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by Kumedi Ja'far Dkk

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Reconstruction of Pregnancy Marriage Legality in Indonesia

Kumedi Ja'far^{1,*}, Khoiruddin Nasution², Khoirul Abror¹ and Agus Hermanto¹

¹UIN Raden Intan Lampung, Indonesia

²UIN Sunan Kalijaga Yogyakarta, Indonesia

Abstract: Normatively, the scholars agreed that pregnant women marriage is considered legal, but it must be carried out again after giving birth. There is a renewal of the law relating to the legality of the marriage contract for a pregnant woman. In this case the Indonesian Islamic scholars consider sociological and psychological elements especially the local culture of Indonesian society, but then KHI was a compromising approach to customary law. That compromise is seen from fact happened deviation in teaching of fiqh associated with sociological and psychological factors. Besides, the ultimate goal of permission principle of marrying pregnant woman is to provide a definite law protection to child in the womb, even though that child's status is outside of marriage

Keywords: Contract, Pregnant Women, Renewal.

INTRODUCTION

It Based on Big Dictionary of Indonesian Language (KBBI), marriage comes from word of getting married which etymologically means making family with opposite sex (doing sexual intercourse) (Aninomaus: 1994, Asseqaf: 2005). Getting married is commonly used for plant, animal, and human and shows generative process generally (Al-Mufarraj: 2003, Abidin: 1999, Syahravi: 2010). Marriage can also be said wedding. It comes from word of getting married which means al-jam'u and al-dhamu; gather/gathering. (Al-Mufarraj: 2003). other interprets it as putting in each other and used (wat'i) (Al-Kahlany: tt., al-Jurjani: 1988). Getting married is often used (wat'u al-zauj) for sexual intercourse (coitus). Also (zawáj) is for meaning aqdu al-tazwij or marriage contract (Az-Zuhaily: 1989). While terminologically getting married is a contract determined by syara' to allow man and woman having fun and to make having fun between woman and man as a halal activity. According to Rahmat Hakim, getting married come from Arabic nikâhun which means masdar or comes from verb (fi'il mâdhi) nakahan, its synonym is tazawwaja (Hakim: 2000, Asseqaf: 2005, al-Asqalani: 1374 H., Nasution: 2013).

Marriage contains law cause aspect. Continuing marriage is getting right and obligation each other also aiming to provide society relationship based on giving mutual aid. Marriage is performing religion, so there is a goal to get Allah SWT's bless.

These Shâfi'iyah scholars gives definition as mentioned above seeing truth of its contract if it is related to husband and wife life which happens later; they are allowed to have sexual intercourse while before that contract is made they may not have sexual intercourse.

THEORETICAL FRAMEWORK

A. Marriage Goal

According to his natural tendency, human is equipped by God with sexual tendency (libido sexuality). Therefore, God provides legal media to carry out that channeling suited to humanity level. Yet, marriage is not simply meant to fulfill that biological desire. If it is so, marriage goal has same value with marriage in biology; marriage unites male and female to only fulfill generation reproduction need. Marriage taught in Islam has multi aspects (Hakim: 2000).

Those aspects as follow:

1. Personal Aspect

a. Biology Need Channeling

All human both man and woman has sexual instinct with different level and intensity. By marriage, a man can channel his sexual desire to a woman legally and vice versa.

b. Getting Offspring

Instinct to get offspring is owned both man and woman. Yet, it should be known that having a child is not an obligation but Allah SWT's message even in the fact there is someone who is predestined to not have a child. Allah's word in letter al-Shûrâ verse 49-50, Meaning: "To Allah belongs the dominion of the

8

*Address correspondence to this author at the UIN Raden Intan Lampung, Indonesia; E-mail: khumeidi.jafar@radenintan.ac.id

8

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heavens and the earth. He creates what He wills (and plans). He bestows (children) male or female according to His Will (and Plan), Or He bestows both males and females, and He leaves barren whom He will: for He is full of Knowledge and Power.”

2. Social Aspect

a. A good Household as Foundation of Good Society

Human through marriage contract will unite in harmony, be one to face challenge in going through marriage life. So that it will see praying peace off. It is only element mentioned in al-Qur'an called mawaddah and rohmah. It causes them so strong in going through this marriage life.

b. Making Human Creative

Marriage also teaches us responsibility on all effects of causes. From this responsible and love and affection feeling towards family is emerged desire to change condition better with any way. A family man always tries to make his family happy. This thing motivates him to be more creative and productive, not same on his single time.

3. Ritual Aspect

a. Following Sunnah of Prophet

Prophet Muhammad (PBUH) asked his people to get married as mention¹² in hadith which meant: “Yet I myself perform prayer, sleep, I fast and also break the fast, I marry woman. Those who dislike my sunnah, then they are not my people.”

b. Performing Order of Allah SWT

Allah asks us to get married if we have already had ability. Words of SWT, letter al-Nisâ' verse 3, mean: “...Marry women of your choice...”

4. Moral Aspect

By marriage, human is asked to follow rules or religion norms, while other creature is not asked to do so. So that marriage is demarcation line to differentiate human from other creature to channel the same need.

5. Cultural Aspect

Besides marriage is to differentiate human from animal, it is also to differentiate between civilized human and uncivilized human, primitive human and modern human. Though in primitive world there were possibly marriage rules, it can be ascertained that our rules are much better than their rules. It shows that we have better culture than primitive or ancient human.

a. Definition of Pregnancy Marriage

Pregnancy can be happened through legal marriage or through effect of rape, or through mutual agreement out of marriage which is called sexual acts outside of marriage/prostitution (Anshari: 2010).

Pregnancy marriage is often interpreted in Arab discourse with term (al-tazawuj ni al-haml), which is meant marriage of a man with a pregnant woman. There are two possibilities; firstly impregnated, married later or impregnated by other and then married by person who did not impregnate her.

Born baby from pregnancy marriage in the past was called by Islam lawyer ibn al-zinaa or ibn al-mula'ana (child from cursed man). So that name is not name of born baby, it is related to parents who did sexual acts outside of marriage or did cursed act. While born baby is still pure from sin and does not inherit the sin of what his parents did (Mahjuddin: 1995).

b. History of Genesis Islam Law Compilation in Indonesia

Talking about Islamic family law available in Indonesia can not be separated from history of law system course in Indonesia since Dutch colonialism until present. The interesting part is all along Indonesian history, discourse about family law included marriage law generally at least involved three sides; they are need of religion, state and woman. Most Moslems for example as the majority religion for Indonesia are always responsible for its people which are realized by inserting Islamic law in Indonesia.

Although informally Indonesia claims as Islamic State, Indonesia is a country with the biggest population of Moslems in the world. Real effort of Islamic family law renewal¹⁴ was started in 1960s which at the end created Law Number 1 Year 1974 about marriage. Before marriage matter was ruled in law variation, a customary law for indigenous Indonesian society; Islamic law for indigenous Indonesian citizens: Ordinance of Christian Indonesian Marriage for Christian Indonesian citizens in Java, Minahasa, and Ambon; Civil Code for Indonesian offspring of Europe and China; and intercourse marriage regulation for intercourse marriage. Ideally, as a law product, UPP needs to be restudied to see how effective it regulates a society act in marriage side (Munti: 2005).

1. Marriage Law of Dutch Colonial Era/Pre-Independence

At Pre-Colonial era, in Indonesia (in reality at that time Indonesia country had not been formed where

there were autonomous kingdoms spread in island of Java, Sumatra, Kalimantan, Sulawesi, etc) occurred various customary laws in various big social political systems. In Java for example according to Jaspian there are seven ethnics, valid different customary law in those seven ethnics. Yet those various kinds of customary laws were based on social political systems of Java at that time, for instance Hindu pattern – there is hierarchy in society (Nursyahbani, dkk.: 1991). Besides, law system at that time in few cases determined by available kinship system, for example matrilineal kinship system for Minangkabau region, patrilineal for Batak, parental or bilateral for Java, etc.

When Islam entered into Indonesia, and spread almost to whole archipelago in Indonesia at 13th century, all sorts of regions in this archipelago became territory/Islamic kingdom which also implicated on accepted Islamic law as one of valid laws. At that time, society in the Indonesian archipelago tried to merge between customary law and Islamic law.

2. Marriage Law of Sociopolitical Order before 1965

Since Independence era, there started an effort to create law system unification, this effort was hard to realized now that reality of various cultures and needs happened in Indonesia and also there was heterogeneity of law framework – both customary law, BW, and Islamic law which did not provide consistent law foundation for a unity of available value set (Herlina: 1991). However Indonesian nation faced difficulty, Indonesian nation never stopped proposing and trying law unification, one of them was towards marriage law.

3. Marriage Law of Sociopolitical Order Since 1965

No longer after government of sociopolitical order since 1965 was felled by people of sociopolitical order since 1965, exactly in 1966, Minister of Justice at that time assigned National Law Government Institution (LPHN) to organize national Draft of Marriage Law suited to **basic principles of the Republic of Indonesia** philosophy. In 1968, duty of LPHN was successful in organizing Draft of Law about Main Marriage Stipulations, and this document was given to Indonesian Legislative Assembly Gotong Royong (DPR-GR). In other side, in 1967, government was divided into two poles. One pole could be said as government pole which at that time sided with nationalist (Combination of Golkar and PDI), while the other pole was PPP represented Islam religion group. The first pole really supported that Draft of Marriage

Law, while the second pole objected, even basically rejected it. This difference caused prolonged conflict.

4. Background of Organizing Islamic Law Compilation (KHI)

Even it was fully criticized (especially from woman class), since religion and State are institutions have more right to have control over any plan, at the end Law of Indonesian Republic No.1 Year 1974 officially was legalized as the only law ruling about marriage for Indonesian nation. Yet, even a law unification about marriage has been formed, its practice especially that happened in religious court (PA), opinion of each judge based on Book of Fiqh referred was dominant (in previous part, it has been exposed at least 13 Books of Fiqh recommended to become Book of references for judges in religious court (PA).

As consequence of no standard book available in religious court (PA), decision taken by judges was often different for the same case, so it can be said that the subjectivity of judges was very high. Even a judge can use law decision taken as a political tool to attack other sides (Basri: 1992). Seen from perspective of theory of law, this means those products of religious court are against law certainty principle (Sadzali: 1999). In other side, books of fiqh as reference for judges are products of scholars' thinking in the middle century (since 2nd century CE), where context of society, politic, and culture was different from Indonesia's context at that time. Its implication of fiqh laws should be taken for granted and used by judge, but they should be suited to Indonesia's context so that Indonesian fiqh should be formulated.

Based on these some reasons, Supreme Court (MA) as the highest court in Indonesia, in 1985 proposed to formulate an Islamic Law Compilation which was used as standard book for judges in Religious court (PA). This proposal firstly did not get response. Yet, when Minister of Religion, Munawir Sadzali, proposed the same thing, the society began to respond it. The most concrete response was Public Decree (SKB) between Head of Supreme Court on President's initiative (at that time Soeharto) (Abdurrahman: 2007). If seen when the idea came from, obviously it was top-down, it was from party having capacity as policy maker. Besides, President's initiative showed how this decree has political interest.

Political interest coloring the formed idea of Islamic Law Compilation (KHI), was not separated from politic condition at that time, many literatures showed

between the middle 1980s until at the end of 1990s was society accommodation politic towards Islam. After for many years the government of sociopolitical order since 1965, then in this 1980s era, when Golkar considered would be decreased (one of proofs was increasing votes for Development Unity Party (PPP) in general election of 1982), the government of sociopolitical order since 1965 got support from Islam group. According to Bakhtiar Effendi, state politic phenomenon towards Islam, had wide spectrum covered some policies as follow:

1. Structural, signed with more open chance for Islam activist to integrate themselves in state, either through channel of legislative, executive or judicative. The forming of Indonesian Moslem Intellectual (ICMI) in the end of 1990, due to that its proximity with state could be seen from some Islam political structural leverage.
2. Legislative, related to some Law (UU) legalized which was evaluated accommodative towards Islam interest. For instance Law of Religious Court in 1989, Islam Law Compilation (KHI) in 1991, SKB about BAZIS (Body of Charity, Tithe, Infaq, and Shadaqah) in 1991, new policy about wearing veil in 1991, and abolition Prized Social Fund Donation (SDSB) – a lottery in 1993; (c) infrastructural, by providing infrastructure for Moslems, for example building worship facility, sending proselytizers in transmigration area, and even building Indonesia Muamalat Bank (BMI); (d) cultural, related to state cultural accommodation towards Islam culture which realized in using Islam idioms (Effendi: 1995).

The attitude of government which was very accommodative towards this group would be seen on process of composing Islamic Law Compilation (KHI).

5. Process of Composing Islamic Law Compilation

Through SKB Head of Supreme Court (MA) and Minister of Religion issued on 21 March 1985 No. 07/KMA/1985 and No. 25 Year 1985 about Assignment of Islamic Law Establishment Implementation Project through jurisprudence. That project started with time limit of two years. Tremendously this implementation was supported by Decree of President Number 191 Year 1985 issued on 10 December 1985. Fund provide for this project was Rp. 230.000.000, - where that fund came from President's property (Abdurrahman: 2007). That SKB also appointed this Project General Leader Prof. H. Bustanul Arifin, SH, who was Youth Head of

Supreme Court Religious Court Environment Matter at that time.

Besides deciding committee who would implement this project, implementation of Book/jurisprudence division, interview division, and Data Collecting and Analyzing was also decided. Ironically among some people involved in composing this Islamic Law Compilation (KHI) there was only a woman as secretary, a stereotype position, which froze woman's role.

In attachment part of that SKB, it was asserted that main duty of this project was effort of implementing establishment Islamic Law. Therefore divisions were formed which concrete duty was broken into four tracks as follow:

- a. Book Track; collecting and studying 13 Books so far used as guideline and reference for Judges in Religious Court (PA). Besides those 13 books, additional books were also used until reaching 38 books. Those books then divided into 7 State Islam Religion Institutes (IAIN) to be investigated and analyzed related to this compilation composing.
- b. Interview Track, conducted by this division was interviewing scholars in entire Indonesia considered able to represent Indonesian society. Noted 86 scholars became respondents.
- c. Jurisprudence Track, collecting Religious Court (PA) sentences up till now.
- d. Comparison Study Track. Countries chosen for this comparison study were Egypt, Morocco, and Turkey. The reason choosing those three countries could be said very pragmatic. Morocco for example chosen due to this country was famous for professing Maliki's persuasion; Turkey chosen because this country was famous for secular country, while choice towards Egypt was simply due to this country was between Morocco and Turkey (Sadzali: 1999).

RESULTS

In December 1987, Composing Islamic Law Compilation (KHI) project was finished. Islamic Law Compilation consisted of three books. They were Book I about Marriage Law, Book II about Inheritance and Book III about Religious Foundation Law. Before this Islamic Law Compilation (KHI) was legalized, project

implementation considered that workshop to embrace input from society at large. That workshop was held in Jakarta on 2-5 February 1988, attended by 123 participants who consisted of General Heads of Indonesian Council of Religious Scholars of Province, Head of Higher Religious Court (PTA) All-Indonesia, some Rectors of IAIN, Islam mass organization, and woman organization. In that workshop, participants were divided into three commissions (based on systematization of KHI), and each commission formed by Formulator Team.

Input from workshop participants formulated by Board Team, then processed by project implementation, until March 1988 this Islamic Law Compilation (KHI) was completely finished. When this Islamic Law Compilation (KHI) would be legalized there was a problem to be solved. It was that Islamic Law Compilation (KHI) which later became material law should be provided by formal law. Therefore government processed formal law and created Law of Religious Court No. 7 Year 1989 legalised on 29 December 1989. Based on this formal law, *Islamic Law Compilation (KHI) through Instruction of President No. 1 Year 1991* was issued on 10 June 1991.

Seen from law order arrangement available in Indonesia, position of Instruction of President was under Law, yet in practice, Islamic Law Compilation (KHI) became main reference used by judge to decide case. In marriage matter, Judges in Religious Court (PA) referred to this Islamic Law Compilation (KHI), besides Marriage Law (UUP), so that it was as if having power like Law (UU). That position was implicitly parallel called in a Decision of a high authority of Religious Minister Decision No. 154 Year 1991, that to decide a case related to Marriage, Inheritance, and Religious Foundation, as capable as possible used Islamic Law Compilation (KHI) besides other law regulations. This last sentence, besides that regulation indicated the same status between Islamic Law Compilation (KHI) and Law.

Woman's involvement in composing Islamic Law Compilation (KHI) and role standardization in KHI

Woman's involvement in Islamic Law Compilation (KHI) was very minimum. This could be seen from implementer committee of Islamic Law Compilation (KHI) numbered 16 people, only a woman, Mrs. Lies Sugondo as a secretary. It was common role and position attached to a stereotype of woman. Furthermore when this woman conducted interview

towards scholars All-Indonesia as an interviewer, out of 27 people, none involved. From respondents' side (scholars), there were only four women becoming respondents among 186 people.

Subordination towards woman was also seen when workshop went by in completing this Islamic Law Compilation (KHI). Commission I discussed about marriage. Out of 44 members were only three women. They were half number of women involved in this workshop who only numbered 123 participants.

Little number of woman's involvement in composing Islamic Law Compilation (KHI) especially one who discussed about marriage, influenced contents of that KHI. If it was seen from woman's perspective, material contained in Book I (about marriage) in Islamic Law Compilation (KHI) was very bias patriarchy. From this point was seen how religion and country tried to put woman at edge continuously since past. Monogamy concept was never stopped to be struggled by woman since polygamy put woman at edge was not paid attention. Even in this Islamic Law Compilation (KHI) obviously supported polygamy.

Besides KHI very played the role in standardizing woman's role, which all of it was framed in something considered as religion doctrine. Wife should be played role as a housewife (article 79 verse (1)) while husband as a household leader, referred to how patriarchy interpretation towards texts of Al-Qur'an or Hadits was very dominant. As also with woman's position up till now was subordinate and it was more solidified by KHI. Started with limitation of marriage age where minimum limit of woman was younger than man. This thing related tightly to assumption that husband obliged to educate his wife.

About role standardization in Law Number 1 about Marriage or that Islamic Law Compilation (KHI), admitted by Halimah Ginting, SH, Director of Legal Aid Consultation Services (LKBH) Jogjakarta, more solidified role standardization available in society. With that article based on his experience in handling victim, husbands considered that they had right to rule their wives and children as they liked it (Sirajuddin: 2008). In harmony with Halimah, Wahid Hasyim, S.Ag, activist of LSM Rifka Annisa, in her research about nusyuz, said that she often found husbands feel superior with their roles as "family leaders" and even they thought that role was destiny of man. Implication of that role, wives as parties led had to obey husbands. Therefore either Halimah or Wahid, really supported if Islamic Law Compilation (KHI) was revised (Munti: 2005).

¹¹ Law Number 1 Year 1974 ruled marriage nationally for all classes in Indonesian society. This marriage law was law unification in marriage law which started on 1 October 1975 with ⁶ Executor Regulation Governmental Regulations Number 9 Year 1975 about Implementation of Law Number 1 Year 1974 about marriage.

Different from secular country, marriage according to Marriage Law in Indonesia not only covered civil aspect but also religiosity aspect. Therefore legal or not a marriage fully depended on religion law and each belief of Indonesian people based on Article 2 verse (1) Marriage Law (Sosroadmodjo: 1975).

This Article 2 verse (1) caused Law Marriage called a non-fully unification since it only ruled general matters. It meant there was differentiation in specific thing like marriage legality. This differentiation could not be avoided since Indonesia had 5 religions protected by state law and about this marriage was sensitive thing due to that related to belief. Special for Moslems, it was ruled in Islamic Law Compilation (KHI).

Islamic Law Compilation (KHI) formed since government saw Indonesian Moslems were not only majority class but also the biggest class of Moslems in the world, then with Instruction of President of Republic Indonesia Number 1 Year 1990 claimed that Islamic Law Compilation (KHI) was valid as material law used in Religious Court. By prevailing this Islamic Law Compilation (KHI) it was expected it would increase role of Religion Judges in interpreting according to Al-Qur'an and Hadist.

The grow of Islamic Law Compilation (KHI) was beside to incite back of interpreting according to Al-Qur'an and Hadist in Moslems, it was also to unite perception in Moslems circle itself in seeing matters happened in society suited to Indonesian Culture but it was not opposed to Al-Qur'an and Sunah (Abdurrahman: 2007).

DISCUSSION

Method of Islamic Law Renewal

Renewal of Islamic Law Thinking towards contemporary era, generally formed new methodology offers different from classic contemporary. Paradigm used more tended to emphasize divine revelation from its context. Relationship between divine revelation text with social change was not only composed and

comprehended through literal interpretation but also through interpretation towards universal message contained by divine revelation text (Hallaq: 1997). Even that Islamic law methodology offer had different model from a figure with others, yet according to writer generally it had rational-philosophical tendency or in other words used burhani logic paradigm as pa place to stand on their thinking.

Either Islamic law discipline or ushul fiqh or fiqh together with Arabics and Science of God's words, basically stood on bayani logic since it based on text autohority. Most of Islamic lawyer along the history had used bayani logic as thinking base. Al-Qur'an and Sunnah which became Islamic law source was Arabic text, so basically whether liberal Islamic law thinking or not would not be able to avoid or freed from text at all. Therefore Islamic law thinking had rational-philosophical tendency as said before. It basically only "borrowed" burhani logic as base of place to stand on to analyze the meaning of Al-Qur'an and Sunnah text as Islamic law source (Najib: 2003). Therefore al-Jabiri called rational-philosophical thinking tendency in this kind Islamic law with term ta'sis al-bayan 'ala al-burhan; It was establishing science of bayani discipline (in this case, Islamic law) with base of place to stand on burhani thinking frame (al-Jabiri: 1990).

There were two natures of law reformation developed in Islamic modern countries, they are ; 1) intra doctrinal reform, this nature seen by law family reformation conducted by joining some opinions of persuasion great Moslem leaders or taking great Moslem leaders' persuasion out from what they professed. 2) exstra doctrinal reform, did renewal in family law by giving totally new interpretation towards nash available. This later called as interpreting according to Al-Qur'an and Hadist. (Nasution, 2012).

Various things formed the background of grow of policies and law products as explained above, became reason for Islamic law reformer in Indonesia to renew Islamic family law in Indonesia as law product (Islamic law legislation in Indonesia), suited to dynamic and development of society (social transformation) which sued to equality and parallelism between man and woman.

Legality of Marriage Contract for Pregnant Woman

Moslem Scholars disagreed with opinion of pregnancy marriage law (pregnancy from sexual acts outside of marriage), as follow:

1. Sexual acts outside of marriage do not have part in obligation of 100-day waiting period before a widow or divorced woman may remarry. Same outside with whether woman engaged in illicit sex pregnant or not. If she has a husband, then halal for her husband to copulate her directly and if she does not have husband, then a man who engaged in illicit sex with her or other to marry her, either she is pregnant or not. Copulating with her is makruh until she gives birth. This is opinion of Syafi'i Scholar.
2. If woman is engaged in illicit sex not pregnant, then man engaged in illicit sex with her or other man may marry her, and she does not have to do 100-day waiting period before a widow or divorced woman may remarry. This is opinion agreed by Imam Hanafi. If man engaged in illicit sex with her marries her, then he may copulate with her, according to agreement of Hanafi Scholars. The child belongs to that man, if he is born after six months of marriage. If that child is born before six months, then the child is not his son and does not get inheritance from him except that man said, "this is my child not child from engaging in illicit sex". While if woman engaged in illicit sex is pregnant, then she may be married according to Abu Hanifah and Muhammad, but she may not be copulated with until giving birth. While Abu Yusuf and Zafar from persuasion of Hanafi see that if woman engaged in illicit sex is pregnant, she may not be married.
3. Woman engaged in illicit sex may not be married and she must do 100-day waiting period before a widow or divorced woman may remarry if she is not pregnant. If she has husband, then her husband may not copulate with her until iddah time is over. This is opinion of Rabi'ah, al-Tsauri, al-Auza'i, and Ishaq. It is persuasion of Maliki and Hanbali. According to persuasion of Maliki Scholars, she may exempt her womb with three times of period or be effective in three months. According to Imam Ahmad, she exempts her womb with three times of period. While Ibnu Qadamah sees that it is enough for her to exempt her womb with once of period. These opinions supported and solidified by Ibnu Taimiyah. Scholars of Hanbali persuasion gives other condition for permission to marry woman engaged in illicit sex, they repent from engaging in illicit sex (al-Khatib: 2005).

Opinion of Moslem scholars, like Imam Hanafi, Imam Maliki, Imam Syafi'i and Imam Hanbali based on them that their marriage is legal and may mingle like husband and wife with certainty if that man impregnated her and married her later, yet both of them is marked as adulterer, and scholar opinion which is possibly based on verse of al-Qur'an that man of adulterer halal marries adulterer of woman (al-Zuhaili: 1985).

Ibnu Hazm claims that both of them may be married and may mingle with certainty if he has repented and undergone a whip because of engaging in illicit sex. This opinion based on things decided by Friend of Prophet Muhammad (PBUH), as follow:

4. When Jabir bin Abdillah was asked about probability of marrying woman has engaged in illicit sex, then He said: "May marry them if both of them have repented and changed their attitudes".
5. A man asked Abu Bakar: "Ya, Amirul Mu'minin, my daughter has been copulated by my guest, and I want both of them married". At that time Abu Bakar asked his friend to punish both of them a whip then marry them.

Is this that a man hampers a woman then does marriage contract the problem is over? Since they commit a sin in breaking Allah's law, then they must repent with nasuha repenting, istiqfar, regret and keep away from sin, both of them start to live without sin. Truly Allah SWT., accepts their repenting (Sabiq: 1404 H).

If marriage is done by a person who does not impregnate her, about this has become opinion difference among scholars circle:

1. Abu Yusuf said that both of them may not be married since if they are married, then their marriage is cancelled. This opinion based on words of Allah SWT, latter al-Nur verse 3. Then saying of Prophet Muhammad (PBUH), meaning: "That a man has married a woman. When he copulated with her, he found her in pregnancy condition then she was reported to Prophet Muhammad (PBUH), then Prophet divorced them and gave a woman bride price, then punished her 100 times of whip".

While Abu Hanifah and Imam Syafi'i claim that marriage of pregnant woman is legal, since they are

not attached to marriage with others and may mingle her due to fetus will not be stained with new embryo implanted.

Ibnu Qudamah agrees with opinion of Abu Yusuf that a man may not marry a woman who engaged in illicit sexual with other man except with condition:

- a. That woman has given birth, if she is pregnant, so in condition of pregnancy she may not be married.
 - b. That woman has undergone a whip whether she is pregnant or not.
2. Imam Abu Hanifah and Imam Syafi'i said that marriage is legal since they are not attached to marriage with others (no iddah time), that woman may also be mingled because descent of fetus in the womb is impossibility stained by her husband's sperm. While that baby is not the offspring of person married his mother. Adulterer of woman (pregnant woman) both of them do not get had now that that woman is possibly forced or man comes to her when sleeping. Basically a woman (except whore) does not want to engage in illicit sexual (Zuhdi: 1999). Yet if that woman is pregnant due to engaging in illicit sexual by mutual agreement, then had certainty is still effective.

Thus, if a man marries his mother is not a person who impregnates her, then status of that child is not child of engaging in illicit sexual yet if a man marries his mother is a person who impregnates her, opinion difference then comes up:

1. That baby includes child of engaging in illicit sexual if baby in the womb is more than four months. If mother of baby gets married less than four months then that baby is legal child of that husband. Yet if we see explanation from Al-Qur'an that age of pregnancy is at least six months based on letter Al-Baqarah verse 233 and letter Al-Ahqaf verse 15.

Based on those two verses, a mother is pregnant until wean a thirty month child and breastfeed him after two years (24 months). It means pregnancy time is thirty minus twenty four equals six.

2. That baby is child of engaging in illicit sexual now that that baby is outside marriage even seen from language aspect that baby is his child,

a result from sperm and ovule of his both parents. According to KHI Chapter VIII Article 5 verse (1), (2) and (3) mentioned:

1. A pregnant woman outside marriage can be married with a person who impregnates her.
2. Marriage with pregnant woman mentioned in verse (1) can be held first without waiting for the baby born.
3. By holding marriage when the woman is pregnant, it should not be needed to have remarriage after the child is born.

So that KHI is compromising approach with customary law. That compromise seen from its fact that divergence happened in fiqh lesson related to sociological and psychological factor. In customary law concluded allowance principle: "every plant of someone grows in other's land, he is the owner of that plant, even he does not plant it". Besides, main goal of pregnancy marriage allowance principle is to give certain law protection to child in the womb, even the status of that child is child of engaging in illicit sexual (Harahap: 1999).

CONCLUSION

Marriage has goal as wishes of human himself in developing harmonious, peaceful, and happy life in loving affection condition from two kinds of Allah SWT creatures. Marriage is a way to channel humanism instinct, to fulfill orgasm desire by still keeping religion salvation related and if orgasm has pushed, in fact ability of getting married is not enough, fasting is the way of controlling the self, closing ourselves to Allah to have mental power in facing possibilities of Satan's temptation to repeatedly drag to engage in illicit sexual.

Normatively, Moslem scholars agree that marriage of pregnant woman should be held again after giving birth. There is a renewal related to validity of pregnant woman, in this case Indonesian Moslem scholars consider sociological and psychological elements especially local culture of Indonesian society. Then that KHI is compromising approach with customary law. That compromising seen from fact aspect of divergence happened in fiqh lesson related to sociological and psychological factor. Besides, main goal of pregnancy marriage allowance principle is to give certain law protection to a child in the womb, even the status of that child is child of engaging in illicit sexual.

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