

**THE PROHIBITION OF PREGNANT MARRIAGE BY MODIN(CASE
STUDY IN TEMAS VILLAGE, BATU DISTRICT, BATU)**

THESIS:

by:

Mukhammad Nur Hadi

Student ID Number 12210125



AL-AHWAL AL-SYAKHSHIYYAH DEPARTMENT

SHARIA FACULTY

THE STATE ISLAMIC UNIVERSITY

MAULANA MALIK IBRAHIM OF MALANG

2016

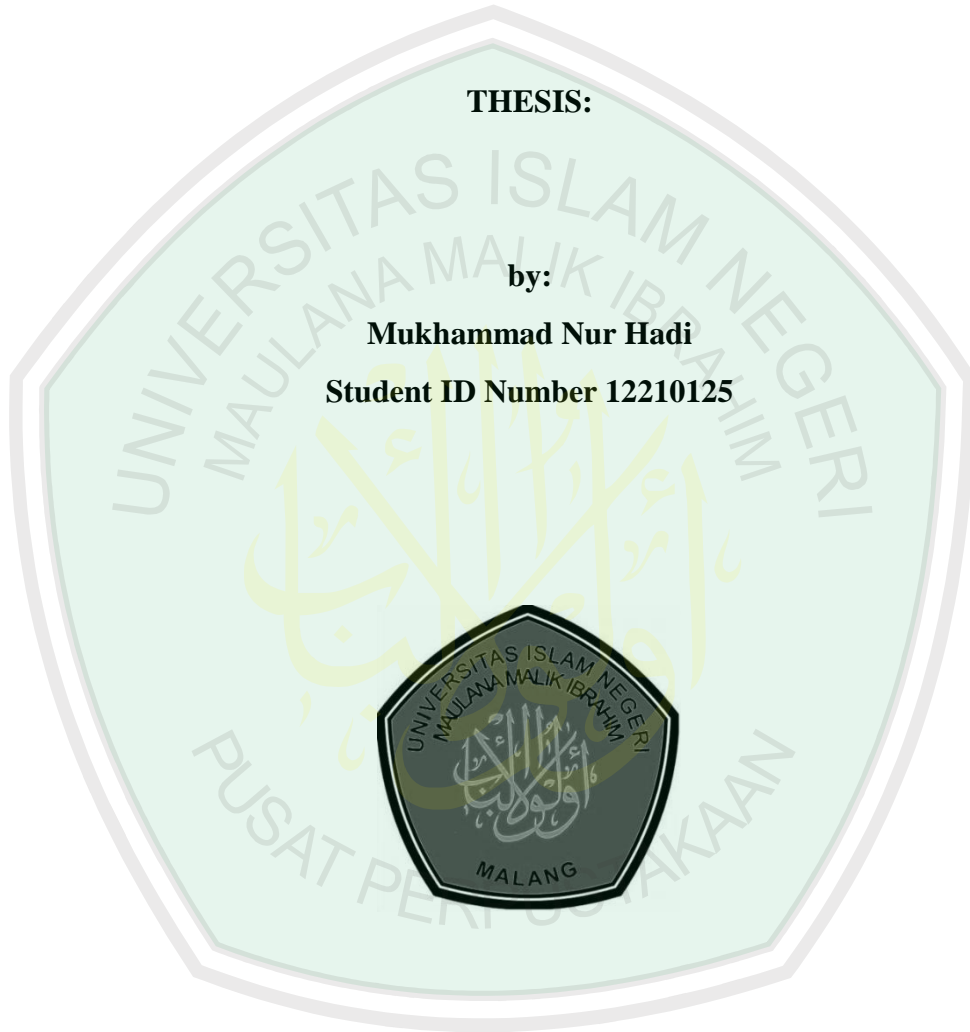
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2016

STATEMENT OF THE AUTHENTICITY

In the name of Allah (SWT),

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

**THE PROHIBITION OF PREGNANT MARRIAGE BY MODIN
(CASE STUDY IN TEMAS VILLAGE, BATU DISTRICT, BATU)**

is truly the writer's original work. It does not incorporate any material previously written or published by another person. If it is proven to be another person's work, duplication, plagiarism, this thesis and my degree as the result of this action will be deemed legally invalid.

Malang, June, 6th 2016

Author,

Mukhammad Nur Hadi
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MOTTO

مَنْ رَدَّ عَنْ عَرَضِ أَخِيهِ رَدَّ اللَّهُ عَنْ وَجْهِهِ النَّارَ يَوْمَ الْقِيَامَةِ (رواه الترميذي)

“Who preserve disgrace’s person, Allah (SWT) will preserve too his face from the hell in the doomsday”. (Narrated by Tirmîdî)

APPROVAL SHEET

After examining and verifying the thesis of Mukhammad Nur Hadi, NIM 12210125, Al-Ahwal Al-Shakhsiyyah Department, Sharia Faculty, The State Islamic University of Maulana Malik Ibrahim of Malang entitled:

**THE PROHIBITION OF PREGNANT MARRIAGE BY MODIN
(CASE STUDY IN TEMAS VILLAGE, BATU DISTRICT, BATU)**

The supervisor states that this thesis has met the scientific requirements to be proposed and to be tested by the Board of Examiners.

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**THE PROHIBITION OF PREGNANT MARRIAGE BY MODIN
(CASE STUDY IN TEMAS VILLAGE, BATU DISTRICT, BATU)**

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Dr. H. Roibin, M.HI
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DEDICATION

This thesis is dedicated proudly to:

My beloved parents, Abdul Hamid and Nurul Aini, who always give me spirit, support, prayer, love, and invaluable attentions to face various trialin life. Thanks for everything you have given to me. I will prove that I can.

My beloved thesis supervisor, Dr. Hj. Tutik Hamidah, M.Ag., who always makes me perfect, my beloved guardian lecturer, Ahmad Izzudin, M.HI., who always guide and suggest me to do what is better for my life during my study, and my beloved lecturer Dr. Sudriman M.A. and Christopher Macdonald,a student of McGill University of Canada, who always guide me to write this thesis using good English language.

My beloved teachers, in *Pondok Pesantren* Nurul Huda,who always guide and bring me to the right ways,particularly for KH.Ahmad Tqiyyudin Alawy, MT, the leader of *Pondok Pesantren* Nurul Huda. To Dr.KH.Isyroqunnjah,M.HI, KH. Achmad Shampthon,S.HI, and KH. Shihabuddin, Thanks for your unlimited advices.

Mr. Samsul Hadi and family, Mr. Adtiya Prasaja, the head of village, and all scholars in Temas, who helped me for collecting data when I was in Temas, thank you very much.

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All praise due to Allah (SWT), the Cherisher and Sustainer of all the worlds. There is neither might nor power but with Allah the Great, the Exalted. With only His Grace and Guidance, this thesis entitled “The Prohibition of Pregnant by Modin (Case Study in Temas Village, Batu District, Batu)” could be completed, and also with His benevolence and love, peace and tranquillity of the soul. Peace be upon the Prophet Muhammad (saw) who had brought us from the darkness into the light, in this life. May we be together with those who believe and receive intercession from Him in the day of Judgment. Amîn.

With all the support and help, discussions, and guidance and directions from all parties involved during the process of completing this thesis, the author wishes to express his utmost gratitude to the following:

1. Prof. Dr. H. Mudjia Rahardjo, M.Si, as the Rector of State Islamic University, Maulana Malik Ibrahim Malang
2. Dr. H. Roibin, M.HI, as the Dean of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim Malang
3. Dr. Sudirman. M.A., as the head of the Al-Ahwal Al-Syakhshiyah Department of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim of Malang.

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5. Ahmad Izzudin M.HI., as supervisory lecturer during the author's course of study in Al-Ahwal Al-Syakhshiyah Department of Sharia Faculty of State Islamic University, Maulana Malik Ibrahim, Malang.
6. All lecturers for dedicating teaching during the author's course in this university. May Allah (SWT) shower them with His blessings.
7. Staff of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim, Malang. The author expresses gratitude for all their support and cooperation during the course of completing this thesis.
8. KH. Ahmad Taqiyydin Alawy, MT., Dr. KH. Isyroqunnajah, M.HI, and KH. Ahmad Shampthon, S.HI, who are the soul guider during the author life in Pondok Pesantren Nurul Huda. Then, to KH. Ahmad Shihabuudin and Nyai Hj. Ismatud Diniyah, who are the author's guider in finishing *tahfidz al-Qur'an* (memorizing the Quran) completely.
9. My beloved Father and Mother always giving support, source of spirit and inspiration of the author.
10. My friends of International Class Program (ICP) of 2012 who always give support, encouragement, and knowledge and discussion that have helped and accompanied author during their education at Sharia Faculty. My friends at Sharia Faculty, Al-Ahwal Al-Syakhshiyah Department of 2012, who have helped in the process of thesis writing.

11. The informants who have taken the time to the author to provide information about The Prohibition of Pregnant Marriage happening in Temas and helped the author in the research to get the data
12. For all my friends in *Pondok Pesantren* (Islamic Boarding School) Nurul Huda, Mergosono, Malang who always guide me through the right way. Thanks for everything.

Hopefully, by imparting what has been learned during the course of study in the Faculty of Sharia of State Islamic University, Maulana Malik Ibrahim, Malang, the benefit will be gotten all readers and the author himself. Realizing the fact that error and weakness is impartial to being human, and that this thesis is still far perfection, the author appreciates constructive criticism and suggestions for the improvement and betterment of this thesis.

Malang, June 27th, 2016
Writer

Mukhammad Nur Hadi
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12210125

TRANSLITERATION GUIDE

A. General

The transliteration guide which is used by the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim Malang, is the EYD plus. This usage is based on the Consensus Directive (SKB) from the Religious' Ministry, Education Ministry and Culture Ministry of the Republic of Indonesia, dated 22 January 1998, No. 158/1987 and 0543. b/U/1987, which is also found in the Arabic Transliteration Guide book, INIS Fellow 1992.

B. Consonants

ا	= a	ز	= z	ق	= q
ب	= b	س	= s	ك	= k
ت	= t	ش	= sy	ل	= l
ث	= ts	ص	= sh	م	= m
ج	= j	ض	= dh	ن	= n
ح	= <u>h</u>	ط	= th	و	= w
خ	= kh	ظ	= dh	ه	= h
د	= d	ع	= '(comma facing upwards)	ي	= y
ذ	= dz	غ	= gh		
ر	= r	ف	= f		

The hamzah (ء) which is usually represented by *alif*, when it is at the beginning of a word, henceforth it is transliterated following its vocal pronouncing and not represented in writing. However, when it is in the middle or end of a word, it is represented by a coma facing upwards ('), as oppose to a comma (,) which replaces the “ع” .

C. Long Vowel and Diftong

In every written Arabic text in the *latin* form, its vowels *fathah* is written with “a”, *kasrah* with “i”, and *dlommah* with “u”, whereas elongated vowels are written as such:

Elongated (a) vowel = â example قال becomes *qâla*

Elongated (i) vowel = î example قيل becomes *qîla*

Elongated (u) vowel = û example دُونَ becomes *dûna*

Specially for the pronouncing of *ya' nisbat* (in association), it cannot be represented by “i”, unless it is written as “iy” so as to represent the *ya' nisbat* at the end. The same goes for sound of a diftong, *wawu* and *ya'* after *fathah* it is written as “aw” da “ay”. Study the following examples:

Diftong (aw) = و example قول becomes *qawlun*

Diftong (ay) = ي example خير becomes *khayrun*

D. Ta' Marbûthah (ة)

Ta' marbûthah is transliterated as “t” if it is in the middle of word, but if it is *Ta' marbûthah* at the end, then it is transliterated as “h”. For example: الرسالة will be *al-risalat li al-mudarrisah*, or if it happens to be in the middle of a phrase which constitutes *mudlaf and mudlafilayh*, then the transliteration will be using “t” which is enjoined with the previous word, for example في رحمة الله becomes *fi rahmatillah*.

E. Definite Article

Arabic has only one article, “al” (ال) and it written in small letters, unless at the beginning of a word, while “al” in the phrase of *lafadh jalalah* (speaking of God) which is in the middle of a sentence and supported by and (*idhafah*), then it is not written. Study the following:

1. Al-Imâm al-Bukhâriy said ...
2. Al-Bukhâriy explains, in the prologue of his book ...
3. *Masyâ Allâh kâna wa mâ lam yasya' lam yakun.*
4. *Billâhi 'azza wa jalla.*

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ABSTRAK

Hadi, Mukhammad Nur, NIM 12210125, 2016. *Larangan Nikah Hamil oleh Modin (Studi Kasus di Kelurahan Temas, Kecamatan Batu, Kota Batu)*. Skripsi, Jurusan al-Ahwal- al-Syakhshiyah, Fakultas Syariah, Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Dr. Hj. Tutik Hamidah, M.Ag.

Kata Kunci: Nikah Hamil, Modin

Fenomena pernikahan hamil telah menjadi fenomena global yang menuntut munculnya berbagai respon di beberapa wilayah, sebagaimana respon Modin di kelurahan Temas dengan membuat kebijakan yang berupa larangan pernikahan bagi wanita hamil. Larangan tersebut berlaku sampai wanita tersebut melahirkan. Munculnya kebijakan tersebut menunjukkan bahwa fenomena pernikahan hamil membawa dampak yang cukup besar bagi perkembangan generasi masa depan. Fokus penelitian yang menjadi pembahasan dalam penelitian ini adalah pemikiran dasar Modin dalam membuat kebijakan, pendapat ulama' Temas tentang kebijakan tersebut menurut *madzâhib al-arba'ah*, dan implementasi kebijakan menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Pernikahan dan Kompilasi Hukum Islam.

Metode penelitian yang digunakan dalam penelitian ini adalah penelitian lapangandengan menggunakan pendekatan kualitatif. Metode pengumpulan data menggunakan interview dan dokumentasi. Sedangkan teknik analisis data melalui *editing, classifying, verifying, analyzing, dan concluding*.

Hasil penelitian ini menunjukkan bahwa kebijakan tersebut merupakan ide Modin yang bertujuan untuk mencegah kemafsadatan dan menjaga kesucian nasab masyarakat Temas. Ide tersebut didasarkan pada pendapat ulama' *Hanâbilah* yang melarang pernikahan wanita hamil, begitu juga pendapat ulama' Temas yang mendukung kebijakan tersebut. Ulama' Temas yang tidak mendukung kebijakan tersebut berdasarkan pada pendapat ulama *Syâfi'iyah* yang memperbolehkan pernikahan wanita hamil secara mutlak. Ulama' Temas yang tidak melarang dan tidak mendukung kebijakan tersebut mendasarkan pendapatnya pada pendapat atau dalil yang digunakan oleh setiap orang dalam memahami kebijakan tersebut, karena setiap pendapat mempunyai aspek kemashlahatan dan kemafsadatan. Adapun implementasi kebijakan menurut Undang-Undang No 1 Tahun 1974 Tentang Perkawinan dan Kompilasi Hukum Islam adalah diperbolehkan, karena dalam peraturan-peraturan tersebut tidak terdapat aturan yang tegas yang melarang Modin untuk membuat dan melaksanakan kebijakan tersebut.

ABSTRACT

Hadi, Mukhammad Nur, NIM 12210125, 2016. *The Prohibition of Pregnant Marriage by Modin (Case Study in Teras Village, Batu District, Batu)*. Thesis, Al-Akhwal Al-Syakhshiyah Department, Sharia Faculty, State Islamic University Maulana Malik Ibrahim of Malang. Advisor: Dr. Hj. Tutik Hamidah, M.Ag.

Keywords: Pregnant Marriage, Modin

The pregnant marriage phenomenon became a phenomenon that caused reactions from various figures in different places, for instance, the response of Modin in Teras village. The response was realized by arranging policy prohibiting pregnant marriage. That prohibition prevails until the end of pregnancy. The emerging policy shows that pregnant marriage has an effect on developing the future generations. Therefore, in discussing phenomena, the researcher focus on the basic thought of Modin in determining policy, scholar's opinion according to *madzâhib al-arb'ah* about the policy, and the implementation of the policy according to Act Number 1 of 1974 about Marriage and Compilation of Islamic Law.

The research method used in this thesis is qualitative field research. The data collection method was by interview and documentation. Then, the data analysis method was through editing, classifying, verifying, analyzing, and concluding.

The data of this research shows that the policy is Modin's idea intending to prevent *mafsadah* and protect the purity of lineage in Teras society. The Modin's idea is based on the opinion of *Hanâbilah* prohibiting pregnant marriage. Teras scholars who support the policy also use the opinion of *Hanâbilah*. The opinion of Teras scholars who do not support the policy is based on the opinion of *Syâfi'iyah* permitting pregnant marriage absolutely. Teras scholars who do not prohibit and support the policy base their opinion on the propositions used by people in comprehending the policy, because every opinion has *mashlahah* and *mafsadah*. Then, according to Act Number 1 of 1974 about Marriage and Compilation of Islamic Law, the policy's implementation is permitted, because those regulations do not have the article prohibiting Modin to make and implement that policy.

ملخص البحث

هادي، محمد نور، رقم القيد ١٢٥١٠٢٢١، ٢٠١٦. منع نكاح الحمل بالموظف الديني في القرية (الدراسة الواقعية في قرية تيماس، مدينة باتو)، البحث الجامعي، قسم الحوال الشخصية، كلية الشريعة، جامعة مولانا مالك إبراهيم الإسلامية الحكومية مالانج.

المشرفة: الدكتور الحاجة توتيك حميدة الماجستير.

الكلمات الرئيسية: الموظف الديني في القرية، نكاح الحمل

جعل نكاح الحمل الظاهرة العمومية التي تثير إستجابة في بعض الأماكن، كما إستجابة الموظف الديني في قرية تيماس. تحقق الإستجابته بتكوين التقرير الذي يمنع نكاح الحمل. يطبق هذا التقرير حتى تولد المرأة الولد. يدلّ هذا المنع أنّ نكاح الحمل يحمل المفسدة لقرون القديمة. فلذا في هذا البحث، ركّز الباحث فكرة أصول الموظف الديني في قرية تيماس لجزم التقرير، وأراء العلماء عن التقرير عند مذاهب الأربعة، وتطبيق التقرير عند قانون النكاح النمرة الواحدة السنة ١٩٧٤ م و تجميع الشريعة الإسلامية الأندونيسية.

اعتمد هذا البحث منهج البحث الميداني، باستخدام مدخل الظاهرية. و استعمل طريقة الملاحظة والمقابلة والتوثيق في جمع المعلومات. وكان أسلوب تحليل البيانات من خلال التحرير، والتجميع، والتحقيق والتحليل والخاتمية.

النتائج من هذا البحث هي أن التقرير الفكرة التي تقصد لمنع المفسدة و يحفظ تزكية النسل. تسند هذه الفكرة إلى رأي الخنابلة التي تمنع نكاح الحمل، وكذا علماء تيماس التي تدفع عن التقرير. ثم يسند رأي علماء تيماس التي تمنع التقرير إلى رأي الشافعية التي يطلق جواز نكاح الحمل. أما علماء تيماس التي لا تمنع و لا توزر تسند رأيهم إلى رأي الشخص الذي يستعمل في تفهيم التقرير، لأنّ كل الرأي له المصلحة و المفسدة. ثم تؤذن تطبيق التقرير عند قانون النكاح النمرة الواحدة السنة ١٩٧٤ م و تجميع الشريعة الإسلامية الأندونيسية، لأنّ هذه النظمات لا تحمل الفصل التي تمنع العالم لتكوين وتطبيق التقرير.



CHAPTER I

INTRODUCTION

A. Background of Research

Developing sophisticated technology changed the social culture of human society. On one side, this phenomenon brings the human into the modern life and provides many *mashlahah* (benefits). On the other side, it can cause *mafsadah* (harms). Obtaining both *mashlahah* and *mafsadah* depends on how human response and behaves it.

By developing technology Indonesians can communicate with each other in an easier way. One of the easiest ways is internet access. The Internet is one of the forms of communication that can be accessed. With the internet, one can

communicate with each other using social media like Facebook, twitter, line, etc. As a result, communication among people is not hampered by everything.

The freedom of communication brings to the freedom of social intercourse, even sexual intercourse. It will happen when there is no restriction to reduce it. The cross culture between Indonesian culture and Western culture will happen in which there is no filter to choose what is suitable and not to the life of this nation. Sarjono Sukanto said that cross culture has changed some aspects, such as; fashion, ethics, liberalization of sexuality, and other features that influence social problems. Those are the social asymmetry, the injury of the ecosystem, the criminality, and the delinquency of teenagers.¹

The cross culture between Indonesian culture and Western culture had existed for decades. Some of the effects are free sex, modern lifestyle, a celebration of Valentine's Day, a celebration of Halloween, and other effects that cannot be mentioned clearly. These things have influenced many people commonly and the young generation particularly. However, the big problem that has not been discussed is the blooming trend of free sex in most of the world, particularly in Indonesia.

Malang Raya is one of the groups of big cities in East Java which consists of Kota Malang (Malang City), Kabupaten Malang (Malang Regency), and Kota Batu (Batu City). Kota Malang is a famous city with the most universities in East

¹ <http://rivalhardiyanto.wordpress.com/2013/10/14/pengaruh-dan-dampak-masuknya-budaya-asing-di-indonesia/>, accessed January, 8th 2016.

Java, while Kabupaten Malang and Kota Batu are famous for their tourism places. Malang Raya is the second largest group of metropolitan cities in East Java after Gerbangkertosusilo². One of the characteristics of a metropolitan city is the existence of western culture and one of it is the existence of free sex. This condition is caused by the modern media existing and offering western cultures.

Free sex is one of the effects of cross culture between Indonesian culture and Western culture. In 2010, the data of Kabupaten Malang Government showed 40% students practiced free sex.³ Then, The Religion Court of Kabupaten Malang showed the high number of young marriage. In 2012, 284 students had submitted underage marriages. Moreover, in the next year 367 students had submitted underage marriages.⁴ It is amazing data that should be observed in order to find a solution.

Dr. Boyke, the gynecologist, consultant, and speaker of the Seminar of The Behavior of Free Sex of Youths and The Consequences in Brawijaya University in March 2012 said that the number of free sex among young generations in Malang had risen 50%. It is the same with the percentage of free sex happening in Yogyakarta and Bandung. Dr. Boyke added that the abortion cases in Indonesia rise 2.3 million every year. One effect of free sex is an increase of

²Gerbangkertosusilo is an abbreviation of the name of cities in East Java including the group of the metropolitan city. Those cities are Gresik, Bangkalan, Mojokerto, Surabaya, Sidoarjo, and Lamongan, in which Surabaya as the center of the group.

³ "Astaghfirullah, 40 Persen Pelajar Kabupaten Malang Lakukan Seks Bebas", m.voa-islam.com/news/indonesiana/2010/10/05/10629/ astaghfirullah-40-persen-pelajar-kabupaten-malang-lakukan-seks-bebas, accessed on January 7th, 2016.

⁴"Angka Pelajar Hamil di Luar Nikah Tinggi", radarmalang.co.id/angka-pelajar-hamil-di-luar-nikah-tinggi-9902.htm, accessed in January 7th, 2016.

HIV/AIDS disease. East Java Province has increased the rate of HIV-AIDS, from 8% in 1998 to 40% in 2012. This data was taken by East Java Province showing that it had the third highest rank of HIV-AIDS in Indonesia, after Papua province, and before DKI⁵ Jakarta province.⁶

The psychology unit of Department of Public Health of Batu showed the data of free sex. Since the beginning of 2013 until the end of 2014, there were 94 phenomena of woman teenagers. Most of them had done free sex with their partner. According to data from the Health Department of Batu, December 1st, 2015 edition, the amount of HIV AIDS cases in Batu was 160 patients. It showed the critical number of HIV-AIDS and included serious condition. Then, around 70 patients had died. Furthermore, from the 24 villages in Batu, the highest number of HIV-AIDS in Batu was derived by Batu District, such as Sisir village and Temas village.⁷ The data above shows the spread of free sex which has a high number which needs to be solved.

The government had given an effort to prevent the spread of the free sex. It is proven by the rising of Compilation of Islamic Law declared by President as an Instruction of President at 1991. Long before Compilation of Islamic Law was created, Indonesian Private Law, *the burgelijk wetboek*, had regulated about free sex. In Kabupaten Malang, the Government's effort is showed by closing the

⁵DKI is abbreviation of *Daerah Khusus Ibukota*

⁶ <http://prasetya.ub.ac.id/berita/Free-Sex-di-kota-Malang-Menyamai-Bandung-dan-Yogyakarta-9394-id.htm>, accessed January 9th, 2016.

⁷ <http://www.malang-post.com/index.php/kota-batu/110691-kota-batu-gencar-sosialisasi>, accessed January 9th, 2016.

prostitution complex in Malang area. The prostitution complex was separated in seven places: Suko, Slorok, Kebobang, Girun, Kalikadu, Embong Miring, and Fairy Island. Those places have closed since November 24th, 2014. The chief of HTI(*Hizbut Tahrir* of Indonesia), Dr. Syarifuddin, said that this action is part of the government's effort to save the society from the breathing of morals, woman trafficking, and sexual crime, particularly for young generations.⁸ Then, Khofidah, the chief of the Moslem woman of NU Malang city, supported parents, especially mothers in preventing the free sex phenomenon.⁹

The actions above are aimed to save society in line with *the qâidah fiqhiyyah*

الضَّرَّارُ يُزَالُ^{١٠}

“The mafsadah must be removed”

Every *mafsadah* needs to be removed. Removing *mafsadah* is conducted by using methods producing *mashlahah*. Related to the actions above, Allah SWT said in the Qur'an:

⁸ <https://cerdasmedia.wordpress.com/2014/12/08/hti-malang-dukung-penutupan-tujuh-lokalisasi-di-malang-dan-batu/>, accessed on January 9th, 2016.

⁹ <http://m.malangtimes.com/baca/4057/20150913/101658/Muslimat-akan-dorong-peran-ibu-untuk-cegah-seks-bebas/>, accessed on January 9th, 2016.

¹⁰ Abdul Haq and friends, *Formulasi Nalar Fiqh: Telaah Kaidah Fiqh Konseptual*, (Ed. 5, Surabaya: Khalista, 2009), p. 209.

وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَأُولَئِكَ هُمُ الْمُفْلِحُونَ¹¹

"Let there is arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity".

The verse above applies to people preventing *mafsadah* and obtaining *mashlahah*. This order is intended to all Muslim people in the world in order to derive peacefulness in the world and the hereafter. Prophet Muhammad (saw) also said in his hadith as the emphasizing for preventing *mafsadah*

حَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ، حَدَّثَنَا وَكِيعٌ، عَنْ سُفْيَانَ، وَحَدَّثَنَا مُحَمَّدُ بْنُ الْمُثَنَّى، حَدَّثَنَا مُحَمَّدُ بْنُ جَعْفَرٍ، حَدَّثَنَا شُعْبَةُ كِلَاهُمَا، عَنْ قَيْسِ بْنِ مُسْلِمٍ، عَنْ طَارِقِ بْنِ شِهَابٍ - وَهَذَا حَدِيثُ أَبِي بَكْرٍ - قَالَ: أَوَّلُ مَنْ بَدَأَ بِالْخُطْبَةِ يَوْمَ الْعِيدِ قَبْلَ الصَّلَاةِ مَرْوَانُ. فَقَامَ إِلَيْهِ رَجُلٌ، فَقَالَ: الصَّلَاةُ قَبْلَ الْخُطْبَةِ، فَقَالَ: قَدْ تَرِكَ مَا هُنَالِكَ، فَقَالَ أَبُو سَعِيدٍ: أَمَّا هَذَا فَقَدْ قَضَى مَا عَلَيْهِ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: مَنْ رَأَى مِنْكُمْ مُنْكَرًا فَلْيُغَيِّرْهُ بِيَدِهِ، فَإِنْ لَمْ يَسْتَطِعْ فَبِلِسَانِهِ، فَإِنْ لَمْ يَسْتَطِعْ فَبِقَلْبِهِ، وَذَلِكَ أَضْعَفُ الْإِيمَانِ. (رواه المسلم)¹²

"Abu Bakar bin Abî Syaibah told us, Waqî' told us, from Sufyan, and Muhammad bin al-Mutsanna us, Muhammad bin Ja'far told us, Syu'bah told us, from Qais and bin Muslim, from Thâriq bin Syihab-This is Abu Bakar's hadith-, Thâriq bin Syihab said: the first person beginning sermon (khotbah) then prayer (shalat) in the feast (eidun) day is Marwân. Then, a man came to him and said: prayer is before a sermon. Thâriq bin Syihab said: It really had been left. Abu Sa'id said: About this case had been determined, I heard Rasulullah (p.b.u.h) said: when one of you sees a bad thing, you must change it by your hand. If you cannot change by

¹¹QS. Ali Imrân (3): 104.

¹²Al Imam Muslim bin al-Hajjaj al-Naysaburi, *Shâhih Muslim*, Vol. I,(Ed. 5, Beirut: Dâr al-Kutub al-Ilmiyyah, 2012), p. 46-47.

your hand, change it by your statement. Then, if you cannot change it with your statement, change it by your heart and it is the lowest of faith." (Narrated by Muslim).

Temas village is one of the village in kecamatan Batu (Batu district) that is famous as a farmer village. The location of Temas is near the town center of Batu. Temas village has various type of Muslim societies, including the mysticism society Muslim, the modern Muslim, and the traditional Muslim. Although there are people who follow other religions, the harmony of life in Temas village is preserved. The one unique society of Temas village is the loyalty to the cultural regulation, the wisdom, the tradition, and other regulations made by some of the people in power in the village.¹³ On the other side, Temas conditions have been changed by modernization. It is proven by the location of most of the number of tourism places located in Temas village. This condition changed the life of society and altered the way of life in the village. The lifestyle of society changed from the traditional style to the modern style or the luxurious style.¹⁴

One of the big problems in Temas village is the spread of free sex. Temas village has critical numbers also in the free sex phenomenon even the effects of it. This problem has to stop, but growing of free sex is faster than preventing it. It is caused by the role of social media and the development of technology influencing the traditional norm or condition. Many pregnant marriages happening in Temas are the result of free sex. Some of them conducted the marriage when the

¹³Samsul Hadi, *interview* (Temas, February, 6th 2016).

¹⁴Samsul Hadi, *interview* (Temas, February, 6th 2016).

time of pregnancy was seven days, one month, three months, six months, even nine months.¹⁵ It is amazing news showing the critical problem of Temas village. Even less, there is information explaining a number of HIV/AIDS deriving critical numbers and getting the highest number of all the villages in Batu district. It demonstrates the critical problem happening in Temas village.

Based on this phenomenon, the Modin of Temas village, Samsul Hadi, made a new regulation which will contribute in preventing the current phenomenon. At the end of 2014, Modin made a new policy for free sex phenomenon in the village. Then, he declared the policy on January 1st, 2015. At that time, he stated that he did not want to marry the woman getting pregnant before the woman gave birth to the child. This policy gives new rules for the Muslim society in the village and it is purposed to the people who want to conduct a marriage. He called the policy the prohibition of pregnant marriage. The policy is not written in the paper or documented by other ways.¹⁶ He only announced the policy in front of the public. Although the policy is not written, all people in Temas abide by it.

This action is one of the ways to prevent *mafsadah*, although it causes controversy in society. The emerged policy had made controversy among *scholars* (scholars). They talked about the policy according to their opinion based on *the madzâhib al-arba'ah* concept. On the other hand, most of the societies in

¹⁵Samsul Hadi, *interview* (Temas, January, 30th 2016).

¹⁶Samsul Hadi, *interview* (Temas, January, 30th 2016).

Temas village follow *Syâfi 'iyyah* teachings. If it is viewed by *Syâfi 'iyyah*'s concept it will be contradicted with *Syâfi 'iyyah*'s concept that prohibits the marriage between pregnant women and men. However, this policy commanded to prohibit marriage when the woman is pregnant, even if the pregnancy is only one day old. Is it the acts bringing *mashlahah* or *mafsadah*, or is it the destruction of religious norms or not? This question must be answered and solved. But, since the declaration of policy, the number of pregnant marriages has decreased.¹⁷

Based on the above explanation, the writer was interested in conducting research related to this phenomenon. In this case, the power of Modin to make policy as the preventing way of free sex is the unique thing. It makes the writer interested to find out the background of rising policy, moreover, to find out the real implementation of policy in Temas village, in order to inform the new action of Modin in the current phenomenon.

B. Statement of Problems

Based on the background of research above, researcher determined some problem that should be explained in this research those are:

1. What is the basic thought of Modin to create the policy of prohibition of pregnant marriage?
2. What are the views of Temas scholars in *madzâhib al-arb'ah* perspective?

¹⁷Samsul Hadi, *interview* (Temas, January, 30th 2016).

3. How does the policy implement in Teras village according to Indonesian Islamic Law?

C. Objective of Research

Appropriate to the main question, the objectives of this research are:

1. To describe and analyze the basic thought of Modin in determining prohibition of pregnant marriage policy in Teras village.
2. To find out the views of scholars toward prohibition of pregnant marriage policy in Teras village
3. To describe and analyze the implementation of prohibition of pregnant marriage policy in Teras village

D. Significance of Research

The significances of research which are obtained by this research are:

1. Theoretically Significance

Theoretically, the research is intended as the treasure thought of developing knowledge, moreover it includes the academic contribution particularly for pregnant marriage in the view of Islamic law. Then, the research is also intended to give a new thought of Islamic law and is designed to give the reference for the next research.

2. Practically Significance

- a) This research is expected to help the researcher developing discourses and creating erudition. Then, the research is expected also to elaborate the view between Islamic law and Indonesian Islamic law toward the prohibition of pregnant marriage policy in Teras village.
- b) The result of this research is expected to be the reference as new literature in developing academic thought and consideration for everyone, particularly for common people to face pregnant marriage phenomenon issues according to Islamic law and Indonesian Islamic law.

E. Definition of the Key Terms

In order to minimize ambiguity, the writer wants to clarify the meaning of the words used in the title of this study and some words as considered as the keywords. Their definitions are:

a. Pregnant Marriage

This term is used to the marriage conducted the woman got pregnant caused by illegal sexual activity.

b. Modin

Historically, the word “Modin” is formed from the word “*Qâimuddîn*”, calling for Modin in the past, meaning the upholder of religion. In the past, *Qâimuddîn* live in the center mosque of a city in which he is the

solver religion problem or handler of religion agenda. For Javanese people, word *Qâimuddîn* is pronounced with Modin in order to make the easy. Nowadays, Modin is who help people in processing marriage administration in the village, even processing funeral ritual.

F. Discussion Structure

The writing of research will be divided into five parts those are:

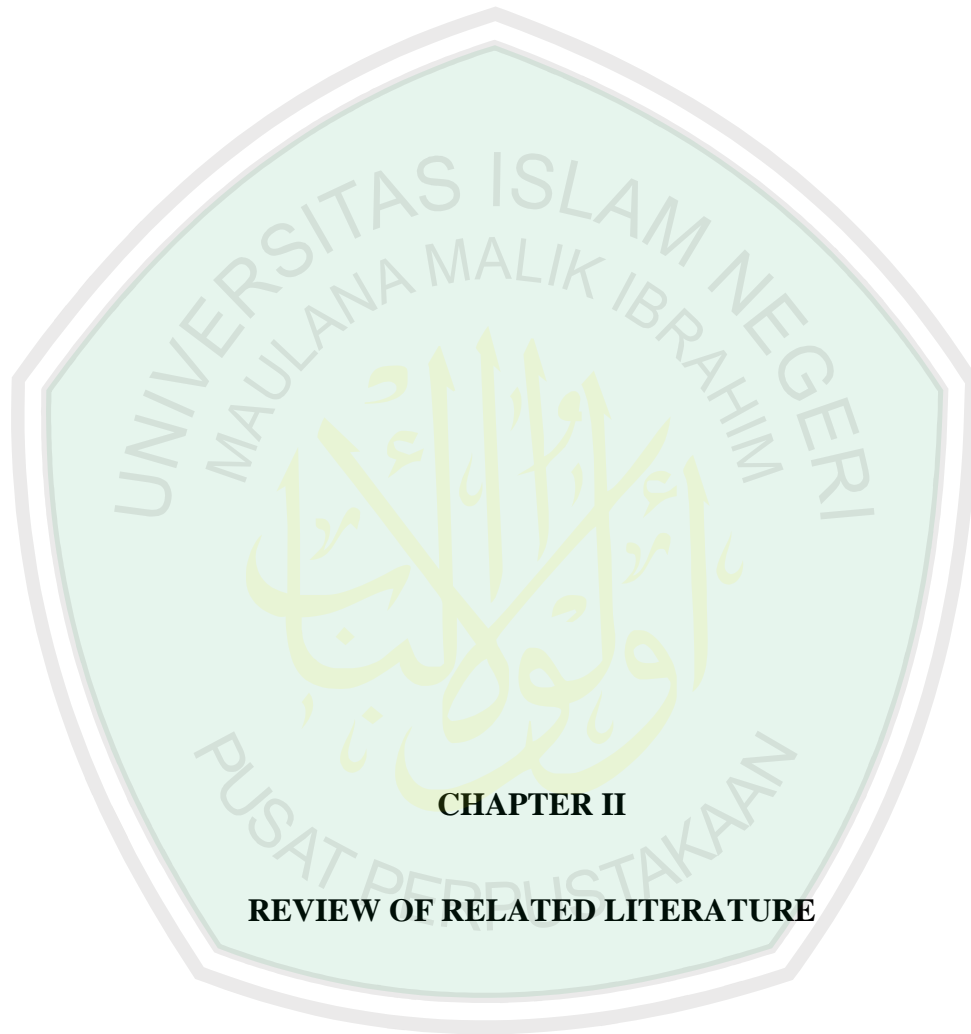
Chapter I is a companion guiding the reader to learn the discussion. This part consists of the background of research, statement of the problem, the objective of research, significance of research, and discussion structure. Furthermore, the intent of this part is explaining the problem and the case of study generally.

Chapter II is a part of theory consideration. This chapter consists of previous research and theoretical framework. The previous research explains about the conducted research related to the phenomenon of pregnant marriage. The explanation of previous research is intended to make a different part of the new research and the previous research. The theoretical framework of this research explains about the theories explaining the concept of pregnant marriage on the view of *madzâhib al-arba'ah* and the pregnant marriage concept in Indonesian Islamic law. The theoretical framework will be used as an analysis tool for the topic.

Chapter III is a description of research method used by the writer in the research. In this part, there is explanation of locus of research, type of research, approach of research, data sources, data collecting method, and data analysis method.

Chapter IV is a part of findings and discussion. In this part, the problem will be elaborated and analyzed by the theories that have explained in the part before. The discussion is intended to get the new concept of the phenomenon and the result. The subtitle is adapted to the subtheme in this research.

Chapter V is an explanation of conclusion and suggestion. The conclusion is concluded by the discussion process of research. The conclusion gives the reader the easy in comprehending problem and analysis of research. The suggestion gives advice and recommendations toward reader and explanation of weakness and strengths of research.



CHAPTER II

REVIEW OF RELATED LITERATURE

A. Previous Research

The research discussing the theme of pregnant marriage has been conducted by various researchers. Source titled "*Status Hukum Perkawinan Yang Dilakukan Oleh Wanita Hamil (Studi di KUA Singosari, Kabupaten Malang)*" was written by Dwi Prihatin, a student of Sharia Faculty, State Islamic University

Maulana Malik Ibrahim Malang, who graduated in 2001. She explains the status of pregnant marriage and the rate of childbirth, moreover, it also explained the background of growing pregnant marriages in the Office of Marriage Administration (KUA) Singosari, Malang. She concluded that pregnant marriage can be conducted when the man and the woman who will conduct marriage are not tied by legal marriage.

The second article titled "*Penundaan Perkawinan Bagi Wanita Hamil Ditinjau dari Metode Sadd Al-Dzari'ah (Studi di Desa Mojorejo Kecamatan Junrejo Kota Batu)*", was written by Maziyatul H Prihatin, another student of Sharia Faculty, Maulana Malik Ibrahim State Islamic University, who graduated in 2011. Maziyatul explained the postponing of marriages of pregnant women happening in Mojorejo village, Junrejo, kota Batu. The postponing of marriage on this research is based on the growing rate of pregnant marriage happening in Junrejo village. She discusses the policy of this phenomenon compares with *sadd al-dazri'ah* method.

The third source titled "*Nikah Hamil Dalam KHI Menurut Pandangan Tokoh Agama Kelurahan Panjer Kec. Kebumen Kab. Kebumen*", was written by Gugat Budi Prasongko, student of Sharia Faculty and Law, Sunan Kalijaga State Islamic University, who graduated in 2012. This research explained different Scholars opinions about pregnant marriages in Panjer village, Kebumen district,

Kebumen. In this research, Panjen scholars stated that pregnant marriage is permitted, although most of Panjen scholars prohibit it.

Based on the above researches, there are some points that should be explained. All these sources above discuss the pregnant marriage which is same with the research topic. The first source focuses on the status of pregnant marriage and the child. The second source explains new regulation for pregnant marriage happening in Junrejo in which it is compared by *sadz adz-dzâri'ah*. The, the third research discusses about Scholars opinion confronting marriages by accident in society.

To find the difference in this research, the writer chooses a phenomenon containing the policy about marriage in which it will be researched using other view. The prohibition of pregnant marriage policy made by Modin happening in Temas village will be discussed. This phenomenon will be elaborated upon using the theories of *madzâhib al-arba'ah* and Indonesian Islamic Law, in which the theories used will be elaborated upon using the theory of *mashlahah*'s al-Ghazâli.

B. Theoretical Framework

In this part, the writer will explain the theories related to the theme of research. Before we learn the reasons behind the evidence of each scholar, the reader will be made certain that the opinions which are produced by the scholars

have *mashlahah* in which every *mashlahah* has different quality. Thus, in this part, the elaboration of Scholars opinion by using *mashlahah* theory of *al-Ghâzali* will be explained. As has been stated by *al-Ghâzali*, *mashlahah* is the inviting of benefit or profit or the preventing harm. Moreover, he explained that *mashlahah* in *shara'* terminology is the preservation of Islamic law, intention preserving religion(*al-dîn*), life(*al-nafs*), intellect(*al'aql*), progeny(*al-nasl*), and property(*al-maâl*). *Al-Ghâzali* stated that everything ensuring and preserving the existence of one of those principles is qualified as *mashlahah*. On the contrary, everything depraving and offending one of five principles is qualified as *mafsadah*.¹⁸

The *mashlahah* theory of *al-Ghâzali* will be used in elaborating theories below in which this concept is aimed to derive purpose and philosophy of each theory. Then, it is also aimed to reach further research and comprehension.

1. Pregnant Marriage on *Madzâhib al-Arba'ah*

Before explaining the main theory, the intents of marriage will be explained. According to Act Number 1 on 1974 about Marriage, the intent of marriage is to form a happy and the eternal family that is relevant to the concept of divinity. Additionally, according to the Compilation of Islamic Law, the intent of marriage is to realize God's command and the happy family.

¹⁸ Abu Hamid bin Muhammad Al-Ghazâlî, *al-Mustashfa min 'Ilmi al-Ushul, tahqîq wa ta'lîq Muhammad Sulaiman al-Asyqâr*, Vol. 1, (Beirut: Mu'assasah al-Risâlah, 1997), p. 416-417.

One of the philosophies of marriage is to keep the human from *zina* or illegal sexual activity.¹⁹ It is relevant with hadith of Prophet Muhammad SAW.

حَدَّثَنَا عَبْدَانُ، عَنْ أَبِي حَمْزَةَ، عَنِ الْأَعْمَشِ، عَنْ إِبْرَاهِيمَ، عَنْ عَلْقَمَةَ، قَالَ: بَيْنَا أَنَا أَمْشِي، مَعَ عَبْدِ اللَّهِ رَضِيَ اللَّهُ عَنْهُ، فَقَالَ: كُنَّا مَعَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ: مَنْ اسْتَطَاعَ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصْرِ، وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وَجَاءٌ (رواه الجماعة)²⁰

"Abdan told us, from Abu Hamzah, from al-A'masy, from Ibrahim, from 'Alqomah who said: when I went with Abdullâah r.a. he said: I was joint with the prophet (p.b.u.h) and he said: who capable of marrying so let he marry, because marriage is that bow eyes and keep sex desire, and who do not capable of marrying, let they fast because it is a need". (Narrated by al-Jamâ'ah)

The next part is an explanation of the term of pregnant marriage. The word of "pregnant marriage" has a terminology *التزوج بالحامل*. This word is purposed for conducting the marriage between a man and a pregnant woman.²¹ The pregnancy is caused by two possibilities: pregnancy happening inside marriage and happening outside marriage.

In this case, the discussion topic focuses on pregnancy happening outside marriage that is caused by illegal sexual activity, called as *zina*. This

¹⁹Dahlan Tamrin, *Filsafat Hukum Islam*, (Malang: UIN Malang Press, 2007), p. 149; Sayyid Sabiq, *Fiqh al-Sunnah*, Vol. II (Beirut: Al-Maktabah al- Ashriyyah, 2012), p. 11.

²⁰*Al-Bukhâri, Shahîh Bukhari*, p. 345

²¹Mahjuddin, *Masailul Fiqhiyyah: Berbagai Kasus yang dihadapi Hukum Islam Kini*, (Jakarta: Kalam Mulia, 2008), p. 44.

topic caused differences in opinions among scholars. Even the regulations by the government about pregnant marriage are also debated by scholars. Then, if there is a signal pregnancy in the woman, the man will find a way to cover the disgrace quickly. Finally, the final way to change society's perception is a marriage between the woman and the man who copulated her or another man who did not copulate her.²² On the other hand, the aim of pregnant marriage between the woman and the man is aimed to cover the disgrace and preserve the lineage of children.

The controversy among scholars will be explained in this part. There are types of pregnant women according to Islamic Law: pregnant women caused by legal sexual activity and pregnant women caused by illegal sexual activity.

a. Pregnant Women Marriage Caused by Legal Sexual Activity

All the scholars of Islamic law agreed that the marriage of pregnant woman caused by legal marriage, in which she has been divorced by her husband or is a widow, has to complete 'iddah period. The ending of 'iddah period is the birth of a child.²³ This opinion is based on the verse of *the Quran* below:

²²Huzemah Tahido Yanggo, *Fikih Perempuan Kontemporer* (Jakarta :Ghalia Indonesia. 2010), p, 58.

²³Husian bin 'Audah, *al-Mausu'ah al-fiqhiyyah al-Muyassarah Fî Fighi al-Kitâb wa al-Sunnah*, Vol. V, (Lebabon: Dâr Ibnu Hazm, 2008), p. 390, Abdurrahman bin Muhammad 'Aud al-Jaziri, *Al-Fiqh 'alâ Madzâhib al-Arb'ah*, Vol. IV, (Lebanon: Dâr al-Kutub al-'Alamiyyah, 2003), p.467.

وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا عَرَّضْتُمْ بِهِ مِنْ خِطْبَةِ النِّسَاءِ أَوْ أَكْنَنْتُمْ فِي أَنْفُسِكُمْ عَلِيمَ اللَّهِ أَنَّكُمْ
 سَتَذْكُرُونَهُنَّ وَلَكِنْ لَا تُؤَاعِدُوهُنَّ سِرًّا إِلَّا أَنْ تَقُولُوا قَوْلًا مَعْرُوفًا وَلَا تَعْزِمُوا عُقْدَةَ النِّكَاحِ
 حَتَّى يَبْلُغَ الْكِتَابُ أَجَلَهُ وَاعْلَمُوا أَنَّ اللَّهَ يَعْلَمُ مَا فِي أَنْفُسِكُمْ فَاحْذَرُوهُ وَاعْلَمُوا أَنَّ اللَّهَ
 غَفُورٌ حَلِيمٌ^{٢٤}

“There is no blame on you if you divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means, and the poor according to his means;- A gift of a reasonable amount is due from those who wish to do the right thing.”

b. Pregnant Women Marriage Caused by Illegal Sexual Activity

Pre-marital pregnancy will be the topic of discussion in this research because conducting the marriage of pregnant woman has been debated by scholars. In Islam, illegal sexual activity is called *zina*. To be certain, not all woman who have done *zina* get pregnant. Possibly, when they do *zina* they use contraceptions in order to prevent the effects of their actions. This act may cause two possibilities: *zina* may cause pregnancy or not in the woman. Thus, pregnant marriage is always caused by a sexual act outside marriage or *zina*.

²⁴QS. al-Baqarah (2): 235.

1) Marriage between a pregnant woman and the man who copulated her

Jumhûr al-Ulamâ' (most of the scholars) allowed that the marriage between adulterer and adulteress. It is relevant to the opinion that the adulteress does not have 'iddah period so that they are permitted to be married to the man. Then, if the child is born when the time of marriage is six months or more than six months, the child's lineage is leaned on the father. While, if the child is born when the time of marriage is under six months the lineage of the child is not leaned on the father unless the father confesses by saying "the child is my son and it is not a child of *zina*".²⁵ In addition, the adulteress is permitted to copulate with the adulterer who copulated her before.²⁶ This marriage is conducted as the final way to reduce the issue and derive *mashlahah* for themselves and their child further.

2) Marriage between a pregnant woman and another man who did not copulate her

In discussing this topic, there are arguments. The first opinion is stated by *Jumhûr al-Ulamâ'*. They stated that pregnant marriage is permitted and does not break the marriage. The second opinion is stated by *Hasan al-Bashri*. His statement is based on the statement of *Ali bin*

²⁵Wahbah az-Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, Vol. XI (Damascus: Dar al-Fikr, 2006), p. 6648-6649.

²⁶Mahjuddin, *Masailul Fiqhiyyah*, p. 44.

Abi Thâlib prohibit the marriage.²⁷ The difference opinion is based on the verse below:

الرَّانِي لَا يَنْكُحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكُحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ

عَلَى الْمُؤْمِنِينَ^{٢٨}

“Let no man guilty of adultery or fornication marry and but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an Unbeliever marry such a woman: to the Believers such a thing is forbidden.”

Based on the distinct meaning of the verse above, there are two groups that have opposite meaning. The first group assumes that the verse above indicates the prohibition of marriage between them. This group learns the verse by the clarity aspect. In their theory, the sentence لا يَنْكُحُ and لا

يَنْكُحُ indicate prohibition's mandate.²⁹ This opinion is supported by a

hadith narrated by Abu Dâwud:

²⁷ Saifuddin Abu Bakar Muhammad bin Ahmad, *Hilyatu al-Ulamâ' Fî Ma'rifati Madzâhibi al-Fuqohâ'*, (Ed. 1, Oman: Maktabah ar-Risâlah al-Hadîtsah, 1988), p. 276-277.; Wahbah, *Al-Fiqh al-Islami*, p. 6648.

²⁸ QS. an-Nûr (24): 3.

²⁹ Wahbah az-Zuhaili, *Al-Fiqh al-Islami*, p. 6649.

حَدَّثَنَا مُسَدَّدٌ، وَأَبُو مَعْمَرٍ، قَالَا: حَدَّثَنَا عَبْدُ الْوَارِثِ، عَنْ حَبِيبٍ، حَدَّثَنِي عَمْرُو بْنُ شُعَيْبٍ، عَنْ سَعِيدِ الْمُقْبَرِيِّ، عَنْ أَبِي هُرَيْرَةَ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا يَنْكِحُ الزَّانِي الْمَجْلُودَ إِلَّا مِثْلَهُ. وَقَالَ أَبُو مَعْمَرٍ حَدَّثَنِي حَبِيبُ الْمَعْلَمِ، عَنْ عَمْرُو بْنِ شُعَيْبٍ³⁰

"Musaddad and Abu Ma'mar told us and then said: Abdu al-Wârits, from Habîb, Umar bin Syu'aib told me, from Sa'id al-Maqburiyyi, from Abu Hurairah and said: Prophet Muhammad (p.b.u.h): Let no the punished adulterer marry except with the adulteress. Abu Ma'mar said Habîb al-Mu'allim told me, from Amr bin Syua'ib". (Narrated by Abu Dâwud)

The second group stated that the prohibition in an-Nur verse 3 is not purposed to prohibit but to censure the marriage. They stated that the verse above indicates the permission or the liberty for the man to marry with a pregnant woman or not. This opinion is supported by hadith of the prophet narrated by Imam an-Nasâ'i and Abu Dâwud:

أَخْبَرَنَا الْحُسَيْنُ بْنُ حُرَيْثٍ، قَالَ: حَدَّثَنَا الْفَضْلُ بْنُ مُوسَى، قَالَ: حَدَّثَنَا الْحُسَيْنُ بْنُ وَاقِدٍ، عَنْ عُمَارَةَ بْنِ أَبِي حَفْصَةَ، عَنْ عِكْرِمَةَ، عَنْ ابْنِ عَبَّاسٍ، قَالَ: جَاءَ رَجُلٌ إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ: إِنَّ امْرَأَتِي لَا تَمْنَعُ يَدَ لَامِسٍ، فَقَالَ: غَرَبَهَا إِنْ شِئْتَ، قَالَ: إِنِّي أَخَافُ أَنْ تَتَّبِعَهَا نَفْسِي، قَالَ: اسْتَمْتِعْ بِهَا (واه النسائي)³¹

³⁰Abu Dâwud Sulaiman, *Sunan Abu Dâwud*, Vol. II, (Ed. 1, Riyadh: Maktabah al-Ma'ârif, 1997), p. 356.

³¹Abu Abdurrahman Ahmad bin Syu'aib bin Ali, *Sunan al-Nasâ'i*, (Ed. 1; Riyadh: Maktabah al-Ma'ârif, 1997), p. 534.

“Al-Husain bin Huraitis reported me and said: al-Fadhl bin Musa told me and said: al-Husain bin Wâqid told me, from Umârah bin Abu Hafshah, from ‘Ikrimah from Ibn Abbas and said: a man came to prophet Muhammad (p.b.u.h) then he said: my wife does not want to refuse the hand of each the toucher, then prophet said: divorce her, he said: Indeed, I am afraid that I will be not patient man without her, prophet (p.b.u.h) said: Do free sex intercourse with her”. (Narrated by an-Nasa’i)

Muhammad bin ‘Ali bin Muhammad bin Abdullah al-Syaukani stated in his book, *Nailu al-Author*, the explanation book of hadith, that the sentence *إِنَّ امْرَأَتِي لَا تَمْنَعُ يَدَ لَامِسٍ*, indicates the absence of *zina*. Then, sentence *غَرَّبَهَا* meaning a mandate to avoid her.³² The next explanation is about the arguments of *the scholars*. Their arguments will be elaborated upon with the concept of *mashlahah* of al-Ghazâli.

a) Hanafiyyah Scholars

Hanafiyyah scholars have two opinions. The first opinion comes from Abu Hanifah and Muhammad. They permit marriage between adulteress and another man, even if the woman is pregnant or not. On the other side, they prohibit the copulation between them until the birth of the child.³³ Their argument is based on the theorems below:

³² Muhammad bin Ali bin Muhammad bin Abdullah al-Syaukani, *Nailu al-Author*, Vol. VI, (Ed. 1, Egypt: Dar al-Hadith, 1993), p 172.

³³ Wahbah az-Zuhaili *Al-Fiqh al-Islami*, p. 6649.

1) Based on *surah an-Nisa'* verse 23-24.

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُم مِّنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُم مِّن نِّسَائِكُمُ اللَّاتِي دَخَلْتُم بِهِنَّ فَإِنْ لَمْ تَكُونُوا دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا (٢٣) وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ كِتَابَ اللَّهِ عَلَيْكُمْ وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسَافِحِينَ فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَاضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا (٢٤)

"Prohibited to you (for marriage) are: your mothers, daughters, sisters; father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers (who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom ye have gone in,- no prohibition if you have not gone in;- (Those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-forgiving, Most Merciful;-also (prohibited are) women already married, except those whom your right hands possess: Thus hath Allah ordained (prohibitions) against you: Except for these, all others are lawful, provided you seek (them in marriage) with gifts from your property,- desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree Mutually (to vary it), there is no blame on you, and Allah is All-knowing, All-wise."

From the above verses, we can learn that women who get pregnant through *zina* are not included in the group of women prohibited to marry. Thus, the marriage is *mubah* (permissible).³⁴

2) Based on hadith narrated by *Bukhâri*

حَدَّثَنَا آدَمُ، حَدَّثَنَا شُعْبَةُ، حَدَّثَنَا مُحَمَّدُ بْنُ زَيْادٍ، قَالَ: سَمِعْتُ أَبَا هُرَيْرَةَ: قَالَ
النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: الْوَلَدُ لِلْفِرَاشِ، وَلِلْعَاهِرِ الْحَجَرُ (رواه البخاري)³⁵

“Adam told us, Syu’bah told us, Muhammad bin Ziyâd told us and said: I heard that Abu Hurairah said: Prophet (p.b.u.h) said: The child is for the husband, while for the adulterer is stone”. (Narrated by *Bukhâri*)

This hadith is basic the thought of marriage permission between the man and pregnant adulteress caused by illegal sexual activity. According to the hadith above, the sperm produced by *zina* is not purified with the evidence that there is no lineage of it. As a result, the marriage is permitted.³⁶

Second, Abu Yusuf and Zufar give a different opinion. They stated that a pregnant woman caused by *zina* is prohibited to conduct a marriage contract. If the pregnancy hampers the marriage, the marriage

³⁴Wahbah az-Zuhaili *Al-Fiqh al-Islami*, p. 6649.

³⁵Muhammad bin Isma'îl bin Abu Abdullah al-Bukhâri, *Shahîh Bukhâri*, (Ed. 7, Beirut: Dar al-Kutub al-Ilmiyyah, 2013), p. 1236.

³⁶Wahbah az-Zuhaili *Al-Fiqh al-Islami*, p. 6649.

contract is hampered to.³⁷ The basic argument of them is *qiyas*. The interpretation of *qiyas* is based on the lineage of the womb leaned to the father. The *Illat* of it is the honor of the womb, in order to avoid the mixed sperm between men.³⁸

The theory guides people to cover disgrace. In the hadith book, *Sunan al-Tirmîdî*, there is a hadith suggesting to cover the disgrace:

حَدَّثَنَا أَحْمَدُ بْنُ مُحَمَّدٍ قَالَ: أَخْبَرَنَا ابْنُ الْمُبَارَكِ، عَنْ أَبِي بَكْرِ التَّهْشَلِيِّ، عَنْ مَرْزُوقِ أَبِي بَكْرِ التَّيْمِيِّ، عَنْ أُمِّ الدَّرْدَاءِ، عَنْ أَبِي الدَّرْدَاءِ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: مَنْ رَدَّ عَنْ عَرَضِ أَخِيهِ رَدَّ اللَّهُ عَنْ وَجْهِهِ النَّارَ يَوْمَ الْقِيَامَةِ. وَفِي الْبَابِ عَنْ أَسْمَاءَ بِنْتِ يَزِيدَ: هَذَا حَدِيثٌ حَسَنٌ.³⁹

"Ahmad bin Muhammad told us and said: Ibn al-Mubarrak reported us, from Abu Bakar al-Nahsyaliyyi, from Marzûq Abu Bakar al-Taymiyyi, from Ummu ad-Dardâ, from the prophet (p.b.u.h) who said: who preserve disgrace, Allah (SWT) will preserve his face from the hell in the doomsday. In another chapter from Asma' binti Yazid: this hadith is Hasan level". (Narrated by Tirmîdî)

According to the concept of *mashlahah* of al-Ghazâlî, *mashlahah* is anything inviting benefits and preventing harms.⁴⁰ So

³⁷Wahbah az-Zuhaili, *Al-Fiqh al-Islami*, p. 6649.

³⁸Yahya Abdurrahman al-Khatib, *Fikih Wanita Hamil*, p. 92.

³⁹Muhammad bin Isa bin Sûroh bin Mûsa bin ad-Dlohâk al-Tirmîdî, *al-Jâmi'u al-Kabîr*, Vol. III (Ed. 1, Beirut: Dâr al-Gharbi al-Islâmi, 1996), p. 488.

⁴⁰Dahlan Tamrin, *Filsafat Hukum Islam*, (Malang: UIN Malang Press, 2007), p 114.

that, *mashlahah* containing in the theory is the preservation of lineage, self-disgrace, and family disgrace.

The writer views that regarding *Hanafiyyah* scholars of this arguments is aimed to help and reduce woman's burdens by doing marriage. In order to keep disgrace of women and women's family, the lineage of the child will be covered, in which the child born will be assumed as a legal child although the child's lineage cannot be leaned on the father, and what is the right of the child will be covered also. Besides, the psychology reason is also the basic consideration in determining this argument. With this argument, the woman will feel that her life will be preserved, likewise, her child and her burdens will be brought together by the man and the woman.

b) *Malikiyyah* Scholars

Malikiyyah scholarssaid that a pregnant woman caused by *zina* are prohibited to married by another man who did not copulate her. They stated that a pregnant woman should be completed *istibra*⁴¹. It can be known by the birth of the child. By uttering the child, she is seen that she has completed 'iddah period. Then, if marriage contract is conducted before completing *istibra*, it can be broken and must be

⁴¹*Istibra* ' steps to know the purity of the womb.

separated.⁴² The reason of *Malikiyyah* scholars is based on the arguments below:

1) The Saying of Allah in Surah An-Nur verse 3:

الرَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ

“Let no man guilty of adultery or fornication marry and but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an Unbeliever marry such a woman: to the Believers, such a thing is forbidden.”

2) Hadith of *Ruwaifi' Ibn Tsâbit*

عن أبي مرزوق عن حنشل الصنعاني عن رويفع بن ثابت الأنصاري قال سمعت رسول الله صلى الله عليه وسلم يقول يوم حنين قال لا يحل لامرئ يؤمن بالله واليوم الآخر أن يسقي ماءه زرع غيره (رواه أبو داود)⁴³

“From Abu Marzuq from Hansy al-Shanâ'iyyi from Ruwaifi' bin Tsâbit who said: I heard prophet (p.b.u.h) who was saying in Hunanin days, he said: who believe Allah (SWT) and the doomsday, let not pour his water to person garden's". (Narrated by Abu Dâwud)

⁴² Abu al-Walid bin Muhammad bin Ahmad bin Muhammad bin Ahmad bin Rusydi bin al-Qurthubi al-Andalusi, *Syarhu Bidayah al-Mujtahid wa al-Nihayah al-Muqtashid*, (Kairo: Dar al-Salam, 1995), p. 1320.; Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia Antara Fiqh Munakahat dan Undang-Undang Perkawinan*, (Ed. 3, Jakarta: Kencana, 2009), p. 132.; Wahbah az-Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, p. 6650.

⁴³ Abu Dâwud Sulaiman, *Shahîh Sunan Abi Dâwud*, Vol. II, (Ed. 2, Riyadh: Maktabah al-Ma'ârif, 2000), p. 600.

The hadith above indicates the prohibited sex with pregnant women. The prohibited is intended for the man who did not copulate her. It prevails before completing *istibra'*, i.e., before the birth of the child.

3) Hadith narrated by *Abu Dâwud*

حَدَّثَنَا عَمْرُو بْنُ عَوْنٍ، أَخْبَرَنَا شَرِيكٌ، عَنْ قَيْسِ بْنِ وَهَبٍ، عَنْ أَبِي الْوَدَّاءِ، عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ، وَرَفَعَهُ، أَنَّهُ قَالَ فِي سَبَايَا أُوطَاسَ: «لَا تُوطَأُ حَامِلٌ حَتَّى تَضَعَ، وَلَا غَيْرُ ذَاتِ حَمْلٍ حَتَّى تَحِيضَ» (رواه أبو داود)⁴⁴

"Umar bin 'Aun told us, Syarik reported us, from Qais bin Wahab, from Abu al-Waddak, from Abu Sa'id al-Khudzriyy and raise it in which he said in Sabâyâ Authâ book: Let no you copulate with a pregnant woman untill she has born her child, and let no you copulate a woman until the end of haidh time". (Narrated by Abu Dâwud)

According to the theory of *mashlahah* of *al-Ghâzali*, the decision determined by *Malikiyyah* has *mashlahah* values. *Mashlahah* purposed, in this case, is the purity of lineage or progeny. Moreover, with this regulation, the spread of *zina* in the current era can be reduced and people will be saved from the immoral acts in containing harms. According to the prophet's hadith, *zina* is one of the big sins:

⁴⁴ Abu Dâwud, *Shahîh Sunan Abi Dâwud*, p. 600.

حَدَّثَنَا عَمْرُو بْنُ عَلِيٍّ، حَدَّثَنَا يَحْيَى، حَدَّثَنَا سُفْيَانُ، قَالَ: حَدَّثَنِي مَنصُورٌ،
وَسُلَيْمَانُ، عَنْ أَبِي وَائِلٍ، عَنْ أَبِي مَيْسَرَةَ، عَنْ عَبْدِ اللَّهِ رَضِيَ اللَّهُ عَنْهُ، قَالَ: قُلْتُ:
يَا رَسُولَ اللَّهِ، أَيُّ الذَّنْبِ أَعْظَمُ؟ قَالَ: أَنْ تَجْعَلَ لِلَّهِ نِدًّا وَهُوَ خَلَقَكَ قُلْتُ: ثُمَّ أَيُّ؟
قَالَ: أَنْ تَقْتُلَ وَلَدَكَ مِنْ أَجْلِ أَنْ يَطْعَمَ مَعَكَ قُلْتُ: ثُمَّ أَيُّ؟ قَالَ: أَنْ تُزَانِيَ حَلِيلَةَ
جَارِكَ. قَالَ يَحْيَى: وَحَدَّثَنَا سُفْيَانُ، حَدَّثَنِي وَاصِلٌ، عَنْ أَبِي وَائِلٍ، عَنْ عَبْدِ اللَّهِ،
قُلْتُ: يَا رَسُولَ اللَّهِ، مِثْلُهُ. قَالَ عَمْرُو: فَذَكَرْتُهُ لِعَبْدِ الرَّحْمَنِ، وَكَانَ حَدَّثَنَا عَنْ
سُفْيَانَ، عَنِ الْأَعْمَشِ، وَمَنصُورٍ، وَوَاصِلٍ عَنْ أَبِي وَائِلٍ، عَنْ أَبِي مَيْسَرَةَ قَالَ: دَعَاهُ
دَعَاهُ (رواه البخاري)⁴⁵

"Umar bin 'Ali told us, Yahya, told us, Sufyan told us and said: Manshûr and Suliamân told me, from Abu Wâil, from Abu Maysaroh, from Abdullah r.a. who said: I said: Oh prophet, what is the biggest sin? Prophet said: You worship another God besides Allah who created you. I said: and then? Prophet said: You murder your child. I said: and then? Prophet said: You do zina with your neighbor. Yahya said" Sufyan told us, Wâshil told us, from Abu Wâil, from Abdullâh and said: Oh prophet, the statement is same. Umar said: I mentioned the hadith is for Abdurrahman in which he told us from Sufyan, from A'masy, mânshûr, and Wâshil, from Abu Wail, from Abu Maisarah who said: Avoid it" (Narrated by Bukhari)

We can learn that the opinion of *Malikiyyah* is intended to preserve progeny and life. Then, as has been stated by *al-Ghazâli*, by

⁴⁵ Muhammad bin Isma'il bin Abu Abdullah al-Bukhari, *Shahîh Bukhari*, (Ed. 7, Beirut: Dar al-Kutub al-Ilmiyyah, 2013), p. 1236.

preventing harmshuman has preserved and represented God's law in which it is relevant with *the Qur'an*:

وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَأُولَئِكَ هُمُ الْمُفْلِحُونَ^{٤٦}

“Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity”

Moreover, Prophet Muhammad (p.b.u.h) also stated:

حَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ، حَدَّثَنَا وَكِيعٌ، عَنْ سُفْيَانَ، وَحَدَّثَنَا مُحَمَّدُ بْنُ الْمُثَنَّى، حَدَّثَنَا مُحَمَّدُ بْنُ جَعْفَرٍ، حَدَّثَنَا شُعْبَةُ كِلَاهُمَا، عَنْ قَيْسِ بْنِ مُسْلِمٍ، عَنْ طَارِقِ بْنِ شِهَابٍ - وَهَذَا حَدِيثُ أَبِي بَكْرٍ - قَالَ: أَوَّلُ مَنْ بَدَأَ بِالْخُطْبَةِ يَوْمَ الْعِيدِ قَبْلَ الصَّلَاةِ مَرْوَانُ. فَقَامَ إِلَيْهِ رَجُلٌ، فَقَالَ: الصَّلَاةُ قَبْلَ الْخُطْبَةِ، فَقَالَ: قَدْ تَرَكْتُ مَا هُنَالِكَ، فَقَالَ أَبُو سَعِيدٍ: أَمَّا هَذَا فَقَدْ قَضَى مَا عَلَيْهِ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: مَنْ رَأَى مِنْكُمْ مُنْكَرًا فَلْيُغَيِّرْهُ بِيَدِهِ، فَإِنْ لَمْ يَسْتَطِعْ فَبِلِسَانِهِ، فَإِنْ لَمْ يَسْتَطِعْ فَبِقَلْبِهِ، وَذَلِكَ أَضْعَفُ الْإِيمَانِ. (رواه المسلم)^{٤٧}

⁴⁶QS. Ali Imrân (3): 104.

⁴⁷Al Imam Muslim bin al-Hajjaj al-Naysaburi, *Shahîh Muslim*, Vol. I,(Ed. 5, Beirut: Dâr al-Kutub al-Ilmiyyah, 2012), p. 46-47.

“Abu Bakar bin Abi Syaibah told us, Waqî’ told us, from Sufyan, and Muhammad bin al-Mutsanna us, Muhammad bin Ja’far told us, Syu’bah told us, from Qais and bin Muslim, from Thâriq bin Syihab- This is Abu Bakar's hadith-, Thâriq bin Syihab said: the first person beginning sermon (khotbah) then prayer (shalat) in the feast (eidun) day is Marwân. Then, a man came to him and said: prayer is before the sermon. Thâriq bin Syihab said: It really had been left. Abu Sa'id said: About this case had been determined, I heard Rasulullah (p.b.u.h) said: when one of you sees a bad thing, you must change it by your hand. If you cannot change by your hand, change it by your statement. Then, if you cannot change it by your statement, change it by your heart and it is the lowest of faith.” (Narrated by Muslim).

Another view of applying the concept of *Malikiyyahis* that bad effects will be gotten by pregnant women. During pregnant, a pregnant woman will get bad responses from the society. They will judge that the woman has conducted contemptible act by having sexual outside of marriage. Moreover, people will say that she has announced abominable act or immoral act. Whereas, it is must be covered in which it is purposed to get composure life for them.

c) *Syâfi’iyyah* Scholars

Syâfi’iyyah scholars stated that the woman doing *zin* does not has *‘iddah* period. The pregnant woman who caused by *zina* is allowed to marry with every man.⁴⁸ It also prevails to the adulteress who does not get pregnancy. Their opinion is based on the explanations below:

1) Allah (SWT) explained about women who prohibited to married:

⁴⁸ Abu Ishaq al-Syirazi, *Al-Muhazzab*, Vol. II, (Kairo: Dar-Al-fikr, unknown), p. 43.

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُم مِّنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُمْ مِّنْ نِّسَائِكُمُ اللَّاتِي دَخَلْتُمْ بِهِنَّ فَإِنْ لَمْ تَكُونُوا دَخَلْتُمْ بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا (٢٣) وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ كِتَابَ اللَّهِ عَلَيْكُمْ وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسَافِحِينَ فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَاضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا (٢٤)^{٤٩}

“Prohibited to you (For marriage) are:- Your mothers, daughters, sisters; father's sisters, Mother's sisters; brother's daughters, sister's daughters; foster-mothers (Who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom ye have gone in,- no prohibition if ye have not gone in;- (Those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-forgiving, Most Merciful;-Also (prohibited are) women already married, except those whom your right hands possess: Thus hath Allah ordained (Prohibitions) against you: Except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property,- desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree Mutually (to vary it), there is no blame on you, and Allah is All-knowing, All-wise.”

⁴⁹QS. an-Nisâ' (4): 23-24.

From the above verse, we can learn that pregnant woman is not included in the group of women prohibited to be married.

2) Surah an-Nûr verse 32:

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُعْطِهِمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ

“Marry those among you who are single, or the virtuous ones among yourselves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasseth all, and he knoweth all things.”

Based on this verse, we can learn that pregnant woman caused by *zina* is permitted to be married to the man because a pregnant woman is included to the woman who does not has a husband.

3) Hadis of Aisyah:

حَدَّثَنَا يَحْيَى بْنُ مُعَلَّى بْنِ مَنصُورٍ قَالَ: حَدَّثَنَا إِسْحَاقُ بْنُ مُحَمَّدٍ الْفَرَوِيُّ قَالَ: حَدَّثَنَا عَبْدُ اللَّهِ بْنُ عُمَرَ، عَنْ نَافِعٍ، عَنْ ابْنِ عُمَرَ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: لَا يُحَرِّمُ الْحَرَامُ الْحَلَالَ (ابن ماجه)⁵⁰

⁵⁰QS. an-Nûr (24): 32.

“Yahya bin Mu’alla bin Manshuûr told us who said: Ishaq bin Muhammad al-Farwiyyu told us who said: Abdullah bin Umar told us, from Nâfi’, from bin Umar, from prophet (p.b.u.h) who said: the forbidden thing does not forbid the allowed thing”. (Narrated by IbnuMâjah)

The opinion declared by *Syâfi’iyyahis* not included as affirmation for the legalization of *zina*. If it is viewed by *mashlahah* concept, it has the same meaning with what was declared by *Hanafiyyahscholars*. In the view of *mashlahah*, the aim of their opinion is to relieve the burden of pregnant women and stop disgrace and society's reproach. Besides, they also get the psychology burden that is very heavy for their life. That is why *Syâfi’iyyahscholars* determine this argument.

The permission of marriage can be comprehended as the way to cover slender from society in which if it does not conducted the woman will be assumed as unpurified woman. It is relevant with the verse below:

وَإِذْ أَسَرَّ النَّبِيُّ إِلَىٰ بَعْضِ أَزْوَاجِهِ حَدِيثًا فَلَمَّا نَبَّأَتْ بِهِ وَأَظْهَرَهُ اللَّهُ عَلَيْهِ عَرَفَ بَعْضُهُ
وَأَعْرَضَ عَنْ بَعْضٍ فَلَمَّا نَبَّأَهَا بِهِ قَالَتْ مَنْ أَنْبَأَكَ هَذَا قَالَ نَبَّأَنِيَ الْعَلِيمُ الْخَبِيرُ⁵²

“When the Prophet (p.b.u.h) disclosed a matter in confidence to one of his consorts, and she then divulged it (to another), and Allah made it known to him, he confirmed part thereof and repudiated a part. Then when he told her thereof, she said, “Who told you this?” He said, “He told me Who knows and is well-acquainted (with all things).”

⁵¹ Abu Abdullâh Muhammad bin Yazid al-Qazwani, *Sunan Ibnu Mâjah*, (Ed. 1, Riyadh: Maktabah al-Ma’ârif, 1997), p. 348.

⁵² QS. at-Tahrîm (66): 3.

It has accordance also with hadith narrated by *Tirmîdî*.

حَدَّثَنَا أَحْمَدُ بْنُ مُحَمَّدٍ قَالَ: أَخْبَرَنَا ابْنُ الْمُبَارَكِ، عَنْ أَبِي بَكْرِ النَّهْشَلِيِّ، عَنْ مَرْزُوقٍ أَبِي بَكْرِ التَّيْمِيِّ، عَنْ أُمِّ الدَّرْدَاءِ، عَنْ أَبِي الدَّرْدَاءِ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: مَنْ رَدَّ عَنْ عَرَضٍ أَخِيهِ رَدَّ اللَّهُ عَنْ وَجْهِهِ النَّارَ يَوْمَ الْقِيَامَةِ. وَفِي الْبَابِ عَنْ أَسْمَاءَ بِنْتِ يَزِيدَ: هَذَا حَدِيثٌ حَسَنٌ⁵³.

"Ahmad bin Muhammad told us and said: Ibnu al-Mubarrak reported us, from Abu Bakar al-Nahsyaliyyi, from Marzûq Abu Bakar al-Taymiyyi, from Ummu ad-Dardâ, from Prophet Muhammad (p.b.u.h) who said: who preserve disgrace, Allah (SWT) will preserve to his face from the hell in the doomsday. In a chapter explaining Asma' binti Yazid: this hadith is Hasan level". (Narrated by al-Tirmîdî)

Hanafiyyah and Syâfi'iyah scholars have difference opinion. If Hanafiyyah scholars prohibit copulation between them, while Syâfi'iyah scholars permit it. The permission of Syâfi'iyah scholars to the copulation is based on the quotation of hadith narrated by *Ibnu Mâjah*.

لَا يُحَرِّمُ الْحَرَامُ الْحَلَالَ

"The forbidden thing does not forbid the allowed thing"

The hadith stated the prohibited thing does not prohibit the permission thing. So that Syâfi'iyah scholars determined this argument.

⁵³ Muhammad bin Isa bin Sûroh bin Mûsa bin ad-Dlohâk al-Tirmîdî, *al-Jâmi'u al-Kabîr*, Vol. III (Ed. 1, Beirut: Dâr al-Gharbi al-Islâmi, 1996), p. 488.

In *mashlahah*'s view, the permission of *Syâfi'iyah* scholars is intended to delete the woman's statement about her filthy. By permitting copulation between them, the woman will believe that there is the man who wants to marry her, and also believe that the burden of her to take care the child will be covered between them.

The important *mashlahah* of this concept is preserving the lineage of the child. When a pregnant woman marriage is married to the man, in which the time of pregnant is under three months, the child's lineage can be leaned on the father. In this case, this theory has accordance with the *mashlahah* theory of *al-Ghâzali* preserving the lineage.

d) *Hanâbilah* Scholars

Hanâbilah scholars stated that the marriage between a pregnant woman and the man who did not copulate her is permitted by completing two requirements⁵⁴.

- 1) The woman should complete 'iddah period. This argument similar to the argument of *Malikiyyah* scholars. The argument is based on the hadith narrative by Abu Dâwud:

⁵⁴Wahabah az-Zuhaili, *Al-Fiqh al-Islami Wa Adillatuhu*, p. 6650.

عن أبي مرزوق عن حنش الصنعاني رويفع بن ثابت الأنصاري قال سمعت رسول الله صلى الله عليه وسلم يقول يوم حنين قال لا يحل لامرئ يؤمن بالله واليوم الآخر أن يسقي ماءه زرع غيره (رواه أبو داود)⁵⁵

"From Abu Marzuq form Hansy al-Shanâ'iyyi from Ruwaiḡi' bin Tsâbit who said: I heard prophet (p.b.u.h) who was saying in Hunanin days, he said: who believe Allah (SWT) and the doomsday, let not pour his water to person's garden". (Narrated by Abu Dâwud)

Then, it is also supported by hadith narrated by Abu Dâwud:

حَدَّثَنَا عَمْرُو بْنُ عَوْنٍ، أَخْبَرَنَا شَرِيكٌ، عَنْ قَيْسِ بْنِ وَهَبٍ، عَنْ أَبِي الْوَدَّاءِ، عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ، وَرَفَعَهُ، أَنَّهُ قَالَ فِي سَبَايَا أُوطَاسَ: «لَا تُوطَأُ حَامِلٌ حَتَّى تَضَعَ، وَلَا غَيْرُ ذَاتِ حَمْلٍ حَتَّى تَحِيضَ حَيْضَةً» (رواه أبو داود)⁵⁶

"Umar bin 'Aun told us, Syarîk reported us, from Qais bin Wahab, from Abu al-Waddak, from Abu Sa'id al-Khudzriyy and raise it in which he said in Sabâyâ Authâ book: Let no you copulte with a pregnant woman untill she has born her child, and let no you copulate a woman untill the end of haidh time". (Narrated by Abu Dâwud)

- 2) Then, the woman must *taubat*⁵⁷ (repent) from her abominable act, that is *zina*. This argument is based on surah an-Nur verse 3:

⁵⁵ Abu Dâwud Sulaiman, *Shahîh Sunan Abi Dâwud*, Vol. II, (Ed. 2, Riyadh: Maktabah al-Ma'ârif, 2000), p. 600.

⁵⁶ Abu Dâwud, *Sunan Abu Dâwud*, p. 374.

⁵⁷ *Taubat* is a step to reduce the sin and clean their self from the abominable attitudes which contradict to the Islamic concept

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ

“Let no man guilty of adultery or fornication marry and but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an Unbeliever marry such a woman: to the Believers such a thing is forbidden.”

The sentence *هو حرم ذلك على المؤمنين* is prevailed when the woman has not *taubat* (repented). When the woman has repented, the prohibition is vanish. It is line with a hadith of prophet

حَدَّثَنَا أَحْمَدُ بْنُ سَعِيدٍ الدَّارِمِيُّ قَالَ: حَدَّثَنَا مُحَمَّدُ بْنُ عَبْدِ اللَّهِ الرَّقَاشِيُّ قَالَ: حَدَّثَنَا وَهَيْبُ بْنُ خَالِدٍ قَالَ: حَدَّثَنَا مَعْمَرٌ، عَنْ عَبْدِ الْكَرِيمِ، عَنْ أَبِي عُبَيْدَةَ بْنِ عَبْدِ اللَّهِ، عَنْ أَبِيهِ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: التَّائِبُ مِنَ الذَّنْبِ، كَمَنْ لَا ذَنْبَ لَهُ (رواه ابن ماجه)⁵⁸

“Ahmad bin Sa’id al-Dârimiy told us who said: Muhammad bin Abdullâh al-Raqâsyiy told us who said: Wuhaib bin Khâlid told us who said: Ma’mar told us, from Abdu al-Karîm, from Abu ‘Ubaidah bin Abdullâh, from his father, who said: Prophet (p.b.u.h) said: who repent from the sins like a person do not have the sin”. (Narrated by IbnuMâjah)

⁵⁸Abu Abdullâh Muhammad bin Yazid al-Qazwani, *Sunan Ibnu Mâjah*, (Ed. 1, Riyadh: Maktabah al-Ma’ârif, 1997), p. 704.

Allah (SWT) also has commanded to mankind to *taubat* from the sins throughout the verse in the *Qur'an*:

يَا أَيُّهَا الَّذِينَ آمَنُوا تُوبُوا إِلَى اللَّهِ تَوْبَةً نَصُوحًا عَسَىٰ رَبُّكُمْ أَن يُكَفِّرَ عَنْكُمُ
سَيِّئَاتِكُمْ وَيُدْخِلَكُم جَنَّاتٍ تَجْرِي مِنْ تَحْتِهَا الْأَنْهَارُ يَوْمَ لَا يُخْزِي اللَّهُ النَّبِيَّ
وَالَّذِينَ آمَنُوا مَعَهُ نُورُهُمْ يَسْعَىٰ بَيْنَ أَيْدِيهِمْ وَبِأَيْمَانِهِمْ يَقُولُونَ رَبَّنَا أَتِمِّمْ لَنَا نُورَنَا
وَاجْفِرْ لَنَا إِنَّكَ عَلَىٰ كُلِّ شَيْءٍ قَدِيرٌ⁵⁹

"Oh you who believe! Turn to Allah with sincere repentance: In the hope that your Lord will remove from you, your ills and admit you to Gardens beneath which Rivers flow,- the Day that Allah will not permit to be humiliated the Prophet and those who believe with him. Their Light will run forward before them and by their right hands, while they say, "Our Lord! Perfect our Light for us, and grant us Forgiveness: for Thou hast power over all things."

In truth, the concept of *mashlahah* arranged by *Hanâbilah* scholars is similar to what arranged by *Malikiyyah* scholars. In addition, *Hanâbilah* scholars add *taubat* (repent). This concept must be done by adulteress before conducting the marriage. *Taubat* is intended to invite people returning to the god way that is relevant with sharia in which it can be learned as preserving religion. Adding this requirement is assumed to keep the soul of the faith

⁵⁹QS. at-Tahîm (66): 8.

To make it easy, the writer arranges table below:

Scholars	Marriage between a pregnant woman and the man copulating her	Marriage between a pregnant woman and another man who did not copulate her
<i>Hanafiyyah</i>	All scholar permit this marriage	Permit, but prohibit copulation between them until the birth of child
<i>Malikiyyah</i>		Prohibit before the birth of child
<i>Syâfi'iyah</i>		Permit to married by the man and permit copulation between them
<i>Hanâbilah</i>		Prohibit, except the child, has been born and the woman has repented

Table 1. The Opinions of Scholars

2. Pregnant Marriage in Indonesian Islamic Law

Indonesia is one of the states that have many Muslim societies in the world. Based on this truth, certainly, Indonesia has Islamic regulations. Some of the regulations related to this topic are Act Number 1 on 1974 about Marriage and Compilation of Islamic Law.

a. Pregnant Marriage in Act Number 1 of 1974 about Marriage

The Act Number 1 on 1974 about Marriage is marriage regulation of Indonesia becoming the basic consideration for the judges. There is no article of this regulation organizing pregnant marriage clearly, but there are some articles related to the theme of research.

We have known that this act is not intended for Muslimsonly, but for other religion followers also such as Christianity, Hinduism, Buddhism and Konghucu. These religions also use Act Number 1 on 1974 about Marriage as the basic for conducting the marriage. When they do not find the rules which are needed for doing marriage according to their rules, they are permitted to find or use other rules which support it.

Regulation of prohibited marriage is founded in article 8 point f. Act Number 1 on 1974 about Marriage article 8 Paragraph (f) stated

“Perkawiman dilarang antara dua orang yang mempunyai hubungan yang oleh agamanya atau peraturan lain yang berlaku, dilarangan berkawin”

"Marriage is prohibited between two persons which have a relationship in which it is prohibited by religion or other regulations."

The regulation above indicates a prohibition of marriage. In Islam, there is regulation indicating prohibited marriage explained in many sources. Prohibited marriage in Islam can be caused by some aspects. *Ibnu Rusydi* stated in his book, *Bidâyah al-Mujtahid wa Nihâyah al-Muqtashid*, that there are some barricades of marriage. They are the aspect of lineage, *mushoharoh*, nest, *zina*, collecting wife, collecting sisters, enslavement,

infidel, *ihram* condition, disease, *'iddah* period, and types of marriage.⁶⁰ It explained that pregnant marriage is included prohibited marriage caused by *zina*.

The debated opinions among scholars have been explained in the part before, in which they are divided into two categories: the opinion supporting and not supporting pregnant marriage. As a result, in the view of Act Number 1 on 1974 about Marriage, pregnant marriage in Islam is based on the opinion followed by every person. Indeed, according to Regulation No 1 Year 1974, pregnant marriage in Islam can be permitted and prohibited.

The article 43 paragraph (1) stated that:

“Anak yang dilahirkan di luar perkawinan hanya mempunyai hubungan perdata dengan ibunya dan keluarganya”

“The child who is born outside of marriage has private relationship with his mother and mother’s family only”

The command of article 43 indicates indistinctness lineage. The child will be judged as a child who does not have the father. One time, if the child knows this reality, the child will be shocked and his psychology will be rocked. Whereas, scholars stated that *zina* does not cause the

⁶⁰ Ibnu Rusydi, *Syarhu Bidayah al-Mujtahid*, p. 1302-1345.

relationship between child and father, although, biologically, the child is produced by biological father and mother.⁶¹ Moreover, scholars stated that lineage is gift and comfort from God, while *zina* belongs to criminal acts and it can receive punishment like stoning and isolation.⁶²

The implication of nothing relationship between child and father is that child and father will get problems in some juridical aspects. First, the man who biologically is father's child is assumed as other people. As a result, if the child is female, her father may marry her. Second, there is no obligation for father to guarantee living cost of the child. Third, there is no relationship of mutual inheritance between them. Fourth, the father cannot be a guardian for the child in marriage.

The Constitution Court Verdict Number 46/PUU-VIII/2010, dated February 17th, 2012, explained that statement in article 43 paragraph (1) of Act Number 1 on 1974 about Marriage contradicts to The Act Foundation on 1945. This verdict stated that the child who is born outside of marriage also has a private relationship with his father.⁶³ The consideration of the verdict is a punishment for the man doing *zina*.

⁶¹ M. Nurul Irfan, *Nasab dan Status Anak dalam Hukum Islam*, Ed. 1, (Jakarta: Amzah, 2012), p. 114.

⁶² M. Nurul Irfan, *Nasab dan Status Anak dalam Hukum Islam*, p. 115

⁶³ Syafr Sofyan, "Putusan Mahkamah Konstitusi Tentang Anak Luar Kawin", www.jimlyschool.com/read/analisis/256/putusan-mahkamah-konstitusi-tentang-anak-luar-kawin/, accessed February 11th, 2016.

Thus, the man and the woman have the same obligation to protect and take care the child.

b. Pregnant Marriage in Compilation of Islamic Law

The Compilation of Islamic Law is one of the products of law in Indonesia regulating Islamic values, particularly regulating marriage among Muslims. The Compilation of Islamic Law is a regulation made by the government in which it is relevant to the social culture and condition of Indonesians. The Compilation of Islamic law consist of three books: book explaining marriage containing in the First book, the law of inheritance containing in the Second book, and the law of tithe (*zakat*) containing in the third book.

The pregnant marriage has been regulated in the Compilation of Islamic law, precisely in article 53 paragraph (1) until (3) in the First book:⁶⁴

- 1) Seorang wanita hamil di luar nikah, dapat dikawinkan dengan pria yang menghamilinya
- 2) Perkawinan dengan wanita hamil yang disebut pada ayat (1) dapat dilangsungkan tanpa menunggu lebih dulu kelahiran anaknya
- 3) Dengan dilangsungkannya perkawina pada saat wanita hamil, tidak perlu perkawinan ulang setelah anak yang dikandung lahir

⁶⁴Undang-Undang RI Nomor 1 Tahun 1974 Tentang Perkawinan dan Kompilasi Hukum Islam, Ed. 1, (Bandung: Citra Umbara, 2012), p. 338.

- 1) *A pregnant woman outside of marriage can be married by the man who copulated her.*
- 2) *Marriage with pregnant women who are said in paragraph (1) is conducted without waiting for birth of child, and*
- 3) *By conducting pregnant marriage, the second marriage is not needed after the child is born*

The rising of the Compilation of Islamic Law motivates the emerging of two groups that have a different opinion. The writer assumes that the group not supporting the regulation stated that the concept of pregnant marriage in the Compilation of Islamic Law have an uncertainty of law now that compounding opinions among Scholars.

According to Yahya Harahap's argument, the permission of pregnant marriage in the Compilation of Islamic Law is started by elaborating *ikhtilaf* (difference) with '*urf* (custom) in society. Then, when it was compared there were found a contradiction between Islamic Law and Customs Law. Based on this condition, the scholars took conclusion grounded on the principle of *istishlah*. The compilers of Compilation of Islamic law concluded that larger *mashlahah* will be obtained when pregnant marriage is permitted but harm will be obtained when pregnant marriage is prohibited. Harahap added that one of the intents pregnant marriage is to get the clarity of law intending for preserving child.⁶⁵

Regulating pregnant marriage in Compilation of Islamic Law expressly is regulated by shorting arrangement and general arrangement. It

⁶⁵Cik Hasan Basri, dkk., *Kompilasi Hukum Islam dan Peradilan Agama*, p. 58.

is intended to give authorship for the court to find other principles throughout new alternative which is more actual and rational⁶⁶. So that the Compilation of Islamic Law is not a permanent decision in Islamic Private Law in Indonesia.

We can learn that in the first paragraph of the Compilation of Islamic Law article 53 uses word “can”. Certainly, this word has various meaning and makes many interpretations which are stated by Scholars and academicians. The using of word “can” is purposed as an anticipative way. It is based on the truth that a pregnant may happen inside of marriage or outside of marriage in which it can be caused by rape or *zina*.⁶⁷ As a result, a pregnant woman caused by rape can be married to the man who did not copulate her. Finally, the formula of this article can be stated: “a pregnant woman outside of marriage can be married to the man who did not copulate her”.⁶⁸

The second paragraph of article 53 stated that marriage with the pregnant woman said in paragraph (1) is conducted without waiting for birth of the child. This paragraph provides ambiguity to comprehend marriage. There is no clarity when marriage should be conducted by people who involved in the case. Probably, she will be married when the time of

⁶⁶Cik Hasan Basri, dkk., *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional*, (Jakarta: Logos Wacana Ilmu, 1999), p. 57.

⁶⁷Nurul Irfan, *Nasab dan Status Anak dalam Hukum Islam*, (Jakarta: Amzah, 2012), p. 167.

⁶⁸Nurul Irfan, *Nasab dan Status Anak*, p. 167

pregnant is more three months or under three months. It is not very clear. So that it needs the clarity of law in order to avoid misconception among people and it should be understood by people.

Arranging the Compilation of Islamic Law is based on factors which can be a supporting argument of it. The aspects that will be explained contain *mashlahah* values of *al-Ghâzaliin* the perspective of *Syâfi'iyyah* scholars. In this case, there are three aspects that can be basic arguments of arising article 53 of the Compilation of Islamic Law:

1) Philosophy Factor

This regulation is made to keep the life of a woman and her child further. In order to get the right of them individually or socially, the rising of this regulation can be basic to demand responsibility of the man in which it is applied by doing marriage with the woman.⁶⁹ Then, with this regulation, if the woman is a victim of rape, the woman's family can find another man who wants to marry her in order to cover disgrace of family and protect the woman. It is a realization of preserving soul, descent or lineage, and property.

2) Sociological Factor

As the custom happening in Indonesia in the past, if there were pregnant woman caused by illegal sexual activity the parents would marry her

⁶⁹Nurul Huda, "Kawin Hamil dalam Kompilasi Hukum Islam (Tinjauan Maqashid Syariah)," *Ishraqi*, 1 (January 2009), p. 42.

with the man who copulated her. It is the way to cover disgrace of the family. So that regulation of pregnant woman in the Compilation of Islamic Law is in line with social conditions of Indonesians.⁷⁰ It is a realization of preserving life.

3) Psychological Factor

Probably, getting pregnant caused by *zina* is not a wanted thing by a woman, so that women will get more burdens than the men. If this condition is not be finished, the bad conditions will be gotten, like suicide and abortion. Actually, these cases can be happened when a woman feels that her life is uncomfortable and haunted by the sense of shame, low self-esteem, depression, and pessimistic.⁷¹ On the other hand, the children also will get psychology tension when they are born outside of marriage without the father. By this reason, the decision of pregnant woman in article 53 of the Compilation of Islamic Law is intended to prevent harms further and preserve the health of body and spiritual. It is also aimed to keep the human from the immoral acts. These are the realization of preserving life, intellect, and progeny.

⁷⁰Nurul Huda, "Kawin Hamil", p. 43.

⁷¹ Asmar Yeti Zein dan Eko Suryani, *Psikologi Ibu dan Anak*, (Yogyakarta: Fitramaya 2005), p. 114.



The research method is a method for studying one or some phenomena by analyzing the fact and attempt to make solutions from the problem. The research method is prominent of research step to guide the analysis step of research. This part

will explain about type of research, research approach, locus research, type and data sources, data collection method, and data analysis method.

A. Type of Research

Determining the type of research is the beginning step to start research. Type of research should be based on the right choice, because if it is not considered it will influence the process of research and make the dissonant result.

The type of research is empirical research which is conducted by doing observation in the field to obtain the data directly. Empirical research focuses on data taken from informants.⁷² This research is conducted directly where the object lives in order to obtain data related to the discussion of this research. Then, the objects that will be researched are Modin of Teras village and scholars of Teras village.

Viewed by the type of analyzing, this research includes the group of description research.⁷³ Description research discusses problems, questions, relations, behaviors, views, considerations, traditions, conditions, and influences that are related to certain phenomenon.⁷⁴ The characteristic of description research is illustrating phenomenon clearly. In this case, research will explain and figure

⁷²Lexy J. Moleong, *Metodologi Penelitian Kualitatif*, New Edition, (Bandung: PT Rosada Karya, 2006), p. 26.

⁷³Saifuddin Anwar, *Metode Penelitian*, (Yogyakarta: Pustaka Pelajar, 2009), p.6.

⁷⁴Soejono and Abdurrahman, *Metode Penelitian Suatu Pemikiran dan Penerapan*, (Jakarta: Rineka Cipta, 1990), p. 21.

the phenomenon that contains factors of rising prohibition of pregnant marriage policy and society responses toward prohibition of pregnant marriage policy in Teras village. On the other side, this research includes the group of diagnostic research. The diagnostic research is purposed to obtain data and information, especially factors of happening a phenomenon involved certain indications. In this case, the researcher will find the data in the field clearly related to prohibition of pregnant marriage policy in Teras village.

B. Approach of Research

The approach of research used in this research is the qualitative approach in which the data discussed in this research is descriptive containing words written in the paper.⁷⁵ This approach is appropriate for objective research that will explain and describe a phenomenon clearly. By using qualitative research, this research focuses on the concept to reveal the secret. In qualitative research, the researcher is the prominent instrument to obtain data because the data that will be obtained is existed in society, in which it cannot be obtained by searching the books or literature, but must go to the field.

⁷⁵Lexy J. Moleong, *Metodologi Penelitian Kualitatif*, p. 3.

C. Locus Research

The research location is Temas village, Batu district, Kota Batu. Temas village is located about 2 kilometers from the town center of Kota Batu and 15 kilometers from the town center of Kota Malang. Geographically, Temas village is categorized as mountain range area in Malang Raya. Temas village is a village in kecamatan Batu dubbed as farmer village. Situations in Temas are harmony, although there are some societies following the minor religion such as Christianity, Hinduism, and Buddhism.

Temas village is chosen as research location because it has a new policy about marriage called prohibition of pregnant marriage. This policy is created by Modin assumed as the new way to prevent growing of the free sex phenomenon in Kota Batu. This policy is one of objectives study in sharia faculty, particularly in Al-Akhwal Al-Syakahshiyah department focusing in Islamic Family Law.

D. Type and Data Sources

The type of data and source of data of the research is divided into two types: primary data and secondary data.

1. Primary data

Primary data is obtained from the field of research directly. In another word, primary data is obtained directly from the source then observed and recorded for the first time. It is obtained by doing interview directly without a mediator

to the informants. Primary data in this research is obtained from Modin of Temas that is Samsul Hadi, Temas scholars: Abdullah Tahir, Abdul Mu'in, Abdul Wahab, Muhammad Hammam, Muhammad Yusuf, Miftahul Jannah, Samidi, and Muhammad Zaini, Aditya Prasaja as Temas chief, and Putri Anwari as a midwife.

2. Secondary data

Secondary data is obtained from books, statistic data, or other documents that support the authentic of research. The secondary data in this research is obtained by searching in the books, literature, and opinions that are relevant the theme of research.

3. Tertiary data

Tertiary data is data or sources providing explanations and supports for primary data and secondary data and it can emphasize to show the originality of research. The tertiary data in this research are; Islamic encyclopedia, law dictionary, language dictionary, and news.

E. Collecting Technique

Types of collecting technique used in this research are:

1. Interview

The interview is a process to obtain an information of research to the interviewee. The interview can be comprehended as dialogue process between

interviewer and interviewee to get information clearly. The interview is meeting between interviewer and interviewee to get information, by using guide interview or not.⁷⁶

The interview is conducted to informants in Temas village. The informants are Modin of Temas, Samsul Hadi, scholars of Temas: Abdullah Tahir, Abdul Mu'in, Abdul Wahab, Muhammad Hammam, Muhammad Yusuf, Miftahul Jannah, Samidi, and Muhammad Zaini, the chief of Temas, Aditya Prasaja, and the midwife, Putri Anwari.

2. Documentation

Documentation is a process of research by searching something that relevant to the problem such as; notes, transcript, magazine, agenda, etc.⁷⁷ The qualitative research, a documentary method is prominent to collecting technique.⁷⁸ The prominent characteristic of this data is indefinite in place and time so that it gives a chance to researchers to detect something happening in the past. This step is used as a complement data and supporting data to get the authentic research. The researcher uses data and book related to the research object, such as; population archive, employment, economic level, education level, and other data related to the research object.

⁷⁶Andi Prastowo, *Metode Penelitian Kualitatif Dalam Perspektif Rancangan Penelitian*, Ed. 1, (Yogyakarta: Ar-Ruzz Media, 2011), p. 212.

⁷⁷Suharismi Arikunto, *Prosedur Penelitian: Suatu Pendekatan Praktek*, (Jakarta: Rineke Cipta, 2002), p. 231.

⁷⁸Andi Prastowo, *Metode Penelitian*, p. 226.

F. Data Analysis Method

Processing data is a technique to process or analyze data that has been obtained. Processing data is purposed to explain data clearly. As a result, the researcher will obtain deeply comprehension. In this case, there are some steps which are:

1. Editing Data

Editing is the first step of analyzing data process. Editing is rechecking data completely. This step is purposed to review data that had been obtained. Editing data is an investigation toward data that was obtained. The investigation is conducted to make authentic of data. This step is conducted by discarding the matters which are not important for processing data of research.

2. Classifying Data

Classification is a step conducted by classifying data in the certain group to make discussion research easier. The data are classified in the certain category based on the statement of the problem. By doing this step the researcher will obtain the easy in research to explain the problem. Classifying step is adapted with the problem statements of research which make the researcher more focus to explain and analyze data. The data obtained are divided into three groups: the thought of Modin in determining policy, the view of Scholars, and the implementation of the policy.

3. Verifying Data

Verifying data is a step to prove the truth of data in order to assure the validity of data. This process is committed by verifying data that had been obtained when the researcher was conducting interview. In this case, the researcher meets informants toward the validity of data.

4. Analyzing Data

Data analysis is a process of data simplification into easily draft and interpretation form.⁷⁹ Analyzing data is a prominent step in research. Analyzing data is a step of explanation or discussion data of research. This step is conducted by using theories, al-Qur'an or hadith, and interpretation ideas of the researcher. Analyzing data uses descriptive qualitative analysis. The descriptive qualitative analysis is one of analysis methods by describing conditions and phenomena with words or sentences, then they are to get a conclusion.⁸⁰ In this step, all problems will be explained and finished, so that reader will get comprehension about the systematic of analyzing the process. The researcher attempts to describe pregnant marriage policy and analyze it through the perspective of Islamic Law and Indonesia Islamic law.

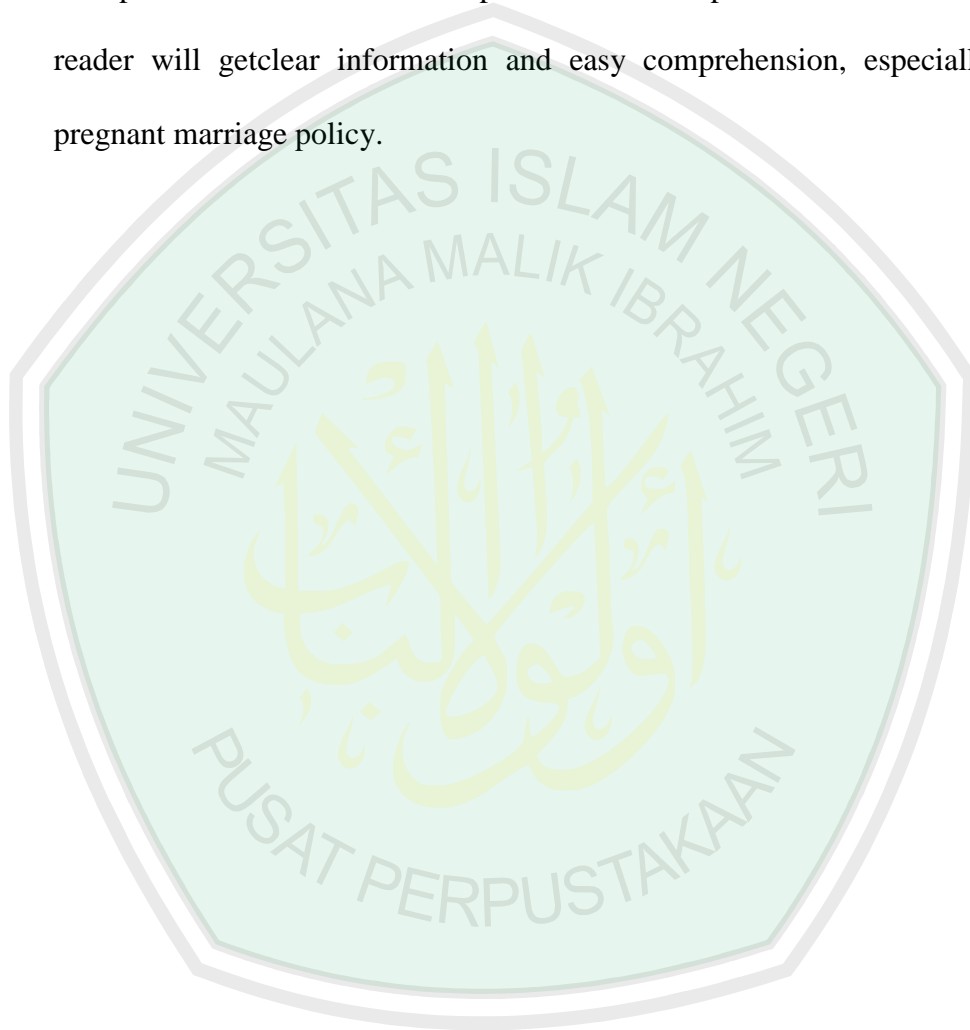
5. Conclusion

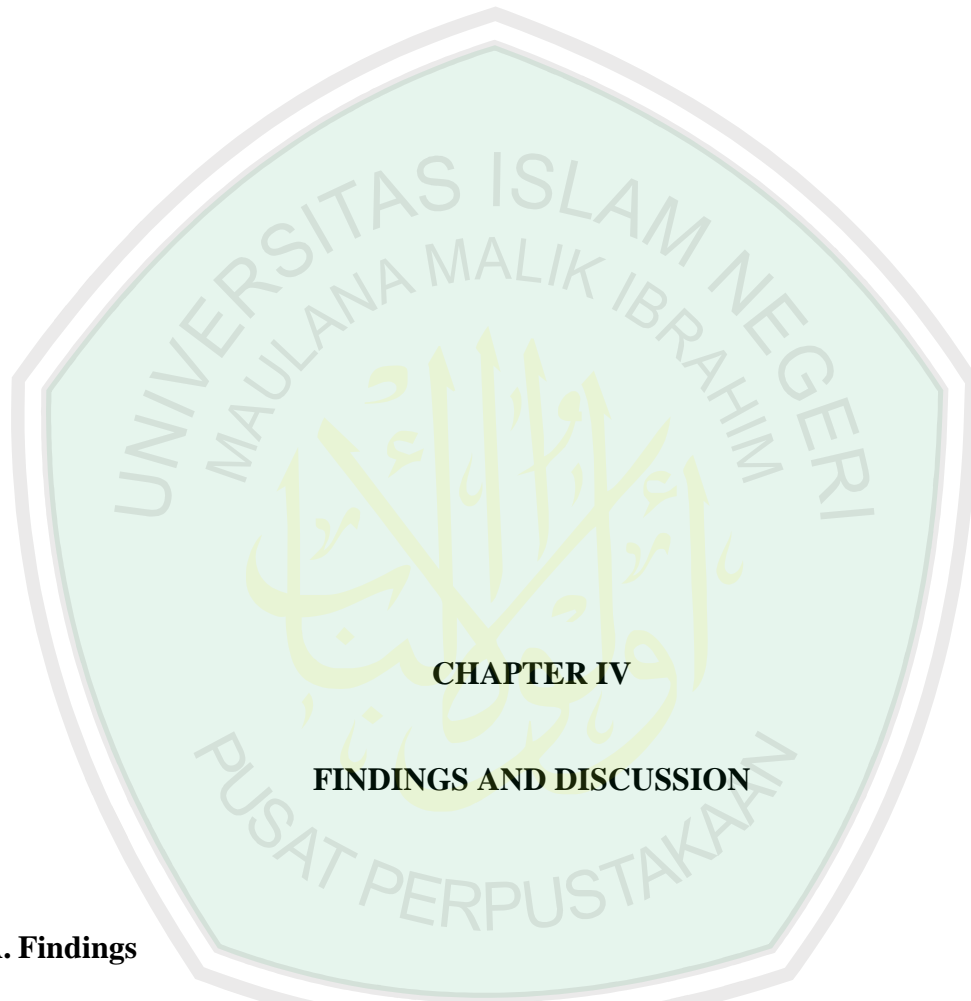
The last step of processing data is the conclusion. This step is conducted by taking important points yielded from elaborating and discussing data. In this

⁷⁹Masri Singarimbun and Sofyan Efendi, *Metode Penelitian Survei*, (Jakarta: LP3ES, 2011), p. 263.

⁸⁰Lexy J. Moleong, *Metodologi Penelitian Kualitatif*, (Bandung: Rosda Karya, 2010), p. 3-6.

step, the researcher will obtain the result of research. The important point informed is called conclusion. Taking conclusion is purposed to make simple comprehension for reader to comprehend the main problem of research. So that, reader will get clear information and easy comprehension, especially about pregnant marriage policy.





CHAPTER IV

FINDINGS AND DISCUSSION

A. Findings

One of the important things about field research is the data directly obtained from the field. The explanations below consist of data obtained through interviews and documentations. Grouping the data is aimed to give comprehension to the reader.

The data consists of research location, interview data of the basic thought of Modin in determining policy, the *ulama*'s views of Teras to the policy, and the informant data. The explanation of research location consists of geographical conditions, social-religious conditions, educational-social conditions, and socio-economic conditions.

1. Research Location

a. Geographical Conditions

Teras village is well-known as an agriculture tourist village in Batu. Agriculture tourism place is located the behind village office. The village farmer festival is held every year in Teras, motivating tourists to come to the city.

The area of Teras village is 323² hectare. It consists of 66 RT and 11 RW. The total population of men is 8881 and 8074 for women, with a total of population of 17585 people.

The boundaries of Teras village are

North : Pandanrejo village

East : Torongrejo village

South : Oro-oro Ombo village

West : Sisir village

Temas village is located in the plateau area of Batu located 900 meters above sea-level. The peak temperature in Temas is 34⁰ Celcius and the lowest temperature is 25⁰ Celcius.⁸¹

b. Religious Conditions

The religion with the most followers shows the religious environment of Temas. The statistic data from the Demography and Civil Notation Department of Batu shows that most of Temas societies are Muslim.⁸²

No	Religion	The amount of society			Percentage
		Men	Women	Total	
1	Islam	8585	8370	16955	96,42%
2	Christian	216	240	456	2,59%
3	Catholic	70	82	152	0,86%
4	Hindu	1	2	3	0.02%
5	Budha	6	9	15	0,09%
6	Other faith	3	1	3	0,02%
Total		8881	8704	17585	100%

Table 2. Religion Follower Data of Temas

According to the data above, Temas has many religious events held each week or month. Temas also has a better religious environment than the other villages in Batu district. *Diba'an*⁸³, *tahlil*⁸⁴, *istighostah*⁸⁵,

⁸¹The data of Demography and Civil Notation Department of Batu, updated on February, 2nd 2016.

⁸²The data of Demography and Civil Notation Department of Batu, updated on February, 2nd 2016.

⁸³Diba'an is weekly agenda which is held by Muslim women on Sunday night. The agenda is conducted by reading diba' book containing prays for Prophet Muhammad (p.b.u.h).

*yasinan*⁸⁶, *sholawat*⁸⁷, *manaaqib*⁸⁸, and *lailatul istima'*⁸⁹ are some of the religious events held in Temas regularly.⁹⁰

Marriage is one of the worships suggested by God and emphasized by the Prophet's command through his hadiths. With marriage, people can achieve closeness with God. The data below shows the number of society that are has married or not.⁹¹

No	Condition	The amount of society			Percentage
		Men	Women	Total	
1	Unmarried	4277	3468	7745	44,04%
2	Married	4360	4449	8809	50,09%
3	Divorce	244	785	4029	25,85%
4	Unknown	0	2	2	0,01%
Total		8881	8704	17585	100%

Table 3. Marriage Data of Temas

⁸⁴Tahlil is one of religious agenda held to pray a person who died. It is held by Muslim man community on Thursday night and Muslim women community on Friday noon and it also includes the weekly agenda.

⁸⁵*Istighâstah* is a prayer agenda intended to pray the help from God

⁸⁶*Yasinanan* is an agenda conducted by reading surah Yasin, and it is held every week.

⁸⁷*Shâlawat* is an agenda held by *Riyadhul Jannah*, the popular group of sholawat in Batu, and it is held every month.

⁸⁸*Manâqib* is a prayer by reading the history of *Waliyyullah*, Syekh Abdu al-Qadir al-Jailani.

⁸⁹*Lailatu al-Istimâ'* is an agenda held every month by reading yellow books, *kutubu al-turats*, and *istighostah*.

⁹⁰Samsul Hadi, *interview* (Temas, February, 6th 2016).

⁹¹The data of Demography and Civil Notation Department of Batu updated on February, 2nd 2016.

c. Educational Conditions

Education is an important aspect of development. Education can bring changes to society in a positive manner. Moreover, education can change the societal paradigm type the globalization era.

The data explains the type of education received, classified by the highest education received.⁹²

No	Information	The amount of society		
		Men	Women	Total
1	No school/yet to attend school	1554	1609	3163
2	Unfinished study of elementary school	1047	1066	2053
3	Elementary School	2174	2214	4388
4	Junior High School	1459	1409	2868
5	Senior High School	1996	1853	3849
6	Diploma I/II	50	69	119
7	Academy/Diploma/Young Scholar	107	89	196
8	Diploma IV/Bachelor's degree	438	431	869
9	Master degree	55	22	77
10	Doctoral degrees	1	2	3
Total		8881	8704	17585

Table 4. Education Data of Temas

Islamic education in Temas village has the highest number. It is proven by the data obtained through an interview with the informants. There are 19 TPQ⁹³. The total of TPQ's students in Temas is 1535 students. The

⁹²The data of Demography and Civil Notation Department of Batu updated on February, 2nd 2016.

⁹³TPQ is The Education Garden of Quran.

total of TPQ's teachers is 140 teachers. The methods used for studying are Tilawati, Yanbu'a, Ummi, Iqro', and Qiroati.⁹⁴

Temas also has some *Islamic* Boarding Schools. The existence of boarding schools can change socio-religious condition. Observe data below⁹⁵:

No	Boarding School	Adress
1	Badiatul Huda	Jl. Oro-oro Ombo Temas
2	Al-Ulya	Jl. Pattimura No 25 Temas
3	Darul Muta'alim	Jl. Wukir Temas
4	Darus Sa'adah	Jl. Wukir Temas

Table 5. Islamic Boarding School Data of Temas

d. Economic Conditions

Many occupations are chosen by Temas society. Different choices are caused by the different of educational background. From the total types of occupations, the most occupations common in Temas society those are trade, entrepreneurship, agriculture, and teacher. See the data below:⁹⁶

⁹⁴Samidi, *interview* (Temas, February, 13th 2016).

⁹⁵Aditya Prasaja, *interview* (Temas, March, 11st 2016), <http://kemenag.batukota.web.id>, accessed February 11th, 2016.

⁹⁶The data of Demography and Civil Notation Department of Batu, updated on February, 2nd 2016.

No	Occupation	Total Person
1	Entrepreneurship	3822
2	Trade	1228
3	Agriculture	706
4	Government Employee	341
5	Teacher and Lecturer	153
6	Driver	56
7	Other	11.279

Table 6. Occupation Data of Temas

2. Modin's Biography

According to Temas society's perspective, a Modin is a person who helps society to manage funerals and marriages in the village. In Temas, a Modin is chosen through discussion among the citizens. By choosing Modin, holding religion agenda carefully with the Modin's help is the hope of society.⁹⁷

The elected Modin in Temas is Samsul Hadi. He was chosen by discussion among scholars. In that discussion, the society chooses two people as the candidates for Modin in Temas village but only one person was ready to be the Modin. Choosing two people was aimed at making it easy to the village to organize both funerals and marriages. With this condition, Samsul Hadi has difficulty to realize the duty to help the society.⁹⁸

⁹⁷Aditya Prasaja, *interview* (Temas, March, 14th, 2016).

⁹⁸Aditya Prasaja, *interview* (Temas, March, 14th, 2016).

Samsul Hadi is a figure which has a good attitude and obeys with the religious rules.⁹⁹ Because of society has chosen him, Samsul Hadi commits to working with fidelity, moreover, he gives total bestowal to execute the job. He wants to be serious in executing the job that has been entrusted to him.¹⁰⁰

The background study and life story of Modin show his spirit to survive with the changeable condition when he was young. Viewing the background study, Samsul Hadi is a man who has the enthusiasm to study. During six years from 1977 until 1983, he studied in Elementary School Number 1 of Teras. After he finished the elementary school, he continued the study to the Junior High School Number 1 of Batu, from 1983 until 1986. After that, Modin continued the study in Senior High School Number 1 of Batu, from 1986 until 1989. Although Modin had passed three levels of education, he wanted to continue the study in Islamic Boarding School to realize his dream. He determined to study in *Lirboyo Islamic Boarding School*, Kediri. This dream had been dreamed when he was young, but it can be realized when he has graduated from the Senior High School. He studied in *Pondok Pesantren Lirboyo* during two years, from 1992 until 1994.¹⁰¹

⁹⁹ Muhammad Zaini, *interview* (Teras, February, 13th 2016).

¹⁰⁰ Samsul Hadi, *interview* (Teras, February, 6th 2016).

¹⁰¹ Samsul Hadi, *interview* (Teras, March. 27th 2016).

3. Informant Descriptions

The informants chosen in this research were the Modin, Temas scholars, Temas chief, and midwife of the Central of Society Health of Temas (*Puskesmas Temas*). Their data is listed below:

No	Name	Age	Occupation	Status
1	Samsul Hadi	45	Farmer	Modin of Temas village
2	Abdul Wahab	38	Religion Figure	Scholar
3	M. Hammam	42	Religion Teacher	Scholar
4	M. Yusuf	44	Farmer	Scholar
5	Abdullah Tahir	54	Seller and Teacher	Chief of Suriah NU Batu and Scholar of Temas village
6	Abdul Mu'in	50	Religion Teacher	Scholar and Head of Badia'atu Huda Boarding School
7	Miftahul Jannah	46	Teacher of PAUD	Scholar
8	Samidi	48	Farmer	Head of LPPTKA-BKPRMI ¹⁰² of Temas
9	M. Zaini	65	Teacher of TPQ	Deputy of Jatman ¹⁰³ Batu
10	Aditya Prasaja	33	Employee	The Chief of Temas
11	Anwari Putri	31	Midwife	Midwife

Table 7. Informants Data

¹⁰²LPPTKA-BKPRMI is an abbreviation of "*Lembaga Pembinaan dan Pengembang TK Al-Qur'an-Badan Komunikasi Remaja Masjid Indonesia*" (Institution Construction and Development of Qur'an's Kindergarten and Corporation of Teens Communication of The Indonesian Mosque).

¹⁰³Jatman is an abbreviation of *Jami'yyah Ahlu at-Tharîqoh al-Mu'tabarrah al-Nahdliyyah* that is one of the Islamic organizations in Indonesia. This organization is led by Habib Lutfi bin Yahya. This organization supported International Conference of Islamic Scholars held on 2015 in Maulana Malik Ibrahim State Islamic University of Malang.

4. The Basic Thought of Modin to Create Marriage Prohibition Policy

In determining the policy, the Modin has reasons classified in two categories:

a. To Prevent Spreading *Mafsadah*

According to the concept of Islamic Law, every *mafsadah* should be prevented and every *mashlahah* should be realized. Related to this concept, Modin gives a statement about his thought in determining the policy through the explanation below:

“Sebenarnya banyak hal mas, kenapa saya putuskan ini, untuk tidak menguruskan orang hamil. Ternyata ternyata banyak mafsadatnya, diantaranya ketika orang hamil dinikahkan, anak hamil berarti ya, maka mereka akan dakwah kepada yang lain. Dia akan mengatakan kepada teman-temannya ‘gak popo aku dulu juga hamil juga dinikahkan’. Nah, apakah dengan buku nikah semua permasalahan selesai?Padahal nggak seperti itu.Kalau ini diteruskan, ndak menutup kemungkinan dalam satu tahun ini anak yang lahir adalah anak yang lahir di luar nikah walaupun ini masalah khilaf, tetapi ketika masalah khilaf, maka kita harus cari yang lebih kuat walaupun ada yang memperbolehkan.Apalagi di dalam Hukum Kompilasi dalam pasal 53 memperbolehkan.Tetapi apa yang dipakai rujukan itu saya ndak tahu.”¹⁰⁴

“In the truth, many aspects are influenced why I have determined this policy with the aim to do not organize pregnant marriage. In reality, the mafsadah obtained is greater. When a pregnant woman is married, they will announce to their friends. They will say ‘it is fine when I am pregnant, I am be married by Modin.’ If this exists, in the range of one year, the children born outside of marriage will be found. When we find controversy, we must find stronger opinion, although there is the rule that permits it. Even, article 53 in the Compilation of Islamic Law permits it. But, I don not know about the basic argument used.”

¹⁰⁴Samsul Hadi, interview (Temas, February 6th, 2016).

b. To Preserve The Lineage

Preserving lineage is also main idea in creating this policy.

Observe the data below:

“Kedua, jika mereka dinikahkan apakah kita yakin, 25 tahun mendatang, ketika anak mereka mau menikah orang tua akan menjelaskan bahwa mereka membuat anak itu ketika belum menikah. Ketika wali tidak bisa menjadi wali, bagaimana hukumnya nanti? Gak sah to pernikahannya. Jika ini diteruskan bagaimana nanti hukumnya? Ini yang saya takutkan. Ini adalah dakwah saya dan saya lebih tenang ketika itu diterapkan disini. Jika mau silahkan tunggu sampai anaknya lahir dulu. Jika tidak silahkan cari Modin di desa lain yang mau menikahkan. Jangankan di kitab besar, di kitab kecil saja *Sulam al-Taufiq* dijelaskan, anak hasil zina boeh dinikahi oleh bapaknya sendiri. Kalau mereka mau menikah silahkan, tapi jangan libatkan saya. Kalau ada ulama yang memperbolehkan nikah siri ya silahkan, karena pernikahan sirri itu biasanya dilakukan oleh orang-orang yang bermasalah. Kadang, pernikahan itu hanya sebagai kedok dan jarang anak belum lahir ditinggalkan, karena pernikahan dilaksanakan bukan karena ibadah karena keterpaksaan.”¹⁰⁵

*“Second, if they are married, do we believe that in 25 years when their children want to marry, the parents will explain clearly that they produce them through illegal sexual activity? Then, when the guardian, (father) cannot be the guardian in marriage, how does the status of the law of marriage? The answer is that marriage is not valid. And if it is continued, it makes me fear. I am more composed when it is applied here. If they want to marry, please wait for the birth of the child. If they do not want to wait for it, please find other Modins who want to marry them in another village. Not only in the big books, but also in the small book, *Sulam al-Taufiq*, explained that child produced by illegal sexual activity is permitted to be married by her father. So that how does the father be a guardian for her? If they want to marry with that condition, do not involve me. If some scholars permit underhand marriage, it does not matter, because that marriage is actually done by people who have the problem. Sometime, marriage is only conducted as legality*

¹⁰⁵Samsul Hadi, interview (Temas, February 6th, 2016)

and often the children are alive before they are born because marriage is conducted with the compulsion, not with the worship."

About reviving way aimed for those who want to marry is the aim in applying the policy. A reviving person is conducted by *mudzâkarah*. Let see the data below:

*"Selain itu, ketika mereka datang ke saya, saya juga ajak mudzkaroh. Dan Alhamdulillah mereka sadar."*¹⁰⁶

"Then, when they come to me, I also invite them to mudzakaroh. And Alhamdulillah, they are aware of it."

The Modin emphasizes arguments above with statement below:

"Ini saya lakukan agar bagaimana temas lebih baik, pergaulan juga terjaga, anak-nak juga lebih terjaga, paling tidak itu jadi menjadi acuan saya. Ayo kita mulai dari sekarang, kalau kita biarkan tidak akan ada selesainya."

"I do it with the aim to make Temas better. Interaction will be preserved, likewise the children. I think that it is my consideration. Let's start from now, if it is permitted, it will be unfinished."

5. The Views of Temas Scholarsto the Policy

The existence of the policy has influenced controversy among scholars in Temas village. In response the policy, Temas scholars provide various opinions which are divided in three groups. All groups have the base foundation to support or to refuse the policy. The different opinion among them is based on

¹⁰⁶Samsul Hadi, interview (Temas, February 6th, 2016)

the *mashlahah* concept in which it is based on *madzâhib al-arb'ah*'s perspective.

a. The Scholars who Support the Policy

The scholars categorized in this part are Muhammad Yusuf and Miftahul Jannah. Observe the data below to know their reasons.

- 1) Reviving society about the importance of preserving lineage, the dangers of free sex, decreasing chance of free sex

In this category, Muhammad Yusuf stated:

“Jadi kebijakan yang beliau ambil sebenarnya adalah untuk pressing untuk menekan supaya masyarakat ini memiliki kepedulian tentang menjaga keaslian sehingga tidak begitu saja mudah membiarkan anaknya terjerumus didalam kemaksiatan yang dikatakan sebagai seks bebas.”¹⁰⁷

“The policy made by Mr. Samsul is not included regulation. The regulation must be written. The policy taken by him is only for pressing in order to make society observe about the preservation of lineage. So that, they will not cultivate their child misguided in an immoral act called as free sex.”

Then, Miftahul Jannah, one of women scholars of Temas who has interviewed by researcher, gives statement supporting the policy. She explains about function of policy as explanation below:

“Mengenai kebijakan pak Samsul saya setuju saja terhadap kebijakan itu, supaya anak-anak tidak sembrono ‘gak nio aku meteng yo dinikahno ae’ (meskipun saya hamil teap dinikahkan

¹⁰⁷Muhammad Yusuf, *interview* (Temas, 6th February, 2016).

kok).Supaya anak-anak tidak ada peluang untuk melakukan perzinaan di luar nikah saya sangat setuju.”¹⁰⁸

“I agree with the policy so that the children do not act authoritatively by saying ‘it is fine, when I got pregnant, I can be married by Modin’. It also aimed to decrease the chance for children to do the illegal sexual activity.”

2) Reviving society about the essence of marriage

By providing statements below given by Muhammad Yusuf, marriage essence which is one of reasons in implementing policy can be known.

“Itu cuma sebagai untuk menakut-nakuti masyarakat bahwa memang itu tidak baik. Memang tidak ada jalan lain bagi pak Samsul untuk bagaimana menekan angka kehamilan diluar nikah yang sudah terlanjur besar seperti ini jadi kita mencoba untuk mengambil sisi positif dari keterbatasan pak Modin yang beliau bagi masyarakat awam adalah rujukan dalam bidang agama dan masyarakat tidak pernah tahu dengan nilai-nilai fiqih. Sehingga, mereka tidak membiarkan anak mereka terjerumus kepada zina.”

“It is only a warning for society in which it is not a good thing. Yes, there are no ways for Mr. Samsul Hadi how to decrease the number of pregnant outside of marriage. So that, in this case, we attempt to take a positive side from the limitedness of Modin who is the source for citizens about the religion cases, and they never know the fiqh values.”

¹⁰⁸Miftahul Jannah, *interview* (Temas, 6th February, 2016).

b. The Scholars who do not Support the Policy

The scholars who do not agree and support the policy are Samidi, Muhammad Zaini, Muhammad Hammam, and Abdul Wahab. The reasons provided can be categorized below:

1) Pregnant marriage is an accident which must be saved

Samidi, the head of LPPTKA-BKPRMI of Temas, provides the statement as explanation below.

“Kebijakan niku kebijakan pak samsul piambek, *wonten sing kontra wonten sing mboten*. Nek wes terlanjur hamil niku, daripada anaknya gak punya ayah lebih baik dinikahkan tapi dengan nikah sirih bukan nikah sah untuk pemerintah. Tapi pak samsul gk mau, katanya pak samsul sendiri, ditakuti kalau nanti ada pertanyaan pertanggungjawaban. Kalau kulo geh, untuk menolong demi kebaikan daripada dicela dimasyarakat. Seperi orang kecelakaan, lebih baik ditolong.”¹⁰⁹

“The policy is Mr. Samsul’s policy. There are controversies among society. If a woman is pregnant, she must be married but by underhand marriage. It is better than the child being born without a father. But Mr. Samsul does not want to do it, he said that he is afraid when he dies, he will get a question about the responsibility. In my opinion, it is better to avoid society’s disgrace. Like an accident, that is better to be helped.”

2) Conducting marriage is intended to cover disgrace

M. Zaini, Deputy of Jatman Batu, gives the comment as explanation below:

¹⁰⁹Samidi, *interview* (Temas, 13th February, 2016).

“Menawi kangge kulo, demi kangge menjaga fitnah di masyarakat, terutama itu. Namanya sudah terlanjur hamil, kalau kita ndak mau menikahkah, nampaknya juga tidak baik. Kalau saya sering, biar ada kedamaian untuk menutup fitnah dari masyarakat. Saya ndak begitu setuju dengan kebijakannya. Ya memang dia takut hukum. Dia takut kalau nanti di sana dituntut, di akhirat.”¹¹⁰

“In my opinion, it is conducted only to reduce slander in society. If we do not want to marry them, it likely provides bad things. In order to cover society’s slander and get peacefulness, I often marry them. I do not agree with his policy. It is right that he is submissive to the law. He is afraid when he will be demanded in the beyond.”

Abdul Wahab, also gives the opinion as the explanation below:

“Kalau masalah nikah, kalau sudah hamil jarang ke pak Modin, karena mereka sudah tahu ditolak, akhirnya mencari alternatif, ya ke kyai-kyai. Kalau saya tetep saya nikahkan kalau di sini untuk meredam masyarakat. Kalau misakan tiga bulan ke bawah saya mau, mislanya sudah terlanjur tiga bulan lebih tetap saya nikahkan, dengan catatan setelah anaknya lahir harus akanikah lagi. Istilahhnya untuk meredam masyarakat karena masyarakat awam untuk pengertin itu gak tau, bukan memperbolehkan. Dan diberi syarat-syarat. Syaratnya tidak boleh kumpul, harus jauh dari daerah ini dan setelah nanti anak lahir, harus kesni, saya nikahkan lagi.”¹¹¹

“In pregnant marriage, if the woman gets pregnant, she rarely does not come to Modin, because, people have known that it will be prohibited. Finally, they find an alternative way by coming to the scholars. But according to me, I will marry them in order to reduce condition in society. If the time of pregnant is under three months I want to marry them. If the time of pregnant is more three months I decide to marry them with one condition. The condition is that after the child has been born they must conduct marriage again. It is conducted to restrain society from the unwanted actions because they do not know about the law of it,

¹¹⁰ Muhammad Zaini, interview (Temas, 13th February, 2016).

¹¹¹ Abdul Wahab, interview (Temas, February, 6th 2016).

and it is not intended to permit. And it is given requirements: they prohibit to live together and must to separate from the village, then after the child is born they must come back here, and I will marry them again."

Moreover, he explains:

"Saya jelaskan dan beri pengertian kepada pak RT dan pak RW, secara hukum syariat nikah ini gak sah, hanya untuk meredam supaya masyarakat tahu, bahwa ini sudah ada ikatan dan siap bertanggungjawab. Intinya adalah ada rasa tanggung jawab. Solusi ini adalahantisipasi dari kebijakan pak samsul. Paling tidak di masyarakat, itu ada rem. Karena untuk saat ini dari pemerintah sendiri tidak ada pencegahan agar anak tidak hamil, seharusnya ada undang-undang yang ketat".¹¹²

"I explain to the stakeholder that according to sharia law the marriage is not legal. This way is only to reduce the conflict so that they know that it has a tie and the man ready to be responsible. This solution is the anticipation for Mr. Samsul's policy. "Because, in this time, there is no the act from the government to protect the child from the pregnancy caused by illegal sexual activity. Properly, there is regulation which regulate the pregnant marriage"

- 3) Permitting pregnant marriage is not to publicate zina, but to realize *mashlahah*

Muhammad Hammam states:

"Saya tidak mendukung kebijakan itu. Karena itu menutup akses dari orang yang bertaubat. Islam tidak begitu dengan kejadian apapun pasti ada hikmah dibalik itu. Orang yang berzina pasti melakukan kesalahan apakah dianggap salah? Menurut saya, melihat dari Imam Syafi'i pun itu adalah boleh dalam keadaan orang itu hamil tapi dengan catatannya adalah

¹¹² Abdul Wahab, *interview* (Temas, February, 6th 2016).

kemashlahatan. Makanya ya itu tadi, dinikahkan dengan orang yang membuahi atau dengan orang yang tidak membuahi. Tapi dengan persyaratan, nasabnya adalah dinasabkan dengan ibunya karena tidak ada akad yang sah.”¹¹³

“I do not support the policy. It closes access for people who want to taubat. Islam does not teach this way, every event has the philosophy. Are people who have done the illegal sexual activity outside of marriage assumed as the wrong man? In my opinion, according to Imam Syafi’I’s opinion, pregnant marriage is permitted when it provides mashlahah. Therefore, as the statement before, she must be married to the man who copulated her or with the man who did not copulate her. With the requirement, the lineage is leaned on the mother because there is no legal contract.”

Moreover, Hammam says that:

“Orang hamil boleh dinikahkan itu karena ada kejadian. Bukan boleh terus digembor gemborkan dan menjadi tradisi bukan itu. Jangan dikategorikan orang yang hamil ini boleh hamil duluan dengan cara dipublikasikan.”¹¹⁴

“The permission of pregnant marriage is caused by the phenomenon. It is not a category of permission which announces to public and it is not tradition. Do not be assumed that it is permitted in order to be announced.”

He also gives affirmation to his statement by supporting article of pregnant marriage in Compilation of Islamic Law:

“Saya mendukung pasal 53 KHI karena ada mashalahat disitu. Terus apakah orang yang hamil itu disingkirkan? Nggak bisa, karena ia itu bagian dari masyarakat dan tetap boleh dinikahkan. Kata-kata boleh itu bukan melegalkan, untuk mencari jalan keluar. Kita harus bisa membedakan antara melegalkan dan mencari jalan keluar. Melegalkan berarti setuju tanpa ada syarat, kalau mencari jalan keluar meskipun itu toh ada

¹¹³ Muhammad Hammam, interview (Temas, 6th February, 2016).

¹¹⁴ Muhammad Hammam, interview (Temas, 6th February, 2016).

larangan, karena yang asalnya dilarang menjadi boleh itu pasti ada jalan keluar.”¹¹⁵

“I support article 53 in the Compilation of Islamic Law because there is mashlahah. So, is the pregnant woman isolated? No, because she is a member of society and she is permitted to marry. The words “permit” in this case is not aimed to give legality, but to find the solution. We have to know the differences between legality and finding a solution. Legality is an agreement without a requirement, while, finding a solution is try to find the way although it is prohibited. Because something in the past is prohibited and in the future is permitted, there is solution”

c. The Middle Group

Abdu Mu'in, Head of Badiatul Huda Boarding School, provides argument as the explanation below:

“Lek menurut kulo, hukume nikah kale tiang sampun hamil niku sah-sah mawon, sing mboten angsal niku nikah kale wanita yang bermasa ‘iddah. Baik itu yang menikahi yang menghamili ataupun orang lain, wonten kitabe teng Kitabun Nikah. Akan tetapi saya setuju dengan kebijakan beliau yang menolak pernikahan wanita hamil, agar mereka tidak sembrono. Pak samsul memang sanjang, pokok wanita yang hamil dia mboten kerso nikahkaken, terus diserahkan teng poro ulama dan poro ustadz gak mau menikahkan. Kalau saya mau menikahkan ketika dimintai, ketika syarat nikah lengkap kalua saya mau saja menikahakn. Nah, solusinya tadi ya itu lari ke para kyai.”¹¹⁶

“In my opinion, the status of marriage between adulteress getting pregnant and men is legal. The prohibition of marriage is a marriage between man and woman who is getting ‘iddah period, although, although the man who will marry the woman is the adulterer or not the adulterer, then it is given to the scholars. This statement will be found in Kitabun Nikah (books of marriage). Exactly, he told me that he does not want to do it. I will marry them

¹¹⁵ Muhammad Hammam, interview (Temas, 6th February, 2016).

¹¹⁶ Muhammad Mun'im, interview (Temas, February, 6th 2016).

when the parents ask me, and when the condition is completed. So that, the solution is marriage through the scholar as mediator”

Abdullah, the Chief of Suriah NU Batu, stated that

*“Wadh’ul hamli yang ada ‘iddahnya itu karena firoq, terus kalau, yang hamil di luar nikah itu gak ada ‘iddahnya. Jadi kalau orang yang hamil diluar nikah harus nunggu lahir saya kira ndak, soalnya gak ada ‘iddahnya. Saya kira ndak papa, bukan memperbolehkan, kira-kira, karena pertimbangan saya kira ndak ada ada ‘iddah Kalau untuk memberikan efek jera, lebih banyak mashalahatnya, jadi orang-orang tiddak sewenang-wenang untuk melakukan itu, ya ndak papa. Kalaumashlahat dan madharatnya kita pertimbangkan, ya wes kita ambil sajalah dar’u al-mafâsid muqoddam alâ jalbi al-mashâlih”.*¹¹⁷

“A Pregnant woman caused by divorce has ‘iddah period, but a pregnant woman caused by illegal sexual activity has not ‘iddah period. Because she does not has ‘iddah period, I think the woman getting pregnant outside of marriage does not wait for the birth of the child. If it is intended to give the lesson for them and get mashlahah, it does not matter. So that, everyone will do not act authoritatively to do. If mashlahah and mafsadah are considered, we take way based on dar’u al-mafâsid muqoddam alâ jalbi al-mashâlih (preventing the harms is more important than taking the benefits)”.

To make the easy in comprehending the data, the writer arranges table below:

¹¹⁷ Abdullah Tahir, *interview* (Batu, 6th February, 2016).

Subject	Ideas/Reasons
The Modin	<ol style="list-style-type: none"> 1. Prevent spreading harm 2. Preserve the lineage of society
The Scholars who Support the Policy	Reviving society about: <ol style="list-style-type: none"> 1. The importance of preserving lineage 2. The essence of marriage 3. The dangers of free sex 4. Decreasing chance of free sex
The Scholars who do not Support the Policy	<ol style="list-style-type: none"> 1. Pregnant marriage is an accident that must be saved 2. Conducting marriage is intended to cover disgrace 3. Permitting marriage is not to publicize <i>zina</i>, but to realize <i>mashlahah</i>
The Middle Scholars	Depend on how people view the policy so that it may bring <i>mafsadah</i> or <i>mashlahah</i>

Table 8. The Opinions of Temas Scholars

6. The Implementation of Policy

Implementing policy is done through several steps. All steps can be conducted if cooperation among society's elements is created. Samsul Hadi, as Modin in Temas has an authority to decide the step that will be passed by people who want to marry. As a consequence, people must obey to his policy.

Samsul Hadi explained that the first step done is publication. It is conducted by announcing in front of public in some routinized events of society. He also explained the step that must be completed by society. See the data below:

“Jadi gini mas, saya mulai memberlakukan ini semenjak awal tahu 2015, persis awal tahun baru. Saat itu saya umumkan ketika ada orang meninggal, karena menurut saya itu tempat yang efektif, dimana

banyak orang berkumpul. Biar orang tua juga tahu. Selain itu saya juga koordinasi kekelurahan dan pak lurah mengatakan terserah ini wilayah jenengan. Selain itu saya juga melakukan pengumuman ini di pengajian-pengajian Muslimat atau jamaah pengajian laki-laki, acara pernikahan, acara kematian juga, dan bahkan face to face, setiap ketemu orang. Tetapi sering saya lakukan di pengajian ibu-ibu karena ibu-ibu cenderung lebih memperhatikan anak-anaknya. Jika mereka datang tanpa membawa surat kehamilan, saya meminta mereka untuk cek kehamilan dulu ke puskesmas. Saya yakin bidan tidak mungkin bohong dalam hal ini. Jika positif saya tolak, baik itu telat seminggu, tiga bulan, enam bulan, atau sehari, tetap saya tolak karena itu perbuatan di luar nikah.”¹¹⁸

“I started to operate the policy at the beginning 2015, precisely on the first date of the year. At that time, I announced it in front of the public at a funeral, because I thought that the time was effective because many parents were coming. Moreover, I hope the public can know about it. Besides, I also confirmed with the village chief. The village chief said that it is my area. I also announced it in agenda of Muslim women and Muslim men, even when I met people I informed them. But, I often announce it in the women agenda, because women have more proneness to attend their children than men. Moreover, I had them to come and check the condition of the uterus to the center of society health. I believe that midwives do not want to lie about this case. If they, pregnant women, come to me without bringing pregnancy evidence, I will reject them, although the age of pregnancy is only seven days, or three months, six months, or even one day”.

The midwife of The Central of Society Health of Temas (*Puskesmas Temas*),

Anwari Putri who contribute in checking pregnant in Temas, also stated:

“Ya memang masyarakat periksa kehamilan di sini, kadang juga di puskesmas sisir. Kan Temas ikut sana. Gini mas, untuk mengetahui kehamilannya itu dari tes kencingnya itu. Kalau memang positif ya kita beri tahu bahwa dia positif hamil. Kenapa se, disini kok pakai surat keterangan seperti itu, takutnya tanggung jawabe Modin yang besar kalau dia menikahkan pas posisi hamil. Kan di desa lain ndak ada.”¹¹⁹

¹¹⁸Samsul Hadi, interview (Temas, February, 6th 2016)

¹¹⁹Anwari Putri, interview (Temas, March, 14th 2016).

“It is true that society checks a pregnancy here, sometimes they also check in The Center of Society Health of Sisir. The pregnancy is known from the result of the urine test. If she gets the positive result we must inform it. The fear of Modin when the marriage is conducted in pregnant condition is the big responsibility. It is the reason using this letter. It only prevails in Temas”.

The chief of Temas village, Aditya Prasaja has given argument about policy's implementation as explanation below:

“Karena Modin ini adalah hasil rembukan masyarakat, ya ini adalah kearifan lokal yang harus kita hargai. Kalau menurut saya ini bukan kebijakan ya, saya cenderung ke prinsip. Ya kita menghargai dengan dasar yang beliau pahami seperti itu, ya monggo, wong gak ono aturane, wong Masyarakat juga mempercayakan kepada pak Samsul. Kita tidak menegur tidak memberi tahu, juga tidak mengiyakan, ini urusan keyakinan. Selama masyarakat tidak menyampaikan keberatan terhadap kebijakannya pak modin, ya kami tidak merespon.”¹²⁰

“Because Modin was chosen by society's agreement, the policy is local wisdom that must be respected. I think that it is not policy, I have inclined that it is the principle. We respect to his basic thought because there is no regulation about it. The Society also entrust it to Mr. Samsul. We do not address them because it is about the faith. If society does not complain toward his policy, we will not give a response.”

Based on the statement of Aditya Prasaja, the policy is local wisdom which must be respected and maintained. If society does not give complain he does not want to advise or address them. Modin also explains about

¹²⁰ Aditya Prasaja, *interview* (Temas, March, 14th 2016).

decreasing the number of pregnant marriage the compared with the year before.

However, he does not explain it clearly.

“Alhamdulillah, setelah saya menerapkan ini saya merasa tenang. Kalau mengenai tentang penurunannya saya ndak tahu persis mas, soalnya saya dulu ndak ngitung. Kalau dikira-kira mungkin menjadi 1 dari 10 orang, yang dulu lebih banyak dari itu tentunya”¹²¹

“Alhamdulillah, after I implement this policy, I feel more composed. About degradation number of it, I do not know clearly, because in the past I did not count it. But, the count in the past is many. If it is predicted the number can be 1 out of 10 people.”

To get the validity of the policy, data of brides and grooms that was prohibited from marrying because of pregnancy caused by illegal sexual activity is shown below. That to be known, in truth, Modin only gives two sets of data, because he wants to keep his promise to the doers that he will not announce it. The name of doer in the data is changed to preserve their disgrace.¹²² See the data below.

¹²¹Samsul Hadi, interview (Temas, February, 6th 2016)

¹²²Samsul Hadi, interview (Temas, February, 16th 2016).

Date	The Couple	Prohibiting Motive
July, 15 th 2016	DS. Born in Malang, 1986. Live in Sukomulyo, Pujon, Malang	Pregnancy certificate from midwife shows the positive result.
	RN. Born in Malang, 1999. Live in Temas, Batu.	
July, 13 th 2016	FM. Born in Malanh, 1986. Live in Bumiaji, Batu.	They do not bring or show pregnancy certificate. ¹²³
	NN. Born in Malang, 1996. Live in Temas village.	

Table 9. Prohibition Marriage Data of Temas

B. Analysis Data

In this part, the policy will be analyzed using the results from interviews with the concept of *madzâhib al-arb'ah* and the *mashlahah* concept of *al-Ghazâli*. It should be noted that this policy prevails for those who want to marry within pregnant.

1. The Basic Thought of Modin in Creating Policy

The prohibition of marriage policy is Modin's idea. Before determining policy, the Modin had observed the Compilation of Islamic Law. Then, the Modin became aware of the regulation inserted in the Compilation of Islamic Law. According to the Modin's statement, permitting marriage in the Compilation of Islamic Law does not provide *mashlahah*. This statement shows

¹²³Until now, they do not come again to Modin. Then, Modin assumes that they have done sexual act outside marriage or they have married by underhand.

that the Modin knew that applying this rule provided harms. After he analyzed the Compilation of Islamic Law regulating pregnant marriage, he concluded that the implementation of the regulation is not in line with the current phenomena in the village. It can be known that Modin's interpretation about Compilation of Islamic Law is assumed as a legalization rule for illegal sexual activity. Besides, his ignorance about the source of Compilation of Islamic Law indicates the doubt toward the sources which are used.

By learning the concept of popular *fiqh*, he gets the answer, in which according to his thought, it has *mashlahah* when it is applied. So that he determined that the policy which is yielded by his effort is assumed as the alternative way to prevent the spread of *mafsadah* in the village. The basic thought of the Modin in determining policy is obtained by observing opinions of scholars who are knowledgeable of with the topic. Then, the Modin learned about the concept of pregnant marriage in *Madzahib al-arba'ah*'s perspective.

The Modin tried to find the way to solve the problem of pregnant marriage by finding stronger arguments. To be certain, all the scholar's opinions have strong arguments taken from the hadiths and *the Quran* which are validated. He also knows the different opinions happening among scholars. But, in this case, stronger arguments purposed in his statement can be learned as the theory that can be applied in current condition. Then, in considering the

policy, he has two arguments which served as basic thoughts to create the policy.

a. Prevent The Spread of *mafsadah*

Mafsadah is anything bringing about the danger to human life which will be disturbed. So that, everything bringing danger must be removed, likewise, pregnant marriage happening in Temas village must be removed or prevented because it has *mafsadah*.

Pregnant marriage is influenced by *zinain* Temas village. It is caused by the changing condition in Batu in which the location of Temas village is near to the town center. Now, Batu City is well-known as famous tourism place in Malang Raya even in East Java. This situation explains the effects for the current conditions. The effect of this condition can be known by the data that the number of free-sex in Temas has risen. It is proven by increasing number of HIV-AIDS in Temas which has the high number in Batu district besides Sisir village. The number of pregnant women getting marriage in Temas is also increased.¹²⁴

According to the Modin's view, this case has influenced *mafsadah* that will make continuous problems that will be hard to stop. This problem made him worried. His fear led him to create the policy in which it is intended to reach the *mashlahah* for Temas society. With this policy

¹²⁴Mr. Samsul Hadi, *interview* (Batu, February 16th, 2016).

prohibiting pregnant marriage, the society's assumption about permission of marriage will be stopped. Many verses in *the Qur'an* prohibit *zina*, like verse below:

وَلَا تَقْرُبُوا الزِّنَا إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا¹²⁵

"All of you do not approach zina. Indeed, zina was obscene and a worsened way"

Prophet Muhammad (p.b.u.h) explained that *zina* is one of the largest sins after worshipping another God besides Allah (SWT) and murdering the child, as explained with the hadith below:

حَدَّثَنَا عَمْرُو بْنُ عَلِيٍّ، حَدَّثَنَا يَحْيَى، حَدَّثَنَا سُفْيَانُ، قَالَ: حَدَّثَنِي مَنْصُورٌ، وَسَلْيَمَانُ، عَنْ أَبِي وَائِلٍ، عَنْ أَبِي مَيْسَرَةَ، عَنْ عَبْدِ اللَّهِ رَضِيَ اللَّهُ عَنْهُ، قَالَ: قُلْتُ: يَا رَسُولَ اللَّهِ، أَيُّ الذَّنْبِ أَعْظَمُ؟ قَالَ: أَنْ تَجْعَلَ لِلَّهِ نِدًّا وَهُوَ خَلَقَكَ قُلْتُ: ثُمَّ أَيُّ؟ قَالَ: أَنْ تَقْتُلَ وَلَدَكَ مِنْ أَجْلِ أَنْ يَطْعَمَ مَعَكَ قُلْتُ: ثُمَّ أَيُّ؟ قَالَ: أَنْ تُزَانِيَ حَلِيلَةَ جَارِكَ. قَالَ يَحْيَى: وَحَدَّثَنَا سُفْيَانُ، حَدَّثَنِي وَاصِلٌ، عَنْ أَبِي وَائِلٍ، عَنْ عَبْدِ اللَّهِ، قُلْتُ: يَا رَسُولَ اللَّهِ، مِثْلُهُ. قَالَ

¹²⁵QS. al-Isrâ' (17): 32.

عَمَرُو: فَذَكَرْتُهُ لِعَبْدِ الرَّحْمَنِ، وَكَانَ حَدَّثَنَا عَنْ سُفْيَانَ، عَنِ الْأَعْمَشِ، وَمَنْصُورٍ، وَوَاصِلٍ
عَنْ أَبِي وَائِلٍ، عَنْ أَبِي مَيْسَرَةَ قَالَ: دَعَا دَعَاهُ (رواه البخاري)¹²⁶

“Umar bin ‘Ali told us, Yahya, told us, Sufyan told us and said: Manshûr and Suliamân told me, from Abu Wâil, from Abu Maysaroh, from Abdullah r.a. who said: I said: Oh prophet, what is the biggest sin? Prophet said: You worship another God besides Allah who create you. Did I say: and then? Prophet said: You murder your child. Did I say: and then? Prophet said: You do zina with your neighbor. Yahya said” Sufyan told us, Wâshil told us, from Abu Wâil, from Abdullâh and said: Oh prophet, the statement is same. Umar said: I mentioned the hadith is for Abdurrahman in which he told us from Sufyan, from A’masy, mâns’hûr, and Wâshil, from Abu Wail, from Abu Maisarah who said: Avoid it” (Narrated by Bukhari)

The hadith above emphasizes about *mafsadah* of *zina*. By including *zina* as a big sin, the worshippers will avoid this act.

With this consideration, the Modin’s effort by creating the policy is the way to enjoin the virtues and forbid the evils. He assumes that it is the situation which constrains him to do the act. No one except himself is entrusted by society to organize and help the marriage administration steps in which it is a good condition providing the renewal condition and changing society’s perspective. Allah explained in *the Qur’an*:

وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَأُولَئِكَ هُمُ

الْمُفْلِحُونَ^{١٢٧}

¹²⁶Muhammad bin Ismaîl bin Abu Abdullah al-Bukhârî, *Shahîh Bukhârî*, (Ed. 7, Beirut: Dar al-Kutub al-Ilmiyyah, 2013), p. 1236.

“Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity”

In this verse, Allah (SWT) commanded his followers to be a person who enjoys virtue and forbids evil. According to this verse, the Modin's effort in preventing *zina* has fulfilled God's command. The Modin became a person who enjoined virtues and prevented *mafsadah*. In the exegesis book, *Tafsîr al-Jâlalain*, the authors stated that the acts are obligated for the learned scholars and not layman. If one of the scholars has made a command, the others do not have a burden.¹²⁸ By doing this command, they will be grouped as lucky people. M. Qurasih Shihab, Indonesian Exegesis's Scholars explained that life is a war between evil and virtue. If there is no one to oppose and confront the earth will be encompassed by evil and cruelty. Then, if evil and cruelty are not opposed, they will be influenced and destroy the human.¹²⁹ According to this opinion, Muslim people have to oppose people who do the damage or the dangers in order to protect the earth from destroying or eclipse in which in this case the destroyers are the adulterers who damaged the moral.

¹²⁷QS. Ali-Imrân (3): 104.

¹²⁸Jalaludiin bin Muhammad bin Ahmad al-Mahalli and Jalaluddin bin Abdur Rahman bin Abi Bakr, *Tafsîr al-Jâlalain*, (Surabaya, Nurul Huda, uk), p. 58.

¹²⁹Aam Abdussalam, “Teori Sosiologi Islam (Kajian Sosiologis Terhadap Konsep-konsep Sosiologi dalam al-Qur'an al-Kaim),” *Ta'lim*, 1 (2014) p. 28.

Prophet Muhammad (p.b.u.h) also commanded through the hadith to enjoy virtues and prevent evils. As has been stated by the hadith:

حَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ، حَدَّثَنَا وَكِيعٌ، عَنْ سُفْيَانَ، وَحَدَّثَنَا مُحَمَّدُ بْنُ الْمُثَنَّى، حَدَّثَنَا مُحَمَّدُ بْنُ جَعْفَرٍ، حَدَّثَنَا شُعْبَةُ كِلَاهُمَا، عَنْ قَيْسِ بْنِ مُسْلِمٍ، عَنْ طَارِقِ بْنِ شِهَابٍ - وَهَذَا حَدِيثُ أَبِي بَكْرٍ - قَالَ: أَوَّلُ مَنْ بَدَأَ بِالْخُطْبَةِ يَوْمَ الْعِيدِ قَبْلَ الصَّلَاةِ مَرْوَانُ. فَقَامَ إِلَيْهِ رَجُلٌ، فَقَالَ: الصَّلَاةُ قَبْلَ الْخُطْبَةِ، فَقَالَ: قَدْ تُرِكَ مَا هُنَالِكَ، فَقَالَ أَبُو سَعِيدٍ: أَمَّا هَذَا فَقَدْ قَضَى مَا عَلَيْهِ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: مَنْ رَأَى مِنْكُمْ مُنْكَرًا فَلْيُغَيِّرْهُ بِيَدِهِ، فَإِنْ لَمْ يَسْتَطِعْ فَبِلِسَانِهِ، فَإِنْ لَمْ يَسْتَطِعْ فَبِقَلْبِهِ، وَذَلِكَ أَضْعَفُ الْإِيمَانِ. (رواه المسلم) ¹³⁰

"Abu Bakar bin Abî Syaibah told us, Waqî' told us, from Sufyan, and Muhammad bin al-Mutsanna us, Muhammad bin Ja'far told us, Syu'bah told us, from Qais and bin Muslim, from Thâriq bin Syihab-This is Abu Bakar's hadith-, Thâriq bin Syihab said: the first person beginning sermon (khotbah) then prayer (shalat) in the feast (eidun) day is Marwân. Then, a man came to him and said: prayer is before the sermon. Thâriq bin Syihab said: It really had been left. Abu Sa'id said: About this case had been determined, I heard Rasulullah (p.b.u.h) said: when one of you sees a bad thing, you must change it by your hand. If you cannot change by your hand, change it by your statement. Then, if you cannot change your statement, change it by your heart and it is the lowest of faith." (Narrated by Muslim)

The hadith explains the steps which must be conducted by followers to confront or oppose evils. The methods used are hand or action, speech or advice, and heart. Using hand or action is conducted when people are not afraid of the dangers that will attack them. Then, when people are afraid they

¹³⁰ Al Imam Muslim bin al-Hajjaj al-Naysaburi, *Shâhih Muslim*, Vol. I, (Ed. 5, Beirut: Dâr al-Kutub al-Ilmiyyah, 2012), p. 46-47.

may use the second method. Using speech is applied by advising in a good way and not using immoral act, like violence. If people are not able to do two methods mentioned above they may choose the last method, which is the heart. With this method, a person is assumed as the weak person who does not have the power to do it in which only his or her heart is able to oppose it by praying for stopping to what is assumed as the evil.¹³¹ The Modin prevents evils by conducting marriage policy. As a result, according to the hadith above his method is categorized as the second method in preventing the *mafsadah*.

b. Preserve The Lineage

Preservation of good lineage is the second thought of Modin to create the policy. With this policy, he wants to make society know about the importance of preservation of lineage. The purity of lineage is the most important to keep, because it has many influences, like the validity of contract marriage, inheritance, and the rights of children.

The fear of Modin is that in several years marriage will not be sacred. According to his opinion, he does not believe that in 25 years later when the children marry parents will explain the clarity of lineage. We never know what is the status of a woman is who will conduct the marriage. We also never know if there are some parents do not explain of the clarity of

¹³¹Amr bin Shâlih bin 'Amr, *Maqâshid as- Syarî'ah inda al-Imâm al- 'Izz bin Abdul al-Salâm*, (Ed. 1st, Oman: Dâr al-Nafâ'is, 2003)p. 318-320.

lineage. If it prevails, the lineage of the child will be not clear, and if it is not prevented it will be influenced by several years later. This opinion indicates that Modin has a view of the future that must be realized started from nowadays to derive good generation.

Allah (SWT) has commanded through the verses in *the Quran* to protect, to preserve, and to save the lineage or progeny.¹³² Moreover, Allah (SWT) has told Maryam as the woman who must preserve the dignity of woman. Maryam is told as the woman who has not touched by the man during her life and she has the child.¹³³ It indicates that Allah (SWT) will provide affection and love to everyone preserve the dignity, men or women.

Learning the guardian in *fiqh* concept, there were long explanations of guardian in marriage. Guardian of women, father (*wali*), is one of the marriage requirements that must be completed. If it is not completed, the marriage contract will be invalid. This opinion is in line with the concept of *Syafi'iyah*,¹³⁴ *Malikiyyah* and *Hanâbilah*. When the contract of marriage is not valid, the status of the child is not clear. It is different with the concept of

¹³²See QS. an-Mu'minûn (23): 5; an-Nûr (24): 30.

¹³³See QS. at-Tahrîm (66): 12.

¹³⁴Muhammad bin Qosim al-Ghazi, *Fathu al-Qarib Fi Syarhi Alfaadzhi al-Taqarib*, (Ed. 1, Jakarta: Dar al-Kutub al-Islamiyyah, 2003), p. 102.

Hanafiyyah scholars who do not determine the guardian as the requirement.¹³⁵

Sometimes, a pregnant woman who cannot carry either shames or disgraces will choose the eloped way. It is not in line with the guardian concept *Syafi'iyah* scholars followed by most of Temas society, because the eloped is conducted without attending the existence of guardian in which the guardian does not know about the marriage. The marriage of pregnant woman caused by *zina* will be validated if there is no a guardian of a woman, unless marriage of pregnant women caused by divorce in which scholars have the different opinion about it.¹³⁶

The clarity of lineage is the most important aspect to be considered in order to produce brilliant future generations. Children who are born from good parents and good lineage will be good people in the future. At that time, this nation needs the generations to change the condition to be better in the future, and it will happen when children are born or produced by parents who have the good lineage. Imam Sayfi'I stated that *zina* is debt. Then, the debt must be paid, likewise, people who have conducted *zina*, their generations also do *zina*. This is not only Modin's dream, as the creator of the policy, to derive the good future and the good life, but also for common

¹³⁵ Abu al-Walid bin Muhammad bin Ahmad bin Muhammad bin Ahmad bin Rusydi, *Syarhu Bidâyah al Mujtahid wa an-Nihâyah al-Muqtashid*, (Kairo: Dâr al-Salâm, 1995), p. 1248.

¹³⁶ The pregnant woman caused by *zina* is included a widow. According to the concept of scholars of *Syafi'iyah*, *Malikiyyah*, and *Hanâbilah*, the widow has right to conduct marriage with guardian's agreement, while *Hanafiyyah* scholars stated that the widow has right to conduct marriage without guardian's agreement.

people who want to make this nation be better in which the nation needs the change in the future.

After explaining the basic thought of the Modin, the next part explains the accordance of his thought with the concept of *madzâhib al-Arba'ah*. From the explanations above it can be known that the arguments used or chosen are not in line with the concept *Hanafiyyah*'s concept and *Syâfi'iyyah*'s concept for marriage between pregnant women caused by *zina* and another man. *Hanafiyyah* permits marriage between them but prohibits sex, so that the lineage can be leaned on the father. While *Syâfi'iyyah* absolutely permits marriage and the sexual relation between them, then the child's lineage follows their father. This opinion is based on *an-Nisâ'* verse 23 and 24 explaining the women prohibited to be married to men. In that verse, prohibiting marriage for pregnant marriage caused by *zina* is not mentioned. As a result, they permit the marriage. Then, the explanation based on Prophet's hadith narrated by *Bukhâri*:

حَدَّثَنَا آدَمُ، حَدَّثَنَا شُعْبَةُ، حَدَّثَنَا مُحَمَّدُ بْنُ زَيْدٍ، قَالَ: سَمِعْتُ أَبَا هُرَيْرَةَ: قَالَ النَّبِيُّ صَلَّى اللَّهُ

عَلَيْهِ وَسَلَّمَ: الْوَلَدُ لِلْفِرَاشِ، وَلِلْعَاهِرِ الْحَجَرُ (رواه البخاري) ^{١٣٧}

¹³⁷ Muhammad bin Isma'il bin Abu Abdullah al-Bukhâri, *Shahîh Bukhâri*, (Ed. 7, Beirut: Dar al-Kutub al-Ilmiyyah, 2013), p. 1236.

“Adam told us, Syu’bah told us, Muhammad bin Ziyâd told us and said: I heard that Abu Hurairah said: Prophet (p.b.u.h) said: The child is for the husband, while for the adulterer is stone”. (Narrated by Bukhâri)

In Hanafiyyah’s perspective, the hadith above explains about sperm produced by *zina*. If the woman doing *zina* is married, the child’s lineage is based on her husband. Otherwise, if she is not married, the child’s lineage is based on the woman. As a consequence, the marriage is permitted.

Syâfi’iyyah’s argument is based on *an-Nûr* verse 32 which explains the command to marry the women who do not have a husband and pregnant women caused by *zina* is included in that category. According to this verse, the marriage between them is permitted. Then, Prophet’s hadith explaining that the forbidden thing does not forbid the allowed thing indicates that *zina* is forbidden, while marriage is allowed. So that, according to the hadith marriage is permitted.

Regarding *mashlahah* concept created by *al-Ghazâlî*, *mashlahah* is the reservation of Islamic law intends by preserving religion, life, intellect, progeny, and property. It is assumed that the concept created by Syâfi’iyyah and Hanafiyyah scholar preserved some of the five aspects above. The permission of marriage between them is aimed to reduce the woman’s burden and prevent disgrace of doers and family, in which it is called as the preservation of life and property. Then, the child's lineage can be covered also although it cannot be based on the father. While, Syâfi’iyyah stated that when the age of pregnancy is

under three months at the time marriage is conducted, the child's lineage can be based on the father. This opinion can be seen as the preservation of progeny or lineage. Moreover, their concept reduces psychology disturbance that will make the disturbed intellect in which it is called as the preservation of life and intelligence.

Viewed by *Malikiyyah's* concept and *Hanâbilah's* concept, the basic thought of the Modin is in accordance with both the concept of marriage between pregnant women caused by *zina* and other men. According to *Hanâbilah's* concept and *Malikiyyah's* concept, prohibition of pregnant marriage caused by *zina* only prevails for marriages conducted between the woman who got pregnant and another man, likewise *Malikiyyah's* concept. As a consequence, the lineage of the child cannot be based on the father who married mother's child.

In *Hanâbilah's* concept and *Malikiyyah's* concept, prohibition of marriage is based on the verse of *the Quran* below:

الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى

الْمُؤْمِنِينَ^{١٣٨}

“Let no man guilty of adultery or fornication marry and but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an Unbeliever marry such a woman: to the Believers, such a thing is forbidden.”

The word *وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ*, according to their opinion, is purposed for people who obey and fith to God. Pregnant women caused by *zina* have broken the God’s rule in which she includes people who break the faith. As a result, the man is prohibited to marry with the woman who breaks the rule of God. It is also based on the prophet’s hadith narrated by Abu Dâwud:

عن أبي مرزوق عن حنش الصنعاني عن رويفع بن ثابت الأنصاري قال سمعت رسول الله صلى الله عليه وسلم يقول يوم حنين قال لا يحل لامرئ يؤمن بالله واليوم الآخر أن يسقي ماءه

زرع غيره (رواه أبو داود)^{١٣٩}

“From Abu Marzuq form Hansy al-Shanâ’iyyi from Ruwaiḥi’ bin Tsâbit who said: I heard prophet (p.b.u.h) who was saying in Hunanin days, he said: who

¹³⁸ QS. an-Nûr (24): 3.

¹³⁹ Abu Dâwud Sulaiman, *Shahîh Sunan Abi Dâwud*, Vol. II, (Ed. 2, Riyadh: Maktabah al-Ma’ârif, 2000), p. 600.

believe Allah (SWT) and the doomsday, let not pour his water to person garden's". (Narrated by Abu Dâwud)

The point obtained from the hadith is the reverence for the owner of sperm. *Malikiyyah* and *Hanâbilah* learn the hadith that when a pregnant woman had been copulated by the man, in which sex influences conception between sperm and ovum, the woman is prohibited to be married to other men. Regarding the conception, the child that will be born is produced by another man. It is a reverence to another owner. Another supporting argument is prophet's hadith narrated by Abu Dâwud which explains copulation between them, in which they interpret marriage as copulation.

حَدَّثَنَا عَمْرُو بْنُ عَوْنٍ، أَخْبَرَنَا شَرِيكٌ، عَنْ قَيْسِ بْنِ وَهَبٍ، عَنْ أَبِي الْوَدَّاءِ، عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ، وَرَفَعَهُ، أَنَّهُ قَالَ فِي سَبَايَا أُوطَاسَ: «لَا تُوطَأُ حَامِلٌ حَتَّى تَضَعَ، وَلَا غَيْرُ ذَاتِ حَمْلٍ حَتَّى تَحِيضَ حَيْضَةً» (رواه أبو داود)¹⁴⁰

"Umar bin 'Aun told us, Syarîk reported us, from Qais bin Wahab, from Abu al-Waddak, from Abu Sa'id al-Khudzriyy and raise it in which he said in Sabâyâ Authâ book: Let no you copulate with a pregnant woman until she has born her child, and let no you copulate a woman until the end of haidh time". (Narrated by Abu Dâwud)

¹⁴⁰ Abu Dâwud, *Shahîh Sunan Abi Dâwud*, p. 600.

Hanâbilah determines *taubat* as another requirement that must be conducted by a pregnant woman before she is married to another man. The prohibition that based on *وَحُرْمٌ ذَلِكَ عَلَى الْمُؤْمِنِينَ*, is prevailed when she has not *taubat* (repented). If she has done *taubat* she is permitted to be married. The hadith narrated by *IbnuMâjah* explained that a person doing *taubat* from the sins like a person who has not the sin.

حَدَّثَنَا أَحْمَدُ بْنُ سَعِيدٍ الدَّارِمِيُّ قَالَ: حَدَّثَنَا مُحَمَّدُ بْنُ عَبْدِ اللَّهِ الرَّقَاشِيُّ قَالَ: حَدَّثَنَا وَهَيْبُ بْنُ خَالِدٍ قَالَ: حَدَّثَنَا مَعْمَرٌ، عَنْ عَبْدِ الْكَرِيمِ، عَنْ أَبِي عُبَيْدَةَ بْنِ عَبْدِ اللَّهِ، عَنْ أَبِيهِ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: التَّائِبُ مِنَ الذَّنْبِ، كَمَنْ لَا ذَنْبَ لَهُ (رواه ابن ماجه) ¹⁴¹

"Ahmad bin Sa'id al-Dârimiy told us who said: Muhammad bin Abdullâh al-Raqâsyiy told us who said: Wuhaib bin Khâlid told us who said: Ma'mar told us, from Abdu al-Karîm, from Abu 'Ubaidah bin Abdullâh, from his father, who said: Prophet (p.b.u.h) said: who repent from the sins like a person who do not have the sin". (Narrated by *IbnuMâjah*)

Moreover, Allah (SWT) commanded it in the *Qur'an* in which it is a strong evidence for *taubat*, as has been stated in *at-Tahrîm* verse 8. If a pregnant woman does not repent from *zina*, she is assumed as a person who has not believed, because *zina* is the act which breaks the norm of the pillar's faith.

¹⁴¹ Abu Abdullâh Muhammad bin Yazid al-Qazwani, *Sunan Ibnu Mâjah*, (Ed. 1, Riyadh: Maktabah al-Ma'ârif, 1997), p. 704.

The term *mudzâkarah* mentioned by Modin can be interpreted as the way to remember philosophies, intents, and *mashlahah* of marriage in which they must be gotten. *Mudzâkarah* can be interpreted as Modin's way to stimulate people in order to guide and bring them to the right way that is Islam values. So that *mudzâkarah* can be mentioned *taubat*. Therefore, the policy is in line with the concept of *Hanâbilah* which stated that a pregnant woman permit to marry when the child is born and she has done *taubat* (repented).

In the perspective of *al-Ghazâli's mashlahah*, the opinion of *Malikiyyah* and *Hanâbilah* fulfills preservation values of the five principles. The permission of marriage will be assumed as the way to cultivate *zina*, to fade the purity lineage or progeny, to change the true function of life, to break the function of intellect, and to change the property function. By prohibiting marriage for the pregnant woman, the suspicion mentioned above will be stopped. Then, about how to preserve religion, it is conducted by doing *mudzâkarah* as *taubat* way which is relevant to the aims of preserving religion as an evidence of committing people to the faith in which it is in line with the opinion of *Hanâbilah*. In brief, only *Hanâbilah's* concept fulfills preservation values of five principles in the perspective of *al-Ghazâli*.

The second case is the marriage between pregnant women and the men who copulate them. Viewing this case, This policy is not in line with the opinion of *madzâhib al-arba'ah's* opinion, because scholars allowed that the

marriage between them is permitted. Prevailing policy for this marriage is an expansion of *Hanâbilah*'s concept prevailed for marriage between a pregnant woman and the man. This is aimed to get *mashlahah*, in which *mashlahah* intended in this case is for Temas soociety.

The concept of preventing *mafsadah* indicates to do acts that can solve the current problem. Although this policy opposes the opinion of scholars, it does not matter because fiqh is changeable rules. According to Modin's thought, if the rule does not be renewed, *zina* will be spread and the clarity of lineage of future generations will be broken. About how the prevailing rules of this marriage are same with the first marriage using *Hanabila*'s concept for marriage between pregnant women caused by *zina* and other men. According to the Modin's thought, that fiqh's concept of *Hanâbilah* is more relevant with the current condition to be applied in reducing global phenomena that is dangers for future generations and the existence of religion. The writer assumes that the policy has fulfilled *mashlahah* concept of *al-Ghâzali*. Although *Hanâbilah*'s concept is only in line with the first case, pregnant marriage between pregnant women and other men, this concept can be expanded to the second case, pregnant marriage between pregnant women and the men who copulated them, in order to get *mashlahah* in the citizens.

Hanâbilah's concept is more relevant to the aims of Islam as the peace religion. Islam is a religion which wants to establish Moslem family in which the members of family are educated people and establish the purity of lineage. It can be created when mothers or wives are educated people with good religion values like attitude. In Islam, the attitude teaches people how to have relation with God, prophet, human, and universe. It must be learned by people for getting good position in front of God. Because a person who has not something, he or she cannot to give something.¹⁴² Allah (SWT) said in *the Quran*, surah *al-Baqarah* verse 223:

نَسَاؤُكُمْ حَرْثٌ لَّكُمْ فَاتَّبِعُوا حَرْثَكُمْ

“Your wife is field, so that come to her wherever you want”

This verse explains that a woman is the field of the man. The plant can grow healthy when the field provides ground with high prosperity, likewise in human. The man must find good field for child's life. He must find a woman with good attitude and good education in order to produce the best generations. The defect of wife causes the defect of society. Finally, society will utter uneducated children with nasty morals. This is that will be created by Modin to repair the collapse of society.

¹⁴²Yahya Abdurrahman al-Khatib, *Fikih Wanita Hamil*, trans. Mujahidin Muhayyan, (Ed. 2, Jakarta: Qisthi Press, 2008), 103.

Viewed by sociological aspect, although the policy is not included the tied law, it has some functions. In the sociological perspective, one of its functions is that law is the social engineer in which the law is aimed to organize society. By organizing, the problem or the phenomena happening in the community will be regulated carefully. In this case, the pregnant marriage made confused society's perspective about its law, in which it must be organized or regulated well. So that different opinions among people in Temas village will be reduced and finished well. See the diagram below.

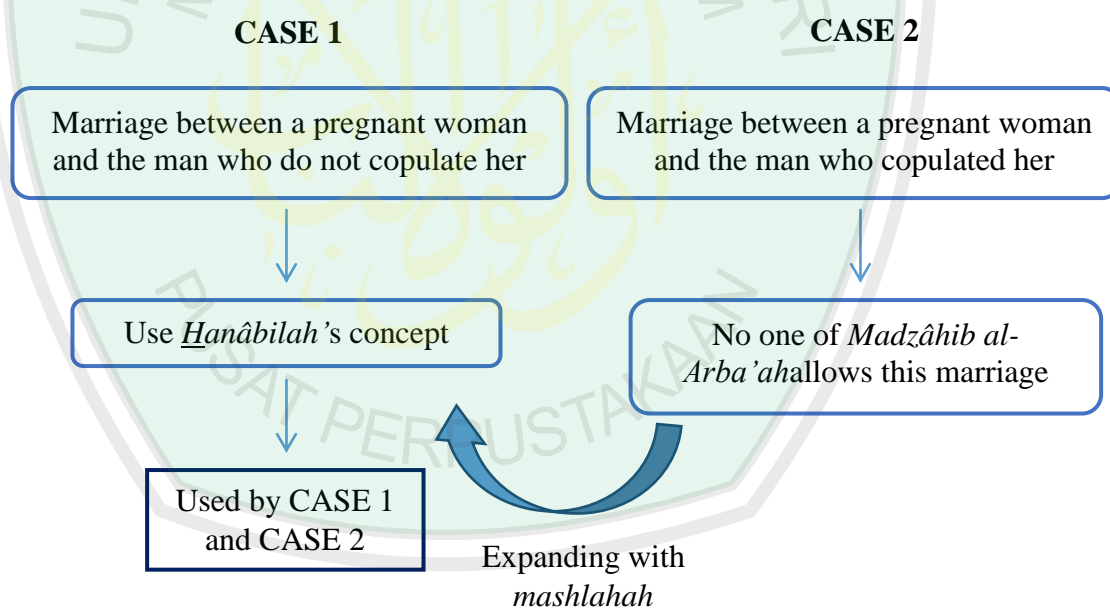


Table 10. Modin's Thought

2. The View of Temas Scholars to the Policy

The result of interviews with scholars shows that there are three groups: group supporting policy, the group not supporting policy, and the middle group. Each group bases their view on the *madzâhib al-arb'ah*. Their opinion provides the explanation of *mashlahah*. Some of them also give solutions to confront the policy. In this case, it will be explained by the perspective *madzâhib al-arba'ah* and concept of *al-Ghazâli's mashlahah*.

a. The Scholars who Support the Policy

This group consists of two persons: Miftahul Jannah and Muhammad Yusuf. They agreed to support Modin's opinion which prohibits pregnant marriage. Their opinion in supporting policy is similar to Modin's opinion based on *mashlahah*. Modin stated that the policy was created as a realization of his fear with the spread of *mafsadah* and the unclear lineage or progeny. According to their opinions, the policy has other values in which it is intended to open society's minds, because until nowadays many parents assume pregnant marriage is the final way to finish the problem.

After analyzing the data, the writer obtains four points of reasons stated by the scholars in supporting the policy

1) Reviving society about the importance of preserving lineage

The problem happening in Temas village in the current time, as has been explained by Muhammad Yusuf, is that society does not know

about the *fiqh* values. The society does not care about the *fiqh* values which are must be obeyed as *Muslim*'s obligation when they are doing religion's command. They only know when a woman is pregnant she must be married. With rising policy, they will know the important of preserving lineage or progeny.

2) Reviving society about the essence of marriage

Marriage is the pure tie which must be realized by the right way. The Compilation of Islamic Law explained in article 2 that marriage in Islamic law is the strong contract (*mîtsâqan ghâlidhân*) in obeying God's command and implementing the worship. Then, in article 3 explained that marriage is intended to realize *sakînah* (peaceful), *mawaddah* (friendship), and *rahmah* (love) in the family. Achieving the values should be reached by the right way. As a consequence, people have duties to protect and preserve themselves from evils or *mafsadah* which bring to the lust and the sin.

3) Reviving society, particularly teenagers and youths, about the dangers of free sex

Today, the youth phenomena are more apprehensive. Many problems are experienced by youths, such as the free of social intercourse, the use of illegal drugs, and the spread of free-sex. Those cases are caused by their anxious with the new something in which they

only attempt to do it. These phenomena are caused by their emotional which is not stable. On one side, they only want to reach either satisfaction or desire. On the other side, they do not think neither the future effect nor the *mashlahah*.

With this policy, the Modin attempts to explain people the story of rising policy. The background of rising this policy provides illustration and history about the damage of generations which is caused by free sex, not only for health but also for morals, intellect, and others. Finally, people can learn how the policy emerges and know that the intents of rising policy are to prevent free sex phenomenon.

4) Decreasing chance of illegal sexual activity

This policy can be the alternative way to prevent the free sex in Temas village. By applying this policy, the parents will be protectors for their children from the illegal sexual activity. As a result, the spread of illegal sexual activity will be more pressed by the parent's role.

Applying policy by using the concept of *Hanâbilah* provides different views. According to opinions of scholars who support the policy, *fiqh* of *Hanâbilah* provides more *mashlahah*. Using *Hanâbilah's* *fiqh* to this case will revive and inform people that there is a rule of *fiqh* prohibiting premarital marriage. So that, they cannot assume that premarital marriage is a final way to finish or stop the problem, and they cannot assume that sexual act is a habit happening in the current era. Related with *zina*, many aspects must

be finished or organized such as about guardian, inheritance, and rights. This concept does not only prevail for marriage between pregnant women outside of marriage and the man who did not copulate her, but it prevails for marriage between the pregnant woman and the men.

According to Imam Ghazali's *mashlahah*, the writer assumes that *hifdzu an-nasl* is the most important value which must be realized besides preserving religion, life, intellect, and property. Preserving lineage or progeny is one of religion command that must be realized as has been explained in *the Quran* and *the Sunnah*. By preserving lineage other preservation can be held. A person who want to get good generations, they must obey with religion rules, in which reaching it can be realized by keeping morals which are in line with Islamic attitude. Then, Islamic attitude teaches people to obey with the prevailed norms, keep life in order to get peacefulness, keep intellect from its abusing, preserve from immoral acts, and utilize the property in good ways. So that keeping moral contains the five principles: preserving religion, life, intellect, progeny, and property.

Implementing the five principles can be realized as explanation below. *Hifdzu al-din* can be known from realizing God command to avoid and repent from the immoral acts. *Hifdzu an-nafs* and *al-'aql* can be known by understanding the effect of free-sex. If the purity of lineage is not preserved, life and intellect will be broken. Burdens or other psychological tensions will be experienced by doers and their generations, likewise with the intellect.

Producing good lineage must be yielded from the legal or the allowed way, because anything which is yielded by the forbidden way it will give bad effect to the body, even less life, and intellect. Then, *Hifdzu al-mâl* is intended for people to utilize the property in the right way, not in the wrong way, now that there are many places which provide patronizing prostitutions with the lowest cost and it is easy to reach.

The unimplemented policy may cause many problems, like eloped, abortion, and spread of *zina* causing the spread of HIV-AIDS diseases. Happening abortion is often caused by *zina*, likewise HIV-AIDS diseases. As has been stated by Dr. R. Wilcock, avoiding *zina* totality is the effective solution to prevent the Syphilis that is one of sex diseases. Moreover, Dr. Hoffland stated that the disease which threat and bring human to the death is sex disease caused by sexual exploitation. Because of the danger of this disease, James Page through his research suggesting to teenagers to protect themselves by building good moral that is in line with religion norms which prohibit the act causing dangers for the followers.¹⁴³ It is relevant to phenomena happening in the current time that many teenagers are experienced decreasing moral and free sex. Moreover, many of them have not completed the age of marriage.

¹⁴³Fadhel Ilahi, *Zina: Problematika dan Solusinya*, trans. Subhan Nur, (Ed. 2, Jakarta: Qisthi Press, 2006), p. 48-49.

The effect of *zina* can influence the psychology of doers. When they have done *zina*, the faith in their heart is empty even their pray will not be accepted by God.¹⁴⁴ This is one of the effects that will be achieved because of their acts. Indeed, with this consideration, the Modin attempts to prevent *zinawhich* is the way of happening pregnant marriage by determining the concept of *Hanâbilah*.

b. The Scholars who do not Support the Policy

Samidi, Muhammad Zaini, Muhammad Hammam, and Abdul Wahab are scholars who do not agree and support the policy. Their disapproval of the policy is caused by different view used to respond pregnant marriage phenomena. Their reasons are categorized in three categories below.

1) Pregnant marriage is an accident which must be saved

According to Samidi's opinion, Samidi suggested conducting marriage although it is conducted through underhand marriage. Conducting marriage is aimed to protect the child in which by marriage the child will have the father that will protects him.

A pregnant happening outside of marriage is an accident that must be helped. The help is aimed to avoid society's reproaches. It is relevant with God's command that every person should be competed in enjoining

¹⁴⁴Fadhel Ilahi, *Zina*, p. 34.

virtues. Moreover, Zaini stated that it is also aimed to create peacefulness conditions in the community.

In competing virtues, Samidi has the different view with Modin's opinion. Samidi explained that helping their marriage is a virtue preserving them from society's slanders and reproaches. The Modin explained that competition in virtues is realized by preventing or prohibiting marriage between them in which marriage brings *mafsadah* for society. So that, the interpretation between Modin and Samidi to the verse 3 surah an-Nisa' is based on the different view in which their interpretation is assumed as the right answer according to their self.

In this case, the command purposed to compete in virtues has two probabilities. First, prohibiting pregnant marriage can be assumed as a virtue in which the Modin follow this type. Second, permitting pregnant marriage also can be assumed as a virtue in which Samidi who do not support the policy follows this type. All interpretations are right, but the best interpretation is interpretation which has big *mashlahah* value that can be known by implementing each opinion. So that, based on the explanations above, fulfilling God's command in competing virtues is realized by helping them through marriage.

- 2) Conducting marriage is intended to cover disgrace of women, children, their family

In this case, the scholars not supporting the policy states that disgrace of women and children will be saved by permitting marriage. Viewing the rule allowing this marriage, the Act Number 1 of 1974 about Marriage and the Compilation of Islamic Law provide articles indicating chances for people to do pregnant marriage by using *mashlahah* as the reason of applying these rules.

With covering disgrace, slanders or reproaches of society also will be reduced. Many people will assume in negative opinion when there is a woman in pregnant condition but she has not married with the man. Covering disgrace by conducting marriage will make peacefulness conditions in society.

Hamam and Abdul Wahab provides the same opinion that the marriage is to reduce disgrace or reproach. In permitting pregnant marriage Wahab, additionally, provides requirements.

- a) After they have conducted the marriage, they must be separated in the different area. Marriage purpose in this case in underhand marriage through village scholars.
- b) Then, they must come back to this village in order to marry again. The second marriage is conducted through the employee of KUA, i.e. legal marriage.

The writer assumes that this solution is not aimed to give them liberty, but it is only to illustrate that as the citizen they have rights to conduct marriage as has been noted in regulations. On the other side, the solutions are to revive them that they have broken Gods' rules which must be obeyed. Because the God's rules containing prohibition must be obeyed or realized by people constantly.

As the concept of *Syâfi'iyah*, conducting marriage is intended to cover disgrace in which it is categorized as *sunnah* of the prophet which is better to do. By covering disgrace, burden of the doers or the family will be reduced. Moreover, Wahab stated that its realization is conducted by explaining to the stakeholder in the village. Certainly, conducting marriage is aimed to reduce controversy among society and inform to society that the man who marry a pregnant woman will be the responsible person. Based on the explanation, what is offered by Abdul Wahab is relevant with *Syâfi'iyah*'s concept giving for preserving the lineage of the child. It is the point of *Syâfi'iyah*'s thought. The lineage is the prominent aspect to be saved and protected in order to give the rights that should be obtained by the child.

3) Permitting pregnant marriage is not to publicize *zina*, but to realize *mashlahah*

Hamman stated that prohibiting pregnant marriage is closing access to *taubat*, whereas every event has the philosophy. On the other side, human always try to recover their life. He uses the concept of *Syâfi'iyah* which permits marriage in which conducting marriage contains *mashlahah*. Hamman provides rebuttal toward reason of Modin and scholars who support the policy.

Pregnant marriage is permitted because of an event or accident, as has been stated by Hamman. Can be assumed that permitting marriage is not to publicize *zina*, but it is only to keep human and their progeny. It indicates the command to avoid an assumption of marriage which is assumed as publication access and custom. Hamman also explained about his support for article 53 of the Compilation of Islamic Law regulating pregnant marriage in which according to his opinion this regulation has *mashlahah*. Word “permit” in the regulation means finding the solution not giving legalization. Permitting marriage in the Compilation of Islamic Law can be assumed as a solution to confront the current phenomena.

According to the explanation above, permitting marriage between the pregnant woman and the man copulating her by them is in line with the opinion of *madzâhib al-arb'ah*. Conducting marriage between a pregnant

woman and another man who did not copulate her, on one side it is in line with the opinion of *Hanafiyyah* and *Syâfi'iyyah* for. On the other side, it is not in line with the opinion of *Malikiyyah* and *Hanâbilah*.

Fiqh of *Syâfi'iyyah* is chosen as the base foundation used in viewing the policy by this group. In the *Quran*, there is no verse commanding to prohibit marriage with pregnant women caused by zina in which it is the basic thought of *Syâfi'iyyah*. Observe the verse below.

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُعْطِهِمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ^{١٤٥}

“Marry those among you who are single, or the virtuous ones among yourselves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasseth all, and he knoweth all things.”

By observing that verse, according to *Syâfi'iyyah*'s opinion, the *Quran* commanded, i.e. allowed, people to marry with women with single status. The pregnant woman caused by illegal sexual activity is included as the single woman because she had not married with the legal way. Then, the status of the woman who conducted *zina* is same with women who did not conduct *zina*. They do not have *'iddah* period, although they are pregnant or

¹⁴⁵QS. an-Nûr (24): 32.

not. This consideration does not provide legalization for *zina*, but it indicates protection for pregnant women and their child.

Syâfi'iyah's opinion providing *mashlahah* is more relevant to be applied in that condition. *Syâfi'iyah* stated that marriage between a pregnant woman and the man copulating her or not is permissible. If marriage is conducted when the time of pregnancy is under three months, the lineage of the child can be leaned on the man who marries her, although he is the man who copulated her or not. Covering disgrace is another *mashlahah* value of *Syâfi'iyah*. It is aimed for the doers and the doer's family. According to the concept of Islamic attitude, covering disgrace is a realization of prophet's command. As has been narrated by *Tirmîdî*:

حَدَّثَنَا أَحْمَدُ بْنُ مُحَمَّدٍ قَالَ: أَخْبَرَنَا ابْنُ الْمُبَارَكِ، عَنْ أَبِي بَكْرِ التَّهْشَلِيِّ، عَنْ مَرْزُوقِ أَبِي بَكْرٍ التَّيْمِيِّ، عَنْ أُمِّ الدَّرْدَاءِ، عَنْ أَبِي الدَّرْدَاءِ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: مَنْ رَدَّ عَنْ عَرَضِ أَخِيهِ رَدَّ اللَّهُ عَنْ وَجْهِهِ النَّارَ يَوْمَ الْقِيَامَةِ. وَفِي الْبَابِ عَنْ أَسْمَاءَ بِنْتِ يَزِيدَ: هَذَا حَدِيثٌ حَسَنٌ^{١٤٦}

"Ahmad bin Muhammad told us and said: Ibnu al-Mubarrak reported us, from Abu Bakar al-Nahsyaliyyi, from Marzûq Abu Bakar al-Taymiyyi, from Ummu ad-Dardâ, from the prophet (p.b.u.h) who said: who preserve dis, Allah (SWT) will preserve to his face from the hell in the doomsday. In a chapter explaining Asma' binti Yazid: this hadith is Hasan level". (Narrated by *Tirmîdî*)

¹⁴⁶Muhammad bin Isa bin Sûroh bin Mûsa bin ad-Dlohâk at-Tirmîdî, *al-Jâmi'u al-Kabîr*, Vol. III (Ed. 1, Beirut: Dâr al-Gharbi al-Islâmi, 1996), p. 488.

The hadith above explains that who cover disgrace of people, Allah will cover themselves from the hell. So that, covering disgrace is one of god commands that is better to do. Moreover, Allah (SWT) explained in *the Qur'an* in surah *at-Tahrîm* verse 3:

وَإِذْ أَسَرَّ النَّبِيُّ إِلَىٰ بَعْضِ أَزْوَاجِهِ حَدِيثًا فَلَمَّا نَبَّأَتْ بِهِ وَأَظْهَرَهُ اللَّهُ عَلَيْهِ عَرَفَ بَعْضُهُ وَأَعْرَضَ
عَنْ بَعْضٍ فَلَمَّا نَبَّأَهَا بِهِ قَالَتْ مَنْ أَنْبَأَكَ هَذَا قَالَ نَبَّأَنِيَ الْعَلِيمُ الْخَبِيرُ^{١٤٧}

"When the Prophet (p.b.u.h) disclosed a matter in confidence to one of his consorts, and she then divulged it (to another), and Allah made it known to him, he confirmed part thereof and repudiated a part. Then when he told her thereof, she said, "Who told you this?" He said, "He told me Who knows and is well-acquainted (with all things)."

The concept of *Syâfi'iyyah* is tighter. Permitting marriage is conducted to punish the men., because most of the men are not be responsible when they have conducted *zina*. They do not want to guarantee burden, whereas they have done the act. They think that the effect is caused by woman's carelessness in which a woman cannot able to protect themselves. As a consequence, many marriages are conducted as the imposition for the men to show their responsibility. Moreover, properties and what the man has can be utilized in the right way to finance woman and child. Then, the women's burden can be reduced by this marriage. It is the difference with

¹⁴⁷QS. at-Tahrîm (66): 3.

Hanâbilah's concept that leans child's lineage to the father and permits marriage after the birth of the child in which it may give more burden for the woman and child.

In the verse above, Allah gives an example by illustrating prophet's life. Prophet Muhammad (p.b.u.h.) has given an example for us to cover or protect disgrace although it comes from the family.

The dangers will be derived when the marriage is not conducted. It likely provides the effect influencing woman psychological, even influencing children's development further. Entringer and Leung stated, based on their research, when a pregnant woman feels fear, anxious, confused, and other emotional, it may influence psychological changes influencing fetus conditions. In this condition, woman can do deviate acts like decreasing treatment to the fetus before the birth period.¹⁴⁸ Sometimes, a woman getting more burdens, she likely will choose the way which has bigger *mafsadah*, like eloped.

Taige and friends stated that during pregnant the higher anxious can influence pregnant in further. The effect obtained is the child who is born may have the problem of emotional and cognitive, attention deficit hyperactivity

¹⁴⁸John W. Santrock, *Perkembangan Masa Hidup*, trans. Benedicine Wisdayasitna, (Ed. 13, Jakarta: Penerbit Erlangga, 2011), p. 103.

disorders, and the late of languages.¹⁴⁹ Moreover, Diego and friends through their research stated that maternal depression gotten by a woman when she is pregnant may influence growing of fetus or cause the premature birth.¹⁵⁰

To preserve the child from the dangers, marriage can be assumed as marriage containing *mashlahah*. As has been explained by Muhammad Hammam, marriage is permitted when it contains *mashlahah*.¹⁵¹ Moreover, it is conducted to abolish the unconfident of the woman. Sometime, they assume that they are not purified woman and feel that they do not have not self-esteem. Although it is right, but if marriage is conducted it will change woman's perspective.

With the opinion of *Syâfi'iyah*, conducting pregnant has bigger *mashlahah* than *mafsadah*. Dereliction right of woman and child is more important that must be preserved than others. If marriage is prohibited as the barricade of spreading *zina*, it is possible happening abortion, secuide, and other emotional effects.

c. The Middle Group

Scholars including this group do not give endorsement and rejection.

Abdullah Thahir, the chief of Suriah NU Batu, and Abdul Mu'in, the head of

¹⁴⁹Santrock, *Perkembangan Masa Hidup*, p. 103.

¹⁵⁰Santrock, *Perkembangan Masa Hidup*, p. 103.

¹⁵¹Muhammad Hammam, *interview* (Temas, February, 6th 2016).

Badi'atul Huda Boarding School, are the scholars who provided the non-block opinions.

Abdullah Thahir stated that a pregnant woman caused by *zina* is categorized as a woman who does not have 'iddah period in which it indicates permitting marriage between them. It is relevant to the opinion of *Hanafiyyah* and *Syâfi'iyah*. Likewise Abdul Mu'in, head of Badi'atul Huda boarding school, who supports pregnant marriage between them which is based on *Kitâb an-Nikâh* explaining the rule in which he follows the opinion of *Hanafiyyah* and *Syâfi'iyah*. It is the indication of his knowledge and comprehension to a phenomenon. On the other hand, Mu'in provides the agreement for the policy made by Modin in which he stated that it is conducted to revive them to be careful in doing what is commanded by God and prophet. The carefulness purposed, in this case, is to avoid *zina* or other illegal sexual activity. The opinions above are relevant with the opinion of *Malikiyyah* and *Hanâbilah* scholars.

Abdullah Thahir also supports conducting marriage by waiting for the birth of a child. According to his opinion, it is permitted when there is *mashlahah*. Giving punishment for them is to make them more careful to do what is commanded by God and prophet. The consideration of this case is *mashlahah*. When this case is viewed from *mashlahah*, Abdullah Thahir explained by using *qâidah fihiyyah* below.

دَرْءُ الْمَفَاسِدِ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ

"Preventing harms (mafsadah) is more important than obtaining benefits (mashlahah)".

He assumed that anything always has *mashlahah* and *mafsadah*. It is depended on the view which is used by people. According to his opinion, viewed from the origin of marriage intents, conducting marriage is aimed to realize *the Sunnah*. Marriage is conducted to protect the man or the woman from the uncontrolled lust. Marriage is a legal way to fulfill sexual importance of human. By marriage people able to control the lust and keep the eye from women who are prohibited to looked. So that, one of the philosophies of marriage is that preserve human from *zina*.¹⁵² It is in line with hadith of Prophet Muhammad SAW.

حَدَّثَنَا عَبْدَانُ، عَنْ أَبِي حَمْزَةَ، عَنِ الْأَعْمَشِ، عَنْ إِبْرَاهِيمَ، عَنْ عَلْقَمَةَ، قَالَ: بَيْنَا أَنَا أُمَشْيِي، مَعَ عَبْدِ اللَّهِ رَضِيَ اللَّهُ عَنْهُ، فَقَالَ: كُنَّا مَعَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقَالَ: مَنْ اسْتَطَاعَ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغْضُ لِلْبَصَرِ، وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وَجَاءٌ (رواه الجماعة)^{١٥٣}

"Abdan told us, from Abu Hamzah, from al-A'masy, from Ibrahim, from 'Alqamah who said: when I went with Abdullâah r.a. he said: I was joint with the prophet (p.b.u.h) and he said: who capable of marrying so let he marry,

¹⁵²Dahlan, *Filsafat Hukum*, p. 149; Sayyid Sabiq, *Fiqh al-Sunnah*, Vol. II (Beirut: Al-Maktabah al-Ashriyyah, 2012), p. 11.

¹⁵³Al-Bukhâri, *Shahîh Bukhâri*, p. 345

because marriage is that bow eyes and keep sex desire, and who is not capable of marrying, let they fast because it is a need". (Narrated by al-Jamâ'ah)

If marriage is conducted when a woman is pregnant, is marriage philosophy can realize God's command or reject God's command? This is the point of the *qâidah* containing human beings to choose anything which is suitable for their life. So that, it cannot yield a burden for their life, in the world and the hereafter. The point gotten from *Hanafiyyah* and *Syâfi'iyyah* concept is that conducting pregnant marriage is a punishment to the doers that they have burdens or obligations that must be fulfilled and completed. Another argument, according to *Malikiyyah* and *Hanâbilah* scholars, pregnant marriage is prohibited. This opinion can be learned as the way to reduce the spread of free sex in the village. Finally, according to Abdullah Thahir's opinion, permitting or prohibiting marriage is based on where we view the policy by using *madzâhib al-arb'ah's* concept and *mashlahah* concept of *al-Ghazâli*.

Abdul Mu'in explains the solution of implementing policy. Mu'in states that the Modin permitted doing underhand marriage in which he can conduct that marriage with his position in the village as the *scholars* believed by society, but the Modin does not want to involve for conducting the underhand marriage. Mu'in assumed that the Modin does not prohibit them when they want to marry throughout other people who want to marry them. It

can be learned that there is a chance to do underhand marriage. According to Compilation of Islamic Law, it can be mentioned as the legal marriage in which the rule acknowledges it when marriage has fulfilled requirements. It is what is mentioned as the solutions by Abdul Mu'in to confront the policy.

That different opinion among scholars existing until now is normal. One group may assume that anything is good, but another group may assume that anything is the danger. Actually, the different opinion among scholars has *mashlahah* values. The opinion produced by scholars is also intended to get *mashlahah* for human, moreover to conduct God's command. Applying scholar opinions of *Hanafiyyah*, *Malikiyyah*, *Syâfi'iyah*, and *Hanâbilah*, other scholars can be applied appropriately with the condition. So that, the different opinions about this policy among 'scholars is normal. Fiqh is a product of scholars' *ijtihad*. While, *Ijtihad* uses intellect to get a good result. Then, intellect is part of human beings which has superiority and infirmity. So that, the result of *fiqh* is right, but it also contains wrong probability, or the result of *fiqh* is wrong, but it also contains right probability. In the perspective of scholars, the dominant result is rightness. Based on the explanations above, we can get the point that in determining opinion the scholar intends to derive the *mashlahah*, but they have different way or method or media used. The table below will show and guide the reader to learn this part.

The Scholars who Support the Policy	The Scholars who do not Support the Policy	The Middle Group
Use <i>Fiqh</i> of <i>Hanâbilah</i> and its expanding with <i>mashlahah</i>	Use <i>Fiqh</i> of <i>Syâfi'iyyah</i>	Use all opinions of <i>madzâhib al-arba'ah</i> connected with <i>mashlahah</i>
↓	↓	↓
Intent to reach the five principles <i>al-Ghâzali</i> : preserving religion(<i>al-dîn</i>), life(<i>al-nafs</i>), intellect(<i>al'aql</i>), progeny(<i>al-nasl</i>), and property(<i>al-maâl</i>)		

Table 11. The Relation between *Fiqh* and *Mashlahah* in Scholar's Opinion

3. The Implementation of the Policy

As has been explained by Modin, the policy is declared in the beginning 2015. He declared in the public when the funeral ceremony was conducted. He assumed that the time was effective for the announcement because there were people attending in the agenda. So that, since the time, the policy has prevailed for Temas society. Moreover, the Modin still continue publication of the policy through several agenda in the village. The steps used by Modin to announce the policy are:

a. Public Announcement

This step is conducted by announcing in front of public. This step is the first step which is conducted in the funeral agenda. Moreover, Muslim agenda or events are other fields to announce the policy, like *tahlil*, *yasinan*, *istighotsah*, *manaqib*, etc., which are held in the village every week or month. The writer assumes that choosing this way is an effective

way because there are people collected in one place. It is aimed to make society know the current condition that is very critical.

b. Individual Communication

This step is conducted when the Modin meets people everywhere. It is a form of reviving people about the responsibility as the parent to their child and youths to keep their self from the immoral acts and the spread of free sex.

The Modin suggested to the community to bring the pregnant certificate that can be gotten from the midwife, doctor, Center of Public Health (*Puskesmas*), and hospital. The Modin gives them liberty in checking pregnant wherever they want. It is an evidence of pregnant in women. If they do not bring it, the Modin will reject them in submitting marriage, in which they need help of the Modin. Because the pregnant certificate is a requirement which must be completed.

The modin also reported to the chief of the village before he announced the policy in order to get approval. So that the policy has a power and the policy can be accepted by society. According to Aditya's opinion, the chief of Temas village, the policy is local wisdom. Aditya assumes that the policy is a local wisdom which must be preserved. The local wisdom comes from society and it prevails for society too. Although scholars had debated the policy, it must be preserved. Moreover, society enjoys the policy and do not give complain now that they believe that the Modin is a person chosen by

them which has good figure and attitude. The Midwife, Anwari Putri who contributes to check a pregnant in Teras, also stated that, by her knowing about the policy, it is unbearable for her to give the counterfeit pregnant certificate.

The contribution of the village chief and the midwife indicates their roles for implementing policy in the village. Without cooperation among the Modin, the midwife, and the village chief, the policy can not be applied completely. The Modin has an obligation to announce it, the chief of the village has an obligation to preserve it and keep stability in the village, and midwife has an obligation to help the woman who wants to check pregnant. If this policy can reduce phenomenon, this policy will be more preserved by village staff, even government. The reduction number of pregnant women caused by *zina* is only an assumption. If it is predicted, the count can be illustrated be 1 of 10 persons. Based on the explanation above, the writer arranges table how the policy is implemented in Teras.

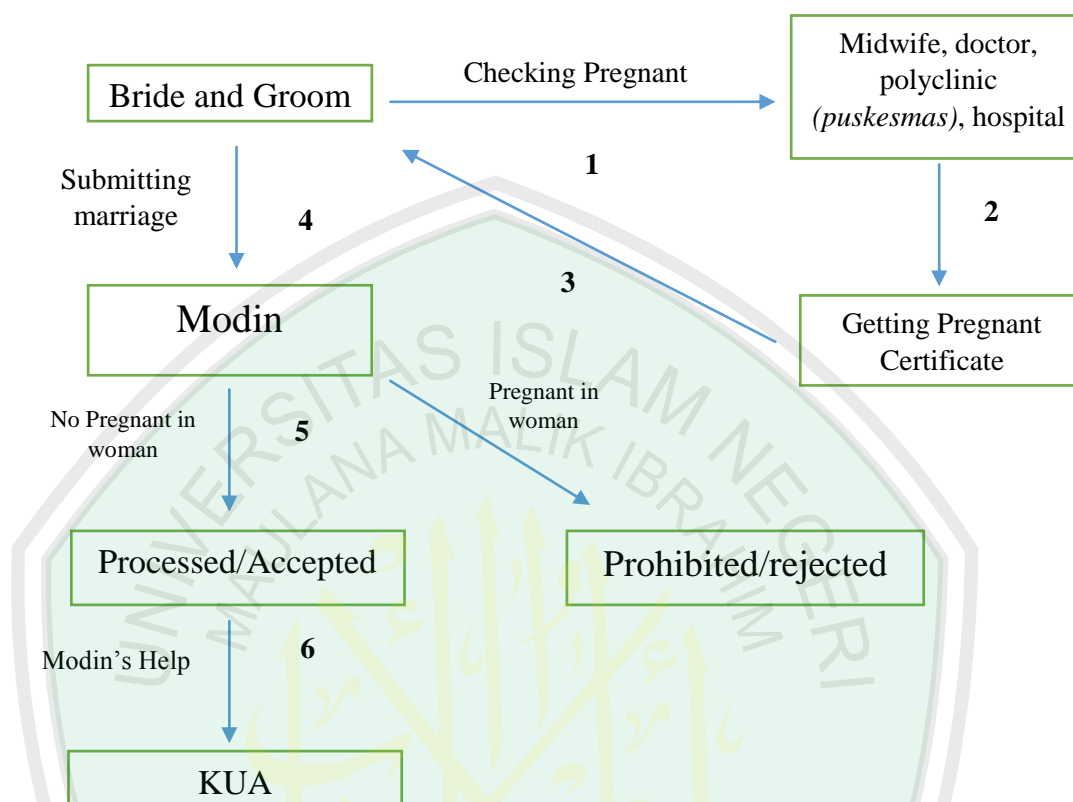


Table 12. Marriage Process through Modin in Temas

The implementing policy is interested matter when it is viewed by using the rules of pregnant marriage prevailed in Indonesia: Act Number 1 of 1974 about Marriage and Compilation of Islamic Law. These articles do not mention clearly about the prohibition of pregnant marriage, but there are regulations related to the prohibition marriage. In article 8 Act Number 1 of 1974 about Marriage stated that:

“Perkawinan dilarang antar dua orang yang mempunyai hubungan yang oleh agamanya atau peraturan lain yang berlaku dilarang berkawin.”

“Marriage is prohibited between two people who have the relationship in which religion or other regulations that prevail prohibit it”.

The regulation above contains meaning that marriage can be prohibited when the religion or the prevailed rule prohibits it. *Infiqh*, the concept of pregnant marriage has been debated by the scholars. The different opinions of them are caused by different *ijtihad* toward *the Qur'an* and *Sunnah*. So that, conducting pregnant marriage has two probabilities: it can be permitted and prohibited. As a result, people may choose one of the scholars' opinions about pregnant marriage. The opinion chosen will bring *mashlahah* when it is applied in the current condition according to their opinion.

Samsul, the Modin, has the power to determine the policy. The power is from the society because he is chosen by them, not by the government. So that this policy can be accepted by society. Choosing him is aimed to help people in organizing marriage administration in Temas. All society will ask him to help the process of marriage administration, whereas they can manage marriage by themselves. Properly, they can come to Marriage Administration

Office (KUA to process marriage administration, but they do not want to do and not care about this matter. They prefer choosing easier way. By Modin's help, they assume that administration will be easier to be finished. As a consequence, they must obey to what is suggested by Modin, like this policy which is aimed to protect them from the dangers.

In this case, Modin follows the opinion prohibiting pregnant marriage. This opinion is chosen as an effort to prevent the *mafsadah*. This opinion is realized by making policy that was not rejected by society. They obeyed toward the policy made by Modin although they were controversies among scholars about it. Regarding article 8 Act Number 1 of 1974 about Marriage, implementing policy does not break this act.

Another prevailed rules, the Compilation of Islamic Law stated in article 43 paragraph (1):

“Anak yang dilahirkan di luar perkawinan hanya mempunyai hubungan perdata dengan ibunya dan keluarganya”

“The child who is born outside of marriage has private relationship only with his mother and mother's family”

The command of article 43 paragraph (1) gives indistinctness lineage, moreover, the child will be judged as the child who does not have father. The scholars also stated that *zina* does not cause the relationship between child and

father, although the biologically child is produced by biological father and mother.¹⁵⁴ It is true that implementing policy has given effect as has been stated by article 43 paragraph (1). By this condition, the relationship between the child and the father will be very visible in some juridical aspects. First, the man who biologically is their father is assumed as other people. As a result, if the child is female, his father may marry her. Then, second, there is no obligation of a living for the child. Third, there is no relationship of mutual inherited between them. Fourth, a father cannot be a guardian in child's marriage. If the child has not a relationship, who will carry the child's need? Is mother will carry the need of child? Whereas, the mother is a woman needing the man's help to take care the child. It is the basic thought of the Modin in determining policy which has been explained in the part before.

The rising of the Constitution Court Verdict Number 46/PUU-VIII/2010, dated February, 17th 2012, can be seen as a support for the implementing policy. This verdict explained that statement in article 43 paragraph (1) of Regulation Number 1 Year 1974 about Marriage contradict to The Foundation Rules Year 1945. This verdict stated that the child born outside of marriage has a private relationship with his father.¹⁵⁵ The consideration of the verdict above is a punishment for people who do *zina*. So

¹⁵⁴ M.Nurul Irfan, *Nasab dan Status Anak dalam Hukum Islam*, (Ed. 1, Jakarta: Amzah, 2012), p. 114.

¹⁵⁵ Syafr Sofyan, "Putusan Mahkamah Konstitusi Tentang Anak Luar Kawin", www.jimlyschool.com/read/analisis/256/putusan-mahkamah-konstitusi-tentang-anak-luar-kawin/, accessed February 11th, 2016.

that the man and the woman also have same obligations to protect and take care the child. As a result of implementing Modin's policy for those who doing pregnant marriage, the child who will be born outside of marriage, the obligation and the right of the child are covered and preserved by that Constitution Court Verdict.

The Compilation of Islamic Law also explains the prohibited marriage. In these regulations, prohibited marriage is explained in six articles:

- a. Article 39 explains prohibited marriage which is caused by relationship of family, lineage, and nest.
- b. Article 40 explains prohibited marriage caused by the condition of a woman. A Woman cannot be married when she married, she has not completed 'iddah period, and she is not a Muslim woman.
- c. Article 41 explains the man prohibited to marry a woman who has the relationship of lineage or nest with his wife.
- d. Article 42 explains the man prohibited to marry four women at one time.
- e. Article 43 explains the man prohibited to marry with a woman who is the former wife that is forced three times by him(*talaq ba'in kubro*). Then, the man is also prohibited with the former wife that has been assumed as the adulteress by the man, in Islam it is called *li'an*.
- f. Article 43 explains the woman prohibited to marry with the man who is not Moslem man.

The explanations above do not mention the prohibition of pregnant marriage. On the other hand, in article 53 paragraph (1) to (3) of the Compilation of Islamic law regulates marriage of the pregnant woman.

- 1) Seorang wanita hamil di luar nikah, dapat dikawinkan dengan pria yang menghamilinya
- 2) Perkawinan dengan wanita hamil yang disebut pada ayat (1) dapat dilangsungkan tanpa menunggu lebih dulu kelahiran anaknya
- 3) Dengan dilangsungkannya perkawinan pada saat wanita hamil, tidak perlu perkawinan ulang setelah anak yang dikandung lahir

- 1) *A pregnant woman outside of marriage can be married by the man who copulated her.*
- 2) *Marriage with pregnant women who are said in paragraph (1) is conducted without waiting for birth of child, and*
- 3) *By conducting pregnant marriage, the second marriage is not needed after the child is born*

From the above article, we can learn some points. By using word “can” in the first paragraph indicates another probability that pregnant woman is permitted to be married to another man who did not copulate her. Then, the second paragraph does not mention the limited time when marriage can be conducted.

The value inserted in this article is that larger *mashlahah* will be obtained when pregnant marriage is permitted, but *mafsadah* will be obtained when pregnant marriage is prohibited. One of the intents of pregnant marriage is to get the clarity of law of preservation for the child. It was very clear, the

opinion used in this article is *Syâfi'iyah's* opinion, in which it contradicts to the Modin's opinion using *Hanâbilah's* opinion in determining policy

The Compilation of Islamic Law is the regulation that is a form of Instruction of President. The application of the rule is that form of Instruction of President is different with the application of Regulation. The President Instruction only prevails for people who are appointed by the rule, while the regulation prevails for common people. Moreover, regulating pregnant marriage in the Compilation of Islamic Law is expressly regulated by shorting arrangement and general arrangement. It is intended to give authorship for the court to find other principles throughout new alternative which is more actual and rational¹⁵⁶. As a result, the Compilation of Islamic Law is not a permanent decision of Private Islamic Law in Indonesia. In another world, Compilation of Islamic Law is only an offer, and its position can be replaced by *fiqh*.

Based on Yahya Harahap's argument, one of the compilers, he stated that the Compilation of Islamic Law is organized by elaborating *fiqh* values and custom prevailing in Indonesia. When it was compared with the concept of *fiqh*, there were controversies among scholars. Regarding custom prevailing in Indonesia, when the woman has gotten pregnant she must be married to the man. The parents will marry her with the man copulating her or another man who did not copulate her. To accommodate the custom, the

¹⁵⁶ Cik Hasan Basri and friends, *Kompilasi Hukum Islam dan Peradilan Agama*, p. 57.

compilers of Compilation of Islamic choose the middle way. In their perspective, the custom can be included as the consideration that must be considered, because in *fiqh*'s perspective custom is one of the sources of law. It is called as the sociological view.

The reasons used by the compilers in compiling Indonesian Islamic Law regulating pregnant marriage containing philosophy factor, sociological factor, and psychological factor, are to protect the woman from burdens. Viewed from the philosophy, conducting marriage is aimed to preserve the life of child and mother further. Then, viewed from psychology, it is aimed to prevent the act bringing *mafsadah* for the woman, like abortion and eloped. So that, they make the general article without explanations in order to give the chance for academician, scholar, judge, or government to make an alternative way to confront pregnant marriage phenomenon.

Viewed from another side, this article likely indicates for the legalization of illegal sexual activity, like free sex, ravishment, and whatever is called as the sexual act or *zina*. If the illegal sexual activity is permitted, the number of pregnant women will get the high number and it is not in line with the concept of *mashlahah* of *al-Ghâzali* which gives a preservation for five aspects, those are the aspect of religion, life, progeny, intellect, and property. Related to this theme, the first paragraph ought to contain *mashlahah* values

which are purposed for the human. It is not in accordance also with the aims of the policy which want to keep society from free sex and get good lineage.

Realization of the five principles can be applied by preventing the growing of illegal sexual activity among Moslem people. Preventing this phenomenon is aimed to preserve Islam as the purity of religion even Islam does not permit this act. The *taubat* of people from immoral acts like *zina* signify preservation of religion. The preservation life is applied by preserving people from hated act and prohibited by religion like the abominable acts, *zina*. The prevention also preserves human from abusing intellect which will make tardiness thinking and stupidity, moreover, it can be applied by preserving people mind from stupidity which is caused by doing immoral act like watching blue film and free sex action. Then, this action also indicates preservation of progeny in order to get clear of lineage with the parents. Preservation of property is applied by preserving people from improvidence habitual which is used to doing the illegal sexual activity, for instance going to prostitution complex, and using property such as, money, jewelry, transportation, and other to utilize in good ways. Indeed, the *mashlahah* values explained above is contained in the policy following *Hanâbilah* scholars in which it is followed by the Modin.

Actually, based on *Syâfi'iyah's* concept followed by most of Indonesian Muslim, the regulation of pregnant marriage in the Compilation of

Islamic Law is purposed to preserve people from the abominable attitude like *zina*. The compilers hope that it will make change of social conditions and makes renewal related to free sex phenomena

Regarding explanations above, the policy made by Modin is a rule of fiqh which is an alternative way or a solution to respond the current phenomenon in which the policy contains *mashlahah* values according to Hanâbilahscholars. Although its position may replace the position of the Compilation of Islamic Law, the policy does not break the legal rule because the Compilation of Islamic Law is not tied rule and it contains common rules, particularly for pregnant marriage. As a result, the policy can be prevailed in Temas village.



CHAPTER V

CLOSING

A. Conclusion

Discussing pregnant marriage policy has some conclusions below:

1. Pregnant marriage policy made by Modin is based on two arguments becoming basic thought of Modin to create the policy. Those are preventing the spread of harms and preserving the lineage and progeny. The harms purposed is the society's assumption about the permission of pregnant marriage and the spread

of the phenomenon of pregnant marriage. Preservation of lineage or progeny purposed is the clarity and the purity of lineage. Moreover, it is aimed also to produce brilliant future generations. According to the concept of *madzâhib al-arba'ah*, applying policy for marriage between a pregnant woman caused by *zina* and another man is appropriate with *Hanâbilah's* concept which prohibits marriage between them. Then, applying policy for marriage between a pregnant woman caused by *zina* and the man copulating her is not in line with the concept of *madzâhib al-arba'ah* which permits marriage between them. The aims of applying this policy for both marriages is to get *mashlahah* according to *al-Ghazâli's* concept preserving five principles which are religion, life, intellect, progeny, and property.

2. In viewing policy, there are three groups of *Temas scholars*. They are the group supporting policy, the group do not support policy, and the middle group.
 - a) The aim of the first group to support the policy is based on the some points those are reviving society about the importance of preserving lineage or progeny, about marriage's essence, and about the dangerous of free sex. Viewing the policy using the concept of *madzâhib al-arba'ah* is similar to what explained Modin before.
 - b) The view of *the scholars* is in line with the *Syâfi'iyah's* concept for marriage between a pregnant woman caused by *zina* and another man is appropriate with *Hanâbilah's* concept which prohibits marriage between them. Then, applying policy for marriage between a pregnant woman caused

by *zina* and the man copulating her is not in line with the concept of *madzâhib al-arba'ah* which permits marriage between them. The reasons used are that pregnant is an accident that must be preserved to avoid society's slender and reduce woman's burdens.

- c) The middle scholars explain that permitting or prohibiting marriage is based on where people view the policy by using *madzâhib al-arb'ah's* concept elaborated with *mashlahah* concept of *al-Ghazâli*.
- 3. Implementing policy viewed by Act Number 1 on 1974 about Marriage and the Compilation of Islamic Law, the tied rules about conducting pregnant marriage is not found. As a result, this policy can prevail and does not break the rules.

B. Suggestions

The prohibition of pregnant marriage existing in Temas made different opinions among Temas society although that difference is based on stronger argument taken from *madzâhib al-arab'ah*. On the other side, not all Temas society has known the policy's rule. Therefore, writer gives the suggestions presented as below:

1. Modin

Since the policy prevailed, Modin only explained the policy clearly to the chief of the village. With his position as a person entrusted by the community, it is better if Modin gathers Temas scholars to discuss the policy. Through this

discussion, Modin and scholars will get agreement and they support the policy.

As a result, the policy can prevail completely.

2. The government

In order to make the tied policy, village government should regulate the policy as the village regulation that must be obeyed and conducted by giving the sanctions for those breaking it. So that, although pregnant marriage is conducted by doing underhand marriage it will be punished. Then, the writer hopes that Batu government will accommodate the policy as a new rule for marriage implemented in Batu community to reduce free sex phenomenon.

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No	Day/Date	Subject of Consultation	Signature
1	Wednesday, January 6 th , 2016	Proposal	
2	Friday, March 11 th , 2016	Chapter I and III	
3	Tuesday, March 15 th , 2016	Review of Chapter I and III	
4	Wednesday, March 16 th , 2016	Chapter II	
5	Thursday, March 31 th , 2016	Review of Chapter II	
6	Monday, April 4 th , 2016	Chapter IV and V	
7	Monday, April 11 th , 2016	Review of Chapter IV and V	
8	Thursday, May, 19 th , 2016	ACC	

Malang, June, 27th 2016

Acknowledged by,

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