

Comparative Study of the Law of Determining the Nasab of Children Outside of Marriage; Perspective of Family Law in Malaysia and Yemen

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ABSTRACT

Purpose – In marriage regulations, children are divided into two categories, namely legitimate children and illegitimate children. Therefore, this study will examine the nasab status of children out of wedlock in Malaysia and Yemen.

Methods – The research method used is a literature study, namely the process of collecting data and information using various sources available in the library, such as books, hadith, and various other written materials.

Findings – The results show that in children out of wedlock or illegitimate children in Malaysia, the nasab (kinship) of children born to biological fathers less than six months of the child's age cannot be connected to their biological father. But the positive law of Malaysia issued a fatwa that those who do not have nasab with their biological father can be bin to Abdullah or *Asmaul Husna*. Similarly, the positive law of Yemen states that if a child is born in a valid marriage from a religious point of view and the birth is within six months, then the child can be related through the father and mother. If the child is born less than six months from the beginning of the marriage or marriage contract, then the child cannot be related through the father and can only be related to the mother.

Research implications - Marriage is a bond, both physically and mentally, between a man and a woman, which aims to form a happy and lasting family based on tawhid. Therefore, marriage must be carried out as applicable law and registered, because this will have an impact on the child's status.

Keywords: *Adulterous Children, Malaysia, Yemen.*

Introduction

With the development of the times, the increase in promiscuity has brought a serious impact on a person's behavior that is not in line with the principles that have been regulated in Islamic law, such as the incidence of pregnancy outside of marriage. Such incidents are often in the public spotlight and a hot topic of discussion, both on social media and conventional media. However, it should be noted that the news revealed in the

media only represents a fraction of the number of cases that have not been revealed and are widespread in the community.¹

In the Marriage Law, children can be divided into two: legitimate children and illegitimate children. Legitimate children refer to children born as a result of a legal marriage, where a man and a woman are married following applicable laws and have a full legal relationship with their parents. On the other hand, an illegitimate child is a child born as a result of the parent's actions not complying with the applicable legal regulations in the context of marriage.

Adultery is an act that is prohibited and also disliked by Allah SWT. Apart from being a serious violation of religious teachings, adultery also has a great impact on the perpetrator and those around him. In particular, the impact is very heavy on the child who is the result of this act. Adultery is also often the cause of conflict and fractured relationships within families, relatives, and society as a whole. This is an attempt to create a society that has dignity and upholds moral values.²

In Malaysia, the definition of an illegitimate child (*anak luar nikah*) itself, Enakmen Hukum Keluarga Islam Negeri Kelantan No. 6 Tahun 2002, states that "Unlawful taraf concerning a child, meaning born outside of marriage and not a child of *syubhah* intercourse". In Enakmen 17 the Year 2003 Enakmen Hukum Keluarga Islam (Negeri Johor) 2003 Bahagian VIII Fasal 111 also explains about the father reads: "If a woman who is married to a man gives birth to a child more than six months *qamariah* from the date of her marriage or within four years *qamariah* after her marriage was dissolved either by the death of the man or by divorce, and the woman was not married originally, then the man shall be recognized as the father of the child, but the man may, utilizing *li'an* or curse, deny the child as his child before the Court".³

Yemen has adopted a family law code that conforms to the principles of traditional Islamic law rooted in the thoughts of the salaf scholars. The law is based on the understanding of various schools of Islamic law, mainly referring to the views of the

¹ Muhammad Hanafi Bin Muzahar, "Pemberian Nama Anak Dengan Bin/Binti Abdullah Pada Anak Diluar Nikah Menurut Enakmen 7 Tahun 2006 Syeksen 111 Enakmen Undang-Undang Keluarga 2006 (Analisis Pendapat Mufti Negeri Perlis Tahun 2019) Islam Tahun" (PhD Thesis, Universitas Islam Negeri Sumatera Utara, 2023), <http://repository.uinsu.ac.id/id/eprint/18849>. Hal 1

² Muzahar. Hal 2

³ *Enakmen 17 Tahun 2003 Enakmen Undang-Undang Keluarga Islam (Negeri Johor) 2003*, t.t.

Zaidi Shia and Sunni schools.⁴ In terms of legislation and fatwas, Malaysia and Yemen have different legislative systems. In some cases, fatwas (Islamic legal opinions), in this case, the researcher is interested in the discussion of adulterous children, both in Yemen and Malaysia. Of the several articles comparing adulterous children in the view of Islamic law in the Malaysian and Yemeni countries, researchers have not found. However, some articles discuss adultery or illegitimate children from the perspective of sharia and legislation in Malaysia.

Method

The research conducted uses qualitative methods, specifically by conducting library research. After collecting data that has been analyzed from various sources such as libraries, scientific journals, print media, electronic media, and books relevant to the comparative study of the law of children outside of marriage according to Islamic law in the country of Yemen and the country of Malaysia. The data collected both understand the context of Islamic law in Yemen and Malaysia and also pay attention to the rights of children involved in this situation, then classified, arranged, summarized, analyzed, and concluded following the problems examined to complete this paper to provide a deeper understanding of this issue.

Results

Determination of *Nasab* in Islam

In language "nasab" is taken from Arabic, one of the meanings is descent. Allah says:

وَهُوَ الَّذِي خَلَقَ مِنَ الْمَاءِ بَشَرًا فَجَعَلَهُ نَسَبًا وَصِهْرًا ۚ وَكَانَ رَبُّكَ قَدِيرًا

“And He created man from water, and He made him (have) offspring and muṣābarah¹ and your Lord is the Almighty.”

In terminology, nasab refers to lineage or family relationships stemming from blood ties, whether in terms of relationships upwards (for example, father, grandfather, mother,

⁴ Siti Nur Aisyah, “Kontekstualisasi Peradilan Agama dan Pembaharuan Hukum Islam di Negara Yaman,” *Innovative: Journal Of Social Science Research* 3, no. 4 (2023): 5329–43. Hal 3

grandmother, and so on), downwards (such as children, grandchildren, and so on), or horizontally (such as brothers, uncles, and so on).⁵ Humans, unlike other creatures, do not have the same freedom in maintaining their survival. Humans are required to follow the path that has been written by God as the creator. In the context of hunting for offspring, humans are different from animals, plants, and also other creatures.⁶

In the breeding process of many of God's creatures, the first step often involves the combination of two elements, namely the seeds of a male individual and a female individual, representing the male and female sexes. In producing offspring, according to the rules set by God, the process begins with a marriage agreement. This covenant involves various elements that must be fulfilled, known as the pillars and conditions of marriage. The pillars of marriage require the existence of a prospective groom, a prospective bride, a marriage guardian, two witnesses, and *ijab* and *kabul*. Each of these elements has requirements that must be met, such as the requirement that the prospective husband and wife must not have several degrees of kinship. This is closely related to determining a person's lineage. Without knowledge of his or her lineage, a person may have difficulty marrying another individual.⁷

The Messenger of Allah (SAW) forbade a person to retain or recognize him as part of his lineage if he did not have a legal lineage relationship. Similarly, it is forbidden for a person to reject or deny another person who is related to that person. The Prophet (peace and blessings of Allah be upon him) conveyed this through the Hadith of Said bin Abi Waqash.

عن سعد بن أبي وقاص رضي الله عنه مرفوعاً: «من ادعى إلى غير أبيه -وهو يعلم أنه غير أبيه-، فالجنة عليه حرام.»

"Whoever recognizes someone in Islam as his father, knowing that he is not, Paradise will be forbidden to him." (hadith narrated by Abu Daud and Tirmidhi)

⁵ Yuni Harlina, "Status Nasab Anak dari Berbagai Latar Belakang Kelahiran (Ditinjau Menurut Hukum Islam)," *Hukum Islam* 14, no. 1 (2014): 64–81.

⁶ Arif Marsal, "Pencatatan Perkawinan: Antara Rukun Nikah Dan Syarat Administratif," *Jurnal Annur* 4, no. 1 (2015), <http://ejournal.uin-suska.ac.id/index.php/Annur/article/view/2052>.

⁷ Harlina, "Status Nasab Anak dari Berbagai Latar Belakang Kelahiran (Ditinjau Menurut Hukum Islam)."

A child is considered to have a legitimate (blood) relationship with the father if he is born through a legal marriage. Conversely, a child born outside of a legal marriage will not be considered a legitimate child; often referred to as a child of adultery or outside of a legal marriage, and he can only have a nasab bond with his mother.⁸

The minimum age of a baby in the womb is six months, starting from the time of the marriage contract. This stipulation is taken from the words of Allah Swt:

وَحَمْلُهُ وَفِصَالُهُ ثَلَاثُونَ شَهْرًا

"Conceiving and also weaning her for thirty months", (QS. Al-Ahqaf: 15)

حَمَلَتْهُ أُمُّهُ وَهْنًا عَلَى وَهْنٍ وَفِصَالُهَا فِي عَامَيْنِ

"She has conceived in a state of increasing weakness and weaned in two years (twenty-four months)". (Q.S. Luqman: 14)

According to the interpretation of Ibn Abbas and the consensus of the scholars, in both verses, the duration of pregnancy and breastfeeding is thirty months. The first verse indicates that fully breastfeeding a baby takes two years or twenty-four months. In this interpretation, it is concluded that the gestation period is 30 months - 24 months = 6 months.⁹

The hadith narrated by Ibn Mas'ud corroborates the idea that the fetus in the womb is equipped with a spirit after four months, and in the following two months, the shape or form of the fetus becomes perfect. Thus, according to this interpretation, if a baby is born within six months, it is considered to have been perfected even though it may have poor health.¹⁰

One of the principles in the law of marriage is that the child belongs to the bed (valid marriage) and the parents who commit a despicable act (adultery) have no right to

⁸ Dr. H. Amiur Nuruddin, *Hukum Perdata Islam di Indonesia* (Jakarta: Prenada Media, 2004).

⁹ Harlina, "Status Nasab Anak dari Berbagai Latar Belakang Kelahiran (Ditinjau Menurut Hukum Islam)."

¹⁰ Muhammad Aunurrochim Mas'ad dan Mohamad Zakwan Nafis bin Mohamed Zamri, "Status Anak Luar Nikah: Satu Kajian Ke Atas Hak Harta Pusaka Mengikut Fiqh Islam Dan Undang-Undang Syarak Wilayah Persekutuan," *Isu Isu Semasa Islam Dan Sains: USIM*, 2018.

it. This principle is important in determining the child's lineage. The Prophet Muhammad (SAW) also emphasized the primacy of lineage, even stating that anyone who attributes himself to someone other than his father falsely has committed an act of kufr.

In the case where a person commits adultery with someone and then a child is born, is the child recognized as the child of the adulterer or not? It is explained that the principle of "the child belongs to the bed" applies here. There is a difference of opinion among scholars about the meaning of "bed". Some scholars believe that the bed refers to legal marriage, while the stronger and correct opinion according to Ibn Taymiyyah and Ibn Qayyim is that the bed refers to sexual intercourse.

Interestingly, Ibn Taymiyyah supports this view even though he reinforces the view of Hanbali scholars on another issue, that if one throws the hijab, then dowry becomes obligatory. This shows that bedding only occurs through sexual intercourse. The woman who performs the marriage contract is validly the bed, and any children born thereafter will have a recognized lineage from their father. However, there are some terms and conditions, one of which is that the child cannot be born in less than six months because Allah's word in surah Al-Ahqaf verse 15 mentions a gestation period of thirty months, and in another verse, Allah mentions a breastfeeding period of two years. So, the difference between the two periods is six months.¹¹

Hence, the first condition is not to be born in less than six months, because if born in less than that time, there will be doubt. Allah SWT never categorizes people based on their birth background but rather focuses on their level of piety towards Allah. As stated in the words of Allah: "Verily, the most honored people in the sight of Allah are those who fear Him the most." (Q.S. Al-Hujurat: 13). Islam does not teach that one person's sins can be transferred to another, including sins committed by parents that cannot be simply passed on to their children. Islam has strict punishments against the perpetrators of adultery, but this does not mean that children born from adultery are placed in the same position as the parents who committed adultery.¹²

محمد حسن عبد الغفار, القواعد الفقهية بين الأصالة والتوجيه, ١٦ رجب ١٤٣٢ هـ.

¹² Muhammad Hajir Susanto, Yonika Puspitasari, dan Muhammad Habibi Miftakhul Marwa, "Kedudukan Hak Keperdataan Anak Luar Kawin Perspektif Hukum Islam," *Justisi* 7, no. 2 (2021): 105–17.

The definition of an illegitimate child, as explained in various Islamic Family Laws in Malaysia such as the Kelantan State Islamic Family Law No. 6, 2002, for example, states "Tak sah taraf concerning a child, means born out of wedlock and not a child of *shubhab* intercourse. Similarly, Enakmen of Johor Islamic Family Law No. 17, 2003, and others, consistently refer to a child born outside of marriage and not the result of legal intercourse. This definition is uniform throughout the Islamic family laws in Malaysia and follows the views of the fiqh scholars which can be found in various fiqh literatures, both classical and more modern.¹³ In the *qanun ahwal syakhsyiyah* of Yemen, in chapter 1, article 299, it states that adulterous children are those who do not have a nasab with a contract.

A marriage contract can be said to be valid if the marriage contract is carried out with the conditions and also the pillars that are following and in line with religious provisions. On the number of pillars of marriage, the fuqaha (jurists) did not reach an agreement. Imam ash-Shafi'i thinks that there are five pillars of marriage, namely the prospective husband, prospective wife, guardian, two witnesses, and dowry. Meanwhile, according to Imam Malik, the pillars of marriage consist of the guardian, dowry, prospective husband, prospective wife, and two witnesses.¹⁴

The child of adultery does not inherit from the adulterous parent. Since there is no hereditary relationship between the two, the child inherits his mother. The scholars are unanimous on this point, that the mother who gave birth to the child of adultery will inherit it. The opinion regarding children born of adultery in this regard is similar to that of children of legal marriages, whose status does not change due to different situations such as impropriety, prohibition, doubt, marriage, or murder.

If kinship (*nasab*) is established because of birth within the family, and this relationship can only be removed by cursing, then if the husband curses and rejects the *nasab*, the family relationship is severed, and the right of inheritance between the adulterous parents and the child of adultery is severed, just as the relationship between the adulterer and the adulterated child is severed. However, if the husband later accepts

¹³ Paizah Hj Ismail, "Anak Tak Sah Taraf Dari Perspektif Syariah Dan Perundangan Islam Di Malaysia," *Jurnal Fiqh* 10, no. 1 (1 Juli 2017): 77–90, <https://doi.org/10.22452/fiqh.vol10no1.4>.

¹⁴ Ahmad Atabik dan Khoridatul Mudhiyah, "Pernikahan dan Hikmahnya Perspektif Hukum Islam," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 5, no. 2 (2016), <http://journal.iainkudus.ac.id/index.php/Yudisia/article/view/703>.

the child and recognizes the family relationship, then the right of inheritance will be restored and the right to inherit will exist again. The details of this can be explored in the context of cursing if Allah permits.¹⁵

So if there is a nasab relationship with his parents, whether it is through an invalid marriage or a *shubhat* marriage, then all kinds of things related to kinship apply. It is forbidden to marry someone who is a mahrom. He is also entitled to maintenance, inheritance and, in the case of a daughter, her father is entitled to be her guardian.

Discussion

The Law of Determining the Nasab of Unmarried Children in Malaysia

Malaysia is a federated country with 13 states, with each state headed by a Sultan and a Menteri Besar. This federal system of government includes official recognition of Islam as the state religion, and Muslims are under the jurisdiction of the central government. The application of Islamic law in Malaysia reflects cultural influences, along with the history of the spread of Islam in the region. Despite Malaysia's ethnic and religious diversity, acceptance of Islamic law has been relatively easy in the country. The diversity of laws applied in Malaysia is due to the government's respect for the many religions that exist there.¹⁶

The legal status of a child born will depend on whether or not the marriage involving the parents is valid. If the marriage is recognized as valid, then the child born from the marriage will have the legal status of a legitimate child. In Malaysia, the status of children deemed illegitimate under Islamic law is further regulated in the Islamic family law regulations. Based on Seksyen 110 of Act 303,

"if a woman marries a man and gives birth to a child more than six months after the date of their marriage or within four years after their marriage ends due to divorce or death, then the man is considered the father of the child. However, the man can deny kinship with the child through the method of li'an or cursing before the court."

As per Section 111, if a child is born more than four qamariah years after the end

عبد الملك بن عبد الله بن يوسف بن محمد الجويني، *نهاية المطلب في دراية المذهب* (دار المنهاج، ٢٠٠٧).

¹⁶ Ramli Makatungkang, "Penerapan Hukum Islam di Malaysia," *Jurnal Ilmiah Al-Syir'ah* 1, no. 1 (2016), <http://journal.iain-manado.ac.id/index.php/JIS/article/view/186>.

of the marriage due to death or divorce, the man cannot be considered the father unless the man or his heirs formally acknowledge the relationship.¹⁷ A child deemed illegitimate in Islamic law cannot be directly attributed to the father, but instead, the courts have ruled that the illegitimate child can be named "bin Abdullah" based on the decision of the first Muzakarah of the National Fatwa Committee for Islamic Affairs held on January 28-29, 1981. This decision mandates that all illegitimate children should use or be directed to use the name "' Abdullah".¹⁸

The issue of illegitimate children greatly affects various legal aspects in the future, and therefore, it is important to address it carefully, making the application of sharia law a top priority. Therefore, if a child is born in violation of Islamic sharia that does not allow recognition of the relationship with his biological father, then the child may not use "Bin" or "Binti" in the name of his biological father. This opinion is the result of a fatwa issued by the Jawatankuasa Fatwa Majlis Kebangsaan which stipulates that children born out of adultery or outside marriage (illegitimate children) should be named "Abdullah".¹⁹

The Ruling on the Determination of the Nasab of an Unmarried Child in the State of Yemen

The history of the Republic of South Yemen (Democrat) records various changes in its governmental structure over time. It started as a commonwealth, then turned into a kingdom, and finally into a republic. Since the 19th century, South Yemen has been a British colony. Until 1967, the Republic of South Yemen remained under the power and influence of the British government.

The Yemeni state adopted a family law based on traditional Islamic law, taking into account the various views of the schools of Islamic law, including the Shi'a Zaidi and Sunni schools. However, in South Yemen, where the majority of the population follows the Maliki Mazhab, with some following the Shafi'i and Hanafi Mazhabs, family law was not codified until 1974. In that year, family law reform efforts in South Yemen resulted in the passage of Law No. 1 of 1974, known as Qanun al Usrah, which contained 53

¹⁷ Sayyida Chazratud Diana, "Anak Luar Nikah Dalam Perspektif Hukum Keluarga Islam Di Indonesia Dan Malaysia" (B.S. thesis, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, t.t.).

¹⁸ Diana.

¹⁹ Diana.

articles regulating aspects of marriage, divorce, the consequences of marriage breakdown, and the rights of children.²⁰

In the context of the application of Islamic family law, Yemen falls into the category of countries that apply traditional Islamic family law. Tahir Mahmood explains that in Yemen, classical Islamic family law is applied based on various madhhabs, which are hereditary and have not undergone changes or solidification until today. The Yemeni state follows the Shi'a Zaidiyah school of thought, while also recognizing the Shafi'i and Hanafi schools of thought in the application of Islamic family law.²¹

The fiqh scholars are unanimous in saying, as well as in Yemeni law, that the child of adultery is related to the mother.

حَدَّثَنَا مُقَدَّمُ بْنُ مُحَمَّدٍ بْنُ يَحْيَى حَدَّثَنَا عَمِي الْقَاسِمُ بْنُ يَحْيَى عَنْ عُبَيْدِ اللَّهِ وَقَدْ سَمِعَ مِنْهُ عَنْ نَافِعٍ عَنْ ابْنِ غُمَرَ رَضِيَ اللَّهُ عَنْهُمَا أَنَّ رَجُلًا رَمَى امْرَأَتَهُ فَأَنْتَقَى مِنْ وَلَدِهَا فِي زَمَانِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَأَمَرَ بِهِمَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَتَلَا عَنَّا كَمَا قَالَ اللَّهُ ثُمَّ قَضَى بِالْوَلَدِ لِلْمَرْأَةِ وَفَرَّقَ بَيْنَ الْمُتَلَاعِنَيْنِ

"Ibn 'Umar (may Allah be pleased with him) reported that during the time of the Messenger of Allah (peace and blessings of Allah be upon him), a man accused his wife of not recognizing the unborn child as his. So the Messenger of Allah ordered them to face each other, but they accused each other. As Allah says, the Messenger of Allah decided that the child belonged to the wife and separated them." (Hadith narrated by Bukhari).²²

So his nasab is returned to his mother and this is agreed upon by the scholars. In the law of *ahwal syakhshiyyah* Yemen no 20 of 1992 article 122 which reads the determination of nasab to the mother is enough to give birth to a child without having to have recognition or certain conditions. Religious scholars agree that if a child is born within the context of marriage and the husband does not deny being the biological father,

²⁰ Aisyah, "Kontekstualisasi Peradilan Agama dan Pembaharuan Hukum Islam di Negara Yaman."

²¹ Aisyah.

²² Ahmed bin Ali bin Ahmed Al-Shehabi Al-Yamani, "Anak hasil zina dan hukumnya Studi perbandingan hukum syariah dengan hukum Yaman dan Indonesia" (Universitas Muhammadiyah Surakarta, t.t.).

then the child is considered legitimate, despite claims to the contrary from other parties. This is because the origins of the child can be linked to a legitimate family.

In Article 121 of the Yemeni *qanun ahwal syakhsyiyah*, the relationship of a child to his or her father is confirmed through marriage, which is a valid marriage that fulfills all the applicable pillars and conditions, including the possibility of intercourse, puberty, and the minimum time of pregnancy after the possibility of intercourse.

Conclusion

In Islam, the cause of determining nasab according to Wahbah Zuhaili's structure is marriage, whether it is a valid *fasid* or *syubhat wathi*. Then the gestation period, according to the fiqh scholars, the minimum limit of a pregnancy that can be attributed to both parents is six months. The definition of an illegitimate child, as explained in various Islamic family laws in Malaysia such as the Islamic Family Law of Kelantan State No. 6, 2002, *Enakmen* of Johor Islamic Family Law No. 17, 2003, etc., consistently refers to a child born outside of marriage and not the result of legal intercourse. The court has ruled that the illegitimate child can be named "bin Abdullah" based on the *muzakarah* decision of the national fatwa committee for Islamic religious affairs.

The fiqh scholars are unanimous in saying and also as regulated in Yemeni law that the child of adultery is related to the mother. In the Yemeni *qonun ahwal syakhsyiyah* chapter 121, the relationship of a child's descent to his or her father is confirmed through marriage, which is a valid marriage that fulfills all the applicable pillars and conditions.

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محمد حسن عبد الغفار, القواعد الفقهية بين الأصالة والتوجيه, : ١٦ رجب ١٤٣٢ .

عبد الملك بن عبد الله بن يوسف بن محمد الجويني, نهاية المطلب في دراية المذهب (دار المنهاج, ٢٠٠٧)