

## The Application of Article 53 of KHI (Islamic Law Compilation) Regarding Pregnant Marriage in Lottery Marriage

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### ABSTRACT

*Pregnant marriage becomes a phenomenon that is still happening in Indonesia and is even one of the most significant contributors to the reason for the dispensation of marriage. In Parang district, Magetan Regency, pregnant marriage is also one of the solutions for a case in which many women get pregnant without a legal marriage. Pregnancies were not initiated from sexual intercourse between a man and a woman but were carried out by many men, so the model of determination was by lottery. Furthermore, this article will analyze the pregnant woman who is married to a man who does not impregnate her and the child's status according to article 53 of KHI. In article 53 KHI, no line explicitly explains the permissibility or prohibition of a pregnant woman to marry a man who does not impregnate her. Still, many interpret that this is not allowed. Meanwhile, a legitimate child in KHI is a child born during a legal bond. So, when DNA testing proof or the like is not done to see the legality of the child, then this child is still considered a legitimate child by both of them because they were born in a marriage bond. In sum, a pregnant marriage in a lottery marriage with a man who does not impregnate the woman has many sides of ambiguity. So, there must be a revision of article 53 and article 99 of KHI.*

**Keywords:** *Pregnant Marriage; Article 53 KHI; Marriage Lottery.*

## **INTRODUCTION**

The phenomenon of pregnant marriage in Indonesia is not a strange phenomenon anymore. In Indonesia, this case is one of the biggest contributors in filing marriage dispensation in religious courts. As reported from the Religious Court page of Lumajang, almost 99% of the applications for marriage dispensation are due to accidents (Syarkowi, n.d.). This statement is in line with ImroatulJamilah's research which concludes that one of the reasons for filing marriage dispensation is the curative factor as an emergency caused by a pregnancy outside marriage (Jannah, 2013). Pregnant marriage is used as an excuse for practicing polygamy following an application to the Religious Court No. 50 / Pdt.G / 2013 / PA. TLM, this petition was rejected by the judge because it did not fulfill the conditions for polygamy, however, the researcher advised the judge to consider the condition of the prospective second wife who was pregnant (Loekman & Bakri, 2019). This phenomenon of pregnant marriage is carried out because it is an attempt to hold accountable, cover-up disgrace, and provide certainty about the child's status impregnated in the legal system and statutory regulations in Indonesia. Cases of pregnant marriage are regulated in KHI Article 53, which states that the implementation of marriage pregnancy outside marriage is allowed or without having to wait for childbirth. The marriage does not need to be repeated after the child is born (Compilation of Islamic Law Presidential Instruction No. 1 of 1991).

In the Parang District, Magetan Regency community, the phenomenon of pregnant marriage is a solution when there is a woman who becomes pregnant outside legal marriage. This area witnessed tens of the same cases. The concrete number is hardly able to be mentioned in precise number, yet this phenomenon has been commonly known in the mentioned areas. The related information is massively obtainable through the chief of the village or the head of the neighborhood. Plenty of the doers want this case to not be publicized since it is a disgrace for their family. However, the phenomenon of pregnant marriage in this region begins with sexual relations between one woman and one man, but between one woman and many men. The determination of the prospective husband in this area is by lottery or lottery system. The determination method certainly creates a new problem when the name that comes out is neither the biological father nor the man who impregnates the woman. This is not regulated in KHI, so it becomes a chosen topic that the author will discuss. Other research related to pregnant marriage has been done a lot, such as one completed by M.

Choirul Anwar and Neng Eri Sofiana regarding pregnant marriage in lottery marriage which also focuses the research in Parang district, Magetan Regency. Still, this research only portrays its legalism in the eyes of Fiqh and the status of a child born from the marriage (Anwar & Sofiana, 2020). This is certainly different from the research that the author will do by reviewing it through the articles contained in KHI.

Another research conducted by Choirul Munif about pregnant marriage in the perspective of Islamic law (a case study of pregnant marriage with a person who did not impregnate her at the KUA or religious affairs office Prambanan District between 1995-1997). The basis for the implementation of pregnant marriage was the absence of the rules governing it and the basis of the benefit that was put forward, but this was canceled because it was deemed the researcher did not meet the *istislahi* requirements (Munif, 2012). Further, Astika Rahmawati's research focuses on the views of public figures on the marriage of pregnant women out of wedlock with a man who is not the perpetrator of impregnation in the perspective of KHI article 53 (Case study in Lebak Village, Grobogan). It concluded that there were community leaders who said that the marriage was legitimate for benefit (Rahmawati, 2018). Samanto's research on pregnant marriage with a man who is not impregnating at the KUA, Piyungan District, Bantul Regency in the perspective of Islamic law concludes that there are differences in the views of Islamic scholars regarding the permissibility of the marriage. At the same time, the KUA's consideration is based on the willingness of both to marry by signing the bride's consent form (N3) and benefit considerations (Samanto, 2018).

These three studies have points of similarity as well as differences with the research conducted by the author. This study examined pregnant marriage with men who did not impregnate them but had different fields and fields of focus. This research will discuss what if a woman who is pregnant out of wedlock in the lottery marriage case marries a man who does not impregnate her and how the child's status is following article 53 of KHI.

## **RESEARCH METHODS**

The method of this research is a normative juridical method and descriptive-analytical. Focus on data in narrative and word argumentation, and library research is a way for collecting the data. So, in general, this study has the

data from KHI, KUHP, other regulations, books, a related journal but complement by the interview with some persons that know about the marriage lottery.

## RESULTS AND DISCUSSION

### Pregnant Marriage in Islam

Pregnancy occurs after intercourse, but intercourse, usually done after marriage, is also done outside the legal bond of marriage. This extramarital pregnancy can occur because of adultery or raping. In the age of ignorance (*jahiliyyah*), many wives got married when they were pregnant. They did not mention that they were pregnant until the letter of *al-Baqarah* verses 228-232 coming down, which forbade a divorced wife to hide the condition of her uterus (Kusmidi, 2017). In the book of *Shahih* Bukhari, it is said that there were four types of marriage in the age of ignorance (Wijaya, 2019). First, *al-wiladah*, or a marriage between a man and a woman, gives dowry as it is. Second, the marriage of *istibdha* or a husband who asks his wife to have sex with other more respected men to get a superior seed. Third, *al-rahth* or when men who are less than ten people having sex with a woman. When the woman is pregnant, she will gather all the men and choose one to attribute his name to the child. Fourth, *al-rayah* or a woman who never rejects any arrival of a man. When she is pregnant, she will call a *qiyafah* expert to determine the father of the child.

Even in the research of Mu'arif, there are 13 types of marriages in the age of ignorance, such as *mut'ah* or contract marriages, *zawaq* or a trial-based marriage in which if the relationship considered not suitable can be severed, *istibdha* or a husband who asks his wife to have sex with other more respected men to get a superior seed, *khadn* or the marriage done after having sexual intercourse based on mutual liking without having proper *ijabkabul*, *mutadhaminah* or the marriage done after having infidelity of an abandoned couple, *badal* or the marriage of substitute or exchange of wives, *syighar* or a barter marriage where a man marries a woman and the wife's younger brother is married to his sister, *maqtor* or a situation when wife with a dead husband will be inherited by the heirs of the husband, *saby* or the marriage carried out when the winner of the war can have for a female prisoner of war, the marriage between someone and their slave, the marriage between strangers, the marriage of polygamy over 10 wives, and the marriage of *bu'ulah* or like *wiladah* or a marriage between a man and a woman by giving dowry as it is (Mu'arif, 2020). In

the light of the marriage of woman taken in adultery has been described in surah *an-Nur* verse 3:

*"Men who commit adultery do not marry, but the woman was taken in adultery, or women who are polytheists; and women who commit adultery are not married but by men who commit adultery or idolatrous men, and that is forbidden for those who believe."*

By this verse, women who commit adultery can only marry adulterous men or men who impregnate them and are prohibited from marrying men who did not impregnate them (Jamil & Saputra, 2020). The views of scholars regarding marriages performed by women who have been pregnant beforehand vary. The Hanafiyah cleric stated that marriage was legal if it was with the man who impregnated her, but copulation is allowed after childbirth (Wibisana, 2017). Syafi'iyah cleric stated that the marriage was valid, whether it was the one who impregnated it or not. Besides, sexual relations between the two were allowed. This some withstated by Abdur Rahman Ba'alawy (Alpian, 2019):

*"It Is permissible to marry a pregnant woman because of adultery, with a man who impregnates her or not and impregnates her."*

Malikiyah clerics emphasized that the marriage was illegitimate, even with the one who impregnated her. Marriage is allowed after the woman performs *istibra* 'or waits for childbirth first. This statement is also in line with Hanabilah clerics' opinion and makes repentance condition for permitting marriage (Rahim, 2017). Ibn Hazm explained that the punishment for adultery was flogging this form of repentance (Romlah, 2016). Imamiyah, adultery is committed by a man with a woman who is already married or is in *'iddah* period because of her husband's divorce. Then it is forbidden for him to marry her forever, unless the woman is not married, not in *iddah* period, then he ultimately can marry her (Mughniyah, 2011).

Adultery in Islam is an act that is prohibited because it is an act that damages the soul, family, and society (Hawa, 2004). This following surah *al-Israa* verse 32:

*"And don't approach adultery; truly, adultery is a heinous act and a bad way."*

Adultery has severe physical punishment in Islam. Intercourse that occurs as a result of is grouped according to the category of the perpetrator. Suppose adultery is committed by a perpetrator who has never been married. He is beaten 100 times and exiled from his country for one year only for male adulterers, not for female ones, whereas if the adulterer has been married, he is stoned until they die (Al-Jazairi, 2004). Like the explanation of the Prophet in the hadith narrated by Muslim and Abu Dawud:

*“From Ubadah bin Samit he narrated, "The Messenger of Allah said, 'Take it from me, take it from me. Verily, Allah has made a solution for them: a virgin adulterer and adulteress is lashed a hundred times and exiled for a year. In comparison, a widower adulterer and adulteress is lashed a hundred times and stoned.'”*

### **Pregnant Marriage in Article 53 KHI**

Compilation of Islamic Law or KHI is Presidential Instruction No. 1 of 1991, which regulates marriage, inheritance, and *waqf* for Muslim communities in Indonesia. KHI is formed with the dynamics of its historicity and contextualization. Long before the birth of KHI, the judges decided on the same issue with different results. Because the references used were also different (Mujib, 2019). There are 13 standard references for religious courts according to the Circular of the Head of the Bureau of Religious Courts dated February 18, 1958, number 13/1/73, all used as sources for the establishment of KHI. A total of 12 books are books with the nuances of the Shafi'i school of thought, and the other is the book of 4 schools of thought, the twelve books are *Al-Bajuri, Fathul Mu'in, Sharqawi ala al-Tahrir, Qalyubi/Muhalli, Fath Wahab, Tuhfah, Targhib al-Mustaq, Qawanin al-Syar'iyyah li sayyid Sadaqah Dahlan, Shamsuri al-Faraidl, Bughayh al-Murtashidin, and Mughni al-Muhtaj. Then the other one is al-Fiqh; ala al-Madhahib al-Arba'ah* (Huda, 2016).

The purpose of establishing KHI in Indonesia is to complement the pillars of religious justice. To equalize perceptions of the application of law and accelerate *taqribbain al-ummah* or the unity of the people. So that there are no differences in terms of marriage, inheritance, endowments, and other relevant matters, and get rid of private affairs or understanding that considers marriage, inheritance, and endowments as private matters (Maulidia, 2011). Since the existence of KHI, PA has put the verdicts under one of its formal sources, which come from this Compilation of Islamic Laws.

Regarding pregnant marriage, KHI regulates it in chapter eight on pregnant marriage in articles 53 and 54. In article 53, three verses state that a pregnant woman out of wedlock can marry a man who impregnated her. The marriage can be carried out without waiting for the childbirth without necessarily repeating the marriage when the child has been born. Article 54 includes two verses that discuss the prohibition of marriage and being a marriage guardian while in a state of *ihram* or the condition of a person who has intended to perform the pilgrimage or umrah (prospective pilgrims or umrah). If it is already done, then the marriage is invalid (Compilation of Islamic Law, Presidential Instruction No. 1 of 1991).

### **The Phenomenon of Pregnant Marriage with Lottery**

This phenomenon occurs in Parangdistrict, as one of the districts in Magetan Regency, an area of 71.65 KM<sup>2</sup> with 1 sub-district and 12 villages and 106 RW, 297 RT 54 hamlets (Anwar & Sofiana, 2020). Promiscuity, open relationships, and feelings of liking are the reasons for the practice of sexual relations outside legal marriage among young people in this sub-district. This sexual relationship is carried out not only with one man but also among many men. When the woman becomes pregnant and asks the man who has had sexual relations with her to take responsibility for it. There are many rejections and evasive actions because she feels doubtful about the baby contained in the woman's womb. If this problem is not resolved, then the method used by women's parents is with the help of regional heads or religious leaders. They were collecting men who have had sexual relations with pregnant women and mentioning their names one by one as a form of solution to overcome this problem. Then decide which man will marry the pregnant woman or the father of her unborn child.

In the case of A, the relationship was not approved by the girl's parents. Then she had sexual relations with the man she loved. However, her parents' approval still was not given, so she rebelled and had sexual relations with several men. When she is pregnant, the solution is to gather all men who had sex with her and then draw their names. The name that comes out will be responsible, and in this case, A, the man who chose to be responsible is the man she has loved since early (Anggun, not her original name, an interview result, Magetan. 08 Mei 2019). Although she is elated, she is also anxious that she will not accept the man's family. As for case B, who was invited to go to a cafe by his male friends, then one of the men that B liked had sex with her, but truthfully, his other friends also

had sexual relations with B. When B is pregnant, the lottery method is the solution (Anis, not her original name, an interview result, Magetan. 15 Mei 2019).

This phenomenon is found in several villages in the Parang sub-district, but there is no concrete data on the exact number related to this. The settlement by using this lottery is carried out in private between the woman's families, several men involved or have had sexual relations with the woman, and the chief of the neighborhood or a religious figure.

The practice of lottery marriage can certainly produce many possibilities. One of which is the name that comes out as the man who will marry the pregnant woman is not the man who managed to get her pregnant or the baby's biological father in her womb—indeed not regulated in KHI. In KHI Article 53 paragraph 1, which reads: "A pregnant woman out of wedlock, can be married to a man who impregnates her," it, as if, gives information that pregnant women may only be married to men who impregnate her, Although some interpret that the word "can" provides an opening to allow marriage between a pregnant woman and a man who does not impregnate her (NurHadi & Khiyaroh, 2020), however, many studies have interpreted this permissibility only valid for those who impregnate her, and are not allowed to marry men who did not impregnate her, This method of interpretation is the method of interpreting a *contrario* or *argumentu*, a *contrario* or what in Islamic law is called *mathum mukhalafah* or a way of explaining the meaning of law based on the opposite meaning of what is regulated in law (Fauzan, 2014). This indicates that the editorial of Article 53, paragraph 1, "a pregnant woman out of wedlock, can be married to a man who impregnates her," contains 2 points of understanding. First, it is permissible to marry a pregnant woman during her pregnancy, and second, it is about who can marry her. The first point, which is explained in the next verse that marriage is permissible without waiting for the birth of the baby conceived. The second point is about the condition for the marriage, which is only permissible with the man who got her pregnant. According to the editorial of paragraph 1, the one who can marry a pregnant woman is the man who impregnates her. If it is understood in a reverse manner, if it is not with the man who impregnates her, then a pregnant woman's marriage cannot be carried out during the pregnancy.

This is a phenomenon in lottery marriages and occurs in many areas in Indonesia when the man who got her pregnant cannot be held responsible. The woman is married to another man who is willing to marry her, and this marriage is still carried out based on benefit. This marriage becomes a matter with



questionable validity since if Article 53 is being interpreted as mentioned above, then the marriage is invalid. In addition, this also impacts the law of sexual intercourse between the two when the woman is still pregnant and the lineage of the child in the womb.

Various opinions regarding the permissibility of marriage for women who become pregnant. First are also accompanied by various opinions concerning the permissibility of intercourse for pregnant women and the men who marry them. For Imam Shafi'i, whether it was with those who impregnated him or not, it was permissible because there would be no mixing of the sperm. Still, Imam Hanifah's intercourse was allowed after childbirth, with marriage only with the man who impregnated her. In addition, there are also the words of the Prophet SAW:

*"Whoever believes in Allah and the Doomsday, don't pour water on other people's plants."* (Narrated by Ahmad).

Apart from that, in the subject of child lineage, KHI chapter 14 concerning child care in article 99 explained that a legal child is a child born in or as a result of a legal marriage, the result of a lawful husband and wife's act outside the womb and born by the wife. According to point A, a child is born as long as the mother has a marital status. He is the legitimate child of both. This also means that if the seed of the fetus existed before marriage or the result of an extramarital relationship, but he was born in a marriage bond, then he is a legal child. Likewise, children from lottery marriages can also be categorized as legitimate children, because they are born under the status of a married mother. This provision is also related to the definition of adultery in KHUP which views adultery only on perpetrators who are already bound by marriage so that those who are not married are not said to have committed adultery. Whereas in Islamic provisions, the child resulting from adultery does not have a lineage to the father who commits adultery with his mother. This is following the opinion of the majority of scholars who agree that adulterous children only have the lineage of their mother (Syukrawati, 2016). This certainly has an impact on the loss of inheritance rights, guardianship rights, and other legitimate children's rights.

The measure of proof in Islam, indeed, has been the subject of scholarly discussion. According to Bahnasi, there are cases of pregnancy out of wedlock. The step or procedure is *al-qiyafah* which is believed to have been used before Islam came. At the time of Rasulullah SAW, it was pioneered by Bani Mudlij in the story of Usamah and his son Zayd (Ruskam, 2015). *Al-qiyafah* is divided into

three, namely *al-'iyafah* or predictions that Islam does not justify, *al-siyafah* or tracing the source of groundwater from plants and animals' physical reactions *al-qiyafah* which is divided into *qiyafah al-basyariyyah*. In the case of human paternity and *qiyafah al-athar* or in the case of determining the trace. The step of *al-qiyafah* uses the principle of comparison and analysis of males and children born, whether they have the same characteristics because there is a polygenic inheritance that children will inherit special physical, record, characteristics, and physical character from both parents (Baharuddina, 2015). The basis of *qiyafah* is:

*"From A'isha (may Allah bless her), she said: "The Prophet (peace be upon him) visited her truly in a state of joy. A trace of joy appeared on his face. Then he said: "Did you not see Mujazzir (a lineage expert) while looking at Zaid bin Harithah and Usamah bin Zaid, then he said: "These legs have something in common with each other." Abu Isa (Tirmidhi) said: "This is a saheehasan hadith." Ibn 'Uyainah indeed narrated this hadith from al-Zuhri from Urwah from A'isha (may Allah bless her) with the addition: "Did you not see Mujazzir passing in front of Zaid bin Harithah and Osama bin Zaid when their heads were covered, and their feet were visible. Then he said: "Surely these feet have something in common with one another." Thus, Sa'id bin Abdirrahman and more than one narrator told us this hadith, from Sufyan bin Uyaynah, from al-Zuhri, from Urwah, from Aisha. This is a saheeh hadith and some scholars have made this hadith as evidence in qiyafah. (HR. Tirmidhi)*

The Messenger Muhammad and their companions with the cases they face in the community's life have legitimized. The pursuit of cultivation is based on *qiyafah* methods by first doing research, surveillance closely with the abilities they possess, which are particular advantages which Allah bestowed on them and at the same time be capable of establishing the results of their research. The results can be a guide for those interested in determining the validity of someone's lineage well. By seeing and observing all these things, the scholars of al-Shafi'iyah responded to the *qiyafah* service to solve cases of human existence. Including ash-Shafi'i, pious Shafi'iyah support *qiyafah* method of perfidy (Hakim, 2017).

In Malaysia, by the Islamic Family Law (Federal Territories Act) 1984 (IFLA) section 10, the determination of the lineage uses the method of *al-firasyor* observing the pregnancy which is older than six months since the sexual intercourse (Hazni & Dahlan, 2020). This statement is similar to the determination

of legitimate children in Islam, which considers the child's birth time. According to Abu Hanifah, a legitimate child or one with a lineage with his father is a child born six months from a distance between the marriage contract and birth, or according to Imam Syafi'i and Imam Malik, is the distance from the marriage contract with the intercourse that occurs (Isnaini, 2013). The 6-month provision is according to the agreement of the majority of scholars, likewise with the opinion of Sheikh Muhammad Zaid Al-Abyani that the minimum gestational age is 180 days or six months. This is because the weaning time according to Surah Luqman verse 14 is 24 months, then the time to contain and wean according to Surah Al-Ahqaf verse 15 is 30 months, so the minimum time to conceive is six months (Luth & Thohir, 2020). DNA tests or Deoxyribonucleic Acid (Deoxyribonucleic Acid) or Deoxyribose Nucleic Acid (AND) are used which can be classified as an effort of *qiyafah* process whose results are more accurate, can even to the extent of refuting completely other allegations. *Qiyafah* is closely related to the to qafif or a person who can recognize the traces (or impregnating) of others, as well as can know, determine who has the traces (Hazni & Dahlan, 2020).

Looking at how Islam regulates related matters to pregnant marriage and the lineage of children born in pregnant marriage, the correction of the editorial or the addition of phrases in articles related to pregnant marriage in the KHI is essential. It is related to the clarity of whether or not a pregnant woman can marry a man who did not impregnate her and the editorial staff who clarify the child's status born from the pregnant marriage. In addition, the extension of the meaning of adultery in the Criminal Code is needed to strengthen the concept of pregnant marriage, which begins with sexual relations between men and women outside legal marriage. Although the condition of a pregnant woman before marriage can occur because it is not adultery, victims of rape usually choose not to marry first because of the trauma they have experienced. However, this should also be regulated in KHI. So that in the future, KHI can categorize marriage in a state of pregnancy specifically and realistically.

Indeed will nullify stigma or views related to KHI legalizing adultery in the real meaning (Islam). With the existence of article 53 KHI with the current editorial staff, this becomes an opportunity for young people to have sexual relations outside legal marriage. Then becomes one of the reasons for applying for dispensation of marriage and the loss of the essence of punishment contained in the abolition of the lineage from the father because the child is not the result of a legal marriage relationship. In Islam, adultery is a vicious thing that is subject to

extraordinary physical sanctions. Apart from getting physical sanctions, children who result from adultery do not get the right of lineage, inheritance rights, and guardianship rights from the biological father. Undoubtedly not how Islam denigrates the child resulting from adultery, but it should be feared and considered by Muslim youths not to commit adultery because of the harm they will get. So is the case with lottery marriages that took place in Parang District, Magetan Regency. This lottery marriage is used to give young people who do not get the blessing of their parents. Then they have free sex with many men undoubtedly a sign of moral decline and vicious behavior.

## **CONCLUSION**

The phenomenon of pregnant marriage has colored the legal dynamics of Indonesian society. This phenomenon is one of the most common reasons for filing a marriage dispensation. Sexual relations of a legal marriage resulted in a pregnancy which is often seen as a disgrace that needs to be covered up, and a solution is sought. One solution that is often used is to marry the pregnant woman so that the child born has a father. Likewise in lottery marriages conducted in Parang District, Magetan Regency, which is fronted by promiscuity and pregnancy before marriage, but this sexual relationship is carried out with many men, so a lottery is conducted to determine which man married the pregnant woman. KHI gives no clear rules regulating the permissibility for a pregnant woman to marry a man who did not impregnate her, whereas in lottery marriages there is a possibility that the man who will marry the woman is not the man who succeeded in impregnating the woman. In addition, the child's position is a dilemma, but looking at KHI at a glance, it can be said that the child is the second legitimate child because he was born in a legal marriage. So it is very necessary to revise the article on pregnant marriage in KHI to respond to the many phenomena that have developed, related to pregnant marriage that occurs in society, one of which is pregnant marriage in lottery marriages.

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