



## Marrying A Pregnant Woman From The Perspective Of Islamic Legal Philosophy

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### Info Articles

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### Abstract

The phenomenon of marriage of pregnant women outside of marriage is a complex issue from the perspective of Islamic law. The Compilation of Islamic Law (KHI) stipulates that a pregnant woman can marry the man who impregnated her without waiting for the birth of the child. However, there is a problem when a pregnant woman marries a man who is not the biological father of the child she is carrying, which raises questions about the validity of the marriage and the legal status of the child. In the context of Islamic legal philosophy, marriage is not just a social contract, but also has moral and spiritual dimensions that must be maintained in order to achieve welfare. This study aims to examine the marriage of pregnant women from the perspective of Islamic legal philosophy in order to find the principles of justice and legal benefits. The method used is qualitative with a literature study approach, analyzing fiqh books, laws and regulations, and related literature. The results of the study show that although the KHI allows the marriage of pregnant women, the jinayah aspect in cases of adultery is still ignored, so a more comprehensive legal reconstruction is needed. The conclusion of this study confirms that the regulation of the marriage of pregnant women must consider aspects of legal protection, justice, and moral responsibility so as not to open loopholes for the increasingly widespread practice of adultery.

### I. INTRODUCTION

The phenomenon of promiscuity that leads to pregnancy before marriage is indeed a serious challenge in the modern era. The development of information and communication technology is accelerating changes in social interaction patterns, including in relations between the opposite sex. Premarital pregnancy is no longer a rare occurrence, but is increasingly widespread and has even become one of the main reasons for the increase in requests for marriage dispensation in religious courts. Data showing a spike in requests for marriage dispensation due to pregnancy before marriage illustrates that this problem is not just an individual case, but has become a broad social problem. (Ratna 2005).

The increase in the minimum age for marriage as stipulated in the Marriage Law aims to ensure that married couples are more prepared, both emotionally, mentally, and economically. By raising the minimum age limit to 19 years for men and women, it is hoped that marriages can take place in more ideal conditions so that the risk of divorce and problems in the household can be minimized.

However, this policy also has other consequences, especially for those who have become pregnant outside of marriage but have not met the minimum age requirement for marriage. Legal loopholes in the form of marriage dispensations do allow marriages to continue, but marriages based on factors of pregnancy outside of marriage often do not begin with optimal preparation.

In the perspective of Islamic law, marriage in a state of pregnancy outside of marriage raises various problems. One of the main issues that is often debated is the validity of the marriage and the status of the child born from the relationship. In the view of the majority of scholars, a marriage that is carried out when the prospective bride is already pregnant is still considered valid as long as it meets the pillars and requirements of marriage. (Faizal 2016). However, debate arises if the one who marries the woman is not the man who impregnated her. In such cases, there is a difference of opinion among scholars regarding the lineage of the child born. Most scholars are of the opinion that a child born from an extramarital relationship cannot be traced to the man who

married the mother unless he is the biological father. On the other hand, there is also a looser view, which allows the child to still be traced to the mother's husband if the husband acknowledges and accepts the child as part of his responsibility.

From the perspective of Islamic legal philosophy, law not only functions to provide legal certainty, but also to provide benefits for society.(November 2023). In this context, resolving the problem of pregnancy outside of marriage is not enough to just look at the legal aspects of marriage, but also consider the social, psychological, and justice impacts on the child born. Children born from extramarital relationships often face social stigma and legal obstacles in obtaining their rights, such as inheritance and lineage rights. Therefore, Islamic law should be able to provide solutions that are more oriented towards child protection and justice for all parties involved.

In addition, this phenomenon also shows the need for a more comprehensive approach in dealing with promiscuity among teenagers. Sexual education based on religious values, strengthening the role of the family in providing moral guidance, and stricter policies in preventing promiscuous sexual behavior are part of the steps that must be taken. If not, then this problem will continue to recur and create a wider domino effect, both in terms of social and legal aspects. Islam teaches that marriage is a sacred bond that is not only based on physical relationships, but also on moral and spiritual responsibility. Therefore, in dealing with this phenomenon, a solution is needed that is not only legal-formal, but also based on ethical values and the common good.

## II. RESEARCH METHODS

The research in this study is a type of qualitative literature study. The research method used is library research, using books related to religion and culture as well as books related to the paradigm of scholars as the main source.(Soekanto 2003). The next source is a related article that discusses marrying a pregnant woman, supplemented by the opinions of Islamic legal experts who have legitimacy on related topics such as scholars and regulations in Indonesia. Then, the author uses a descriptive analysis method to analyze the data.

This research is a qualitative normative literature study. The primary data is article 53

of the Compilation of Islamic Law, the secondary data materials are fiqh books, journals, and so on.

## III. RESULTS AND DISCUSSION

### A. Marrying a Pregnant Woman According to Scholars

Marriage is a spiritual and physical bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the integrity of the Almighty, and creating harmony in the household which (sakinah, mawaddah warahmah) is the dream of every person in the household; as marriage is referred to in the Qur'an as the most sacred, most solid agreement (bond) between husband and wife, firm and strong (mişâqan ghalīẓan)(M Yusuf 2014).

Marriage also aims to avoid adultery, to continue the lineage (children) and aims to worship. Also to preserve the lineage. The purpose of marriage according to Islamic law is to make the relationship between men and women honorable and mutually agreeable, to maintain good offspring, and to create an orderly and safe atmosphere in social life.(M Yusuf 2014).

Scholars have different opinions about marrying an adulteress. This difference is caused by different points of view regarding the understanding of the prohibition on marrying an adulteress, as stated in QS An-Nur (24): 3:

*"A man who commits adultery does not marry a woman who commits adultery, or a woman who is an idolater; and a woman who commits adultery does not marry except a man who commits adultery or a man who commits idolatry, and this is prohibited for the believers."*

According to Ibn Rushd, scholars question whether the prohibition (the words *la yankihuha* do not marry) is due to sin or is it haram.(Gunawan 2023). The majority of scholars tend to interpret it as a sin, not haram, so they allow marrying her, based on the hadith: "There was a man who asked the Prophet SAW about his wife who committed adultery. The Prophet replied, divorce her. The man said: "I love her very much." The Prophet SAW replied: "You don't need to divorce her." This hadith is held by the majority of scholars, the Prophet SAW revoked his order because the man said that he loved his wife very much. The prophet's policy is understandable. If the man really loves

his wife, of course he will keep her from committing adultery again. According to Sayyid Sabiq, it is permissible to marry an adulteress on the condition that they must repent first, because Allah will accept the repentance of His servants and include them among His pious servants.

According to Abu Hanifah and Asy-Shafi'i, it is permissible to marry a woman without waiting for the end of the iddah. Then Imam Asy-Shafi'i allowed marriage to those who commit adultery, and vice versa (Abror 2018). marriage contract with her even though she is pregnant, because there is no prohibition on the grounds of this prohibition.

According to M. Quraish Shihab, basically, it is legal for a man to marry a woman he has committed adultery with. The child she is carrying is considered her child if it is born after 6 months of the marriage contract period, and if less than 6 months the woman's husband recognizes the child she is carrying as her child without saying that it is a child of adultery, her confession is justified so that the child is given her name to the person concerned. (Anjarwati and Kasim 2021). This is because a legal marriage may have occurred without knowing before the pregnancy and also so that a person's good name can be maintained.

The scholars agree that it is halal for an adulterous man to marry an adulterous woman. Thus, a man's marriage to a woman he himself impregnates is valid. They can have sex as husband and wife, because it does not contradict the words of Surah al-Nur verse 3, Yusuf al-Qardhawi is of the opinion that it is not permissible to marry a prostitute. He explained events during the time of the Prophet SAW. as the meaning of the hadith above, "Marsat bin Mursad asked the Prophet SAW for permission to marry a prostitute. The Prophet SAW turned away from him, so the verse *alzanina yankihu illa zaniyatun au musyrik* (Surat al-Nur verse 3) was revealed. The Prophet read the verse to him and said "you must not marry her." Yusuf al-Qardhawi then stated the reason that Allah only allows him to marry good women from among Muslims and people of the Book. Thus, what is lawful for a Muslim man to marry is a good woman (muhsanat), as stated in the QS. al-Nisa' (4): 24.

According to Yusuf al-Qardhawi, verse 3 of the letter of al-Nur above is mentioned after the verse stating the punishment of voluptuousness. According to the law, this is a

physical law. As for the adabiah (moral) law, it is forbidden to marry an adulterer. (Nst 2011). Yusuf al-Qardhawi's opinion is sufficient, but he still provides a way out, namely if they have repented, they may be married, and to know the purity of their wombs, they must go through menstruation at least once. By understanding the verses of the Qur'an and Hadith related to this issue and paying attention to the opinions of scholars, it is permissible to marry an adulterous woman (prostitute) on the condition that she has truly repented (taubatan nasuha). And for the current conditions, it is necessary to consider adding one more condition, namely a medical examination, whether the perpetrator is truly healthy, free from sexually transmitted diseases or not. In general, the views of Islamic jurisprudence scholars regarding the marriage of pregnant women due to adultery can be divided into two: 1). scholars who forbid the marriage of pregnant women due to adultery 2). scholars who allow the marriage of pregnant women due to adultery (Fatima 2021). In more detail, their opinions can be grouped into six:

1. According to Abu Hanifah, based on the narration from Hasan, it is reported that he permitted the marriage of a pregnant woman who committed adultery, but she was not allowed to sleep with her husband before the child she was carrying was born, because there was no textual Islamic provision that prohibited the marriage of a pregnant woman due to adultery.
2. Abu Yusuf and Zukar are of the opinion that the marriage of a pregnant woman due to adultery is not permissible, like the impermissibility of marriage of a pregnant woman other than adultery (such as when her husband dies while pregnant), because it is not possible to sleep together, so it is not permissible to carry out the marriage.
3. Malikiyah scholars do not allow the marriage of a pregnant woman who has committed adultery absolutely before the person is completely free from pregnancy (istibra') which is proven by three menstruations in three months. If the woman marries before istibra', the marriage is fasid (void by itself), because of fear of mixing the offspring in the womb and the Prophet SAW. Forbids us from watering other people's plants.

4. Shafi'iyah scholars are of the opinion that a woman pregnant with adultery may be married off, because her pregnancy cannot be attributed to anyone (except the mother), the presence of pregnancy is seen as the same as the absence of pregnancy. Imam al-Nawawi explained that women who become pregnant due to adultery are not required to carry out iddah (waiting time). Ulama have agreed that marriage during iddah is prohibited in Islam based on the word of Allah: "And do not carry out the aqad marriage until the time specified in the Book (iddah period)" (QS. an-Nisa (4): 21 "How will you take it back, when some of you have mixed (mixed) with others as husband and wife. And they (your wives) have taken from you a strong agreement."
5. Hanabilah scholars determine two conditions regarding the permissibility of marrying a woman who is pregnant due to adultery. According to Ulama Hanabilah, a man who knows that a woman has committed adultery, it is not halal to marry that woman except under two conditions:
  - a) The waiting period has expired, the waiting period for a pregnant woman due to adultery is until the child in her womb is born, before the child in her womb is born, a woman who is pregnant due to adultery is forbidden to marry because the Prophet SAW forbade us from watering other people's crops.
  - b) A woman who is pregnant due to adultery has repented (regrets her actions and does not repeat them). Before repenting, a woman who is pregnant due to adultery is forbidden to be married to a believer, as stated in QS An-Nur (24): 3: "A man who commits adultery does not marry except a woman who commits adultery, or a woman who is a polytheist; and a woman who commits adultery is not married except by a man who commits adultery or a man who is a polytheist, and that is forbidden to the believers". In one narration it is said that a person who has repented from a sinful act is like a person who has no sins. Ibn Hazm is of the opinion that a woman who is pregnant due to adultery may be

married or given in marriage even though she has not given birth to a child. Ibn Hazm explains that a pregnant woman who is forbidden to be married is a pregnant woman whose husband has divorced or died. A pregnant woman other than from a legitimate relationship may be married because the person concerned is not in a marriage bond and is not in a waiting period.

#### **B. Marrying a Pregnant Woman According to the Compilation of Islamic Law**

Marriage of a pregnant woman is a woman who is pregnant before the marriage contract, then married by the man who impregnated her. Indeed, the problem of marriage with a pregnant woman requires carefulness and wise attention, especially by the Marriage Registrar (Abror 2019). This is intended to mean a social phenomenon regarding the lack of awareness of Muslim society towards moral, religious and ethical rules so that without due care regarding the marriage of a pregnant woman, it is possible for a man to marry her instead of impregnating her.

In Law Number 1 of 1974 concerning marriage, there is no regulation regarding the marriage of pregnant women. In the Compilation of Islamic Law Article 53 it is explained that:

1. A woman who is pregnant out of wedlock can marry the woman who impregnated her.
2. Marriage with a pregnant woman as mentioned in the first point can be carried out without first waiting for the birth of the child.
3. By carrying out a marriage while the woman is pregnant, there is no need for a remarriage after the child she is carrying is born. The provisions contained in Article 53 paragraph (2) are an integral part of Article 53.

This means that between one verse and another verse is a unity; So it is impossible for there to be a contradiction between the verses in Article 53. Because the provisions of paragraph 2 are closely related to the permissibility of pregnant marriage. So if there is an obligation to carry out 'iddah (until giving birth) it means it contradicts Article 53 paragraph 1 regarding the permissibility of pregnant marriage. The basis for the

consideration of the Compilation of Islamic Law regarding the marriage of pregnant women is QS An-Nur (24): 3: "A man who commits adultery does not marry except a woman who commits adultery, or a woman who is a polytheist; and a woman who commits adultery is not married except by a man who commits adultery or a man who is a polytheist, and that is forbidden for the believers". This provision can be understood that the permissibility of marrying a pregnant woman for the man who impregnates her is an exception, because the man who impregnates her is the right one to be their partner, while a man who is a believer is not suitable for them.

Thus, in addition to the man who impregnated the pregnant woman, it is forbidden to marry her. In the Compilation of Islamic Law in Indonesia which is regulated in Inpers Number 1 of 1991 and Decree of the Minister of Religious Affairs Number 154/1991, it is stated that a woman who is pregnant outside of marriage can only be married to the man who impregnated her. Marriage with the pregnant woman can be carried out directly without waiting for the woman to give birth, no remarriage (*tajdidun nikah*) is required.

### **C. Reconstruction of Regulations Regarding Solutions to the Phenomenon of Marrying Pregnant Women**

The Compilation of Islamic Law (KHI) accommodates the view that the marriage of a pregnant woman, whether with the man who impregnated her or not, is still considered valid. This is stated in Article 53 of the KHI which explicitly stipulates that a woman who is pregnant outside of marriage can be married to the man who impregnated her without having to wait for the birth of the child. Thus, the child born from the marriage is considered the legitimate child of the mother's husband.(Mutriadi 2022). This provision provides legal certainty and a clearer status for children born in such circumstances. In addition, this regulation also eliminates the obligation of *iddah* for women who are pregnant outside of marriage if she marries the man who impregnated her.

Although the KHI provides a clear legal basis for the marriage of pregnant women, there are issues that have not been explained in detail, especially in cases where a pregnant woman marries a man who is not the biological father of the child she is carrying. This raises questions

about the status of the marriage, as well as the lineage of the child born from the relationship. In practice, this condition has given rise to various views among the community and scholars, where some accept the marriage as a form of social responsibility, while others see it as a deviation from the principles of lineage in Islam.(Tabriz 2003).

There are several positive impacts of allowing the marriage of pregnant women. One of them is reducing the social stigma attached to women who get pregnant out of wedlock and their families.(Fudail 2023). In many cultures, pregnancy before marriage is considered a great disgrace, so with marriage, the woman's status changes to that of a legitimate wife, which can at least reduce psychological and social pressure. Children born from this relationship also get a clearer legal status, so they have the same rights as other children born from a legitimate marriage. This has a good impact on the psychological condition of the mother and child, because excessive social pressure often leads to serious mental disorders for mothers who face pregnancy outside of marriage.

However, on the other hand, this policy also has negative impacts that cannot be ignored. By allowing the marriage of pregnant women, it is feared that more individuals will feel unafraid to have extramarital affairs because they know that if pregnancy occurs, they can still marry and receive legal recognition. This has the potential to open the door wider for adultery and can lead to moral degradation in society, especially among young people who are still in the process of searching for their identity. In addition, the validity of this marriage is still being debated, so that in some cases, *tajdid an-nikah* or a repetition of the marriage contract is carried out to ensure the validity of the marriage bond that has been carried out.

Marriages that occur due to pregnancy outside of marriage also have the potential for long-term problems. Often, couples who marry in such circumstances do not have sufficient mental and emotional readiness to live a household. They marry not because of mature readiness, but because of urgent conditions. This can increase the risk of divorce, especially if later on one of the partners feels that the decision to marry was only based on coercion. An unfavorable past can also be a source of conflict in marriage, where one party may continue to bring up the issue in household arguments, which can ultimately damage the

harmony and stability of the husband and wife relationship.

In the context of Islamic law, even though the Shafi'i school of thought—which later became the basis for the KHI—permits the marriage of pregnant women, Imam an-Nawawi himself emphasized that this permissibility is not something that is absolutely permissible, but rather is *karahah* or hated. (RAHMAWATI 2022). This means that although this type of marriage can be done, it should be avoided because it has various undesirable consequences. Islam teaches that marriage is a sacred bond that must be started in a good way, not by violating the norms of sharia. Therefore, maintaining purity before marriage is something that is highly emphasized in Islam. Marriage is not just a legal bond between two individuals, but also an act of worship that has very broad spiritual and social dimensions.

The phenomenon of marriage due to pregnancy outside marriage reflects the need to strengthen moral values in society. Good religious education, family development, and awareness of the importance of maintaining purity before marriage must continue to be instilled from an early age. (RAHMAWATI 2022). In addition, legal policies must also pay attention to the prevention aspect so that this phenomenon does not increase. If free association continues to be allowed without supervision and guidance, more and more young couples will fall into the wrong association, and ultimately give rise to more complex legal and social problems. Therefore, the best solution is not only to focus on how to deal with extramarital pregnancy after it occurs, but how to prevent it from the start with a more comprehensive moral, social, and legal approach.

#### **IV. CONCLUSION AND SUGGESTIONS**

##### **A. Conclusion**

Islam requires marriage with a good woman, in the hope of building a happy household life and creating harmony in society. In the case of a couple who has a history of adultery, Islam stipulates that they are more worthy to marry a partner who also has a similar background, or a polytheist. However, some scholars are of the opinion that a prostitute can still be married after she has truly repented and is free from sexually transmitted diseases, so that the marriage that is built can begin in a state of purity and cleanliness from past sins.

Regarding the law of marriage of a woman who is pregnant out of wedlock, scholars have different opinions. Scholars from the four main schools of thought, namely Hanafi, Maliki, Syafi'i, and Hambali, are of the opinion that the marriage is valid and the couple may live as husband and wife, on condition that the man who marries her is the man who impregnated her. Thus, the status of the child born from the relationship can be clearer legally and socially. Meanwhile, Ibn Hazm from the Zahiriyah school of thought is of the opinion that the marriage is permissible on condition that the couple has repented and undergone the punishment of flogging as a consequence of the adultery they previously committed. This view is based on the understanding that marriage should not only aim to avoid social disgrace, but must also be accompanied by full awareness of the sins that have been committed and the responsibility to change into better people.

In the laws and regulations in Indonesia, Law Number 1 of 1974 concerning Marriage does not specifically regulate the marriage of pregnant women. However, in the Compilation of Islamic Law (KHI) stipulated through Presidential Instruction Number 1 of 1991 and Decree of the Minister of Religious Affairs Number 154 of 1991, it is stated that a woman who is pregnant outside of marriage can only be married to the man who impregnated her. This marriage can be carried out without having to wait for the birth of the child she is carrying, and after the marriage occurs, no remarriage contract is required. With this provision, the KHI provides legal certainty for children born in such conditions and avoids the status of illegitimate children which can cause various social and administrative problems in the future.

From the perspective of Maqāshid Syarī'ah, the policy on marriage of pregnant women regulated in the KHI brings great benefits to both parties, both for the pregnant woman and the child to be born. The principle of protection and care for women and children is a top priority, which is in line with the five main objectives of Islamic law, namely Hifzh ad-Din (protecting religion), Hifzh an-Nafs (protecting the soul), Hifzh an-Nasl (protecting descendants), Hifzh al-'Aql (protecting reason), and Hifzh al-Mal (protecting property). With this regulation, women who are pregnant outside of marriage can obtain legal and social protection, children who are born can have a

clear legal status, and society can reduce the stigma against cases like this. Therefore, it can be said that the provisions stipulated in the KHI have fulfilled the principle of Maqāshid Syari'ah, by placing benefits as the main objective in regulating the marriage of pregnant women outside of marriage.

### B. Suggestion

Reconstruction of regulations regarding the marriage of pregnant women out of wedlock is important to provide justice, certainty, and legal benefits for the men who marry them and the children who will be born. Currently, the Compilation of Islamic Law stipulates that a woman who is pregnant out of wedlock can immediately marry the man who impregnated her without having to wait for the birth of her child. However, this regulation still leaves problems, especially if the woman marries a man who is not the biological father of the child she is carrying.

To avoid legal ambiguity and to protect all parties involved, the registration of a pregnant woman's marriage outside of marriage should be postponed until she gives birth. This aims to determine the child's status more definitely and to give the couple time to consider marriage more carefully. In addition, in the Islamic legal system, adultery should not be left without legal sanctions. The legal vacuum regarding the crime of adultery in Article 53 of the KHI actually opens up space for increased promiscuity that leads to pregnancy outside of marriage. Therefore, there needs to be a legal reconstruction that not only regulates the marriage of pregnant women but also provides sanctions for perpetrators of adultery. At a minimum, men who impregnate must be required to provide for the woman during pregnancy as a form of responsibility. With this reconstruction, the Islamic legal system can be more in line with the principles of justice and provide better protection for women and children born from the event.

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