unmarried individuals, for whom there is no obstacle to marriage. This implies it is permissible to marry them even if they are pregnant. Imam An-Nawawi supports this position¹⁸ for two reasons: first, based on the verse of Allah saying "And it is allowed for you to marry such [women]" (i.e., those previously mentioned who have committed *zina*), and second, based on a hadith narrated by Aisha ra. wherein the Prophet saw. was asked by a man who had committed *zina* with a woman whether he could marry her or her daughter. The Prophet replied, "The forbidden does not forbid the permissible. Indeed, what is forbidden is not because of marriage."

However, Hanbali scholars maintain that marrying a pregnant woman is not permissible unless two conditions are met: she has repented and she has completed the *iddah* period. According to Ibn Qudamah, marrying a woman pregnant from *zina* is forbidden until she has gone through the *iddah*.¹⁹ After completing the *iddah* and sincerely repenting, based on the verse of Allah that "A fornicator does not marry except a fornicatress or a polytheist woman, and a fornicatress does not marry except a fornicator or a polytheist man", she can marry. She can even repent before undergoing the *hadd* punishment for *zina*, and if she does repent, the punishment is lifted due to her remorse and repentance.²⁰

Marrying a Pregnant Woman in Indonesian Positive Law

The marital status of a pregnant woman in the KHI is stated in Article 53 paragraphs (1) A woman who is pregnant outside of marriage can be married to the man who impregnated her, (2) The marriage with a pregnant woman as referred to in paragraph (1) can be solemnized without waiting for the birth of her child, and (3) With the solemnization of the marriage at the time the woman is pregnant, no remarriage is required after the child she is carrying is born.²¹ The provisions in the KHI do not annul the status of *zina* for the perpetrators despite having pregnancy outside of marriage. Indeed, in Law No. 1/1974 article 42 and KHI article 99 state that a legitimate child is a child born in a legitimate

¹⁶ Wahbah az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, (Damaskus: Dar al-Fikr, 1989), 6650.

¹⁷ Abd. Rahman Ghazali, *Fiqh Munakahat*, (Bogor: Kencana Prenada Media, 2003), 124.

¹⁸ Imam Abi Zakarya Muhyiddin Bin Syarfu Nawawi, *Majmu' Syarah Muhazzab*, Juz 17, (Lebanon: Dar Al-Fikr, 2005), 383.

¹⁹ Chuzaimah T. Yanggo Dan Hafiz Anshary, *Probematika Hukum Islam Kontemporer*, (Jakarta: Logos Wacana Ilmu, 2002), 54.

²⁰ Abdullah bin Ahmad bin Qudamah, *al- Mughni fi fiqhi al-Imam Ahmad bin Hanbal*, (Beirut, Darul Fikri, 1405 H), 516.

²¹ Tim Penyusun, *Kompilasi Hukum Islam*, (Bandung: CV. Nuansa Aulis, 2015).

marriage. However, Article 100 of the KHI states that a child born outside of marriage only has a *nasab* relationship with the mother and the mother's family.

Principally, the permissibility of shotgun marriage in Article 53 of the KHI is more or less a departure from the compromise approach with customary law. This compromise is based on the need for Islamic law to be closer to the lives of the people. This attitude and step can be expressed in the following phrase, "Islamizing customary law while simultaneously bringing customary law closer to Islam."²² By combining the values of Islamic law and customary law, it is hoped that normative values will emerge from philosophical and sociological perspectives, senses of justice and humanity, as well as modernization and globalization. This is highly relevant in fostering the integrity, balance, harmony, and order of human life in general.

Article 53 of the KHI, however, does not provide sanctions or punishments for *zina* perpetrators, but rather provides a solution for someone who is pregnant out of *zina* to marry immediately. Nevertheless, this can become controversial since it will give rise to debate and differences of opinion from various circles. Those who are against it will certainly object to this provision, as they consider it loose and compromising and they are worried that it will be used as a legal umbrella to legalize *zina*. In fact, it is not uncommon for marriage to be carried out when the woman is pregnant only to cover up the family's shame. There is also a fear from the woman's family that the man who impregnated her will run away and shirk responsibility. Oftentimes, men who impregnated women outside of marriage run away to escape their responsibility.²³

It is worth noting, however, that the KHI has a normative basis because although *zina* is a forbidden act, marriage is a lawful act. Therefore, in this case a forbidden act (i.e., *zina*) cannot make a lawful act (i.e., marriage) unlawful.

The issue resurfaces after the government has proposed a Draft Law (*Rancangan Undang-Undang/RUU*) on the Applied Law of Religious Courts in the Field of Marriage, as regulated in Chapter VIII Article 45 paragraph 1, which states, "Every woman who is pregnant outside of marriage can only be married to the man who impregnated her." In principle, the provisions on shotgun marriage in the RUU are identical to those in the KHI; with the only difference is the wording. The opinions show that the issue of marriage for pregnant women out of *zina* is indeed controversial and complex. On the one hand, allowing pregnant women to marry is intended to save the life status and fate of the unborn children, so that after birth they will have the same rights and avoid discriminatory treatment. On the other hand, allowing pregnant women to marry can be harmful, which may lead to increasing rates of *zina* and harm the order of community life. This issue becomes even more complicated when, in today's social life, it turns out to be commonplace in society. This issue not only concerns the *zina* of the perpetrators and the *hudud* punishment for their actions, but also concerns the status and fate of the babies in the womb.

The argument that pregnant women can only marry the man who impregnated her refers to the contents of Article 53 of the KHI stating that the person who has the right to marry the pregnant woman is the man who impregnated her. Indirectly, this implies that pregnant women are not allowed to marry others who did not impregnate them. The marriage of a pregnant woman can be carried out without the implementation of *hadd* first if her pregnancy is caused by *zina* that is deliberate and clear. The reason is, although the

²² M. Yahya Harahap, (ed), *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional*, (Jakarta: Logos Wacana Ilmu, 1999), 22.

²³ Muhammad Ali Hasan, *Pedoman Hidup Berumah Tangga Dalam Islam*, (Jakarta: Siraja Prenada Media Grup, 2006), 253-254.

Qur'an and hadith mention the punishment for *zina*, the punishment does not need to be carried out before marriage.

In terms of marriage without waiting for the birth of the child, when the woman who is pregnant out of wedlock and the man who is responsible for it are both known, then the two can be married off immediately. Even though the age of the fetus is approaching the time of birth, the marriage that has been carried out is already valid and there is no need to repeat the marriage. The legal provisions on the marriage of pregnant women in Article 53 of the KHI allow a pregnant woman to be married to the man who impregnated her, but the KHI does not further regulate whether a woman who is pregnant outside of marriage can also be married to a man who did not impregnate her.

The issue of shotgun marriage pregnancy is a matter of debate among Islamic scholars; some are very strict and do not allow it, while others require repentance and obligatory *iddah*. The more moderate opinion in this case is that of Imam Shafi'i who states it is permissible to marry a pregnant woman, whether to the man who impregnated her or not, and there is no need to wait for the birth of the baby. In the current context, this opinion is relevant considering the aspect of *maslahah*. Likewise, what is contained in the KHI is logical and rational because it has a philosophical basis to protect the survival of women with premarital pregnancy, while also protecting the survival of their children so as not to lose their rights as individuals or as members of society. Article 53 of the KHI also provides a basis for women to sue men to take responsibility, by carrying out marriage and carrying out their obligations as husbands as in a normal family.

A woman's pregnancy caused by *zina* is certainly unwanted. Women are the ones who feel the strongest psychological pressure. If such a circumstance is allowed to drag on and marriage is not immediately carried out with the man who impregnated her, it is inevitable that the situation will worsen. This can affect the psychological and social development of the child afterwards.²⁴

Conclusion

Islamic scholars differ in opinions regarding the law of marrying a pregnant woman. Imam Abu Hanifah view that it is permissible for a man to marry a woman who is pregnant with his child. However, if the man who marries her is not the one who impregnated her, he is not allowed to have intercourse with her until she gives birth. Imam Malik and Imam Ahmad bin Hanbal are of the opinion that a man who did not impregnate a woman is not allowed to marry her unless she has given birth and her *iddah* period has ended. Imam Ahmad adds one more condition, i.e., the woman must have repented from her sin of *zina*. The opinion of Imam Shafi'i is that it is permissible to marry a pregnant woman, regardless of whether the man who marries her is the one who impregnated her or not. In the KHI, a woman who is pregnant outside of marriage can be married to the man who impregnated her. If the marriage is carried out while the woman is pregnant, there is no need to repeat the marriage after the child is born. In the social context of Indonesian society, it is more appropriate to apply the opinion of Imam Shafi'i to this issue. From the aspect of *maslahah*, many men do not take responsibility for their actions in impregnating women outside of marriage; therefore, allowing other men to marry those pregnant outside of marriage will have a positive impact on the psychology of the women and also on the guarantee of the needs and survival of the baby who will be born.

²⁴ Gerungan, W.A. *Psikologi Sosial*, (Bandung: Rafika Aditama, 2004), 199.

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