
**The Majelis Tarjih
Muhammadiyah's *Fatwa*
on the Pregnant Marriage:
A *Maqāṣid* Approach**

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Abstract

This study aims to analyse the Majelis Tarjih Muhammadiyah's *fatwa* on the case of pregnant marriage applying the *maqāṣid al-sharī'ah* approach. There are three rationales why this research is important. First, this issue is considered controversial as opinions regarding the law of pregnant marriage among Islamic scholars are quite diverse. Second, Muhammadiyah as an Islamic organisation in the largest Muslim majority country (Indonesia) has a semi-authoritative body, namely the Majelis Tarjih Muhammadiyah; to provide religious views for its members. Third, this research is important to examine the council's *fatwa* whether it is in accordance with *maqāṣid al-sharī'ah*. Based on the author's analysis, it has been argued that the Majelis Tarjih Muhammadiyah's *fatwa* on the law of pregnant marriage is in accordance with *maqāṣid al-sharī'ah*. This research also studies various opinions and methods used by Muhammadiyah. Finally, this research concludes that pregnant women should not be married except by men who cause pregnancy or by their ex-husbands.

Abstrak

Studi ini bertujuan menganalisis fatwa Majelis Tarjih Muhammadiyah mengenai kawin hamil melalui pendekatan *maqāṣid al-sharī'ah*. Ada tiga alasan mengapa studi ini penting. Pertama, isu ini dianggap kontroversial karena perbedaan pendapat di kalangan para ulama sangat beragam. Kedua, Muhammadiyah sebagai organisasi Muslim modernis terbesar di Indonesia memiliki institusi khusus yang bertugas menyelenggarakan ijtihad dan menjawab pelbagai persoalan keagamaan: Majelis Tarjih. Ketiga, studi ini penting dalam rangka menguji apakah fatwa institusi tersebut selaras dengan *maqāṣid al-sharī'ah*. Artikel ini berargumentasi bahwa fatwa Majelis Tarjih Muhammadiyah mengenai hukum kawin hamil, selaras dengan *maqāṣid al-sharī'ah*. Secara lebih jauh, studi ini juga mengkaji pelbagai pendapat dan metode yang digunakan Muhammadiyah dalam rangka menetapkan fatwa. Akhirnya, studi ini menemukan bahwa, perempuan hamil tidak boleh dikawini kecuali oleh laki-laki yang menyebabkan kehamilannya atau mantan suaminya.

Keywords: *Pregnant marriage; fatwa; Majelis Tarjih Muhammadiyah; maqāṣid al-sharī'ah; maqāṣidi approach*

Introduction

Zina or unlawful sexual intercourse often happens in Indonesia.¹ As a major religion that manages life entirely, Islam has set the guidelines for relationship with the opposite sex as assigned by the Islamic law of marriage.² In addition, there is also a prohibition against committing *zina*, such as said in QS al-Isra' 17: 32, which means: "And do not approach *zina*, it is really a heinous act, and an evil way."

According to Zamroni, marriage for humans is not only a statement that contains permits for sexual intercourse between husband and wife, but also a heart of society.³ Marriage, furthermore, is highly significant for human life and serves as a cultural value to shape a firm foundation in the household.⁴ Additionally, in the Compilation of Islamic Law (KHI),⁵ sexual intercourse according to Islamic law is only allowed after a marriage, which is considered a very strong contract or *mithāqan ghalīzan* to obey God's commands and worship Him.⁶ A hadith narrated by Bukhari from Abdullah bin Mas'ud said:

"We were with the Prophet while we were young, unmarried and had no wealth whatever. So Allah's Apostle said, 'O young people! Whoever among you can marry, should marry, because it helps him lower his gaze and guard his modesty (for example, his private parts from committing illegal sexual intercourse), and whoever is not able to marry, should fast, as fasting diminishes his sexual power.'"⁷

¹ Rambe and Hendri Nauli et al., "Perzinahan dalam Prespektif Islam sebagai Alternatif Pembaharuan Hukum Pidana tentang Perzinahan di Indonesia," *USU Law Journal* 4, no. 1 (2016): 74-85.

² Islam Uddin, "Nikah-only Marriages: Causes, Motivations, and Their Impact on Dispute Resolution and Islamic Divorce Proceedings in England and Wales," *Oxford Journal of Law and Religion* 7, Issue 3 (2018): 401-426.

³ M. Zamroni, *Prinsip-Prinsip Hukum Pencatatan Perkawinan di Indonesia* (Surabaya: Media sahabat Cendekia. 2018), 145.

⁴ M. Zamroni, *Prinsip-Prinsip Hukum Pencatatan Perkawinan di Indonesia*, 145; See also Julie Billaud, "Marriage 'Sharia Style': Everyday Practices of Islamic Morality in England," *Contemporary Islam* 13, Issue 2 (2019): 217-232.

⁵ Fathurrahman Azhari, "Perkawinan Wanita Hamil Perspektif Imam Empat Mazhab dan Kompilasi Hukum Islam," *Syariah: Jurnal Hukum dan Pemikiran* 6, no. 2 (2006): 228-359.

⁶ See KHI Article 2. For further exploration, see Mardani, *Hukum Keluarga Islam di Indonesia* (Jakarta: Kencana, 2017), 24-26

⁷ Ali Manshur, *Hukum dan Etika Pernikahan dalam Islam* (Malang: Universitas Brawijaya Press, 2017).

Ad-Dahlawi when explaining this hadith and the wisdom of the command to marry said,

“Know that if semen accumulates in the body, then its vapour will rise to the brain, which causes feelings of pleasure to see beautiful women and foster love, then down to the genitals raising libido and strengthening lust. This is what happens to teenagers. Consequently, it will form a great barrier for him to do good, arouse his desire to commit in *zina*, damage his morale, and will eventually thrust him into the abyss of destruction. Therefore, the barrier must be removed by marriage. In short, anyone who has capability to have sex and finance his household should marry since it helps him lower his gaze and guard his modesty as marriage enables him to channel his semen lawfully.”⁸

Unlawful sexual intercourse often results in unwanted pregnancy which leads to a marriage as a practical way out. The question is, “Is it legal for a woman to get married while being pregnant, and with whom can she get married?” This question has been discussed by previous scholars including the imams (Muslim legal scholars) of four schools. Pregnant marriage is firmly *khilāfiyah*⁹ in which differing opinions are prevalent among the scholars.

The beneficial dimension of a *fatwa* cannot always be found clearly. Related to this, a Muslim jurist, Al-Juaini offers his most famous concept, *maqāṣid al-sharī'ah* which literally means the purpose of law.¹⁰ Then, later developed by scholars like Abu Ishaq al-Shatibi in his book *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*.¹¹ According to al-Shatibi, in each legal formulation there is *maqāṣid al-sharī'ah*, a purpose, in the form of

⁸ Ali Manshur, *Hukum dan Etika Pernikahan dalam Islam*.

⁹ Crucial matters in terms of the legal issue in Islam that have been debated and Muslims have dealt with disagreement.

¹⁰ Khaled Abou El Fadl, “Qur’anic Ethics and Islamic Law,” *Journal of Islamic Ethics* 1, Issue 1-2 (2017): 7-28.

¹¹ Pradana Boy ZTF, *Fikih Jalan Tengah: Dialektika Hukum Islam dan Masalah-masalah Masyarakat Modern* (Jakarta: Grafindo Media Pratama, 2008), 11-12; Ebrahim Moosa, “The Reconciliation of the Fundamentals of Islamic Law (al-Muwāfaqāt fī Uṣūl al-Sharī'a), written by Ibrāhīm ibn Mūsā Abū Isfiāq al-Shāṭibī. Translated by Imran Ahsan Nyazee. Reviewed by Raji M. Rammuny. The Great Books of Islamic Civilization. Muhammad bin Hamad Al-Thani Center for Muslim Contribution to Civilization in Association with Garnet Publishing. Reading: Garnet, 2012,” *Islamic Law and Society* 23, Issue 3 (2016): 318-322; See further Ibrāhīm ibn Mūsā Abū Isfiāq al-Shāṭibī, *The Reconciliation of the Fundamentals of Islamic Law* (al-Muwāfaqāt fī Uṣūl al-Sharī'a), Translated by Imran Ahsan Nyazee (Reading, UK: Muhammad bin Hamad Al-Thani Center for Muslim Contribution to Civilization in Association with Garnet Publishing, 2012); *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah* (Cairo: Dar al-Fikr al-Arabi, 1341 H).

benefit.¹² When a legal formula that has no clear dimension to its benefit, it can be analysed through *maqāṣid al-sharī'ah* which considers the spirit of the *sharī'ah* law and the general objectives of the *Hanif* religion.¹³ It is, therefore, necessary to include *maqāṣid al-sharī'ah* as a consideration of scholars in the legal term.

In Indonesia, pregnant marriage is plainly legalised. In KHI, it is mentioned that pregnant women with men are to be married to who impregnate them in Article 53 (1) which reads: "A pregnant woman out of wedlock can be married to the man who impregnated her." Similarly, the Marriage Law Number 1 of 1974 Article 42 indirectly also allows pregnant marriage by acknowledging children born as a result of illegitimate intercourse as legitimate children.

However, it is deemed significant to discuss opinions that develop outside KHI. As a predominantly Muslim country, Indonesia has mass organisations based on religion. They also have a stake in the field of Islamic thought, including in answering contemporary problems that arise in Indonesian society itself, even that pertains to marriage after pregnancy.¹⁴ One of the largest Muslim organisations in Indonesia that has issued a *fatwa* on marrying after being pregnant is Muhammadiyah.¹⁵ This *fatwa* shows that Muhammadiyah pays a clear attention to the problems of the nation which is presented through Majelis Tarjih Muhammadiyah (the Muhammadiyah Tarjih Council); the assembly of *ijtihad* and thought tasked to give views of Muhammadiyah in addressing various social dynamics.¹⁶

It seems very interesting to examine the Majelis Tarjih Muhammadiyah's *fatwa* on the law of pregnant marriage based on the concept of *maqāṣid al-sharī'ah*. As an Islamic organisation, has Muhammadiyah considered the benefit in its *fatwa* regarding pregnant marriage as the purpose of law prescription is the main study in the theory of *maqāṣid al-sharī'ah*? In dealing with this, accordingly, the problems raised in are: first; what is the Majelis Tarjih Muhammadiyah's *fatwa* concerning

¹² Pradana Boy ZTF, *Fikih Jalan Tengah*, 11-12; Ebrahim Moosa, "The Reconciliation," 318-322; Al-Shāṭibī, *The Reconciliation of the Fundamentals of Islamic Law*.

¹³ Al-Shāṭibī, *The Reconciliation of the Fundamentals of Islamic Law*.

¹⁴ Latif Nur Khasanah, "Peran Muhammadiyah dalam Pengembangan Pendidikan Islam di Masyarakat" (Undergraduate Honour Thesis, Universitas Muhammadiyah Surakarta, 2016).

¹⁵ Ahmad Najib Burhani, "Muhammadiyah," *Oxford Islamic Studies Online*, accessed March 29, 2019, <http://www.oxfordislamicstudies.com/article/opr/t343/e0296>.

¹⁶ Fathurrahman Djamil, *Metode Ijtihad Majelis Tarjih Muhammadiyah* (Jakarta: Logos Publishing House, 1995), 7; See also Pradana Boy Zulian, *Fatwa in Indonesia: An Analysis of Dominant Legal Ideas and Modes of Thought of Fatwa-Making Agencies and their Implications in the Post-New Order Period* (Amsterdam: Amsterdam University Press, 2018).

about the law of pregnant marriage; second, is its *fatwa* in line with *maqāṣid al-sharī'ah*?

The study applies a philosophical approach to analyse texts in order to more deeply understand the root of the problem. This study requires a thorough analysis because it is studied through the *maqāṣid al-sharī'ah* reasoning. There are a number of previous scholarly works relating to the Majelis Tarjih Muhammadiyah's *fatwa* and the *maqāṣid al-sharī'ah*. For example, Najmah, "Understanding the concept of *maqāṣid al-sharī'ah* in the philosophy of Islamic law," *Al-Bayyinah journal: Journal of Islamic Law*, 1(1) 2017;¹⁷ Wahyu Wibisana, "The marriage of pregnant women outside marriage and its legal impacts according to *fiqh* perspective and positive law," *Ta'lim: The Journal of Islamic Education*;¹⁸ and a dissertation defended by Wismoyo entitled "Analysis of the *fatwa* of the Majelis Tarjih Muhammadiyah on the law of marriage to adulterers" in the Walisongo State Islamic University (UIN) Semarang, Indonesia.¹⁹ However, those studies indirectly examine the Majelis Tarjih Muhammadiyah's *fatwa* and do not reflect upon *maqāṣid al-sharī'ah*. According to the writer, it is what makes this study unique and different with previous studies.

The case of pregnant marriage in Islamic law

According to Azhari, the term pregnant marriage is the marriage of a woman who is pregnant with a man while she is not married or in iddah period; a period of waiting for a woman after the death of her husband or a divorce.²⁰ Basically, there are two categories of marriages with pregnant women, the first is the marriage of pregnant women with whom they have sexual intercourse with and the second is the marriage of pregnant women with the ones whom they do not.

Regarding the marriage law of pregnant women with men who are not the ones having intercourse before, then all four scholars of Islamic legal thought, al-Shafi'i, Maliki, Hanbali and Hanafi, agree that it is *haram* or prohibited.²¹ While the marriage law of pregnant women with whom they have sexual intercourse is what causes a lot

¹⁷ Sitti Najmah, "Memahami Konsep Maqashid Al-Syari'ah Dalam Filsafat Hukum Islam," *Al-Bayyinah: Journal of Islamic Law* 1, no. 1 (2017): 43-58.

¹⁸ Wahyu Wibisana, "Perkawinan Wanita Hamil di Luar Nikah serta Akibat Hukumnya: Perspektif Fiqh dan Hukum Positif," *At-Ta'lim: Jurnal Pendidikan Agama Islam* 15, no. 1 (2017): 29-35.

¹⁹ Bayu Wismoyo, "Analisis terhadap fatwa Majelis Tarjih PP Muhammadiyah tentang Hukum Menikah dengan Pezina" (Undergraduate Honour Thesis, Universitas Islam Negeri Walisongo, 2014).

²⁰ Fathurrahman Azhari, "Perkawinan Wanita Hamil Perspektif Imam Empat Mazhab dan Kompilasi Hukum Islam," *Syariah: Jurnal Hukum dan Pemikiran* 6, no. 2 (2006): 228-359.

²¹ Azhari, "Perkawinan Wanita Hamil Perspektif Imam Empat Mazhab dan Kompilasi Hukum Islam."

of controversy. Among them, Imam al-Shafi'i argues that a pregnant woman can be married, because her pregnancy cannot be administered to anyone (except to her mother), the existence of a pregnancy is considered the same as its absence.²² In addition, the act of unlawful intercourse does not lead to haram laws against others. Pregnancy that was unknown to her father was suspended to the act of intercourse that preceded it. There is an *iddah* obligation for pregnant women by giving birth, if the child is born, she or he is bound to the man who causes her or him to be born. A child conceived because of unlawful intercourse cannot be administered to a man whom her or his mother have intercourse with, therefore it does not apply to the pregnant woman. Thus, pregnant women because of *zina* may be married.²³

Imam Abu Hanifah believes that the marriage of a pregnant woman with her *zina* partner is permissible, but it is not permissible for the two partners to have sexual intercourse, except after the pregnant woman gives birth to the child she is carrying.²⁴ The basis of this is because there is no proof that forbids it, as understood from the verse QS. al-Nûr [24]: 3 which means: "... and it is forbidden for those who believe ...".

Imam Ahmad Ibn Hanbal argues that women who become pregnant because of *zina* must undergo the period of *iddah* until they give birth to a child, therefore they should not be married before their child is born.²⁵ The basis used by Ahmad Ibn Hanbal and his followers is the prohibition of the prophet "Spilling water on other people's plants" and "The prohibition of having an intercourse with a pregnant woman until she gave birth to her child."²⁶

Imam Malik Ibn Anas and several Medina scholars believe it is unlawful for a pregnant woman to marry her *zina* partner.²⁷ The pregnant woman must give birth first. Imam Malik's opinion refers to another prophet's friend, Abdullah Ibn Mas'ud, who differed in opinion. He considers the marriage as invalid and the person concerned is continually assessed as committing in *zina*. Imam Malik who adheres to this opinion explains that the woman is pure and proved not to be pregnant. This is because marriage is something that is holy and honourable. It is reflected in the obligation to maintain that holiness by not mixing it with dirty sperm. Sperm that is poured without

²² Azhari, "Perkawinan."

²³ Muhammad Khatib al-Sharbini, *Al-Mughni al-Muhtaj* (Beirut: Dar al-Kutub al-Ilmiyah, nd.), 562.

²⁴ Al-Sharbini, *Al-Mughni al-Muhtaj*.

²⁵ Azhari, "Perkawinan."

²⁶ Azhari, "Perkawinan."

²⁷ M. Quraish Shihab, *Menjawab 1001 Soal Keislaman Yang Patut Anda Ketahui* (Jakarta: Lentera Hati, 2008), 543.

going through a legal marriage is dirty sperm, the container must be clean first so that the clean one does not mix with the dirty one.²⁸

The controversy regarding pregnant marriage also attracts the attention of contemporary scholars, although their opinions are also not much different from those of previous scholars. For example, Yusuf Qardhawi when asked for a *fatwa* regarding pregnant before marriage, he was inclined to the opinion of Imam al-Shafi'i who allowed pregnant marriages with her *zina* partners. Both man and woman who commit in *zina* is not prohibited to marry according to the legal consensus (*ijma'*) only if they repent and intend to return from the path of deviance to the path of truth, from the association of illicit life to a noble and *halal* one.²⁹

Aside from Yusuf Qardhawi, the opinion of a prominent Indonesian ulama, M. Quraish Shihab, is also not much different. In one of his books, M. Quraish Shihab quoted Imam al-Qurthubi's opinion when interpreting the word of Allah in QS. al-Nur: 3, after dissecting the different opinions said that the Prophet's friend, Ibn Abbas, argued that someone who marries a woman whom he has committed intercourse with has valid marriage. Indeed, the marriage begins after *zina*, but it is deemed a legal marriage after the marriage contract is implemented. This is similar to someone who steals fruit from a garden. This is clearly *haram*. However, when he buys the garden, the fruit becomes *halal* for him. This opinion is shared by Imam al-Shafi'i and Abu Hanifa.³⁰

KHI has regulated the issue of marrying a pregnant woman particularly in Article 53 (1): "A pregnant woman out of wedlock can be married to the man who impregnates her." The next Article explains that marriage with a pregnant woman is permitted without having to wait for the birth of the child first. It seems that laws and regulations in Indonesia, especially related to pregnant marriages, indirectly adopt the opinion of Imam al-Shafi'i.

In addition to the KHI, the Law Number 1 of 1974 also indirectly legalise a marriage after pregnancy. This can be seen in Article 42 regarding the position of the child. Article 42 states that "Legitimate children are children born in or due to a legal marriage." This shows that the origin of pregnancy does not matter. Although pregnancy occurs before marriage or marriage in a state of pregnancy, provided the birth of a baby is already in a legal marriage, the child born is recognised as a

²⁸ M. Quraish Shihab, *Menjawab 1001 Soal Keislaman Yang Patut Anda Ketahui*.

²⁹ Yusuf Qardhawi, *Fatwa-Fatwa Kontemporer Jilid 3* (Jakarta: Gema Insani Press, 2002), 792.

³⁰ M. Quraish Shihab, *Menjawab 1001 Soal Keislaman Yang Patut Anda Ketahui*, 542.

legitimate child. From this, it appears that the child of a pregnant marriage is recognised and indirectly, a pregnant marriage is also recognised.

Maqāṣid al-sharī'ah

Starting from the discussion on the law of pregnant marriage, what needs to be reviewed in this study is *maqāṣid al-sharī'ah*. In terminology, it can be interpreted “the aims of Islamic teachings” or it can also be understood “the higher objectives of the *sharī'ah* maker (Allah) in outlining Islamic teachings”. As for the terminological term, as stated by Abu Ishaq al-Shatibi, what is meant by *maqāṣid al-sharī'ah* is the legal provisions prescribed by Allah for the benefit of human being.³¹ *Uṣūliyyūn* or the scholars of the Islamic legal theories (*uṣūl al-fiqh*) define *maqāṣid al-sharī'ah* with the desired meaning and purpose in prescribing a law for the benefit of mankind.³²

According to Syamsul Anwar (the Head of Majelis Tarjih Muhammadiyah), *maqāṣid* has several meanings, and the original meaning is “aiming for something” or “looking for something.” Therefore, *maqāṣid* can be defined “the intended *sharī'* purpose of the law.”³³

While Wahbah Zuhaili notes that *maqāṣid* is, “The great objective that must be considered by legal experts in legal decision making.”³⁴ Ibn Ashur, in addition, declares that *maqāṣid* is the higher purpose of Islamic law, and it makes itself an important discourse with a different significance than other Islamic jurisprudence, even the classical *fiqh*. Ibn Ashur suggests that *maqāṣid* should be outlined independently out of the discipline of Islamic legal theories (*uṣūl al-fiqh*).³⁵

In al-Shatibi's view, Allah created the *sharī'ah* with the aim of realising His *maqāṣid* for all people, namely to give goodness (*maṣlāfiah*) to them and avoid damage or evil (*maḥṣādah*) rather than upon them. According to him, everything that is prescribed is

³¹ Al-Shāṭibī, *The Reconciliation of the Fundamentals of Islamic Law*; See also its Arabic version, *al-Muwafaqāt fī Uṣūl al-Sharī'ah* (Cairo: Dar al-Fikr al-Arabi, 1341 H), 5.

³² Firman Muhammad Arif, *Maqashid as Living Law dalam Dinamika Kerukunan Umat Beragama di Tana Luwu* (Yogyakarta: Deepublishing, 2018), 125-134.

³³ Syamsul Anwar, “Maqāshid al-Syarī'ah dan Metodologi Usul Fikih” in *Fikih Kebinekaan*, eds. Wawan Gunawan Abdul Wahid, Muhammad Abdullah Darraz and Ahmad Fuad Fanani (Bandung: Mizan, 2015), 71-83

³⁴ Syamsul Anwar, “Maqāshid al-Syarī'ah dan Metodologi Usul Fikih.”

³⁵ Ibnu Ashur, *The Treatise of Maqāsid*, trans. Mohamed El-Tahir El-Mesawi (London: The International Institute of Islamic Thought, 2006), 22.

inseparable from this *maqāshid* which is grouped into three categories³⁶, namely *darūriyyat*, *hājiyyat* and *tafisīniyyat*.

Darūriyyat means everything that is most important in human life for the purpose of religious goodness and life in the world. *Maqāshid darūriyyat* is deemed necessary because it is absolutely essential in maintaining *maṣālif al-dīn* (religion) and the world, in the sense that if *maṣālif* is damaged, then the stability of the *maṣālif* of the world is also damaged.³⁷

Hājiyyat is the necessity of life to facilitate life in the world and the hereafter, in which without it human life will become imperfect and narrow although not to the point of being damaged. It is named *maṣālif hājiyyat* because it is needed to expand (*tawassū'*) the purpose of *maqāshid*. It is also essential to eliminate the strictness of the literal meaning whose application leads to obstacles as well as difficulties that ultimately causes damage to *maqāshid*. As a consequence, when *hājiyyat* is not considered together with *darūriyyat*, then humanity as a whole will face hardship. The destruction of *hājiyyat* does not unsettle the entire *maṣālif*, however, as is the case with *darūriyyat*. An example is, a light relief in prayer and fasting due to illness or travel, in which when there is no relief it will definitely arise difficulties in prayer, fasting and others.³⁸

Tafisīniyyat is the needs that do not reach the second stage above, since it is only for the purpose of comfort and beauty. For example: custom, character and ethics. The benefit of *tafisīniyyat* applies to the people who are approaching perfection. Consequently, they can attract sympathy from other people towards the Islamic community. As exemplified in the obligation to maintain hygiene, as well as in *mu'āmalah* (civil transaction), there is a prohibition on selling unclean goods and dirt that endanger public health.³⁹ *Tafisīniyyat* means taking what is in accordance with the best custom habits and avoiding ways that are not favoured by wise people. Examples of this type are, in terms of worship, purity (*ṭahārah*), or politeness in covering genitalia during prayer (*satr*); in *mu'āmalah*, the prohibition on selling unclean goods or selling excess food and water.⁴⁰

³⁶ Abu Ishaq Al-Shatibi, *al-Muwafaqāt fī Uṣūl al-Sharī'ah*, 326.

³⁷ Yusuf al-Qaradhawi, *Fiqh Maqashid Syariah: Moderasi Islam Antara Aliran Tekstual dan Aliran Liberal*, trans. Arif Munandar Riswanto (Jakarta: Pustaka Al-kautsar, 2017).

³⁸ Yusuf al-Qaradhawi, *Fiqh Maqashid Syariah*.

³⁹ Sapiudin Shidiq, *Ushul Fiqh* (Jakarta: Kencana, 2017), 225.

⁴⁰ Sapiudin Shidiq, *Ushul Fiqh*, 228

Shatibi views this division of *maṣālifi* as a structure consisting of three interrelated levels. Each of these three levels requires certain elements to achieve a full relation of its objectives. For example, in the case of buying and selling which is *maṣlāfiah al-ḍarūriyyat*, while the prohibition of risk and ignorance in buying and selling transactions is complementary. This view requires two explanations: first, the absence of complementary elements does not mean the denial of the main objectives; secondly, consideration and realisation of complements may not result in the denial of original goals. This means that when the consideration of something complementary results in erasing the original goal, the consideration is not trustworthy.

In addition, Jasser Auda argued that *hājīyyat* are public matters that are no less important for human life, but if it is not existent, it does not matter. The application of *hājīyyat* is done after ensuring the level of *ḍarūriyyat* is properly applied and to support the existence of *ḍarūriyyat* values. For example: agricultural or transportation facilities. Islam encourages people to regulate various types of public needs.⁴¹ While *tafisīniyyat* is a level of need that is still recommended to exist but is not at all prioritized both in the context of individuals and the public interest. Its function is only to make life beautiful, like using perfume, or having a comfortable housing. The existence of *tafisīniyyat* assumes ethical boundaries, or the principle of moderation in applying *tafisīniyyat* without violating the rights *ḍarūriyyat* of others. Its existence also must not defeat the two previous needs.

***Maqāṣid al-sharī'ah* and the Majelis Tarjih Muhammadiyah's *fatwa* on the law of pregnant marriage**

At analysing the Majelis Tarjih Muhammadiyah's *fatwa* regarding the case of pregnant marriage, it is necessary to break down the five points of benefit based on the levels of *ḍarūriyyat*, *hājīyyat* and *tafisīniyyat*. This study attempts to answer whether Muhammadiyah has considered the benefit aspect which is measured based on the Shatibi's concept of *maqāṣid al-sharī'ah*.

The case of pregnant marriage is basically not a new phenomenon. The outbreak of free sex and adultery that is happening at this time is what causes pregnancy marriages are much in demand nowadays. A pregnancy can occur at any time if the male genitalia has encountered the female genitalia. That is a necessity that can happen. Unfortunately, this can be a big problem when it is not preceded by a contract that validates the relationship.

⁴¹ Jasser Auda, *Maqasid al-Shariah: An Introductory Guide* (London: International Institute of Islamic Thought, 2008), 7.

The previous scholars have already discussed the study of pregnant marriage. The Shafi'ite school of legal thought (*mazhab*) explicitly states that the marriage of a pregnant women out of wedlock is allowed. Whereas the Malikite school rejects a pregnant marriage. If they still want to have a marriage, they must wait for the birth of the child. According to the Malikite school, relationships due to *zina* are like spilling dirty sperm. Thus, a marriage for a pregnant woman due to *zina* is not legal, because it is considered as spilling sperm in a dirty container, and according to the Malikite legal scholar, mixing something dirty with something clean is highly prohibited.

In Indonesia, pregnant marriage is legalised. This is particularly explained in the Compilation of Islamic Law (KHI) and also indirectly supported by Marriage Law No. 1 of 1974 concerning the status of children. Although the law is already legal and binding, some also indirectly reject it. In various places, the society has not fully accepted the law. One of them is the Syarif Hidayatullah State of Islamic University (UIN) lecturer who stated in Kompas Daily that the Marriage Law No. 1 of 1974 triggered adultery because it legalised married by accident (MBA).⁴² Besides, one of the villages in Gresik Regency, Ujung Pangkah District, is not willing to marry a bride-to-be who is known to be pregnant.⁴³

Then, how does Muhammadiyah deal with the case? This largest modernist Muslim organisation in Indonesia does respond to current social dynamics. Through its Majelis Tarjih, Muhammadiyah has determined its outlook well in advance when asked for a *fatwa* on the law of pregnant marriage. It seems that the Muhammadiyah's *fatwa* is in line with the laws of our country, however.

When asked for a *fatwa* on the law of pregnant marriage, the Majelis Tarjih Muhammadiyah firstly expresses two opinions. A similar question was also answered by the *fatwa* team, and the answers can be found in the "Tanya-Jawab Agama" volume 7, page 149 (2003) and "Tanya-Jawab Agama" volume 3 page 180 (2004). The following is a *fatwa*⁴⁴ from the Majelis Tarjih Muhammadiyah regarding pregnant marriage:

⁴² "UU Perkawinan dinilai Berpotensi picu Perzinahan," Detik, accessed November 24, 2019, <https://news.detik.com/berita/1632099/uu-perkawinan-dinilai-berpotensi-picu-perzinahan/1>.

⁴³ Misbahatus Suroyah, "Analisis Hukum Islam terhadap Pandangan Tokoh Masyarakat tentang Larangan Kawin Hamil di Luar Nikah di Desa Tanjangan, Kecamatan Ujung Pangkah, Kabupaten Gresik" (Undergraduate Honour Thesis, Sunan Ampel State Islamic University (UIN), Surabaya, 2017).

⁴⁴ "Hukum Menikahi Wanita Hamil," Majelis Tarjih Muhammadiyah, accessed November 21, 2019, <https://tarjih.or.id/hukum-menikahi-wanita-hamil/>.

Before answering the *fatwa* requester's question, Muhammadiyah expresses various opinions related to pregnant marriage. The first opinion states that a pregnant woman who does not have a husband may marry either the man who causes the pregnancy or not, as long as the marriage is in line with essential pillars and conditions. Their reason is that there are no scriptural texts (al-Qur'an and Hadith) that prohibit it, or in other words that pregnant women are not included in the category of women who are banned to be married. In QS. al-Nisa' verse 24, after mentioning women who cannot be married by a man, in the verses 22, 23 and 24, Allah asserts that it is permissible for a man to marry other women besides those already mentioned. Allah Most High says, "...*wa ajiilla lakum mā warā'a dhalikum...*" which means "... and it is permissible for you to marry other than (such women)..."⁴⁵

In other verses it is mentioned that other women besides those mentioned in verses 22, 23 and 24 above which are forbidden are married by a man, namely a polytheist (al-Baqārah 2: 221), a woman in her *iddah* while she is still having her period (al-Baqārah 2: 228), a woman who has been divorced three times by her husband, she is unlawful to marry her ex-husband, unless she has married another man and then divorced and her *iddah* is finished (al-Baqārah 2: 230), women who are in the period of *iddah* because their husbands have passed away (al-Baqārah 2: 235), women who do not have menstruation anymore and women who are in the *iddah* period due to pregnancy (al-Ṭalāq 65: 4), marrying a woman as the fifth wife (al-Nisa' 4: 3), and a polytheistic woman (al-Nūr 24: 3). The Hadith states that it is forbidden for a man to marry woman and her father's sister at the same time or a woman with his mother's sister.

The verses and hadith above are additions (*ziyādah*) to the women who are not to marry as mentioned in verses 22, 23 and 24 of al-Nisa'. *Ziyādah* texts that *qat'iy al-thubūt* against *qat'iy al-thubūt* texts are allowed. In these verses and the Prophetic traditions, there is no mention of pregnant woman who does not have a husband. Therefore, it is believed to be permissible to marry a pregnant woman who does not have a husband as long as they complete all terms and conditions.

The second opinion states that pregnant women should not be married except by the man who causes the pregnancy or by her ex-husband. Their reasons are if a wife having menstruation is divorced by her husband, she should wait three times *qurū'* (the word *qurū'* can mean purified or finishes menstruating). During the *iddah* period, she was not allowed to marry another man (al-Baqārah 2: 228). The continued verse explains the wisdom of the prohibition, that is to make it clear whether the ex-wife is pregnant or not. Furthermore, it is stated that the ex-husband may reconcile in this

⁴⁵ QS. Al-Nisa' 4: 24.

period if he wants *islafi* (mediation). From the continuation of this verse, it is understood that the ability of a former husband to remarry his ex-wife during this period is because if the ex-wife is pregnant there is no problem with the child she is carrying. Thus the interests of children will be maintained in the future, especially those related to *nafāqah*, nurture, education and inheritance rights of the child. As Allah has stated, "The divorced women remain in waiting for three periods or *qurū'*".⁴⁶ And it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day. And their husbands have more right to take them back in this period if they want reconciliation."⁴⁷ (...*wa al-muṭallaqāt yatarabbasna bi'anfusihinna thalāthah qurū' wa lā yafiillu lahunna anyaktumna mā khalaqa Allahu fī arfiamihinna inkunna yu'minna billāh wa al-yaum al-ākhir wa bu'ūlatuhunna aḥiaqqu biraddihinna fī dhalika in arādū iṣlāfian*).⁴⁸ In addition, it has been stated that, "As for pregnant women, their *iddah* time is until they give birth to the womb."⁴⁹ (*wa awlātu al-afimāli ajaluhunna an yaḍa'na fiamlahunna*).⁵⁰

If the verse 4 of al-Ṭalāq is related to the verse 228 of al-Baqārah above, it can also be concluded that woman in the *iddah* period of pregnancy may be reconciled with her ex-husband.

Analogy or *qiyas* can be used to determine whether it is legal to marry a pregnant woman with a man who causes her pregnancy.⁵¹ It is by making an analogy to a marriage (reconciliation) of a former husband with a pregnant ex-wife who is in the middle of her *iddah* period. The man who impregnates the woman is parallel to the man who causes her ex-wife in pregnancy. Women who are in a state of pregnancy can be likened to women who are in *iddah* due to pregnancy. Likewise, the sperm contained by the two pregnant women is the sperm of the men who cause the pregnancy. Accordingly, the two women's genital is a place to sow the seeds of the two men. Therefore, it is forbidden to plant seeds of other men on the places that are already sown by men based on the hadith that is narrated Ruwayfi' ibn Thābit al-Anṣāri, "Should I tell you what I heard that the Messenger of Allah says on the day of

⁴⁶ *Quru'* is a plural noun from *qaru'* meaning purified or menstruation. See Departemen Agama RI, *Al-Qur'an dan Terjemahnya* (Bandung: PT. Sygma Examedia Arkanleema, 2009), 36.

⁴⁷ Departemen Agama RI, *Al-Qur'an dan Terjemahnya*, 36.

⁴⁸ QS. al-Baqārah 2: 228.

⁴⁹ Departemen Agama RI, *Al-Qur'an dan Terjemahnya*, 558.

⁵⁰ QS. al-Ṭalāq 65: 4.

⁵¹ *Qiyas* literally means measuring something with others or equating one with another (legal analogy; *ratio legis*). See Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Syariah* (Bandung: Mizan, 2015).

Hunayn, 'It is not lawful for a man who believes in Allah and the last day to water what another has sown with his water (meaning intercourse with women who are pregnant); it is not lawful for a man who believes in Allah and the Last Day to have intercourse with a captive woman till she is free from a menstrual course; and it is not lawful for a man who believes in Allah and the Last Day to sell spoil till it is divided'.⁵²

Based on the information above, the Majelis Tarjih Muhammadiyah dan Pengembangan Pemikiran Islam (the Muhammadiyah Tarjih Council and the Development of Islamic Thought) embraced this second opinion; pregnant women who do not have husbands are prohibited from entering into a marriage contract, except with men who cause their pregnancy. This is consistent with the conclusions of opinion that developed at the Seminar of the Majelis Tarjih Muhammadiyah in Java which took place in Yogyakarta in 1986.

As a *fatwa* institution, the Majelis Tarjih Muhammadiyah realises that not all Islamic law regulations can be known directly from the scriptural texts of al-Qur'an and hadith, but many Islamic rules require critical reasoning through the making law (*istinbat*). Many Quranic verses provide opportunities to perform *istinbath* both from the study of language it uses and the essence of the meaning it contains, as offered by the scholars with two paradigm approaches in understanding the text, namely the linguistic approach (*al-qawāid al-uṣūliyyah al-lughāwiyyah*) and approaches to the objectives of the law (*al-qawāid al-uṣūliyyah al-tashrī'iyyah*).⁵³

Al-Shatibi divides *maqāṣid* or *maṣālif* into that considered as *ḍarūriyyat* or necessities (must), *hājiyyat* (required), *tafisīniyyat* (commendable). *Maqāṣid ḍarūriyyat* is a must because it is absolutely necessary to maintain *maṣālif al-dīn* (religion and the afterlife) and *maṣālif al-dunya* (nowadays life). In this sense, the *maṣālif* results in interruption of life in this world and in the Hereafter, it leads to the loss of salvation and grace.⁵⁴

Based on the *qiyas* method, the Majelis Tarjih Muhammadiyah's *fatwa* states that a pregnant marriage is permissible when it is carried out with whom she previously conducted *zina*. However, the law will be *haram* if the marriage is not with the *zina* partner because what is used as a reference in this case is the permissibility of

⁵² Abu Daud, "Ḥadith Sharīf Marfu' li al-Nabi," taken from *Mausu'ah Hadith Sharīf* (CD Program produced by Global Islamic Software Company, 1997).

⁵³ Said Agil Husin al-Munawar, "Metodologi (Manhaj) Tarjih Muhammadiyah: Kritik dan Rekonstruksi" (Paper presented in Munas Tarjih XXIV, Universitas Muhammadiyah Malang, Malang, January 28, 2000), 1.

⁵⁴ Muhammad Khalid Masud, *Filsafat Hukum Islam* (Bandung: Penerbit Pustaka, 1996), 245.

husband *ruju'* (reconciliation) with his ex-wife who is pregnant during her *iddah* period.

Regarding the legal act on permissible marriage, Muhammadiyah clearly applies *qiyas* as its method of *ijtihad*. However, regarding the prohibition of marrying pregnant woman with a man not causing this pregnancy, it does not clearly explain its method. Nevertheless, the method used is most likely the same. In other words, the prohibition of marrying with a man who is not the cause of the pregnancy is a reciprocal act of the previous *qiyas* method. The point is that men who are not the cause of pregnancy should not marry the pregnant women because they are similar to the pregnant women in the period of *iddah* who should not be married by men other than their ex-husband.

In relation to preserving religion (*fiifz al-din*), the Majelis Tarjih Muhammadiyah's *fatwa* permits pregnant marriages with *zina* partners. It might be argued that this pregnant marriage may be included in the rank of *hajiyyat*. This is because marriage is a religious provision and carried out with the intention of avoiding *mafsadat*, namely *zina*. At least marital relationship made sexual intercourse no longer included in the category of *zina*.

In relation to maintaining the soul (*fiifz al-nafs*), this pregnant marriage is included in the rank of *hajiyyat*. By marriage, meeting the needs of food, shelter and clothing will be more secure as well as will benefit the prospective baby who will be born later. Pregnant women also do not have to make a living alone because they are single parents.

Maintaining reason (*fiifz al-aql*), with marriage, women who become pregnant due to *zina* do not have to bear the burden of living alone as a single parent. Indeed, being unmarried, the existence of the soul will not be completely damaged, but if it is investigated further, in fact, getting pregnant out of wedlock causes psychological impacts, especially for women who are prone to depression. At least by marriage, the psychological burden is not borne alone because there are those who can share and protect.

Pregnant marriage is very closely related to maintaining offspring (*fiifz al-nasl*). Fundamentally, *zina* has threatened the existence of offspring. If so, if a woman has become pregnant because of *zina*, her child will automatically be born with unclear offspring. The baby will be basically assigned only to the mother's line, however, her or his legal status in the community also needs attention. There is no child who wants to be born from the womb of an adulterer. Although the child conceived has nothing to do with the mistakes or sins of their parents.

Based on the Marriage Law No. 1 of 1974 concerning the status of children, it is stated that a legal status of the child is a child born in a legal marriage. As a consequence, a pregnant marriage will be able to guarantee the status of children in society. The children will be born with complete parents, in addition. In terms of maintaining offspring, pregnant marriage is ranked *hājiyyat*.

In connection with maintaining the treasure, a pregnant marriage is ranked as *tafisīniyyat*. Whether married or not, the child is only descendent to his mother's line, so that even if there is inheritance, it will only reach the mother's husband. Based on this analysis, Muhammadiyah seems to consider the benefits as reviewed from three ranks in the five main benefits. However, if it is seen from the *fatwa* and some arguments that become reference, it seems that the consideration of the benefits is quite visible. In the *fatwa* issued, there is a point regarding aspects of the benefit in the legal review in which on legal grounds, there is a consideration of guarantee of life for the baby or child to be born.

Of the five main benefits, pregnant marriage is definitely more referring to *fiifz al-nasl*. Although the actual pregnancy that occurs due to *zina* principally has damaged the existence of marriage which serves as a means for *halal* relations between men and women. However, according to the author, the pregnancy marriage is included in the rank of *hājiyyat*, because if they are not married it will cause more hardship for pregnant women and their babies.

This is also a consideration of Muhammadiyah as seen from the legal *qiyas* of pregnant marriage with the possibility of reconciling ex-husband to a wife who was pregnant during the *iddah*. From here, there is a prominent benefit considered especially the interest of children will be maintained in the future, especially those relating to *nafaqah*, nurture, education and inheritance rights of the child.

Whereas the prohibition of marriage between a pregnant woman with a man not causing pregnancy even occupies the position of *darūriyyat* in *fiifz al-nasl*. If the prohibition is violated, it will damage the existence of the offspring, because there is a prohibition from the hadith of the Prophet that states not to plant water on other people's plants. In this case the child conceived is not his biological child so it can be said not to plant crops on other people's plantations.

Thus it can be safely assumed that the *fatwa* on the legality of pregnant marriage of the Majelis Tarjih Muhammadiyah is basically in accordance with *maqāṣid al-sharī'ah*. Muhammadiyah allows pregnant marriages with *zina* partners with the analogical reference of ex-husband to ex-wife in the period of *iddah*, in which, the consideration of *maqāṣid al-sharī'ah* in this case is the benefit of ensuring the life of the child in the future if marriage occurs. This is also supported by a variety of health research findings

showing how pregnant women are vulnerable to depression and stress. When it happens, it will have a negative impact on the prospective baby.⁵⁵ With marriage, pregnant women do not carry the burden of living alone. They will share moral, psychological and economic burdens with the partners so that the risk of depression and adverse effects on the prospective baby is also reduced.

Conclusion

The Majelis Tarjih Muhammadiyah's *fatwa* is to allow pregnant marriages with men who impregnated them. In this case, the Majelis Tarjih's method is *qiyas*, namely by following the example of the remarriage (reconciliation) between ex-husband and his ex-wife who is pregnant in the *iddah* period. The man who impregnates the woman can be equated to the man who caused his wife in pregnancy. Women who are in a state of pregnancy can be likened to women who are in *iddah* due to pregnancy, likewise, the sperm contained by the two pregnant women is the sperm of the men who cause the pregnancy, so that the two women's genital is a place to sow the seeds of the two men. Therefore, it is forbidden to plant seeds of other men on the places that are already sown by men

Furthermore, the Majelis Tarjih Muhammadiyah's *fatwa* regarding the law of pregnant marriage is compatible with *maqāṣid al-sharī'ah*. This conclusion can be seen from the opinion followed by Muhammadiyah that pregnant women should not be married except by men who caused their pregnancy or by their ex-husband. The reason emphasised is that it is possible to reconcile the ex-husband with his ex-wife in the period of *iddah*, because if his ex-wife is pregnant there is no problem with the child she is carrying. Thus, the interests of children will be maintained in the future, especially those related to nafaqah, nurture, education and inheritance rights of the child. This last point indicates that Muhammadiyah wants to ensure the benefits for children, it can also be categorized as guarding offspring line (*fiifz al-nasl*) or guarding the soul (*fiifz al-nafs*) if the child is classified as one soul, which is part of the *maqāṣid al-sharī'ah*.

Regarding the *fatwa* on the maternity law issued by the Majelis Tarjih Muhammadiyah, it can be argued that the pregnant women should not be married except by the men who cause the pregnancy. However, it is important to question the law is to follow the law concerning reconciliation between the ex-husband and his ex-wife who is pregnant during the *iddah* period. It is because the *qiyas* applied is unbalanced. It is unreasonable to draw a parallel between getting pregnant from the

⁵⁵ Zulma Aimmatul Mahshulah, "Depresi Pada Ibu Dapat Mengakibatkan Anak Stunting," (Paper presented in Seminar Nasional Pendidikan FKIP, 2019), 324-331.

results of a legal marriage and conceiving from the results of *zina*. It is essential to lean more towards the use of the hadith of the prophet stating that it is initially started by *zina*, then ultimately completed as a lawful marriage and that illicit acts cannot prevent the occurrence of lawful marriage. In addition, the Prophet's hadith states that it is not permissible to plant water on other people's plants. As a consequence, if a marriage is conducted with a man who causes the pregnancy, it is permissible, because it is not someone else's plant.

It is expected from Majelis Tarjih Muhammadiyah to play a major role in the moral improvement of youth and the public. Fundamentally, the provision of religion has an important role to fortify oneself from disobedience. Through its authority, Islamic organisation can awaken the Islamic spirit of our society. In using the *ijtifiād* method, Muhammadiyah should be more critical especially on contemporary problems which mostly have no concrete instructions in the Qur'an and hadith. Accordingly, it is expected to find the compatibility of the method with the results of *ijtifiād* had attempted.[]

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