

halkam

Jurnal Kajian Hukum Islam dan Hukum Ekonomi Islam

- Hak Kekayaan Intelektual (HKI) sebagai Objek Jaminan Pembiayaan dalam Perspektif Hukum Ekonomi Syariah
- Peran Istri sebagai Pencari Nafkah dan Dampaknya terhadap Keutuhan Rumah Tangga Perspektif Islam
- Konsep Nabawi dalam Membangun Keharmonisan Rumah Tangga
- Implementation of The Wakalah Bil Ujroh Contract in Financing Products at Islamic Financial Institutions
- Deconstructing Mu'asyarah Bi Al-Ma'ruf: Toward A Gender-Just Framework of Islamic Family Law
- Eksistensi dan Perkembangan Kelembagaan Hukum Islam di Indonesia
- From Formal Validity to Ethical Accountability: Good Faith in Sharia Electronic Contracts Under Indonesian Law
- Legal Protection for Parties When MPD Fails to Collect Notarial Protocols
- Review of Islamic Law and Law no. 1 of 1974 and Constitutional Court Decision no. 46/PUU-VII/2019 Concerning Siri Marriage Law: The Position of Wives, Children And Property
- Sharia Economic Law on The Growth of Micro, Small, And Medium Enterprises (UMKM) In The Digital Era
- Konsep Kafa'ah dalam Prespektif Imam Malik dan Imam Syafi'i: Analisis Metodologi Ushul Fikih
- Implikasi Normatif dan Sosial Perjanjian Pra-Nikah Perspektif Hukum Keluarga Islam di Indonesia
- The Boycott of Israeli Products From The Perspective Of Sadz Al-Dzarai': A Normative Analysis Within Islamic Law
- Analysis of Legal Policy Implementation Against Perpetrators of Child Bullying
- Kafa'ah dalam Perkawinan Perspektif Maqasid Al-Syari'ah (Studi Kasus pada Pesantren Darul Ma'sum dan Yayasan Darussalam Kabupaten Probolinggo)
- Perlindungan Hukum terhadap Fenomena Perkawinan Siri Dibawah Umur tanpa Wali di Kabupaten Lumajang
- The Genealogy of Taqin Al-Ahkam And Its Initial Implementation In The Ottoman Empire
- Raising the Marriage Age, Raising Dispensations? Evidence From the Malang Religious Court After Constitutional Court Decision no. 22/PUU-XV/2017
- Juridical Review of Marriage Contracts For Pregnant Women: Harmonizing Islamic Law And Indonesian National Law On Lineage And Child Protection

H a k a m

Jurnal Kajian Hukum Islam dan Hukum Ekonomi Islam

e-ISSN : 25808052 | p-ISSN : 2829-5803

DOI: <https://doi.org/10.33650/jhi>

Volume 9 Nomor 2, Juli – Desember 2025

Editorial Office:

Program Studi Hukum Keluarga (Ahwal Syakhshiyah)

Fakultas Agama Islam Universitas Nurul Jadid,

Paiton, Probolinggo, Jawa Timur, Indonesia 67291.

Telepon: 0888 30 78899, Hp: 082232108969

Email: hukumkeluarga.fai@unuja.ac.id

Website: <https://ejournal.unuja.ac.id/index.php/hakam/index>

H a k a m

Jurnal Kajian Hukum Islam dan Hukum Ekonomi Islam

Editor In Chief

Muhammad Zainuddin Sunarto, Sinta ID 6116528, Universitas Nurul Jadid, Probolinggo, Indonesia

Editorial Board

Daniel Fernandez Kranz, Scopus ID 12797471200, Instituto de Empresa University, Segovia, Spain, Spain

Mohammad Fadel, Scopus ID 39261404000, University of Toronto, Canada, Canada

Joana Salifu Yendork, Scopus ID 56328263000, University of Ghana, Ghana, Ghana

Siti Muna Hayati, Scopus ID, UIN Sunan Kalijogo Yogyakarta

Slawa Rokicki, Scopus ID 56404564000, University College Dublin, Ireland, Ireland

Khoirul Hidayah, Scopus ID 57203353119, Universitas Islam Negeri Maulana Malik, Malang, Indonesia

Akhmad Farid Mawardi Sufyan, Scopus ID 57266242300, Institut Agama Islam Negeri Madura, Pamekasan, Indonesia

Zakiyatul Ulya, Scopus ID 57218455431, Universitas Islam Negeri Sunan Ampel Surabaya, Indonesia

Reviewers

Ewa Batyra, Scopus ID 57192590667, The Max Planck Institute for Demographic Research, Germany, Germany

Elizabeth Agey, Scopus ID 57204005122, University of California Santa Barbara, United States of America, United States

Olympia L.K. Campbell, Scopus ID 57221476734, Institute For Advanced Study in Toulouse, France, France

Xiangming Fang, Scopus ID 36339202800, China Agricultural University, Beijing, China, China

Rihab Grassa, Scopus ID 55505935200, Manouba University, Tunisia, Tunisia

Junghua Hung, Scopus ID 8574630700, National Central University, Taoyuan, Taiwan, Taiwan, Province of China

Rüdiger Lohlker, Scopus ID 6506783480, Northwest University, Xi'an, China, China

Marco Alfano, Scopus ID 57527411400, University College London, United kingdom, United Kingdom

Dhofir Catur Bashori, Scopus ID, Universitas Muhammadiyah Jember,
Indonesia

Muslihun -, Scopus ID, Institut KH Abdul Chalim Pacet Mojokerto, Indonesia

Siti Khoirotul Ula, Scopus ID, Universitas Islam Negeri Sayyid Ali

Rahmatullah Tulungagung, Indonesia

Nur Lailatul Musyafa'ah, Scopus ID 57353220700, Universitas Islam Negeri
Sunan Ampel Surabaya, Indonesia

English Language Advisor

Achmad Naufal Irsyadi, Sinta ID 6704870, Universitas Nurul Jadid,
Probolinggo, Indonesia

Layouter

Faizul Mubarak, Universitas Nurul Jadid, Probolinggo, Indonesia

H a k a m

Jurnal Kajian Hukum Islam dan Hukum Ekonomi Islam

Table of Content

1	HAK KEKAYAAN INTELEKTUAL (HKI) SEBAGAI OBJEK JAMINAN PEMBIAYAAN DALAM PERSPEKTIF HUKUM EKONOMI SYARIAH	181 – 194
	Diding Jalaludin, Piqi Rizki Padhilah, Umar Rojikin, Muhamad Kholi, Tatang Astarudin Universitas Islam Negeri Sunan Gunung Djati Bandung	
2	PERAN ISTRI SEBAGAI PENCARI NAFKAH DAN DAMPAKNYA TERHADAP KEUTUHAN RUMAH TANGGA PERSPEKTIF ISLAM	195 – 211
	Muhammad Shidqi Pribadi, Teguh dwi cahyadi Sekolah Tinggi Dirasat Islamiyah Imam Syafi'i Jember	
3	KONSEP NABAWI DALAM MEMBANGUN KEHARMONISAN RUMAH TANGGA	212 – 227
	Muhammad Fathur Rachman Imanda, Winning Son Ashari Sekolah Tinggi Dirasat Islamiyah Imam Syafi'i Jember	
4	IMPLEMENTATION OF THE WAKALAH BIL UJROH CONTRACT IN FINANCING PRODUCTS AT ISLAMIC FINANCIAL INSTITUTIONS	228 – 242
	Muhammad Fikri Auliaurrahman Universitas Islam Negeri Sunan Gunung Djati Bandung	
5	DECONSTRUCTING MU'ASYARAH BI AL-MA'RUF: TOWARD A GENDER-JUST FRAMEWORK OF ISLAMIC FAMILY LAW	243 – 266
	Lina Nur Anisa Institut Agama Islam Ngawi	
6	EKSISTENSI DAN PERKEMBANGAN KELEMBAGAAN HUKUM ISLAM DI INDONESIA	267 – 278
	Hasbi Umar, Husin Bafadhal, Reza Rahmatullah Universitas Islam Negeri Sulthan Thaha Saifuddin Jambi	
7	FROM FORMAL VALIDITY TO ETHICAL ACCOUNTABILITY: GOOD FAITH IN SHARIA ELECTRONIC CONTRACTS UNDER INDONESIAN LAW	279 – 303
	Sigit Nurhadi Nugraha, Abdul Rachmad Budiono, Budi Santoso, Rachmi Sulistyarini Fakultas Hukum Universitas Brawijaya, Malang, Indonesia	
8	LEGAL PROTECTION FOR PARTIES WHEN MPD FAILS TO COLLECT NOTARIAL PROTOCOLS	304 – 326
	Adinda Mellinia Aurel, Herlindah, Imam Rahmat Sjafi'i Universitas Brawijaya Malang, Indonesia	
9	REVIEW OF ISLAMIC LAW AND LAW NO. 1 OF 1974 AND CONSTITUTIONAL COURT DECISION NO. 46/PUU-VIII/2010 CONCERNING SIRI MARRIAGE LAW: THE POSITION OF WIVES, CHILDREN AND PROPERTY	327 – 341
	Syaiful Bakri, Muhammad Abrori Sekolah Tinggi Ilmu Syari'ah Darul Falah Bondowoso	
10	SHARIA ECONOMIC LAW ON THE GROWTH OF MICRO, SMALL, AND MEDIUM ENTERPRISES (UMKM) IN THE DIGITAL ERA	342 – 355

- Meisa Nur Safitri, Nabila Nurkhafiah, Siti Nurzihan, Afifaturohmaniyah
Universitas Islam Negeri Sultan Maulana Hasanudin Banten, Indonesia
- 11 **KONSEP KAFA'AH DALAM PRESPEKTIF IMAM MALIK DAN IMAM SYAFI': ANALISIS METODOLOGI USHUL FIKIH** 356 – 375
Nailil Maziyyati, Luthfiyah
Universitas Islam Negeri Walisongo Semarang, Indonesia
- 12 **IMPLIKASI NORMATIF DAN SOSIAL PERJANJIAN PRA-NIKAH PERSPEKTIF HUKUM KELUARGA ISLAM DI INDONESIA** 376 – 394
Suwito, Didit Darmawan, Saidah Fiddaroini Harun, Risma A'limathus Zuriyah
Universitas Sunan Giri Surabaya, Indonesia
- 13 **THE BOYCOTT OF ISRAELI PRODUCTS FROM THE PERSPECTIVE OF SADZ AL-DZARAI': A NORMATIVE ANALYSIS WITHIN ISLAMIC LAW** 395 – 407
Ai Samrotul Fauziah
UIN Sunan Gunung Djati Bandung
- 14 **ANALYSIS OF LEGAL POLICY IMPLEMENTATION AGAINST PERPETRATORS OF CHILD BULLYING** 408 – 424
Sulistina, Amilia Putri Kartika Sari, Efrilia Yusri, Arindy Sri Musdalifah
Universitas Nurul Jadid Paiton Probolinggo, Indonesia
- 15 **KAFA'AH DALAM PERKAWINAN PERSPEKTIF MAQASID AL-SYARI'AH** (Studi Kasus pada Pesantren Darul Ma'sum dan Yayasan Darussalam Kabupaten Probolinggo) 425 – 439
Muhamad Agus Salim, Fauziyah Putri Meilinda
Institut Ahmad Dahlan Probolinggo, Indonesia
- 16 **PERLINDUNGAN HUKUM TERHADAP FENOMENA PERKAWINAN SIRI DIBAWAH UMUR TANPA WALI DI KABUPATEN LUMAJANG** 440 – 453
Uswatun Hasanah, Fauziyah Putri Meilinda
Institut Ahmad Dahlan Probolinggo
- 17 **THE GENEALOGY OF TAQNI'N AL-AHKAM AND ITS INITIAL IMPLEMENTATION IN THE OTTOMAN EMPIRE** 454 – 468
Alby Labib Halbana Bunyamin, Abdul Mufti Albasyari
UIN Sunan Gunung Djati Bandung, Indonesia; Institut Nahdlatul Ulama Ciamis, Indonesia
- 18 **RAISING THE MARRIAGE AGE, RAISING DISPENSATIONS? EVIDENCE FROM THE MALANG RELIGIOUS COURT AFTER CONSTITUTIONAL COURT DECISION NO. 22/PUU-XV/2017** 469 – 483
Risma Nur Arifah, Mohd Nurhusairi Bin Mat Hussin, Erik Sabti Rahmawati, Anggreani Kharimatuz Zahro
Universitas Islam Negeri Maulana Malik Ibrahim Malang, Indonesia; Universiti Malaya, Malaysia
- 19 **JURIDICAL REVIEW OF MARRIAGE CONTRACTS FOR PREGNANT WOMEN: HARMONIZING ISLAMIC LAW AND INDONESIAN NATIONAL LAW ON LINEAGE AND CHILD PROTECTION** 484 – 504
Yurizka Syahdani Nst, Uswatun Hasanah
Universitas Islam Negeri Syekh Ali Hasan Ahmad Addary Padangsidempuan, Indonesia



JURIDICAL REVIEW OF MARRIAGE CONTRACTS FOR PREGNANT WOMEN: HARMONIZING ISLAMIC LAW AND INDONESIAN NATIONAL LAW ON LINEAGE AND CHILD PROTECTION

Yurizka Syahdani Nst¹, Uswatun Hasanah²

Universitas Islam Negeri Syekh Ali Hasan Ahmad Addary Padangsidempuan, Indonesia

Email: ¹yurizkasyahdani17@gmail.com, ²uswatun@uinsyahada.ac.id

ABSTRACT

This study discusses the legal provisions regarding marriage contracts for pregnant women from the perspective of Islamic law and national law in Indonesia, with a focus on the validity of the contract and the status and rights of children born from such marriages. The method used is library research with a normative-comparative approach through the study of the Qur'an, hadith, Compilation of Islamic Law (KHI), Law Number 1 of 1974 concerning Marriage, and Constitutional Court Decision Number 46/PUU-VIII/2010. The results of the study show that both legal systems basically allow the marriage of pregnant women in Islamic law as a form of moral responsibility and an effort to preserve offspring (*hifz al-nasl*), and national law through Article 53 of the KHI does not require waiting for the birth of the child, while the Constitutional Court Decision provides certainty of civil protection for children born out of wedlock based on biological evidence. This study fills a gap in the literature, which rarely conducts normative comparative analyses between Islamic law and constitutional jurisprudence regarding the implications of a child's status. The main contribution of this research is to offer an interpretive harmonization framework that integrates biological evidence and the principle of protecting offspring to strengthen legal certainty and child protection. These findings have implications for recommendations for more coherent family law policies between religious norms and positive provisions.

Keywords : *marriage contract, pregnant women, Islamic law, national law*

ABSTRAK

Penelitian ini membahas ketentuan hukum mengenai akad nikah bagi wanita hamil dalam perspektif hukum Islam dan hukum nasional di Indonesia, dengan fokus pada keabsahan akad serta status dan hak anak yang lahir dari pernikahan tersebut. Metode yang digunakan adalah *library research* dengan pendekatan normatif-komparatif melalui telaah Al-Qur'an, hadis, Kompilasi Hukum Islam (KHI), Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan, serta Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010. Hasil penelitian menunjukkan bahwa kedua sistem hukum pada dasarnya memperbolehkan perkawinan wanita hamil dalam hukum Islam sebagai bentuk tanggung jawab moral dan upaya menjaga keturunan (*hifz al-nasl*), dan hukum nasional melalui Pasal 53 KHI tidak mengharuskan menunggu kelahiran anak, sementara Putusan MK memberi kepastian perlindungan keperdataan anak luar nikah berdasarkan pembuktian biologis. Studi ini mengisi kekosongan dalam literatur yang jarang melakukan analisis komparatif normatif antara hukum Islam dan yurisprudensi konstitusional terkait implikasi status anak. Kontribusi utama penelitian ini adalah menawarkan kerangka harmonisasi interpretatif yang mengintegrasikan bukti biologis dan prinsip perlindungan keturunan untuk memperkuat kepastian hukum dan perlindungan anak. Temuan ini berimplikasi pada rekomendasi kebijakan hukum keluarga yang lebih koheren antara norma agama dan ketentuan positif.

Kata Kunci : *akad nikah, wanita hamil, hukum Islam, hukum nasional*

INTRODUCTION

Marriage in Islam is a binding contract between a man and a woman with the aim of forming a family that is *sakinah* (peaceful), *mawaddah* (loving), and *rahmah* (merciful) ¹. Marriage is not merely a biological relationship, but also a means of preserving lineage (*hifẓ al-nasab*), honor (*hifẓ al-ʿird*), and building a dignified social order ². However, in practice, legal issues arise when a woman marries while pregnant, especially if the pregnancy occurred outside of a valid marriage.

In Islamic law, the validity of marriage is determined by the fulfillment of the pillars and requirements of marriage, such as the presence of a prospective husband, a prospective wife, a guardian, two witnesses, and a valid *ijab qabul* (marriage contract) ³. Pregnancy is not an obstacle to the marriage contract if it is carried out with the man who impregnated her, as it is considered a form of moral responsibility and an effort to correct past mistakes ⁴. This opinion is held by most scholars of the Hanafi, Maliki, Shafi'i, and Hanbali schools of thought ⁵. However, if the pregnant woman is married to another man, the scholars differ in their views. The Maliki school and some Hanafi scholars prohibit the marriage until the woman gives birth, while Abu Hanifah and some Shafi'i scholars permit it without waiting for the birth, as pregnancy resulting from adultery does not affect the validity of the marriage contract ⁶.

In Indonesia's national legal system, this issue is indirectly regulated in Law No. 1 of 1974 on Marriage (Marriage Law) and directly regulated in the Compilation of Islamic Law (KHI). Article 2 paragraph (1) of the Marriage Law states that the validity of a marriage is determined based on the respective religious laws ⁷. Based on Article 53 of the KHI, a woman who is pregnant out of wedlock can be married to the man who impregnated her without

¹ Zulfahmi Zulfahmi, "Domestic Violence (KDRT) in the Perspective of Islamic Criminal Law," *Jurnal Hukum Keluarga* 1, no. 01 (2024): 18–25, <https://doi.org/10.63731/jhk.v1i01.4>.

² Nur Kamilia, "Childfree Marriage (Perspektif Pemikiran Maqasid Syariah Jaser Audah)," *Hakam: Jurnal Kajian Hukum Islam Dan Hukum Ekonomi Islam* 8, no. 2 (2024): 186–201, <https://doi.org/10.33650/jhi.v8i2.8805>.

³ Pujo Pangestu and Habibi Al Amin, "Nalar Hukum Isbat Nikah Di Pengadilan Agama Kediri," *Hakam: Jurnal Kajian Hukum Islam Dan Hukum Ekonomi Islam* 7, no. 1 (June 2023): 129–40, <https://doi.org/10.33650/jhi.v7i1.6150>.

⁴ Isman Isman, Lukman S. Thahir, and Adam Adam, "Compilation of Islamic Laws Regarding Marrying Pregnant Women: The Case of Biau Regency, Central Sulawesi," *International Journal of Contemporary Islamic Law Society* 5, no. 2 (2023): 1–10, <https://doi.org/10.24239/ijcils.Vol5.Iss2.69>.

⁵ Wahbah Al-Zuhaili, *Al-Fikih Al-Islami Wa Adillatuhu*, Juz. 10 (Beirut: Dār al-Fikr, 1984).

⁶ Imam Nawawi, *Al-Majmu' Syarah Al-Muhadzab*, Juz 4 (Kairo: Dar al-Hadith, 2010).

⁷ Rudy Harjanto et al., "The Benefits and Challenges of Same-Religious and Interfaith Marriages," *Russian Law Journal* 11, no. 3 (2023): 1139–50, <https://doi.org/10.52783/rj.v11i3.1509>.

waiting for the child to be born, and the marriage contract is considered valid and does not need to be repeated after the child is born ⁸.

On the other hand, the issue of the status of children is also an important debate. The status of children is directly related to the basic rights inherent to the child and is related to social, moral, and legal order in society. In classical fikih, children born out of wedlock only have a blood relationship with their mother, not with their biological father ⁹. However, Constitutional Court Decision Number 46/PUU-VIII/2010 provides the opportunity for children born out of wedlock to be recognized as having a civil relationship with their biological father, provided that the relationship can be proven validly, for example through DNA testing ¹⁰. Thus, national law shows a more inclusive development in protecting children's rights without neglecting religious moral principles.

Fauzi' ¹¹ research shows that the Shafi'i and Hanafi schools of thought allow pregnant women to marry, while the Maliki and Hanbali schools prohibit it until the woman has undergone the iddah period and repented. Article 53 of the KHI is considered a form of flexibility in Islamic law that aims to maintain honor, clarity of lineage, and the welfare of the family. Then, research by Shodiq & Arifin ¹² explains that there are differences in the views of scholars, where some allow the marriage of pregnant women under certain conditions, while others require repentance first. The hadith narrated by Muslim is used as a basis for emphasizing the importance of maintaining lineage clarity and marriage validity. Article 53 of the KHI is seen as providing convenience, but it still leaves issues regarding lineage status, inheritance rights, and its compatibility with *maqasid al-shari'ah*.

Another study by Mobarq et al. ¹³ concluded that Article 53 of the KHI allows pregnant women to marry, either to the man who impregnated them or to another man, without waiting for the child to be born. This view is in line with the moderate Hanafi and

⁸ Isman, Thahir, and Adam, "Compilation of Islamic Laws Regarding Marrying Pregnant Women: The Case of Biau Regency, Central Sulawesi."

⁹ Zulfahmi Zulfahmi, Asrofi Asrofi, and Suroto Suroto, "A Review of Islamic Law on the Practice of "Tumpang Rahim" Based on Maqāsid Al-Syarī'ah and Contemporary Scholars," *MAQASIDI: Jurnal Syariah Dan Hukum* 4, no. 2 (2024): 231–46, <https://doi.org/10.47498/maqasidi.v4i2.3544>.

¹⁰ Mahkamah Konstitusi, "Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Pengakuan Anak Luar Nikah," 2010.

¹¹ "Tinjauan Kawin Hamil Dalam Perspektif Hukum Islam," *Journal of Islamic Law Studies* 3, no. 2 (2020).

¹² "Perspektif Hukum Islam Pasal 53 Tentang Pernikahan Wanita Hamil Di Luar Nikah Dan Korelasinya Dengan Hadits Riwayat Muslim," *Eksekusi: Jurnal Ilmu Hukum Dan Administrasi Negara* 2, no. 3 (2024): 382–95, <https://doi.org/10.55606/eksekusi.v2i3.1309>.

¹³ "Kawin Hamil Perspektif Kompilasi Hukum Islam Dan Mazhab Fikih," *Jurnal Al-Wasith: Jurnal Studi Hukum Islam* 10, no. 1 (2025): 15–26, <https://doi.org/10.52802/wst.v10i1.1419>.

Shafi'i schools of thought, while the Maliki and Hanbali schools prohibit the marriage of pregnant women until they give birth.

Previous studies have mostly examined marriage during pregnancy only from the perspective of Islamic law or positive law, so there has been no normative-comparative study that integrates fikih texts, the Compilation of Islamic Law (KHI), Law No. 1 of 1974, and the jurisprudence of the Constitutional Court to formulate legal harmonization solutions and explain the role of biological evidence in determining the civil status of children. The novelty of this study lies in its difference from previous studies, which only examined marriage during pregnancy from the perspective of Islamic law. This study will conduct an in-depth comparison between Islamic law and national law in Indonesia regarding marriage during pregnancy, particularly concerning the validity of marriage, the status of children, and legal certainty, so that it is expected to provide a more comprehensive and integrative academic contribution.

Based on this gap, this study formulates the main research question, namely how Islamic law and national law in Indonesia regulate the validity of marriage contracts for pregnant women; how the legal status and civil rights of children born from marriages during pregnancy are determined according to both legal systems, particularly in relation to biological evidence and Constitutional Court Decision Number 46/PUU-VIII/2010; and what interpretive harmonization model can be proposed to improve legal certainty and child protection in the context of marriage during pregnancy.

RESEARCH METHOD

This study uses library research with a normative-comparative approach¹⁴. Through this method, the author analyzes various legal sources such as the Qur'an, hadith, the Islamic Law Book (KHI), Law Number 1 of 1974 concerning Marriage (Marriage Law), MUI Fatwa Number 11 of 2012, and Constitutional Court Decision Number 46/PUU-VIII/2010. Normative analysis in this study was conducted by examining relevant primary and secondary legal sources, then interpreting existing legal provisions by considering the context and purpose of their formation. This analysis is used to assess the legal consequences for the

¹⁴ Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Jurnal Gema Keadilan* 7, no. 1 (2020): 20–33, <https://doi.org/10.14710/gk.2020.7504>.

validity of marriage contracts and the status of children, as well as to formulate recommendations based on the principles of justice, legal certainty, and public interest.

Furthermore, a comparative approach was used to examine the similarities and differences between Islamic law and national law, particularly in relation to legal basis, the validity of marriage contracts during pregnancy, the determination of a child's status through biological evidence, and the protection of children's civil rights. With these technical explanations and parameters, the research remains rooted in a normative-comparative approach but becomes more explicit in the way it examines texts and compares the position of Islamic law and national law regarding marriage during pregnancy ¹⁵.

FINDINGS AND DISCUSSION

Marriage Contract for Pregnant Women in Islamic Law

A marriage contract for pregnant women is also known as a pregnant marriage, which is a marriage conducted with a woman who is pregnant outside of marriage, whether she is married to the man who impregnated her or another man ¹⁶. This term refers to a marriage contract conducted by a woman who is pregnant as a result of a relationship outside of marriage, regardless of who her future husband is. In other words, kawin hamil is a form of marriage in which the bride is already pregnant before the *ijab qabul* take place ¹⁷.

Islamic law explains that a marriage is considered valid if it is carried out in accordance with the pillars and conditions stipulated in the provisions of sharia law. These pillars and conditions determine the validity of a legal act, particularly in the context of a marriage contract. With regard to the marriage of pregnant women, scholars have differing views ¹⁸.

Scholars from the four schools of thought, namely Hanafi, Maliki, Shafi'i, and Hanbali, generally agree that marriage between a pregnant woman outside of marriage and the man who impregnated her is considered valid under Islamic law. Pregnancy does not prevent the marriage contract from being performed as long as all the pillars and conditions

¹⁵ Tunggal Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Originis and Approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 1–9, <https://doi.org/10.22219/aclj.v4i1.24855>.

¹⁶ Isman, Thahir, and Adam, "Compilation of Islamic Laws Regarding Marrying Pregnant Women: The Case of Biau Regency, Central Sulawesi"; Mubaroq et al., "Kawin Hamil Perspektif Kompilasi Hukum Islam Dan Mazhab Fikih."

¹⁷ Rusdaya Basri, *Fikih Munakabat 2* (Parepare: IAIN Parepare Nusantara Press, 2020).

¹⁸ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fikih Munakabat Dan Undang-Undang Perkawinan* (Kencana, 2006).

of marriage are fulfilled, such as the presence of the prospective husband and wife, a guardian, two witnesses, and a valid *ijab qabul*¹⁹.

According to the Hanafi school of thought, if a man marries a woman whom he has impregnated, the marriage contract is considered valid and the two can live as husband and wife, because the fetus is the result of their relationship²⁰. The Shafi'i school of thought also argues that a woman who is pregnant as a result of adultery may be married by the man who impregnated her without having to wait for the birth, because such a pregnancy is not considered a period of *iddah* (waiting)²¹. The Maliki and Hanbali schools of thought emphasize that the main purpose of such a marriage must be to improve morals and protect the lineage of the child, not to justify adultery²².

According to Ibn Hazm, a scholar from the Zahiri school of thought, marriage between a woman who is pregnant out of wedlock and the man who impregnated her is permissible and valid, and the two are allowed to have relations as husband and wife after marriage. However, this is only permissible if both of them have sincerely repented and undergone flogging as punishment for the act of adultery that has been committed²³.

Ibn Hazm's opinion is based on practices that were once carried out by the companions of the Prophet Muhammad PBUH. One of them is the story of when Jabir bin Abdillah was asked about the law of marrying an adulterer. He replied that marriage was permissible but on the condition that both parties had repented and improved their morals. In addition, there is also the story of an elderly man who complained to Caliph Abu Bakr about his guest's actions, because the guest had committed adultery with his daughter. Upon hearing this, Abu Bakr ordered that both of them be punished first, then married them²⁴.

Normatively, the permissibility of a man marrying the woman he impregnated reflects the objectives of Islamic law (*maqasid al-shari'ah*), particularly in terms of preserving lineage (*hifz al-nasl*) and honor (*hifz al-'ird*)²⁵. Thus, this marriage is not only valid from a religious perspective, but also carries social value in the form of the man's moral responsibility towards the woman and the child she is carrying. However, scholars emphasize that this marriage does not erase the sin of adultery that has been committed. Both parties

¹⁹ Al-Zuhaili, *Al-Fikih al-Islami Wa Adillatuhu*.

²⁰ Al-Zuhaili.

²¹ Nawawi, *Al-Majmu' Syarah Al-Muhadzab*.

²² Muwaffaq al-Din Ibn Qudamah, *Al-Mughni* (Cairo: Dar al-Hadith, 2004).

²³ Ali ibn Ahmad ibn Sa'id Ibn Hazm, *Al-Muhalla Bi Al-Atsar* (Beirut: Dar al-Fikr, 1900).

²⁴ Umrotul Mujahadah, "Analisis Hukum Pernikahan Seorang Muhallil Perspektif Ibnu Hazm Dalam Buku Al-Muhalla Jilid 14" (Undergraduate thesis, Universitas Islam Negeri Walisongo Semarang, 2021).

²⁵ Kamilia, "Childfree Marriage (Perspektif Pemikiran Maqasid Syariah Jaser Audah)."

are still required to repent sincerely so that the marriage they enter into becomes a new beginning that is pleasing to Allah. Therefore, Islamic law in this case is not only punitive, but also provides an opportunity for self-improvement and the establishment of a dignified social life.

Although there is a basic consensus that marriage to a pregnant woman can be declared valid if it meets formal requirements, a comparative analysis shows differences in normative emphasis between schools of thought. The Hanafi and Shafi'i schools emphasize the aspects of formality and continuity of the relationship, namely that the fetus is a biological consequence that strengthens the basis of marriage ²⁶. Meanwhile, the Maliki and Hanbali schools place ethical emphasis, ensuring that the purpose of marriage is the protection of offspring and moral restoration, not the legitimization of adultery ²⁷. Ibn Hazm's position adds a procedural and punitive dimension that emphasizes moral firmness while demanding normative restoration before living together ²⁸. These differences are not merely technical; they have implications for practice, such as when religious communities or local authorities encourage the marriage process, whether conditions of repentance and punishment are imposed before the contract, and how the social status and rights of children are handled immediately after marriage.

Substantively, Islamic law provides a basis that allows for protective solutions for women and children, but most schools of thought provide little detailed procedural guidance on biological evidence and mechanisms for enforcing children's rights in a modern context. This creates room for interpretation when fikih texts are confronted with scientific evidence and contemporary judicial practices. Therefore, although Islamic law demonstrates normative flexibility for *hifẓ al-nasl* and *hifẓ al-'ird*, an interpretive synthesis is still needed to connect classical provisions with mechanisms for proving and protecting children's rights in the context of modern national law.

The Law of Marrying a Pregnant Woman to Another Man

For pregnant women who are married to another man (who did not impregnate her), there are several views among fikih scholars regarding this matter. Scholars of the Maliki school of thought and two scholars from the Hanafi school, namely Abu Yusuf and Zafar,

²⁶ Al-Zuhaili, *Al-Fikih Al-Islami Wa Adillatuhu*; Nawawi, *Al-Majmu' Syarah Al-Muhadzab*.

²⁷ Ibn Qudamah, *Al-Mughni*.

²⁸ Ibn Hazm, *Al-Muhalla Bi Al-Atsar*; Mujahadah, "Analisis Hukum Pernikahan Seorang Muhallil Perspektif Ibnu Hazm Dalam Buku Al- Muhallā Jilid 14."

argue that it is haram because a woman who is pregnant as a result of adultery cannot be married to a man who did not impregnate her ²⁹. The basis for this opinion is found in the Qur'an Surah (QS) al-Nur, verse 3, which reads: "A male adulterer may not marry except a female adulteress or a polytheist woman; and a female adulteress may not marry except a male adulterer or a polytheist man; and that is forbidden to the believers."

This verse is understood by these scholars as a strict prohibition for believers to marry adulterers, as long as both parties have not sincerely repented. They emphasize that such marriages are not appropriate, as they would destroy the honor and sanctity of the marriage contract, which should be a sacred bond between two people who refrain from sinful acts ³⁰. Thus, the Maliki school of thought and some Hanafi scholars adhere to the principle that the purpose of marriage in Islam is not merely to legalize biological relations, but to build a clean and dignified household ³¹. Therefore, a woman who becomes pregnant as a result of adultery is forbidden to marry another man until the status of her pregnancy is clear and she has truly repented.

The next argument that reinforces the views of the Maliki, Abu Yusuf, and Zafar schools of thought regarding the prohibition of marrying a woman who is pregnant as a result of adultery with another man is based on several accounts and hadiths of the Prophet Muhammad PBUH ³². *First*, there is a story from Sa'id bin al-Musayyib which tells of a man who married a woman, but after consummating the marriage, he discovered that she was pregnant. This case was then reported to the Prophet Muhammad PBUH, and he ordered that the two be separated (divorced), but the woman still received her dowry as her right, and was sentenced to one hundred lashes for adultery. This narration shows that a woman who is pregnant as a result of adultery cannot be married, and the marriage that has taken place is considered invalid ³³.

Second, in a hadith of the Prophet Muhammad PBUH, it is stated that "A pregnant woman should not be sexually intercourse until she gives birth to her baby." This hadith emphasizes the prohibition of sexual intercourse with a pregnant woman, whether the pregnancy is from a valid marriage or from adultery, until the delivery process is complete.

²⁹ Bagas Mustopa, "Pernikahan Hamil Di Luar Nikah Perspektif Hukum Islam," *MADDIKA: Journal of Islamic Family Law* 4, no. 1 (2024): 1–12, <https://doi.org/10.24256/maddika.v4i1.3244>.

³⁰ Basri, *Fikih Munakahat* 2.

³¹ Abdulmuid Aykul, "İslam Ceza Hukukunda Zina Suçunun Soruşturulması (Hanefi Mezhebi Özelinde)," *Marife Dini Araştırmalar Dergisi* 22, no. 1 (2022): 151–65, <https://doi.org/10.33420/marife.1086877>.

³² Mustopa, "Pernikahan Hamil Di Luar Nikah Perspektif Hukum Islam."

³³ Masnun Masnun and Fitrah Sugiarto, *Hadis Pilihan Seputar Hukum Keluarga Islam (Analisis Sanad Dan Matan Serta Ulasan Singkat Untuk Memahami Hadits)*, ed. Shopian Hidayatulloh and Mustahiqurrahman Mustahiqurrahman (Bantul: Mata Kata Inspirasi, 2025).

The purpose of this prohibition is to avoid mixing lineages (*ikhtilat al-ansab*) and to maintain the clarity of descent ³⁴.

Third, the Prophet Muhammad PBUH also said, “It is not lawful for a person who believes in Allah and the Last Day to spill his semen on a field that does not belong to him.” (HR. Abu Dawud) ³⁵. The meaning of this hadith is a moral warning that a man should not have sexual relations with a woman who is pregnant with another man’s child, because this is likened to planting seeds in someone else’s field. From this, it can be understood that marriage to a pregnant woman as a result of adultery is not permissible according to Islamic law until her pregnancy ends, in order to preserve honor, lineage, and social order in accordance with Islamic values ³⁶.

The view that allows women who become pregnant as a result of adultery to be married without conditions was put forward by Abu Hanifah and Muhammad from the Hanafi school of thought, as well as some scholars from the Shafi’i school of thought. According to this opinion, pregnancy resulting from adultery does not invalidate the marriage contract, whether the woman is married to the man who impregnated her or to another man. This is because pregnancy resulting from adultery has no legal consequences for lineage, as the relationship is not valid in the eyes of Islamic law ³⁷.

This opinion is supported by several arguments. *First*, the word of Allah in QS al-Nisa verse 24 which reads: “(It is also forbidden for you to marry) women who are married, except female slaves (war captives) whom you own as a provision from Allah for you. It is lawful for you, other than that, to seek (wives) with your wealth (dowry) to marry them, not to commit adultery. Because of the pleasure you have derived from them, give them their due compensation as an obligation. There is no sin upon you regarding what you mutually agree upon after fulfilling the obligation.” This verse explains that it is permissible to marry women as long as the marriage is conducted with the right intention, not for the purpose of committing adultery ³⁸.

³⁴ Masnun and Sugiarto.

³⁵ Basri, *Fikih Munakahat 2*.

³⁶ Khoirul Abror, *Pernikahan Wanita Hamil Akibat Zina (Studi Komparatif Menurut Hukum Islam Dan UU Perkawinan)* (Bandar Lampung: Pusat Penelitian dan Penerbitan LP2M UIN Raden Intan Lampung, 2017).

³⁷ Kasman Bakry, Armida Abdurrahman, and Fariyanti Fariyanti, “Pernikahan Wanita Hamil Karena Perzinahan (Studi Perbandingan Antara Madzhab Al-Arba’ah Dan Kompilasi Hukum Islam),” *Dirasah: Jurnal Kajian Islam* 1, no. 1 (2024): 39–61.

³⁸ Burhanudin Al-Ghoni et al., “Reframing Qur’anic Perspectives on Interfaith Relations in the Contemporary World: A Thematic Analysis,” *Al-Karim: International Journal of Quranic and Islamic Studies* 3, no. 1 (2025): 1–14, <https://doi.org/10.33367/al-karim.v3i1.6478>.

Second, a hadith narrated from Aisha RA states that “haram matters do not invalidate halal matters,” which indicates that the sin of adultery does not invalidate the halal nature of marriage. *Third*, there is a consensus of the companions narrated from Abu Bakr, Umar bin Khattab, Ibn Umar, Ibn Abbas, and Jabir RA, which states that a man who has committed adultery with a woman is still allowed to marry her ³⁹. Thus, according to this school of thought, marriage is seen as a way to correct past mistakes, preserve honor, and prevent a person from committing the same sin in the future.

In contemporary fikih development, scholars agree that women who become pregnant as a result of adultery are still permitted to enter into a marriage contract with either the man who impregnated them or another man, provided that all the conditions and pillars of marriage are fulfilled ⁴⁰. Yusuf al-Qaradawi explains that pregnancy resulting from adultery does not invalidate the marriage, as the prohibition against marrying a pregnant woman in QS al-Talaq verse 4 applies to women who are pregnant by their lawful husbands, not from extramarital relationships. According to him, the marriage remains valid as long as both prospective spouses repent, but the child cannot be attributed to the man who married the mother, unless there is shar‘i evidence that he is the biological father ⁴¹.

This view is also in line with that of Wahbah az-Zuhayli, who asserts that women who become pregnant as a result of adultery do not have an iddah period and are therefore still permitted to marry anyone. However, he also emphasizes that children born of adultery only have a blood relationship with their mother, because in Sharia law, blood relationships can only arise from a valid marriage ⁴².

Other scholars such as Ali Jum’ah and Abd al-Karim Zaidan also agree on the permissibility of such marriages. Ali Jum’ah argues that there is no strong reason to prohibit the marriage of a woman who is pregnant as a result of adultery, because pregnancy as a result of adultery does not pose a legal obstacle. However, he emphasized that repentance is a moral requirement for the marriage to bring goodness to both parties ⁴³.

³⁹ Masnun and Sugiarto, *Hadis Pilihan Seputar Hukum Keluarga Islam (Analisis Sanad Dan Matan Serta Ulasan Singkat Untuk Memahami Hadits)*.

⁴⁰ Muhammad Hidayat and Muhammad Ikhlas bin Rosele, “Modernization of Fikih in Contemporary Era: A Study of Yusuf Al-Qardhawi’s Fikih Thought,” *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 48, no. 1 (July 2024): 73–87, <https://doi.org/10.30821/miqot.v48i1.1124>.

⁴¹ Dewi Handariatul Mahmudah, “Pernikahan Wanita Hamil Karena Zina Menurut Yusuf Qardhawi Dan Kompilasi Hukum Islam” (Undergraduate thesis, Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2020).

⁴² Al-Zuhaili, *Al-Fikihu Al-Islami Wa Adillatuhu*.

⁴³ Ali Jum’ah, *Al-Bayan Lima Yusyghilul Azhan* (Mesir: Darul Maqtom, 2005).

Furthermore, Abd al-Karim Zaidan, through *maqasid al-shari'ah*, argues that allowing the marriage of couples who have committed adultery can prevent greater social impact and preserve the honor of women ⁴⁴. Thus, both classical and contemporary jurisprudence consistently conclude that the marriage contract of a woman who is pregnant as a result of adultery remains valid, but the child's lineage is not automatically attributed to the man who married the mother.

Marriage Contract for Pregnant Women in National Law

In Indonesian national law, marriage is regulated by Law Number 1 of 1974 on Marriage and the Compilation of Islamic Law. Law Number 1 of 1974 on Marriage serves as the general legal basis applicable to all Indonesian citizens regardless of religion, regulating various key aspects such as the purpose of marriage, the requirements for a valid marriage, the age of marriage, the rights and obligations of husbands and wives, and provisions regarding divorce and annulment of marriage ⁴⁵.

Meanwhile, the Compilation of Islamic Law, which was established through Presidential Instruction No. 1 of 1991, serves as a specific guideline for Muslims in the implementation of marriage law based on sharia principles. The KHI explains in more detail the pillars and requirements of marriage, the position of the guardian, the giving of dowry, the provisions of polygamy, divorce, and the waiting period ⁴⁶. Thus, the two regulations complement each other, with Law No. 1 of 1974 serving as the national legal umbrella, while the KHI provides practical explanations regarding the implementation of Islamic family law in Indonesia.

The Marriage Law does not explicitly regulate the legal status of marriage contracts for pregnant women, whether they are pregnant as a result of a legal marriage or outside of marriage. However, provisions regarding this matter can be implicitly understood through Article 2 paragraph (1), which states that “a marriage is valid if it is conducted in accordance with the laws of their respective religions and beliefs.” This means that the validity of a pregnant woman's marriage depends on the religious laws adhered to by the prospective husband and wife. The state only recognizes the validity of a marriage if it complies with

⁴⁴ Abdul Karim Zaidan, *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Al-Baitul Al-Muslim Fi Al-Syari'ah Al-Islamiah* (Beirut: Muassasah al-Risalah, 1993).

⁴⁵ Zulfahmi, “Domestic Violence (KDRT) in the Perspective of Islamic Criminal Law”; Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fikih Munakahat Dan Undang-Undang Perkawinan*.

⁴⁶ Basri, *Fikih Munakahat* 2; Isman, Thahir, and Adam, “Compilation of Islamic Laws Regarding Marrying Pregnant Women: The Case of Biau Regency, Central Sulawesi.”

religious law, and only then is it registered by the competent official as stipulated in Article 2 paragraph (2) of the same Law ⁴⁷.

For Muslims, the legal reference used is the KHI, which explicitly regulates this issue in Article 53 Paragraphs (1), (2) and (3). Article 53 Paragraph (1) A woman who is pregnant out of wedlock may be married to the man who impregnated her; Paragraph (2) Marriage to a pregnant woman as referred to in paragraph (1) may be carried out without having to wait for the birth of the child; Paragraph (3) With the marriage being carried out while the woman is pregnant, it is not necessary to remarry after the child is born.

This article explains that a pregnant woman can be married by the man who impregnated her. The word “can” can also be interpreted to mean that a woman who is pregnant outside of marriage can be married by another man who wants to take responsibility even though he is not the man who impregnated her. This is because it is possible that the woman’s pregnancy is not the result of adultery but of rape, and the marriage is carried out on the basis that the man wants to take responsibility and cover up the disgrace ⁴⁸.

In the context of child status, the relationship between national law and classical fikih has become increasingly complex following the issuance of Constitutional Court Decision No. 46/PUU-VIII/2010. This decision confirms that children born out of wedlock can have a civil relationship with their biological father as long as it can be scientifically proven, such as through DNA testing ⁴⁹. This paradigm differs from MUI Fatwa No. 11 of 2012, which states that children born out of wedlock only have a blood relationship with their mother ⁵⁰. This difference shows a normative tension between the classical fikih approach, which emphasizes the purity of bloodlines, and the constitutional approach, which is oriented towards protecting children's rights and legal certainty.

The potential for normative disharmony becomes apparent when classical fikih provisions and the KHI are confronted with the modern principle of biological proof recognized by the Constitutional Court. On the one hand, the KHI is still strongly rooted in

⁴⁷ Mesta Wahyu Nita, *Hukum Perkawinan Di Indonesia* (Lampung: CV. Laduny Alfitama, 2021).

⁴⁸ Ibnu Amin, Faisal Efendi, and Hertasmaldi Hertasmaldi, “Mashlahah Married Pregnant Perspective Article 53 Compilation of Islamic Law,” *FOKUS: Jurnal Kajian Keislaman Dan Kemasyarakatan* 7, no. 2 (2022): 103–15, <https://doi.org/10.29240/jf.v7i2.5364>; Fauzi, “Tinjauan Kawin Hamil Dalam Perspektif Hukum Islam.”

⁴⁹ Dwi Arini Zubaidah, “Status Anak Di Luar Nikah Dalam Perspektif Hukum Positif Dan Hukum Islam (Telaah Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010),” *Familia: Jurnal Hukum Keluarga* 4, no. 2 (2023): 91–106.

⁵⁰ Nabila Nabila, Shofiatul Jannah, and Faridatus Sa’adah, “Kedudukan Fatwa MUI Nomor 11 Tahun 2012 Terhadap Kewarisan Anak Hasil Zina Prespektif Hukum Islam Dan Hukum Positif,” *Hikmatina: Jurnal Ilmiah Hukum Keluarga Islam* 6, no. 1 (2024): 177–88.

traditional fikih constructions regarding lineage and marriage ⁵¹, while the Constitutional Court's decision broadens the meaning of the legal relationship of children in order to guarantee substantive justice and the protection of human rights ⁵². However, this disharmony is not absolutely contradictory, but rather indicates a shift in the orientation of the law from purely formal legality to the protection of the best interests of the child. As in Indonesian law, the best protection for children is the main principle that must be prioritized in the interpretation and application of every legal norm ⁵³.

Thus, Indonesian national law demonstrates a gradual harmonization between religious norms and modern constitutional principles. However, a more definitive interpretative formulation is still needed so that the relationship between classical fikih, KHI, and Constitutional Court decisions does not cause legal uncertainty in practice, particularly regarding the status of children and the civil liability of biological fathers in the context of marriage to pregnant women.

Status of Children from Marriages of Pregnant Women

Islamic law states that the status of a child is determined by the clarity of lineage and the validity of the relationship between the parents. If a woman becomes pregnant as a result of adultery, the child she gives birth to only has a lineage relationship with the mother, not with the man who impregnated her. This principle is based on the rule of *al-walad lil-firasy*, which states that the child is only attributed to the lawful husband ⁵⁴.

Based on QS. al-Ahqaf verse 15 and QS. Luqman verse 14, it is stated that the total period of pregnancy and breastfeeding is thirty months. QS. al-Ahqaf verse 15 explains that the period from conception to weaning is thirty months. Meanwhile, QS. Luqman verse 14 explains that the weaning period is two years. Therefore, based on these two verses, scholars conclude that the minimum pregnancy period is six months. This is because the total period

⁵¹ Isman, Thahir, and Adam, "Compilation of Islamic Laws Regarding Marrying Pregnant Women: The Case of Biau Regency, Central Sulawesi."

⁵² Zubaidah, "Status Anak Di Luar Nikah Dalam Perspektif Hukum Positif Dan Hukum Islam (Telaah Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010)."

⁵³ Zul Fahmi, "Preventing Violence Against Women and Children in Mandailing Natal Regency: A Criminological Perspective," *Saree: Research in Gender Studies* 7, no. 2 (2025): 152–67, <https://doi.org/10.47766/saree.v7i2.6265>; Abdul Haris Nasution, Zulfahmi Zulfahmi, and Asrofi Asrofi, "Analisis Hukum Perlindungan Anak Di Indonesia Terhadap Eksploitasi Anak Oleh Orang Tua Dalam Praktik Mengemis," *Mandub: Jurnal Politik Sosial Hukum Dan Humaniora* 2, no. 4 (2024): 13–24, <https://doi.org/10.59059/mandub.v2i4.1652>.

⁵⁴ Rohmawati Rohmawati and Syahril Siddik, "Legal Protection for Children Out of Wedlock: Ensuring the Best Interests of Children Through Judge Decisions," *Al-'Adalah* 19, no. 2 (2022): 315–38, <https://doi.org/10.24042/adalah.v19i2.11761>.

of pregnancy and weaning is thirty months. If the weaning period alone is two years, which is equivalent to twenty-four months, then the minimum pregnancy period is six months ⁵⁵.

This statement means that if a woman gives birth six months or more after the marriage contract and the marital relationship is considered to have occurred after the contract, the child can be attributed to her husband. However, if the birth occurs less than six months after the marriage contract, the child cannot be attributed to the husband. In the national legal system, Law No. 1 of 1974 on Marriage states that a legitimate child is a child born in or as a result of a legal marriage. Meanwhile, children born outside of marriage only have civil relations with their mother and the family of the mother. Before the law was changed, this provision meant that children born out of wedlock had no legal rights to their biological father ⁵⁶.

Indonesian scholars, through Indonesian Ulema Council Fatwa (Fatwa MUI) No. 11 of 2012 concerning the Status of Children Born Out of Wedlock and Treatment of Such Children, stipulate that children born out of wedlock have no blood relationship, marriage guardian, inheritance, or financial support from the man who caused the child's birth, so that the child is attributed to the mother. However, through Constitutional Court Decision Number 46/PUU-VIII/2010, this paradigm has changed. The Court affirmed that children born out of wedlock can have a civil relationship with their biological father if it can be proven by technology such as DNA testing or other valid evidence ⁵⁷. Thus, under current Indonesian positive law, children born out of wedlock are entitled to legal recognition and civil protection, provided that the evidence is legally valid.

One example of determining a child's lineage is found in the South Jakarta Religious Court Decision Number 298/PDT.P/2020/PA.JS with petitioners AR and SM, a married couple who had lived together for a long time and had a son with the initials WAM. The child was born when his parents' marriage had not yet been officially registered by the state, so he was legally categorized as a child born out of wedlock. In 2015, AR and SM entered into a religious marriage (*nikah sirri*) that was valid according to Islamic law because it fulfilled

⁵⁵ Deni Purnama and Dhiauddin Tanjung, "Islam Dan Perlindungan Hak Anak: Tinjauan Fikih Terhadap Nasab Anak Di Luar Nikah," *Al-Mashlahah Jurnal Hukum Islam Dan Pranata Sosial* 12, no. 01 (2024): 41–52, <https://doi.org/10.30868/am.v12i01.6085>.

⁵⁶ M. Nur Abidin and Abdul Basit, "Legal Children in Pregnant Marriage: A Juridical Analysis of Indonesian Positive Law," *Al-Hurriyah: Jurnal Hukum Islam* 7, no. 2 (2022): 131–40, <https://doi.org/10.30983/alhurriyah.v7i2.5321>.

⁵⁷ Zubaidah, "Status Anak Di Luar Nikah Dalam Perspektif Hukum Positif Dan Hukum Islam (Telaah Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010)."

the pillars and requirements of marriage, even though it was not registered at the Religious Affairs Office (*Kantor Urusan Agama/KUA*) and SM was pregnant at the time.

As a result of the marriage not being registered, the KUA could not include AR's name as the father on WAM's birth certificate. To include the father's identity, it is necessary to determine the child's parentage through the Religious Court. Although AR and SM were officially married at the KUA in 2017, WAM's status remains that of a child born out of wedlock because she was born before her parents' marriage was registered by the state, thus not meeting the criteria for a "legitimate child" as stipulated in Article 42 of the Marriage Law.

On this basis, WAM's parents filed a petition with the South Jakarta Religious Court to determine the child's parentage. They requested that WAM be declared the biological child of AR and SM and have a limited civil relationship with her father, in accordance with Constitutional Court Decision Number 46/PUU-VIII/2010, as well as the basis for issuing a birth certificate. The Panel of Judges granted the petition in order to protect the rights of the child, such as the right to identity, support, and birth registration, emphasizing that WAM is the biological child of the petitioners even though he remains legally classified as a child born out of wedlock ⁵⁸.

Comparative Analysis of Islamic Law and National Law

A comparison between Islamic law and national law regarding marriage agreements for pregnant women shows differences in normative emphasis, even though both are based on the goal of social protection. In Islamic law, marriage of pregnant women is in principle permissible if it is with the man who impregnated her, as it is seen as a form of moral responsibility and an effort to maintain honor (*hifz al-'ird*). However, scholars differ on whether a pregnant woman can be married to another man ⁵⁹. The Maliki school of thought and some Hanafi scholars tend to require waiting until the child is born, while Abu Hanifah and some Shafi'i scholars permit it on the grounds that pregnancy due to adultery does not affect the validity of the marriage contract ⁶⁰. This difference shows that classical fikih is not

⁵⁸ Wahyu Fajar Ramadhan, "Penetapan Asal Usul Anak Yang Lahir Di Luar Perkawinan Dan Akibat Hukumnya Ditinjau Berdasarkan Hukum Kekeluargaan Islam (Studi Kasus Penetapan Pengadilan Agama Jakarta Selatan Nomor: 298/PDT.P/2020/PAJS)," *Indonesian Notary* 4, no. 2 (2022): Article 33.

⁵⁹ Mubaroq et al., "Kawin Hamil Perspektif Kompilasi Hukum Islam Dan Mazhab Fikih."

⁶⁰ Jumrah Jamil et al., "Marriage of Pregnant Women Out of Wedlock According to the Shafi'i School and Compilation of Islamic Law," *Formosa Journal of Applied Sciences* 2, no. 11 (2023): 2103–20, <https://doi.org/10.55927/fjas.v2i11.6869>; Muhammad Jawad Mughniyah, *Fikih Lima Mazhab*, trans. Masykur Afif Muhammad and Idrus Al-Kaff (Jakarta: Lentera, 2010).

monolithic, but rather provides a spectrum of interpretations that take into account moral, social, and public interest aspects.

In national law, the Compilation of Islamic Law through Article 53 provides normative certainty by allowing pregnant women to marry the man who impregnated them without having to wait for the child to be born, while Law Number 1 of 1974 continues to place the validity of marriage under the provisions of their respective religious laws⁶¹. The difference in approach becomes more apparent in determining the status of children. Classical Islamic law and MUI fatwas tend to limit the lineage of children born out of wedlock to the mother, while national law, through Constitutional Court Decision Number 46/PUU-VIII/2010, recognizes the civil relationship of children with their biological fathers based on scientific and legal evidence⁶². This reflects a shift in the orientation of national law from a moral-formal approach towards the protection of children's rights and substantive justice.

Theoretically, these differences in orientation can be understood through the framework of legal objectives *maqasid al-shari'ah*. Islamic law places greater emphasis on the preservation of morals and lineage (*hifz al-nasl*) and the prevention of social *mafsadat*, while national law emphasizes legal certainty, non-discrimination, and the principle of the best interests of the child⁶³. Nevertheless, both share the same objectives, namely to protect individual dignity, encourage social responsibility, and maintain social order. Thus, the differences are more methodological and emphasize values rather than fundamental conflicts of purpose.

In this context, the author's view that the lineage of children born out of wedlock remains linked to their mother can be positioned as an effort to maintain the consistency of fikih norms in Indonesian Muslim society. This view is in line with the *maqasid al-shari'ah*

⁶¹ Amin, Efendi, and Hertasmaldi, "Mashlahah Married Pregnant Perspective Article 53 Compilation of Islamic Law."

⁶² Nabila, Jannah, and Sa'adah, "Kedudukan Fatwa MUI Nomor 11 Tahun 2012 Terhadap Kewarisan Anak Hasil Zina Prespektif Hukum Islam Dan Hukum Positif"; Ramadhan, "Penetapan Asal Usul Anak Yang Lahir Di Luar Perkawinan Dan Akibat Hukumnya Ditinjau Berdasarkan Hukum Kekeluargaan Islam (Studi Kasus Penetapan Pengadilan Agama Jakarta Selatan Nomor: 298/PDT.P/2020/PAJS)"; Zubaidah, "Status Anak Di Luar Nikah Dalam Perspektif Hukum Positif Dan Hukum Islam (Telaah Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010)."

⁶³ Basri, *Fikih Munakahat 2*; Isman, Thahir, and Adam, "Compilation of Islamic Laws Regarding Marrying Pregnant Women: The Case of Biau Regency, Central Sulawesi"; Jamil et al., "Marriage of Pregnant Women Out of Wedlock According to the Shafi'i School and Compilation of Islamic Law"; Shodiq and Arifin, "Perspektif Hukum Islam Pasal 53 Tentang Pernikahan Wanita Hamil Di Luar Nikah Dan Korelasinya Dengan Hadits Riwayat Muslim."

which emphasizes the preventive function of law (*sadd al-dhara'i'*)⁶⁴, namely preventing the normalization of behavior that has the potential to damage the moral order, while maintaining social order and the sanctity of marriage. Thus, this argument is not merely normative-doctrinal in nature, but is rooted in the rationality of Islamic law, which aims to regulate social behavior through a combination of protection, prevention, and long-term benefit.

The comparison between Islamic law and national law shows that differences in the regulation of marriage for pregnant women and the status of children are not a form of normative conflict, but rather a reflection of differences in the value frameworks and legal objectives used. Therefore, the main challenge is not choosing one system over the other, but rather formulating an interpretive harmonization model that is capable of maintaining the consistency of Sharia values while ensuring legal certainty and protection for children in the context of Indonesia's pluralistic and dynamic society.

CONCLUSION

Both Islamic law and Indonesian national law recognize the permissibility of marriage for pregnant women with the men responsible for the pregnancy as a legal and moral mechanism to safeguard dignity, social order, and familial responsibility. From the perspective of Islamic law, this permissibility is grounded in the *maqasid al-shari'ah*, particularly the objectives of preventing moral harm, preserving lineage (*hifz al-nasl*), and maintaining social ethics. Marriage in this context functions not merely as a formal legal bond but as a corrective institution aimed at restoring moral balance and preventing broader social disruption. Consequently, Islamic legal reasoning emphasizes substantive justice and communal harmony over punitive considerations, reflecting a flexible yet principled approach to complex social realities.

Similarly, national law adopts a pragmatic and rights-based approach by providing legal certainty and protection for both the mother and the child. Article 53 of the KHI, reinforced by Constitutional Court Decision No. 46/PUU-VIII/2010, underscores the state's commitment to safeguarding the civil rights and legal status of children born outside of marriage, particularly in relation to lineage and paternal responsibility. This alignment

⁶⁴ Muhammad Nazir Alias et al., "The Position of Maqasid Al-Shariah within Islamic Legal Sources: A Comprehensive Analysis," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 9, no. 2 (2025): 937–64, <https://doi.org/10.22373/sjhg.v9i2.26659>.

between religious and state legal frameworks demonstrates a convergence of normative goals, namely the realization of welfare (*maslahah*) and justice within family life. Ultimately, the harmonization of Islamic law and national law in this matter illustrates an integrative legal approach that balances moral values, social realities, and human rights, thereby strengthening the legal foundations of family and social stability.

REFERENCES

- Abidin, M. Nur, and Abdul Basit. "Legal Children in Pregnant Marriage: A Juridical Analysis of Indonesian Positive Law." *Al Hurriyah: Jurnal Hukum Islam* 7, no. 2 (2022): 131–40. <https://doi.org/10.30983/alhurriyah.v7i2.5321>.
- Abror, Khoirul. *Pernikahan Wanita Hamil Akibat Zina (Studi Komparatif Menurut Hukum Islam Dan UU Perkawinan)*. Bandar Lampung: Pusat Penelitian dan Penerbitan LP2M UIN Raden Intan Lampung, 2017.
- Al-Ghoni, Burhanudin, Ahmad Hermawan, Kharis Nugroho, Husain Azhari, Fathiya Azka Awliya, and Shafiqah Amiera Binti Mohd Zambri. "Reframing Qur'anic Perspectives on Interfaith Relations in the Contemporary World: A Thematic Analysis." *Al-Karim: International Journal of Quranic and Islamic Studies* 3, no. 1 (2025): 1–14. <https://doi.org/10.33367/al-karim.v3i1.6478>.
- Al-Zuhaili, Wahbah. *Al-Fikihu Al-Islami Wa Adillatuhu*. Juz. 10. Beirut: Dār al-Fikr, 1984.
- Alias, Muhammad Nazir, Muhammad Najib Abdullah, Mohd Farihal Osman, Nor Faizah Ismail, and Mohd Sham Kamis. "The Position of Maqasid Al-Shariah within Islamic Legal Sources: A Comprehensive Analysis." *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 9, no. 2 (2025): 937–64. <https://doi.org/10.22373/sjhh.v9i2.26659>.
- Amin, Ibnu, Faisal Efendi, and Hertasmaldi Hertasmaldi. "Mashlahah Married Pregnant Perspective Article 53 Compilation of Islamic Law." *FOKUS: Jurnal Kajian Keislaman Dan Kemasyarakatan* 7, no. 2 (2022): 103–15. <https://doi.org/10.29240/jf.v7i2.5364>.
- Aykul, Abdulmuid. "İslam Ceza Hukukunda Zina Suçunun Soruşturulması (Hanefi Mezhebi Özelinde)." *Marife Dini Araştırmalar Dergisi* 22, no. 1 (2022): 151–65. <https://doi.org/10.33420/marife.1086877>.
- Bakry, Kasman, Armida Abdurrahman, and Fariyanti Fariyanti. "Pernikahan Wanita Hamil Karena Perzinahan (Studi Perbandingan Antara Madzhab Al-Arba'ah Dan Kompilasi Hukum Islam)." *Dirasah: Jurnal Kajian Islam* 1, no. 1 (2024): 39–61.
- Basri, Rusdaya. *Fikih Munakahat 2*. Parepare: IAIN Parepare Nusantara Press, 2020.
- Benuf, Kornelius, and Muhamad Azhar. "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer." *Jurnal Gema Keadilan* 7, no. 1 (2020): 20–33. <https://doi.org/10.14710/gk.2020.7504>.
- Fahmi, Zul. "Preventing Violence Against Women and Children in Mandailing Natal Regency: A Criminological Perspective." *Saree: Research in Gender Studies* 7, no. 2 (2025): 152–67. <https://doi.org/10.47766/saree.v7i2.6265>.
- Fauzi, Fahrul. "Tinjauan Kawin Hamil Dalam Perspektif Hukum Islam." *Journal of Islamic Law Studies* 3, no. 2 (2020).
- Harjanto, Rudy, Edy Haryanto, M. Tumanggor, N.R. Indriati, and Michael Adhinugroho. "The Benefits and Challenges of Same-Religious and Interfaith Marriages." *Russian Law Journal* 11, no. 3 (2023): 1139–50. <https://doi.org/10.52783/rlj.v11i3.1509>.
- Hidayat, Muhammad, and Muhammad Ikhlas bin Rosele. "Modernization of Fikih in Contemporary Era: A Study of Yusuf Al-Qardhawi's Fikih Thought." *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 48, no. 1 (July 2024): 73–87.

- <https://doi.org/10.30821/miqot.v48i1.1124>.
- Ibn Hazm, Ali ibn Ahmad ibn Sa'id. *Al-Muhalla Bi Al-Atsar*. Beirut: Dar al-Fikr, 1900.
- Ibn Qudamah, Muwaffaq al-Din. *Al-Mughni*. Cairo: Dar al-Hadith, 2004.
- Isman, Isman, Lukman S. Thahir, and Adam Adam. "Compilation of Islamic Laws Regarding Marrying Pregnant Women: The Case of Biau Regency, Central Sulawesi." *International Journal of Contemporary Islamic Law Society* 5, no. 2 (2023): 1–10. <https://doi.org/10.24239/ijcils.Vol5.Iss2.69>.
- Jamil, Jumrah, Risman Murut, Muhammad Rizal Soulisa, Jan Labondou, Witri M. Kasuba, Reny Raman, and Anwar Talib. "Marriage of Pregnant Women Out of Wedlock According to the Shafi'i School and Compilation of Islamic Law." *Formosa Journal of Applied Sciences* 2, no. 11 (2023): 2103–20. <https://doi.org/10.55927/fjas.v2i11.6869>.
- Jum'ah, Ali. *Al-Bayan Lima Yusyghilul Azhan*. Mesir: Darul Maqtom, 2005.
- Kamilia, Nur. "Childfree Marriage (Perspektif Pemikiran Maqasid Syariah Jaser Audah)." *Hakam: Jurnal Kajian Hukum Islam Dan Hukum Ekonomi Islam* 8, no. 2 (2024): 186–201. <https://doi.org/10.33650/jhi.v8i2.8805>.
- Mahkamah Konstitusi. "Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Pengakuan Anak Luar Nikah," 2010.
- Mahmudah, Dewi Handariatul. "Pernikahan Wanita Hamil Karena Zina Menurut Yusuf Qardhawi Dan Kompilasi Hukum Islam." Undergraduate thesis, Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2020.
- Masnun, Masnun, and Fitrah Sugiarto. *Hadis Pilihan Seputar Hukum Keluarga Islam (Analisis Sanad Dan Matan Serta Ulasan Singkat Untuk Memahami Hadits)*. Edited by Shopian Hidayatulloh and Mustahiqurrahman Mustahiqurrahman. Bantul: Mata Kata Inspirasi, 2025.
- Mubaroq, Afif, Jumni Nelli, M. April, and Zulikromi Zulikromi. "Kawin Hamil Perspektif Kompilasi Hukum Islam Dan Mazhab Fikih." *Jurnal Al-Wasith: Jurnal Studi Hukum Islam* 10, no. 1 (2025): 15–26. <https://doi.org/10.52802/wst.v10i1.1419>.
- Mughniyah, Muhammad Jawad. *Fikih Lima Mazhab*. Translated by Masykur Afif Muhammad and Idrus Al-Kaff. Jakarta: Lentera, 2010.
- Mujahadah, Umrotul. "Analisis Hukum Pernikahan Seorang Muhallil Perspektif Ibnu Hazm Dalam Buku Al- Muhallā Jilid 14." Undergraduate thesis, Universitas Islam Negeri Walisongo Semarang, 2021.
- Mustopa, Bagas. "Pernikahan Hamil Di Luar Nikah Perspektif Hukum Islam." *MADDIKA: Journal of Islamic Family Law* 4, no. 1 (2024): 1–12. <https://doi.org/10.24256/maddika.v4i1.3244>.
- Nabila, Nabila, Shofiatul Jannah, and Faridatus Sa'adah. "Kedudukan Fatwa MUI Nomor 11 Tahun 2012 Terhadap Kewarisan Anak Hasil Zina Perspektif Hukum Islam Dan Hukum Positif." *Hikmatina: Jurnal Ilmiah Hukum Keluarga Islam* 6, no. 1 (2024): 177–88.
- Nasution, Abdul Haris, Zulfahmi Zulfahmi, and Asrofi Asrofi. "Analisis Hukum Perlindungan Anak Di Indonesia Terhadap Eksploitasi Anak Oleh Orang Tua Dalam

- Praktik Mengemis.” *Mandub: Jurnal Politik Sosial Hukum Dan Humaniora* 2, no. 4 (2024): 13–24. <https://doi.org/10.59059/mandub.v2i4.1652>.
- Nawawi, Imam. *Al-Majmu’ Syarah Al-Muhadzab*. Juz 4. Kairo: Dar al-Hadith, 2010.
- Negara, Tunggul Ansari Setia. “Normative Legal Research in Indonesia: Its Originis and Approaches.” *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 1–9. <https://doi.org/10.22219/aclj.v4i1.24855>.
- Nita, Mesta Wahyu. *Hukum Perkawinan Di Indonesia*. Lampung: CV. Laduny Alfitama, 2021.
- Pangestu, Pujo, and Habibi Al Amin. “Nalar Hukum Isbat Nikah Di Pengadilan Agama Kediri.” *Hakam: Jurnal Kajian Hukum Islam Dan Hukum Ekonomi Islam* 7, no. 1 (June 2023): 129–40. <https://doi.org/10.33650/jhi.v7i1.6150>.
- Purnama, Deni, and Dhiauddin Tanjung. “Islam Dan Perlindungan Hak Anak: Tinjauan Fikih Terhadap Nasab Anak Di Luar Nikah.” *Al-Mashlahah Jurnal Hukum Islam Dan Pranata Sosial* 12, no. 01 (2024): 41–52. <https://doi.org/10.30868/am.v12i01.6085>.
- Ramadhan, Wahyu Fajar. “Penetapan Asal Usul Anak Yang Lahir Di Luar Perkawinan Dan Akibat Hukumnya Ditinjau Berdasarkan Hukum Kekeluargaan Islam (Studi Kasus Penetapan Pengadilan Agama Jakarta Selatan Nomor: 298/PDT.P/2020/PA.JS).” *Indonesian Notary* 4, no. 2 (2022): Article 33.
- Rohmawati, Rohmawati, and Syahril Siddik. “Legal Protection for Children Out of Wedlock: Ensuring the Best Interests of Children Through Judge Decisions.” *Al-’Adalah* 19, no. 2 (2022): 315–38. <https://doi.org/10.24042/adalah.v19i2.11761>.
- Shodiq, Teguh Abdurrohman, and Tajul Arifin. “Perspektif Hukum Islam Pasal 53 Tentang Pernikahan Wanita Hamil Di Luar Nikah Dan Korelasinya Dengan Hadits Riwayat Muslim.” *Eksekusi: Jurnal Ilmu Hukum Dan Administrasi Negara* 2, no. 3 (2024): 382–95. <https://doi.org/10.55606/eksekusi.v2i3.1309>.
- Syarifuddin, Amir. *Hukum Perkawinan Islam Di Indonesia: Antara Fikih Munakahat Dan Undang-Undang Perkawinan*. Kencana, 2006.
- Zaidan, Abdul Karim. *Al-Mufassshal Fi Ahkam Al-Mar’ah Wa Al-Baitul Al-Muslim Fi Al-Syari’ah Al-Islamiyah*. Beirut: Muassasah al-Risalah, 1993.
- Zubaidah, Dwi Arini. “Status Anak Di Luar Nikah Dalam Perspektif Hukum Positif Dan Hukum Islam (Telaah Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010).” *Familia: Jurnal Hukum Keluarga* 4, no. 2 (2023): 91–106.
- Zulfahmi, Zulfahmi. “Domestic Violence (KDRT) in the Perspective of Islamic Criminal Law.” *Jurnal Hukum Keluarga* 1, no. 01 (2024): 18–25. <https://doi.org/10.63731/jhk.v1i01.4>.
- Zulfahmi, Zulfahmi, Asrofi Asrofi, and Suroto Suroto. “A Review of Islamic Law on the Practice of" Tumpang Rahim" Based on Maqāsid Al-Syarī’ah and Contemporary Scholars.” *MAQASIDI: Jurnal Syariah Dan Hukum* 4, no. 2 (2024): 231–46. <https://doi.org/10.47498/maqasidi.v4i2.3544>.