

**THE STATUS AND RIGHTS OF AN ILLEGITIMATE CHILD  
ACCORDING TO MAZHAB ASY-SYAFI'I PERSPECTIVE ON THE  
DEVELOPMENT OF ISLAMIC FAMILY LAW IN INDONESIA**

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**ABSTRACT**

*The problem of free social interaction brings a grave danger to society which is involved the sexual act out of wedlock which is known as fornication (zina) and causes a harming impact on their offspring psychologically, socially and religiously in the society. This paper is trying to analyze the perspective of an order of Shafi'i on the statuses and the rights of an illegitimate child. Based on library research, this research used a descriptive analysis method to derive the data and information from primary classical textbooks of mazhab Shafi'i. The result of this research shows that according to mazhab Shafi'i, a child who was born under six months after intercourse with her legal husband is believed to be an illegitimate child of another man. The children are not related to his/her biological father and the status of the child for his / her father is an ajnabiyya (non-mahram). If the child is a girl, her biological father is fully permissible to marry her. In the conclusion, the child is not related to his / her biological father and does not have any rights from his/her biological father whether a right to receive household expenses, a guardianship for marriage, and rights of inheritance.*

**Keywords:** Fornication; An Illegitimate Child; Status; Rights

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## INTRODUCTION

Promiscuity often leads to negative things, such as sexual intercourse and pregnancy. It is caused by culture, so at this point, it becomes symptomatic in their communities living together between a man and a woman without marriage. Children born out of wedlock are gaining prominence in the community as an illegitimate child, this leads to psychological damage to children, although legally the children do not have the legal consequences of the actions of their parents. However, many problems arise, such as relationships between the child and his/her father and any various legal perspectives (Nelli, 2009).

In civil cases on positive law in Indonesia, after receiving the judicial review of Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage at the Constitutional Court, it was decided that the child may have civil relations as legalization that the biological father is responsible for the biological children related to living, education, etc. (Edyar, 2016). This case is a form of protection of the civil rights of a child born out of wedlock by the government for the maintenance of both biological parents (Nurhayati, 2017).

The decision of Constitutional Court judges who rate the article 43 paragraph (1) of the Marriage Law is considered as unconstitutional because the innocent child participates loss error caused by the neglect of their biological father who supposed to finance them, consequently, if the children can be proved that have a relationship with the biological father, the children acquire civil relationship with him (Aziz & et al., 2017). Similarly, the biological father of the children can admit them as his children with the condition approved or admitted by their biological mother (Ward, 2016). In Islamic law, this is done through an *istilhaq* mechanism (Taufiki, 2012). It is based on *mashlahah* analysis (Wahyudi, 2017), by the purpose of preserving the relationship (*hifzh an-nasl*) in *Shari'ah maqashid* (Zakyyah, 2016).

In Islam, marriage is highly recommended and intentionally celibate is regarded as unjustified. Islam considers that marriage has a religious value as worship to Allah and following the Sunnah of the Prophet to maintain the safety of the religious life. From another aspect, the marriage is deemed to have human values, to satisfy human instinct, to establish life, and to have a sense of peace and compassion in social life (Bashir, 2000).

Regarding to the children born out of wedlock, Islamic perspective based on mazhab Syafi'i stated that children born out of wedlock are *ajnabiyah* (stranger) who have no relationship and the right to the biological father, and it is lawful for their biological father for marrying a child born when they are women because the entire law relating to the relationship for children born out of wedlock is revoked, like inheritance and so forth (Al-Syarbini, 1997).

## RESEARCH METHODS

This study is library research and the method used was normative or literature research which is to research by examining the existing materials (Soekanto & Mamudji, 1994). The analysis technique used was descriptive analysis technique. Data were classified in detail and systematically to obtain an overview with a thorough understanding (Nazhir, 1999).

## RESULTS AND DISCUSSION

### ***THE CHILDREN BORN OUT OF WEDLOCK ACCORDING TO MAZHAB SHAFI'I***

Mazhab Shafi'i is based on imam Shafi'i, whose real name is Muhammad bin Idris. He was born in the Mediterranean coastal sea of Ghazzah which was known as Sham, 796 BC or 150 Hijriyyah. Imam Shafi'i combined Hijaz fiqh (al-Maliki and Iraq fiqh (al-Hanafi) and established a new school which taught to his students in the form of a book called *al-Hujjah* (Philips, 1990). Imam Shafi'i has his fiqh style as the result of *mazhab* assimilation from *hadith* and *ra'y* experts which is a combination between text and context thus, it produced a sequence of *istidlal* according to Al-Qur'an, Sunnah, *Ijma'*, *Qiyas*, and *Istishhab* (Karim, 2013).

Generally, an illegitimate child in terms of Arabic language called *az-zina* which means child of adultery, or *makhlukah min ma'ih* which means creature (kids) coming from semen (biological father). The *fuqaha* agreed that a child of adultery only refers to a child born of adultery result, not of a legal marriage or imperfect (*fasid*) or *syubhah* intercourse (intercourse between men and women who think they are legitimately married couples) (Zuhaili, 1985).

The positive law in the Book of Civil Law (Civil Code) described that the child born out of wedlock broadly divided into two; adultery children is the child born from two people who do not have binding legal marriage, and discordant child is children born from the relationship between a man and a woman who are banned to marry by law (Aryanto, 2015).

The *madzhab* found that illegitimate child is a child born less than six months after the intercourse with a lawful husband giving rise to the certainty that the child born is not a legitimate child of the husband. Ibn Kathir in his commentary mentioned that Ali bin Abi Thalib postulated with the Qur'an on a minimum six-month gestation period, in Qur'an: "his gestation and weaning [period] is thirty months" (QS, Al-Ahqaf: 15), and; "and his weaning is in two years" (QS. Luqman: 14).

Based on QS Al-Ahqaf: 15 and Luqman: 14, it is obtained the provisions about the minimum period of pregnancy mentioning that the gestation until weaning is thirty months or two years and six months. As in the second verse states that the minimum age of weaning is two years, then six months is the minimum period of pregnancy, as Ali bin Abi Talib postulated with the above verse and agreed upon by Uthman ibn Affan, and

the other companions (Kathir, 1999). The conditions for children born before the six-month gestation period agreed upon by the various *mazhab* in Islam, both Sunni and Shi'a as an illegitimate child (Shukla, 2017).

Mentioned in the hadith of the Prophet, Abu Hurayrah; "*Children who are born is the owner's right firasy, and adultery is a stumbling block (do not get anything)*" (HR. Muslim). Meaning, if a man has a wife or female slave, his wife or female slave is *firasy* to him, if the child was born, he/she is recognized as a biological child, between the two are inherited and the legal acts concerning the relationship with under requirement that the child is not born less than six months (Al-Nawawi, 1994).

Women are *firasy* for her husband and children born from her is her son according to the generality of the hadith of *firasy*, women are not *firasy* for her husband except in the presence of sexual intercourse or *ba'da dukhul* (Zuhaili, 1985). Thus, in *mazhab* Shafi'i, it is known as an illegitimate child or child born out of wedlock in which they were born less than six months after the sexual intercourse with her legal husband.

Regarding the status of a child born out of wedlock, *mazhab* Shafi'i stated that the is *ajnabiyyah* (stranger) who has neither family relationship nor the right to the biological father, and biological father is lawful to marry the children if there are women, with the argument that the entire law relating to their *nasab* for children born out of wedlock, like inheritance and so forth is not applicable (Al-Syarbini, 1997). This opinion is in line with the decision of the Indonesian Ulema Council (MUI) No. 11 of 2012 on Status and Treatment of Children Born Out of Wedlock. The child of adultery does not have relations with men that cause birth (Pusvita, 2018). Similarly, Islamic Law Compilation mentioned that the child should not be attributed to the biological father, although obviously, the man is a biological father (Jauhari, 2011). In Malaysia, the provision of children was born less than six months after their intercourse with the lawful husband who recognized as children born out of wedlock is adopted as one of the legitimate fatwa decisions by the National Fatwa Council of Malaysia (Grill, Ahmad & Grill, 2017). This indicates that *mazhab* Shafi'i highly influences the family law in Indonesia and Malay in which the analysis and product of *fiqh* Syafi'iyah are adopted by the agency and the official state law.

The Prophet stipulated that children born out of wedlock can not have relation to the biological father, as mentioned in the hadith; Aisyah indeed, he said: Abd bin Zam'ah and Sa'd ibn Abi Waqqas complained to the Prophet about the child, then said Sa'ad: he, Messenger of Allah, is the son of my brother Utbah bin Abi Waqqas who had been intestate me that in fact, the child was his son, look at the similarity to him (Utbah bin Abi Waqqas) said Abd bin Zam'ah: he is my brother, O Messenger of Allah, he was born in *firasy* my father's female slave. Rasulullah saw the resemblance, he saw the child has obvious similarities with Utbah bin Abi Waqqas, the Prophet said: "He is to you, O Abd bin Zam'ah, in fact the child is for the owner of *firasy* and adultery is a stumbling block (excoriation/stoning), and wear a veil for him, O Sauda bint Zam'ah "Sauda said she would never see Sauda.

Muhammad bin Rumh did not mention the editorial "Yes Abd." (HR. Malik, al-Bukhari, Muslim according to Muslim editorial.)

Imam al-Bagawiy explained the hadith above that there is a dispute about the status of children, which is one of the slave women give birth to children in which has occurred intercourse between the slave to the master and the slave is also having sex with someone else, then both recognized the child born from this slave is their descendants. Hence, the Prophet decided that child is for the master of the slave on the recognition of sexual intercourse with the slave, the slave becomes *firasy* to master because of their intercourse, and stop the habit of Jahiliyyah by setting nasab with adultery, as the hadith narrated from Ibn Abbas, The Prophet said; "*No adultery in Islam, who committed adultery in the time of Jahiliyyah then the nasab is to family heir (Ashabah) and who claim the child without evidence, they do not inherit and are not inherited.*" (HR. Abu Dawud and Ahmad). Prophet canceled nasab relationship with adultery in Islam and did not recognize the relationship after the advent of Islam, as the Jahiliyyah set the relationships from adultery (Baghawi, 1983).

According to the imam Shafi'i that "الفراش الولد" has two meanings. The first meaning that the child is for the owner of *firasy* if they do not deny the child with *li'an*. If the owner of *firasy* denies children with *li'an*, the child is hindered from him. It can not be justified to admit the child to the adulteress, though there is a resemblance between them, as the Prophet did not recognize children born besides *firasy*, even though the Prophet determine similarity to him. The Prophet refused the admission of children of adulterers, as in the hadith "و للعاهر الحجر" and an adulteress is a stumbling block that is no relationship for the children who claim the child is the offspring. The second meaning is that if there is a dispute between the owner of *firasy* and adultery, then the child is for the owner. If the owner with *li'an* denies the child, the child is hindered by him, however, if he recognizes the child after *li'an*, he has no right to the child despite the reclaim after *li'an* (Al-Shafi'i, 2001).

#### ***THE IMPLICATIONS AND RIGHTS ON ILLEGITIMATE CHILD STATUS ACCORDING TO THE MAZHAB SHAFI'I***

An illegitimate child may be married by her biological father, because the child's status is as *ajnabiyyah* who is not regarded as a *mahram* for her biological father but to her mother, with the argument that it had been interrupted throughout the legal provisions for a child with their nasab on biological father.

According to Imam ar-Rafi'i that marry the child is forbidden, if there is a belief that the child was the result of his semen, with the argument that prohibition to marry the biological father is as the child who is from his semen, as reported by Prophet, about the events that happened in Prophet Isa ibn Maryam alayh as-salam era. Meanwhile, according to Imam Taqi ad-Din as-Subki, the Saheeh (according to mazhab) is lawful (Al-Syarbini, 1997). The opinion of Imam as-Subki strengthened by Imam Ibn Shihab ad-Din al-Ramli, as quoted by imam Ibn Abidin, he said that *makhluqah* (child) on the results of adultery is permitted to (marry) her biological father, for surely the

shari'a has been decided nasab for the child to his biological father (Abidin, 2003). In *khuruj min al-khilaf* (out of the dispute) that the law of the child married is makruh (Al-Nawawi, 2003).

The inheritance law of an illegitimate child is similar to *mula'annah* child, ie not inherit between biological father and inherit each other due to the dissolution nasab child, rather than the biological father of the family members, the father, mother, and child of the biological father. The child is only inherited from the mother, and the family of his mother (an-Nawawi, 2003). This opinion is selected by a majority of Islamic scholars, that a child born out of wedlock (*walad az-zina*) does not inherit from the father (Kano, 2015).

According to the imam Shafi'i, if a child of *mulā'annah* or illegitimate child dies, it is only from the mother's side and his mother's sister party entitled to inherit his/her property (Al-Shafi'i, 2001). The child may inherit from the biological father because of claims or recognition (*istilhaq*) of the biological father. In recognition of nasab on inheritance, Imam Shafi'i allows the heir who is from biological father party to admit nasab under the condition that the child can have an inheritance or recognized by all the heirs, the person who recognizes (*mustalhiq*) to the child who died (heir) is unknown the nasab possibility beside from the heir, and the party (*mustalhiq*) who confirms the child nasab is rational and baligh. These requirements, as contained in the hadith on the child who is recognized by Prophet as the child belongs to Zam'ah under the recognition of Abd bin Zam'ah (Al-Nawawi, 2003).

Imam Shafi'i stated that a child born out of wedlock is not included in the about the parental responsibility, as quoted by Imam al-Kasani (al-Kasani, 2003), namely; "And upon the [father's] heir is [a duty] like that [of the father]" (QS. Al-Baqarah: 233)

Description in mazhab Shafi'i stated that reason for living based on three things, they are marriage, relatives, and ownership. It is required to provide a living for his wife with their marriage status, required to provide a living for the whole family including children, and parents as the relationship between relatives, and the obligation of a master to the slave as ownership relationship (Al-Syarbini, 1997). An illegitimate child does not have a livelihood from the biological father, because the break of nasab between them, it is not included in the category of relatives who earn a living.

If the child is female and ready for marriage, the marriage should be with the guardian, and the trustee is entitled to be nasab of the men beginning with the father, grandfather, and so on (Baijuri, 1999). As a child born out of wedlock does not have nasab with the biological father, the biological father is not entitled to be a guardian for him.

The guardian of the woman is an absolute requirement according to mazhab asy-Shafi'i, because it is not allowed to marry the woman by herself without permission (guardian). Imam Shafi'i said about the word of Allah Ta'ala; "...do not prevent them from remarrying their [former] husbands..." (Qur'an, al-Baqarah: 232). Imam asy-Shafi'i stated that the above verse is

clear arguments on the necessity of trustees (Al-Syarbini, 1997). Imam al-Baijuri mentioned that married without a guardian and two witnesses, her marriage is revoked because the trustee is a legitimate requirement of marriage. Sulthan will be a guardian if she does not have a guardian (nasab) (Baijuri, 1999). Therefore, the illegitimate child has no nasab guardian of the father party, so that the guardian for her is Sulthan.

### ***THE DEVELOPMENT OF ISLAM IN INDONESIA FAMILY LAW RELATED TO AN ILLEGITIMATE CHILD***

Mazhab Shafi'i as the dominant mazhab adopted by the people of Indonesia, this gives mazhab the patterns of thought in family law. As Islamic law provides many shades in family law in Indonesia, Muslims in Indonesia have done a whole of Islamic law and as a unity (Hidayat, 2014). Through the process of acculturation and inculturation, Islamic law has established a culture of family law in Indonesia in which the pattern of madzhab Syafi'iyah is very strong within the family law rules laid down in Islamic Law Compilation (Rajafi, 2017).

In civil cases in the positive law, before acceptance of the proposed judicial review of Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage at the Constitutional Court, a child born in a marriage which is not recorded or an illegitimate child who has no civil relationship with the biological father means that the child and the biological father are considered to have no relationship. This indicates that mazhab Shafi'i influences the complexion of family law in Indonesia in terms of the relationship of children and biological parents.

As the implications of the absence of a civil relationship with the biological father, the child does not have the right to an inheritance the father and did not acquire the right to any support, and only inherit and below dependents mother's side as embodied in Article 43 paragraph 1 of the Act number 1 of 1974. The positive law under Article 51 of Law No. 1 of 1974 that the right to be the guardian is held by the biological parents that mean a child born out of wedlock does not get custody of her biological father.

Machicha Mochtar, in this case, tried to protect her son (Muhammad Iqbal Ramadhan), which has no civil relationship with his father (Moerdiono), because he was born in unregistered marriage status as a child born outside legal marriage through a Judicial Review to the Constitutional Court (Syafirdi, 2013). The same appeal comes from the chairman of the Indonesian Child Protection Commission, Arist Merdeka Sirait stated that this is injustice for children born outside legal marriage whose rights are neglected, so the Indonesian Child Protection Commission expects the Constitutional Court can undertake judicial review of the Act in promoting advocacy for children born outside legal marriage to obtain their civil rights (Saut, 2013).

Constitutional Court Decision No. 48/PUU-VIII/2010 in the form of Judicial Review in several articles in Marriage Act of 1974; Article 2 paragraph 2, which reads; "*Every marriage shall be registered according to the regulations of the legislation in force*" and Article 43 paragraph 1, states;

"it only stipulates that children born out of wedlock only have a civil relationship with her mothers and her mother's family". The Constitutional Court gives a decision granting in part the petition filed by the Petitioner, Machica Mochtar that is Article 43 paragraph 1 of the Marriage Law. Article 2 paragraph 2 of the Marriage Act was not granted because the marriage registered is to achieve the orderly administration.

The results of Judicial Review Constitutional Court ruled that: "Children born out of wedlock have a relationship of civil with her mother and her mother's family as well as with men as a father who can be proved by science and technology and/or other evidence under the law to have a blood relationship, including civil relations with his father's family. " Article 43 paragraph (1) of Law no. 1 of 1974 states "*it only stipulates that children born out of wedlock only have a civil relationship with her mothers and her mother's family*" in contrast with 1945 Constitution of the Republic of Indonesia that is conditionally unconstitutional which dismisses the civil relationship between a man that can be proved by science and technology and/or the other evidence according to law having a blood relationship as the father.

The right to claim proof the nasab also be recognized in mazhab Shafi'i as *istilhaq* nasab to prove the relationship with some civil cases such as inheritance of conditions, they are the child can be on an inheritance or are recognized by all the heirs, the person who recognizes (*mustalhiq*) a child to the deceased (testator), unknown possibilities nasab apart from the heir, and the party (*mustalhiq*) who justifies the child nasab is a reasonable person and *baligh*. Therefore, the development of Islamic family law in Indonesia still has a foundation in mazhab Shafi'i as the dominant element.

## CONCLUSION

The opinion in mazhab Shafi'i is that an illegitimate child does not have nasab relationship with the father who impregnates his mother in which his status is similar with stranger who does not have kinship (*ajnabiyyah*), so the implications posed is that if the child is a female, the biological father is legally allowed to marry her because it is similar with *ajnabi* woman. On the other hand, for the right, it is caused by no relationship between the two, the child does not acquire inheritance rights to inherit from their father's family unless there is nasab recognition from his biological father. Similarly, the impact on the right to have a father's parental responsibility in which the biological father is not liable for a living his biological child. The biological father has no right to them, in this case, the right is on the ruler or Sulthan. Regarding to the development of Islamic family law in Indonesia after the decision of the Constitutional Court No. 48/PUU-VIII/2010 with *judicial review* on Article 2 paragraph 2 and Article 43 paragraph 1 of the Marriage Law No. 1 of 1974, granting one clause of Article 43 paragraph 1 as contrary to the Constitution is conditionally unconstitutional that dismisses the civil relationship between a man that can be proved by science and technology and/or the other evidence according to law having a blood relationship as the father.



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