

# Legal Legality of Pregnant Marriage in Indonesia Study on the Application of Khi Article 53 in Mlati District Prospective Fatwa Abno Taymiyah

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## ABSTRACT

**Keywords:** Marriage to Pregnant Women; The Kompilasi Hukum Islam; Al-Qur'an Sunnah; Ibn Taimiyah.

Formulating the Compilation of Islamic Law is inseparable from the growth and development of Islamic law and the institution of the Religious Courts before and after the Indonesian people proclaimed their independence on August 17, 1945. The research methodology is library research. The nature of this dissertation research is descriptive research and verification research. This research approach uses a philosophical approach, a historical approach, and a normative approach. The conclusions are as follows: The application of pregnant marriage in the sub-district of Mlati Sleman from the perspective of Ibnu Taimiyah's fatwa is invalid, and 13 books have been used to compile the compilation of Islamic law. The conclusion of the implementation of pregnant marriages carried out in Mlati District in the 2017-2019 time period, in the view of Ibn Taymiyyah's fatwa, is not valid according to Sharia. Thus, the author argues that Ibn Taymiyyah's theory of maternity marriage needs to be raised and made into a new theory to solve this problem and, at the same time, to replace the existing theory in Article 53 of the Compilation of Islamic Law.



## Introduction

The formulation of the Compilation of Islamic Law in Indonesia aims to prepare uniform guidelines (unification) for Religious Court Judges and become a positive law that must be obeyed by all Indonesians who are Muslims (Nasution, 2021). Therefore, there is no longer any confusion over the decisions of the Religious Courts.

One of the provisions of the Compilation of Islamic Law is the law on pregnant marriage. This legal provision for pregnant marriage, mentioned in KHI article 53, has been in effect and applied to Indonesian society (Aulia & Effida, 2018).

In its daily application, society has a phenomenon that occurs: "Married while pregnant" does not cause a great disgrace to the perpetrator and his family. It is also encouraged that, in reality, if someone submits a marriage to the Office of Religious

Affairs, where they are domiciled, the Office of Religious Affairs will still carry out the marriage even though the client is pregnant (Maulidah & Malang, n.d.).

The Office of Religious Affairs also did not act rashly and playfully. They carry out marriages to their clients based on the arguments made by Indonesian Ulama (Aristoni, 2016). The arguments that are used as evidence are the Compilation of Islamic Law, which has become an 'urf or habit to solve marriage problems in a state of pregnancy. The problems of pregnant marriage in the Compilation of Islamic Law are described in Article 53 (Karay, Dahri, & Sari, 2023). The provisions of article 53, which consist of paragraphs 1-3, are:

- a. A woman who becomes pregnant out of wedlock can be married to the man who made her pregnant.
- b. Marriage with a pregnant woman, referred to in paragraph one, can be carried out without waiting for the birth of her child.
- c. By getting married when the woman is pregnant, there is no need for re-marriage after the child is born. They use these arguments or provisions to carry out marriages to their clients.

However, in practice, an exciting case occurred, namely *Tajdiidu Al-Nikah*, if the accumulation of *tajdiidu Al-Nikah* events in the Mlati sub-district from 2017-2019 had reasons for doubt and was invalid by 75 per cent (Husyaini, Nasrallah, Maulana, & Jamarudin, 2022). This event becomes a fascinating problem: Why did the family immediately ask for *tajdiidu Al-Nikah*? How could this happen?

Starting from the background and objectives of the Compilation of Islamic Law Article 53 provisions and the reality of its application in people's lives, it appears that there are new problems related to the implementation of pregnant marriage. Due to the emergence of these problems, legal solutions are needed (Yumarni, 2019).

When studying and studying the theories or opinions of other Ulama, for example, Syaikh al-Islām Ibn Taimiyyah in his book "*Majmū' Fatawa*," in this book it can be concluded that marriage in a state of pregnancy can be carried out if several conditions are met first, namely:

- a. The offender must repent first
- b. *Istibrā'* (waiting for the birth of the baby)

The problem of implementing pregnant marriages that occur in the community, especially in the Mlati Sleman District, is the limitation of this research study. There are differences in *ijtihad* by the scholars in the law on pregnant marriages (Idrus, 2022). By looking at the number of marriages in a state of pregnancy that is close to 10 per cent per year, This shows the importance of this problem to be studied and find a solution or answer (Rahim, 2017).

The results of this study can also be a tool for *saddle-żarā'iyah*/preventing more damage. At least by practising the conditions mentioned above, people will be inclined to be. Before discussing academic research issues, the author conveys the urgency of Ibn Taimiyyah, who is used to reviewing this research problem (Inayati, 2015). Some of the urgency is as follows:

- a. Based on the results of previous studies that the authors have described, no one has yet discussed the law on pregnant marriage in detail from the perspective of Ibn Taimiyyah's fatwa.
- b. Some Indonesian people, especially in the Mlati sub-district, have implemented Islamic Sharia, especially the law on pregnant marriage, in accordance with Ibn Taimiyyah's fatwa
- c. Ibn Taimiyyah is a must-kill mujtahid, as explained by Muhammad Amin Suma after his dissertation entitled "Ijtihad Ibn Taimiyyah in Islamic Fiqh." Muhammad Amin Suma said: "In Ibn Taimiyyah, all the requirements for ijtihad were collected. He has memorised the Koran well since the age of seven, and experts recognise his knowledge of the interpretation of the Koran. Ibn Taimiyyah almost memorised most of the Hadith within the capabilities of an 'alim (mujtahid), and his proficiency in 'mulmul al-Hadith was extraordinary. His knowledge of uşūl al-Fiqh is at the same level as the mujtahids of must kill, and his mastery of the jurisprudence of various schools exceeds that of the adherents of those schools themselves. He is good at Arabic, and his knowledge of proposals and forums is very high. He has mastered so many arguments for naqli and 'aqli, and successfully combining these two propositions is difficult to find. Muhammad Amin Suma further said: "Ibn Taimiyyah is also an absolute mujtahid because any mujtahid does not bind him."

On this basis, the results of this research need to describe how and what the results of the study, research on the law of pregnant marriage examine the application of pregnant marriage in the Mlati sub-district from the perspective of Ibn Taimiyyah's fatwa and what references were used to compile the Compilation of Islamic Law?

## **Method**

The research methodology used in this research is library research. The nature of this dissertation research is descriptive research and verification research. This research approach uses a philosophical approach, a historical approach, and a normative approach.

## **Results and Discussion**

### **Application of Article 53 Compilation of Islamic Law in Mlati District**

Marriages in a state of pregnancy for three years, namely from 2017 to 2019 in the Mlati sub-district, are increasing. This can be explained by the fact that in 2017, the total number of cats in the Mlati sub-district was 504 cats, while those who were married were pregnant. There were 45 cabins, and the percentage is 8.1 per cent (Kurniawati & Juliningrum, 2019). In 2018, the total number of cats in the Mlati subdistrict was 535; while those who were married were pregnant, there were 52 cabins. Suppose the percentage is 8.5 per cent. In 2019, the total number of cats in the Mlati subdistrict was 540 cats, while those who are married are pregnant. There are 58 cats. If the percentage is 9.7 per cent,

Likewise, it can be concluded that the number of respondents/families who perform *tajdīdu al-Nikah* from 2017–2019 has increased. With details in 2017 with a total of 5 respondents/family. Suppose the percentage is 24 percent. In 2018, there was a total of 7 respondents/families. Suppose the percentage is as much as 33 per cent. In 2019, there was a total of 9 respondents/families. Suppose the percentage is as much as 43 per cent. The reasons and considerations for the Mlati community to perform *tajdīdu al-Nikah* are: From 21 respondents/families, the reasons and considerations for conducting *tajdīdu al-Nikah* are 1). Reading *fiqh*, there are only two respondents/families. If it is presented as much as 9.5 per cent, 2). Following the invitation of the *ustadz/ustazah/other people*, there were three respondents/families. If it is presented as much as 14 per cent, 3). There is doubt that there are five respondents/families. If it is presented as much as 24 per cent, 4). There are 11 respondents/families who assume that there are 11 respondents/families. Suppose it is presented as much as 52 per cent. From the data above, it can be concluded that the majority of respondents/families who perform *tajdīdu al-Nikah* have reasons that their marriage is invalid; there are doubts, namely as much as 75 per cent (MALVINAS, 2022).

The Office of Religious Affairs also did not act rashly and playfully. They carry out marriages to their clients based on the arguments made by Indonesian Ulama. The arguments that are used as evidence are the Compilation of Islamic Law, which has become an 'urf or habit to solve marriage problems in a state of pregnancy (Fitriyah, 2016). The problems of pregnant marriage contained in the Compilation of Islamic Law are described in Article 53. The provisions of article 53, which consist of paragraphs 1-3, are:

1. A woman who becomes pregnant out of wedlock can be married to a man who made her pregnant.
2. Marriage to a pregnant woman, referred to in paragraph one, can be carried out without waiting for the birth of her child.
3. By holding a marriage when the woman is pregnant, there is no need for re-marriage after the child is born

They use these arguments or provisions to carry out marriages to their clients. Even though pregnant marriages are legally valid, the number of *tajwid al-Nikah* is increasing. There are several reasons why previously married couples are pregnant and then apply for *tajwid al-Nikah*. Out of 21 couples, reasons 1). Reading *fiqh*, there are only two respondents/families. If it is presented as much as 9.5 per cent, 2). Following the invitation of the *ustadz/ustazah/other people*, there were three respondents/families. If it is presented as much as 14 per cent, 3). There is doubt that there are five respondents/families. If it is presented as much as 24 per cent, 4). There are 11 respondents/families who assume that there are 11 respondents/families if it is presented as much as 52 per cent.

#### **Application of Article 53 of the Compilation of Islamic Law in Mlati Sub-District Perspective of Fatwa Ibnu Taimiyyah.**

The number of pregnant marriages in 2017–2019 in Mlati District has increased; namely, in 2017, it was 8.1 percent; in 2018, it was 8.5 percent; and in 2019, it was 9.7 percent, and the implementation of marriages was the attached procedure. Moreover, the reason for the respondents/families to do *tajdīdu al-Nikah*, as much as 75 percent, is that the marriage they have done is invalid, and there are other reasons for doubt (Amria, 2023).

“The purpose of the discussion here is marriage to a woman who has committed adultery. In this case, there are two problems. The first is regarding the cleansing of the womb. Previously, we stated one opinion that the first adulterer of adultery has no honour. The answer is cleaning the womb not for the honour of the first male sperm but for the honour of the second male sperm because one cannot draw the lineage of a child to him while the child does not come from him. Likewise, if the uterus is not cleaned, it may have attached seeds from adulterers. In addition, there are two opinions of scholars regarding the withdrawal of lineage of children by adulterers when pregnant women are not firmly/figuratively for wives or enslaved women who are consummated.”

Prophet, peace be upon him. Said:

الولد للفراش وللعاهر الحجر<sup>1</sup>

"Children belong to the owner of the first, while men who commit adultery are prevented."

So, the child is connected to the first owner, not the adulterous man. If a woman is not a first, this hadith does not cover her. Umar linked the lineage of children born during the Ignorance to their fathers, but this is not the place to explain that.

Then An-Nawawi said again, “If a person repeatedly commits sins up to 100 times, 1000 times or more, then he repents every time he sins, Allah will surely accept his repentance every time he repents, his sins will fall. If he repents with just one repentance after he has committed all the sins earlier, his repentance is valid.”

Then, regarding the law of marriage with adultery while pregnant, Ibn Taimiyyah, in his book "Majmū' Fatawa," explains that people who commit adultery and are pregnant must fulfil several conditions. Some of the conditions that must be met are:

- 1) Must repent first. The arguments are as described above.
- 2) *Istibrā'* (waiting until the womb is clean/giving birth). The arguments used by this *istinbāṭ* are:
  - a) Hadith of Abu Sa'id Al-Khudry, r.a. Indeed, the Prophet saw. Said about the Authos prisoners of war:  
*"Do not have sex with a pregnant woman until she gives birth, and do not get pregnant until she has had one menstrual cycle."*
  - b) Hadith Ruwaifi 'bin Thabit r.a. from the Prophet, who said:  
*"It is not lawful for someone who believes in Allah and the Last Day, namely: do not water other people's plants."*

c) Abu Darda' Hadith narrated by Muslims from the Prophet, who said:

*“He came to a woman who was about to give birth at the door of the pasthath. He said: Maybe that person wants to fuck him? The Companions replied: “That is right,” then the Messenger of Allah. Said: “Indeed, I have intended to curse him with the curse that was brought to his grave. How can he inherit it when it is not lawful for him, and how can he enslave him when it is not lawful for him.”*

The arguments used by Ibn Taimiyyah above stipulate the law that a person who commits adultery and is pregnant must wait for her iddah first, namely until she gives birth to her. Ibn Qoyyim Rahimahullah said: "From these hadiths, there are obvious arguments for it being forbidden to marry a pregnant woman, whether the pregnancy is because of her husband, her master, or because of adultery."

It can also be understood from the arguments above that a woman who is pregnant because of adultery cannot be married until she gives birth. This is her 'iddah for a woman who is pregnant because of adultery, and this is also shown by the general word of Allah 'azza wa jalla:

“And women who are no longer menstruating (menopausal) among your women if you are in doubt (about their iddah period), then their iddah period is three months; and so (also) women who do not menstruate. Moreover, for women who are pregnant, their iddah period is until they give birth to their wombs. Moreover, whoever fears Allah, Allah will make his affairs easy for him."

So from the description above, it can be concluded that men and women who commit adultery and become pregnant cannot enter into marriage/marriage before they fulfil the requirements, namely: 1) Repentance, and 2) Istibrā' or waiting for their wombs to be clean. For those who commit adultery but are not pregnant, if they want to be married/married, they must meet the following requirements: 1) Repent and 2) Wait for one menstrual cycle. If this is violated, then the marriage is invalid.

So, with the above explanation, it can be concluded that the implementation of pregnant marriages carried out in the Mlati sub-district in the 2017-2019 time period, in the view of Ibn Taimiyyah's fatwa, was not valid according to sharia.

### **Referral to the Islamic Law Commission**

The referred KHI references are the sources used to establish the law on pregnant marriage contained in article 53 KHI. The sources used to establish the law on pregnant marriage in Article 53 KHI are from thirteen books. The thirteen books are as follows:

1) Al-Bājuri book

The author of the Al-Baajuri Book is Burhanuddin Abu Ishaq Ibrahim bin Muhammad bin Ahmad Al-Baajuri Al-Mishri, who belongs to the ash-Shafi'i school.

2) Book of Fathul Mu'in

The book Fathul Mu'in was written by Shaykh Zainuddin Abdul Aziz, who belongs to the Ash-Shafi'i school.

3) The Book of Syarqawi 'alā at-Tahriri

The book "Hasyiah al-Syarqawi 'ala Syarh at-Tahri" (حاشية الشرقاوي على شرح التحرير) is a fiqh work that is famous for being a reference for muta'akhirin ash-Syafi'iyyah

scholars. This book was written by Shaykh al-'Allamah 'Abdullah bin Hijazi bin Ibrahim al-Syarqawi (1150-1226 H).

4) Qolyuubi/Al-Mahalli Book

The full name of this book is Hāsyiyatān Qalyubi wa 'Umairah 'alā Syarh al-Mahalli 'alā Minhaj at-Thalibin. This book combines two books compiled by two well-known Shafi'i scholars.

5) Book of Fathul Wahhāb with its syarah

The Book of Fathul Wahhab, the full name is Fathul Wahhāb Bisyy-Syarhin Minhaj ath-Thullāb. This book was written by Syaikhul Islam Abu Yahya Zakariyyā Al-Anshārī, who belongs to the ash-Shafi'iyyah school.

6) The Tuhfah Book

The original name of this book is al-Habib 'ala Syarh al-Khatib Hasyiyah al-Bujairimi 'alā al-Khatib, which is a work of the Shafi'i school of jurisprudence compiled by al-'Allamah Syekh Sulaiman bin Muhammad bin 'Umar al-Bujairimi al-Azhari (1131-1221H).

7) The Book of Targhibul Musytaghfirīn

The author of Targhibul Musytaghfirīn is Muhammad Abu Zahrah. Muhammad Abu Zahra (1898–1974) was an Egyptian public intellectual and an influential Hanafi jurist. He occupies several positions: a lecturer in Islamic law at Al-Azhar University and a professor at Cairo University. He is also a member of the Islamic Research Academy. His works include Abu Hanifa, Malik, and al-Shafi'i.

8) The Book of Qowanin Syar'iyah Lissayyid bin Yahya

The book Qawanin asy-Syar'iyah li ahl al-Majalis al-Hukmiyyah wa al-Ifta-iyah by Sheikh Uthman ibn Abdullah ibn 'Aqil ibn Yahya. Printed in 1960 AD by Printing Syirkah Maktabah wa Mathba'ah Salim ibn Sa'd ibn Nabhan wa Akhikh Ahmad. I am finished writing in 1317 H. The author of this book belongs to the asy-Shafi'iyyah school.

9) The Book of Qowanin Syar'iyah Lissayyid Sadaqah Dachlan

The author of this book is Sayyid Sadaqah Dachlan, who belongs to the ash-Syafi'iyyah school.

10) The Book of Al-fikihu 'ala al-Mazhāhibi Al-'arba'ati

The book Al-Fikihu 'ala al-Mazhāhibi Al-'arba'ati is written by Sheikh Abdur-Rahman Al-Jazirī. This book contains comparative jurisprudence of the four schools of thought. He belongs to the al-Shafi'i school.

11) Book of Syamsuri fi al-Fara'idh

The author of this book is Syamsuri, who belongs to the ash-Syafi'iyyah school.

12) Book of Bughyatul Mustarsyidīn

This Bughyatul Mustarsyidīn book, full name Bughyatul Mustarsyidīn fi Talkhiishi Fatawā Ba'da al-Immati Minal 'Ulamā i al Muta'akhirīn. The author is Sayyid Abdur Rahman bin Muhammad bin Husain bin 'Umar, who belongs to the Ash-Shafi'i school.

13) The Book of Mughnī al-Muhtajj

The author of the book *al-Mughnī al-Muhtajj* is Sheikh Muwaffaquddīn Abu Muhammad Abdullah bin Ahmad bin Muhammad Ibnu Qoddamah al-Hanbali. He belongs to the Hanbali al-Maqdisi school.

## Conclusion

From the explanation above, it can be concluded that the implementation of pregnant marriages carried out in the Mlati sub-district in the 2017-2019 time period, in the view of Ibn Taimiyyah's fatwa, was not valid according to sharia. Thus, the author thinks that Ibn Taimiyyah's theory of pregnant marriage needs to be raised and made into a new theory to solve this problem and, at the same time, to replace the existing theory in Article 53 of the Compilation of Islamic Law.

By looking at the development of the times and the entry of many new schools of thought in Indonesia and by the nature of Islamic law, namely contributing and or protecting and providing the benefit of all citizens in Indonesia, it changes to:

- a. A woman who is pregnant out of wedlock can be married to a man who impregnated her and is required to repent first.
- b. Marriage with a pregnant woman, referred to in paragraph one, can be carried out by waiting for the birth of her child and
- c. By holding a marriage when a woman is pregnant, a re-marriage is required.



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