

**THE LEGAL POSITION OF CHILDREN  
BORN OUT OF WEDLOCK**

**(Comparative Study between Classical Islamic  
Jurisprudence and the Modern Indonesia  
Law)**

**A Thesis**

**Submitted to the Master's Study Program of Islamic Studies  
Faculty of Islamic Studies in partial fulfillment of the requirements for  
the degree of**

**Master of Arts (M.A.)**



**Universitas  
Islam Internasional  
Indonesia**

**By:**

**Muhammad Mufti**

**01212210007**

**UNIVERSITAS ISLAM INTERNASIONAL INDONESIA**

**DEPOK**

**2024**

# **THE LEGAL POSITION OF CHILDREN BORN OUT OF WEDLOCK**

**(Comparative Study between Classical Islamic  
Jurisprudence and the Modern Indonesia  
Law)**

**A Thesis**

**Submitted to the Master's Study Program of Islamic Studies  
Faculty of Islamic Studies in partial fulfillment of the requirements for  
the degree of**

**Master of Arts (M.A.)**



**Universitas  
Islam Internasional  
Indonesia**

**By:**

**Muhammad Mufti**

**01212210007**

**UNIVERSITAS ISLAM INTERNASIONAL INDONESIA**

**DEPOK**

**2024**

## ABSTRACT

Muhammad Mufti  
01212210007  
muhammad.mufti@uiii.ac.id  
Islamic Studies  
Universitas Islam Internasional Indonesia

The issue of the legal position of children born out of wedlock has become an exclusive discussion among Muslim jurists due to its complexity. The legal position of a child itself is essential and pivotal because it gives significant implications for the child's rights within the family context. This thesis aims to explore the legal position of children born out of wedlock through a comparative study between classical Islamic jurisprudence and modern Indonesian law. On the one hand, classical Islamic jurisprudence has outlined specific principles governing the legal status of children born out of wedlock by restricting legal acknowledgement of children born out of wedlock including their associated civil rights upon their biological fathers. On the other hand, Islamic law which was previously adopted by modern Indonesian law has evolved by involving another legal system such as European law, particularly with the issuance of Constitutional Court Ruling Number 46/PUU-VIII/2010 which has allowed for children born out of wedlock to be attributed to their biological fathers. The research problem in this thesis is formulated into two main research questions as follows: 1) What is the legal position of children born out of wedlock according to Islamic jurisprudence and Indonesian modern law? 2) What made Islamic family law in Indonesia concerning the issue of children out of wedlock different compared to Islamic family law in classical Islamic jurisprudence? As part of library research, data in this thesis is collected from written sources either for primary data or secondary data. Subsequently, the collected data is analyzed using a descriptive-analysis method. The study finding indicates the existence of legal borrowing and legal hybridity of Islamic family law concerning the legal position of children born out of wedlock that has been formalized in Indonesian law with the involvement of biological fatherhood concept which originated from European law. This legal hybridity furthermore could lead to inconsistency, confusion, or even contradiction.

Keywords: *The Legal Position, Children Born out of Wedlock, Classical Islamic Jurisprudence, Modern Indonesian Law*

## TABLE OF CONTENTS

STATEMENT OF AUTHENTICITY.....	i
ANTI-PLAGIARISM STATEMENT.....	ii
ATTESTATION.....	iii
THESIS DEFENSE APPROVAL .....	iv
SUPERVISOR INTERNAL MEMO.....	v
ABSTRACT.....	vi
TABLE OF CONTENTS.....	vii
TRANSLITERATION GUIDE.....	x
GLOSSARY AND ABBREVIATION DIRECTORY.....	xii
PREFACE.....	xv
INTRODUCTION.....	1
A. Introduction.....	1
B. Literature Review .....	3
C. Research Questions .....	5
D. Research Objective and Significance .....	7
E. Conceptual/Theoretical Framework .....	8
F. Research Method .....	9
G. Thesis Structure .....	9
CHAPTER I: THE CONCEPT OF CHILD BORN OUT OF WEDLOCK IN ISLAMIC FAMILY LAW.....	11
1.1. The Definition of the Child Born Out of Wedlock.....	11
1.2. The Causes Making a Child Classified as a Child Born Out of Wedlock. 12	
1.2.1. Void Marriage ( <i>Nikāh al-Bāṭil</i> ) .....	13
1.2.2. Mutual Repudiation ( <i>al-Li'ān</i> ).....	14

1.2.3. Adultery ( <i>al-Zinā</i> ) .....	16
1.3. The Causes making a Child Classified as Legitimate Child .....	17
1.3.1. Wedlock/Valid Marriage.....	17
1.3.2. Defective Marriage ( <i>Nikāḥ al-Fāsīd</i> ) .....	20
1.3.3. Doubtful Sexual Intercourse ( <i>Waṭ' al-Shubha</i> ).....	22
1.4. Legal Position of a Child Born Out of Wedlock in Islamic Jurisprudence	
23	

**CHAPTER II: CHILD BORN FROM INTRAFAMILIAL SEXUAL INTERCOURSE (INCEST) AS PART OF CHILDREN OUT OF WEDLOCK..... 27**

2.1. An Overview of Intrafamilial Sexual Intercourse (Incest) .....	27
2.2. The Existing Legal Framework concerning Incest .....	28
2.3. Incest and Marriage Impediments .....	32
2.3.1. Blood Relationship ( <i>al-Nasab</i> ).....	33
2.3.2. Milk-Relationship ( <i>al-Raḍā'a</i> ).....	35
2.3.3. Affinity Relationship ( <i>al-Muṣāhara</i> ).....	35
2.3.4. Fosterage Relationship.....	37
2.4. The Impact of Incest towards Children Born from Such a Condition .....	38

**CHAPTER III: CONTEMPORARY DISCOURSE REGARDING CHILD OUT OF WEDLOCK IN THE INDONESIAN CONTEXT .....**

3.1. Child in Indonesian National Legal System .....	43
3.2. The Main Promulgation concerning Child in Indonesian Islamic Family Law	45
3.3. The Status and Civil Rights of a Child in Islamic Family Law .....	47
3.3.1. The Lineage ( <i>al-Nasab</i> ) .....	49
3.3.2. The Right to Education ( <i>al-Tarbiyya</i> ) .....	50
3.3.3. The Right to Living Expenses ( <i>al-Nafaqāt</i> ) .....	51
3.3.4. The Right to Breastfeeding ( <i>al-Raḍā'a</i> ).....	51
3.3.5. The Right to Custody ( <i>al-Ḥaḍāna</i> ).....	52

3.3.6. The Right of Guardianship ( <i>al-Wilāya</i> ) .....	54
3.4. The Child out of Wedlock in Indonesian Context.....	54
3.5. The Issue of Incestuous Child as Part of Child Born out Of Wedlock in Indonesian Context.....	59
<b>CHAPTER IV: ANALYTICAL STUDY REGARDING CHILD OUT OF WEDLOCK IN THE INDONESIAN CONTEXT .....</b>	<b>63</b>
4.1. Legal Precedent Adopted from Islamic Jurisprudence.....	63
4.2. Transformation and Adjustment under the Indonesian State Control.....	64
4.3. Comparative Study Involving Similar Provisions from Different Countries	67
4.3.1. Malaysian Islamic Family Act 303 of 1984.....	67
4.3.2. Moudawana: Moroccan Family Code .....	69
4.3.3. Personal Status Law of Kuwait Number 51 of 1984 .....	70
4.4. Legal Analysis on Children out of Wedlock in Indonesian Law compared to Islamic Family Law in Classcial Islamic Jurisprudence.....	71
<b>CONCLUSION .....</b>	<b>79</b>
<b>BIBLIOGRAPHY .....</b>	<b>82</b>
<b>CURRICULUM VITAE .....</b>	<b>88</b>

## TRANSLITERATION GUIDE

### Consonants

Arabic	Transliteration	Arabic	Transliteration
ء	ʾ	ض	ḍ
ب	b	ط	ṭ
ت	t	ظ	ẓ
ث	th	ع	ʿ
ج	j	غ	gh
ح	ḥ	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	ẓ	ل	l
ر	r	م	m
ز	z	ن	n
س	s	و	w
ش	sh	هـ	h
ص	ṣ	ي	Y

### Short Vowels

Arabic Vowel	Transliteration	Example	Transliteration
اَ	a	نَكَحَ	<i>nakaḥa</i>
اِ	i	وُلِدَ	<i>wulida</i>
اُ	u	حُكِمَ	<i>ḥukm</i>

### Long Vowels

Arabic Vowel	Transliteration	Example	Transliteration
اَآ	ā	زِنَا	<i>zinā</i>
اِيِ	ī	تَعْرِيبَ	<i>taghrīb</i>

وُ	ū	مُحَرَّمُونَ	<i>muḥarramūn</i>
----	---	--------------	-------------------

### Doubled Vowels

Arabic Vowel	Transliteration	Example	Transliteration
يِي	<i>īyy</i>	أَجْنَبِي	<i>ajnabiyy</i>
وُو	<i>uww</i>	نُبُوَّة	<i>nubuwwa</i>

### Diphthongs

Arabic Diphthong	Transliteration	Example	Transliteration
وَو	<i>aw</i>	حَوْل	<i>ḥawl</i>
وَي	<i>ay</i>	عَيْب	<i>‘ayb</i>

### Notes:

1. Consonants with *shidda* (◌◌) for instance حَدْ is transliterated into *ḥadd* (double consonants).
2. Arabic letter *tā’ marbūṭa* (ة) at the ending of a word is not written. For instance, the word جَنَابِيَّة is transliterated into *jināya* not *jināyah*.
3. Arabic letter *hamza* (ء) at the beginning of a word is transliterated into “a” not into “’a”. For instance, the word أَمَّة is written as *ama* not *’ama*.
4. Arabic script *alif-lām* is written as “al-” at the beginning of a word and written as “-l-” in the middle of two words that make a phrase. For example: the word الشَّافِعِي is written as *al-Shāfī* and the word أَهْلُ الْكِتَابِ is written as *ahl-l-kitāb*.
5. The diacritical marks in Arabic that indicate an “n” sound at the end of a word (*tanwīn* or *nunation*) is not written. For instance, the word عَيْبٌ is transliterated into *‘ayb* not into *‘aybun*.

## GLOSSARY AND ABBREVIATION DIRECTORY

<i>‘abd mukātab</i> (female: <i>ama mukātaba</i> )	: a slave under a contractual manumission
<i>‘abd</i>	: a male slave
<i>Ahl-l-jāhiliyya</i>	: pre-Islamic society
<i>Ajnabiyy</i>	: foreign or alien status
<i>‘ām al-faḥ</i>	: conquest year
<i>‘ammāt</i> (singular: <i>‘amma</i> )	: paternal aunt
<i>‘ayb</i>	
<i>Bayyina</i>	: disgrace
<i>Burgerlijk Wetboek voor Indonesie/BW/KUH</i>	: evidence : Indonesian Civil Code
<i>Perdata</i>	
<i>Dewan Perwakilan Rakyat/DPR</i>	: the House of Representative of the Republic of Indonesia
<i>Fāsiq</i>	: transgressor person
<i>Faskh</i>	: annulment
<i>Firāsh</i>	: conjugal bed
<i>Ḥaḍāna</i>	: custody
<i>Ḥadīth marfū‘</i>	: elevated prophetic narration
<i>Ḥadīth</i>	: prophetic narration
<i>Ḥarām</i>	: forbidden/impermissible
<i>Hiba</i>	: gift
<i>Hudūd</i> (singular: <i>ḥadd</i> )	: prescribed punishment
<i>Hurr</i>	: free person
<i>‘idda</i>	: waiting period
<i>Iddi ‘ā’</i>	: allegation
<i>Ījab</i>	: statement of offer
<i>Ikhtilāf al-nasab</i>	: mixing lineage or genealogy
<i>Imāma</i>	: leadership/imamate
<i>Iqrār</i>	: acknowledgement
<i>Irth</i>	: inheritance
<i>‘istibrā’</i>	: purification period
<i>Jild</i>	: corporal punishment or whipping
<i>Jināya</i>	: offence or crime
<i>Kafā‘a</i>	: suitability or compatibility
<i>Khālāt</i> (singular: <i>khāla</i> )	: maternal aunt
<i>Khalf</i>	: subsequent generation
<i>Kiswa</i>	: clothing
<i>Kitab Undang-Undang Hukum Pidana/KUHP</i>	: the Indonesian Criminal Code
<i>Kompilasi Hukum Islam/KHI</i>	: the Compilation of Islamic Law
<i>Li‘ān</i>	: mutual cursing/repudiation
<i>Mahkamah Konstitusi/MK</i>	: the Constitutional Court
<i>Mahr</i>	
<i>Maḥram</i>	: dowry : unmarriageable kin

<i>Majelis ulama indonesia/mui</i>	: the Indonesian Ulama Council
<i>Makrūh</i>	: discourage
<i>Mandūb</i>	: encourage
<i>Maskana</i>	: housing
<i>Maṣlahah</i>	: public interest or common good
<i>Mawālī</i>	: freedman
<i>Mu'awada</i>	: exchange contract
<i>Mukallaf</i>	: responsible individual
<i>Murtadd</i>	: apostate
<i>Muṣāhara</i>	: affinity relationship
<i>Nafaqāt</i> (singular: <i>nafqa</i> )	: living expenses
<i>Nasab</i>	
<i>Naskh</i>	: lineage
<i>Nihla</i>	: abrogation
<i>Nikāh al-bāṭil</i>	: bridal gift
<i>Nikāh al-fāsid</i>	: void marriage
<i>Nikāh al-istibdā'</i>	: defective marriage
<i>Nikāh al-istikhyār</i>	: impregnation marriage
<i>Nikāh al-mut'a</i>	: free choice marriage
<i>Nikāh al-rahṭ</i>	: temporary marriage
<i>Nikāh al-shighār</i>	: group marriage
<i>Qabūl</i>	: swap marriage
<i>Qaṣr</i>	: statement of acceptance
<i>Qaṭ'ī</i>	: shortening
<i>Qaḏf</i>	: definitive
<i>Qiyāfa</i>	: false accusation or slander of adultery
<i>Raḏā'a</i>	: physiognomy
<i>Rajm</i>	: breastfeeding
<i>Rukhṣa</i>	: stoning
<i>Rukn</i>	: legal dispensation
<i>Salf</i>	: essential element
<i>Shahwa</i>	: early generation
<i>Shar'iyya</i>	: lust
<i>Sharṭ</i>	: legitimacy
<i>Shāḏ</i>	: condition
<i>Shubha</i>	: irregular or anomalous
<i>Sifāh al-qurbā</i> or <i>zinā bi-l-mahārim</i>	: doubtful
<i>Sifāh</i>	: incest
<i>Ṣīgha</i>	: fornication
<i>Ṭa'ām</i>	: legal contract
<i>Taghrīb</i>	: feeding
<i>Ṭalāq bā'in</i>	: exile
<i>Tamlīk</i>	: irrevocable divorce
<i>Tarbiyya</i>	: ownership
<i>Tawba</i>	: education
<i>Ta'zīr</i>	: repentance
<i>Undang-Undang Dasar 1945/UUD 1945</i>	: discretionary punishment
	: the Indonesian Constitution

<i>Wājib</i>	: mandatory
<i>Walā'</i>	: emancipation
<i>Walad al-li'ān</i>	: child from mutual cursing/repudiation
<i>Walad al-shar'ī</i>	: legitimate child
<i>Walad al-zinā</i>	: biological or natural child
<i>Wālī</i>	: adulterous child
<i>Waṣiyya wājiba</i>	: guardian
<i>Waṭ' shubha</i>	: obligatory bequest
<i>Wilāya</i>	: doubtful intercourse
<i>Ẓannī</i>	: guardianship
<i>Ẓimmī</i>	: presumptive
<i>Zinā bi-l-ikrāh</i>	: non-Muslim citizen
<i>Zinā bi-l-ujra</i>	: rape
<i>Zinā ghayr muḥṣan</i>	: prostitution
<i>Zinā muḥṣan</i>	: adultery committed by unmarried people
<i>Zinā</i>	: adultery committed by married people
	: adultery

## PREFACE

This thesis entitled “*The Legal Position of Children Born out of Wedlock (Comparative Study between Classical Islamic Jurisprudence and the Modern Indonesian Law)*” represents the culmination of my journey through the master's program in Islamic Studies at UIII. The research presented herein is the result of extensive study, rigorous analysis, and the synthesis of knowledge acquired during my study. First and foremost, I would like to express my deepest gratitude to my advisor, Muhammad al-Marakeby, PhD, whose guidance, encouragement, and insightful feedback have been instrumental throughout this research. His unwavering support and expertise have greatly contributed to the improvement of this thesis since the supervision period.

I extend my heartfelt thanks to the Rector of UIII Prof. Dr. Jamhari, MA, the Dean of the Faculty of Islamic Studies, Prof. Noorhaidi, PhD, the Head of the Master Program of the Faculty of Islamic Studies, Zezen Zaenal Mutaqin, S.J.D. and all lecturers of the Faculty of Islamic Studies, whose lectures and discussions have broadened my understanding and sparked my curiosity in this field. Special recognition also goes to Annindhita Timika Aryani, M.Sc., Fakhriyan Ardyanto, S.M. and all faculty staffs for their valuable help and kindness.

I am also indebted to my colleagues and fellow students, whose camaraderie and collaborative spirit have made this journey both enjoyable and enriching. The exchange of ideas and mutual support within this university has been a source of motivation and inspiration. I would like to acknowledge the financial support provided by the Ministry of Religion who gave me a full scholarship during my study. Without their assistance, this research would not have been possible. A special mention goes to my family and friends for their unwavering love, patience, and encouragement. Their belief in my abilities has been a constant source of strength and has helped me persevere through challenging times.

Lastly, it is my hope that this work contributes meaningfully to the field of Islamic Studies and serves as a foundation for future research. Despite the contribution of many people mentioned above I acknowledge that any kind of weakness in this thesis is merely my mistake and my own responsibility.

## INTRODUCTION

### A. Introduction

The legal status of a child is important to determine because it will affect the rights that are obligatory upon the parents. These rights include the right to stipulate the lineage (*al-nasab*), the right to education (*al-tarbiyya*), the right to living expenses (*al-nafaqāt*), the right to breastfeeding (*al-raḍā'a*), the right to custody (*al-ḥaḍāna*) to the right of guardianship (*al-wilāya*) until the child is considered as an adult and capable.<sup>1</sup> These rights could be easily stipulated if the child is legitimate. A legitimate child is a child born in or because of a legal marriage. But in certain circumstances, children's rights could be difficult to stipulate. These conditions are when the child is an illegitimate child born of a void marriage (*al-nikāḥ al-bāṭil*), born of adultery (*al-zinā*), denied by his father through *li'ān* (mutual cursing/repudiation) or fornication (*al-sifāḥ*).

For children born from defective marriage (*al-nikāḥ al-fāsid*) and doubtful sexual intercourse (*waṭ' shubha*), most Islamic jurisprudence scholars argue that the legal position of the child could be attributed to both parents. Consequently, rights such as inheritance (*al-irṭh*), living expenses, and custody are also owned by the child from both parents. But for a child of adultery or *li'ān*, he/she is not seen as having a lineage with his/her father and only has a lineage with his/her mother and his mother's family. This opinion is based on the hadith *al-waladu lil-firāshi wa li-l- 'āhiri al-ḥajaru* (the child is the conjugal bed's and for the fornicator is the stone).<sup>2</sup> This provision has been formalized in Indonesian marriage law through Article 43 Law Number 1 of 1974 concerning Marriage.

In the Indonesian context, in addition to having to be religiously valid, marriages must also be registered to be valid according to the state. It is intended that the marriage bond has a binding legal force and the child born could be assigned a legal position. At the same time, in Indonesia, there are still many whose marriages are not registered for various reasons. As a result, many children cannot receive their rights and cannot be attributed to their fathers legally by positive law. Feeling aggrieved, finally, an unregistered married mother filed a judicial review of Article 43 of the Law of Marriage to the Constitutional Court. The result was that the Constitutional Court issued Ruling Number 46/PUU-

---

<sup>1</sup> Muḥammad Abū Zahra, *Al-Aḥwāl al-Shakṣiyya*, 3rd ed. (Kairo: Daar al-Fikr al-Arabi, 1957). 387.

<sup>2</sup> Abū Zahra. 397-398.

VIII/2010 which opened the opportunity for children born outside of legal marriage to be attributed to their biological fathers.<sup>3</sup>

The Issuance of that ruling has arisen pros and cons. In response to the ruling, *Majelis Ulama Indonesia* (the Indonesian Ulama Council/MUI) finally issued Fatwa Number 11 of 2012 concerning the Position of Children Born from Adultery and the Treatment of Them. Some argued that the issuance of the Constitutional Court Ruling Number 46/PUU-VIII/2010 has opened the gate for illegitimate children to be attributed to their biological father. This is obviously contrary to the preserved Islamic legal tradition which is constituted that the establishment of lineage only occurs through a legal way such as legal marriage and cannot be established through an illegal way such as illicit sexual intercourse. Although later biologically there is a blood relation between an illegitimate child and a man as the biological father, the lineage still cannot be established because the lineage relation occurs due to lawful action, not unlawful action.<sup>4</sup>

There is no difference whether the illicit intercourse is committed between foreign people (*ajnabiyy*) or between people who have filiation (*maḥram*), children born from such intercourse do not have lineage with their biological father. The absence of lineage between illegitimate children and their biological fathers caused the rights and obligations between them to not exist. Nevertheless, if an illegitimate child is born from extramarital intercourse committed by force or in other words by rape action the child will have a different status. In the classical Islamic jurisprudence term, the rape itself is often called adultery by force (*al-zinā bi-l-ikrāh*).<sup>5</sup> The lineage of the child remains to both parents as long as the parents get married before childbirth. In addition, because the lineage could be proven, the child's mother will have a waiting period (*idda*) and the father must pay a dowry (*al-mahr*) to the child's mother in the form of compensation or *niḥla* (bridal gift).<sup>6</sup> Moreover, according to the classical Islamic jurisprudence, a man who raped a woman can marry her to cover her disgrace (*al-'ayb*) if both agree.<sup>7</sup>

<sup>3</sup> "Constitutional Court Ruling," 46/PUU-VIII/2010 § (2012).

<sup>4</sup> Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law," *Journal of Indonesian Islam* 10, no. 2 (2016): 340.

<sup>5</sup> 'Abdurrahmān Al-Jazīrī, *Kitāb al-Fiqh 'alā-l-Maḏāhib al-Arba'a*, 2nd ed., vol. 5, 6 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 2003). 88.

<sup>6</sup> Ibn Rushd Al-Qurtubī, *Bidāyatu-l-Mujtahid wa Nihāyatu-l-Muqtasid*, 1st ed., vol. 3, 4 vols. (Beirut: Dār Ibn Ḥazm, 1995). 1728-1729.

<sup>7</sup> Hamam, "The Status of Outside Marriage Children (The Study of Constitutional Court Regulation No. 46/PUU-VIII/2010 on February 27th, 2012, Based on the Fuqahas' Perspective)," *International Journal of Educational Research & Social Sciences* 2, no. 3 (2021): 579.

In Indonesia, the regulation concerning children born out of wedlock varies because Indonesia has adopted many legal sources consisting of Islamic law, and European law, especially from the Dutch and customary law. Because of that, the issue of children born out of wedlock in Indonesia as part of family law cannot be simplified and reduced in one unified law. Although the provisions regarding the issue of children born out of wedlock in Indonesia apparently have undergone legal transplants referring to Alan Watson's theory in which Indonesian lawmakers have transplanted regulations from other countries or from other more established legal systems,<sup>8</sup> it still needs to be examined whether it is really a legal transplant or a merely legal borrowing that was adopted with no attempt of adaptation or accommodation to the Indonesian particular culture. Due to the highest number of Indonesian citizens is Islamic adherents it is presumably obvious that the most adopted law especially family law is Islamic family law. Considering that the issue of a child born out of wedlock is also part of Islamic family law, this research furthermore will explore the legal status of a child born out of wedlock by comparing what is governed by Islamic family law from Islamic jurisprudence and what is stated in Indonesian national law.

## **B. Literature Review**

Nurlaelawati and Van Huis in their symposium article discuss the interaction of Islamic law, customary law, and human rights related to the issue of children born out of wedlock as illegitimate children. In their works, they focused on children from adultery and adopted children. They describe the concept of the biological father as a concept that can be used in Islamic family law issues in Indonesia related to the legal position of the child born out of wedlock. The argument they use is that based on Islamic values, biological fathers cannot obtain civil relations with their biological children as widely understood from the Constitutional Court decision Number 46/PUU-VIII/2010. Likewise related to adopted children which in Islam is not known as full adoption which results in the equality of adopted children and legal children, although in some customary laws in Indonesia, this could be found.<sup>9</sup>

---

<sup>8</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law*, Second (Athens: University of Georgia Press, 1993), 1.

<sup>9</sup> Euis Nurlaelawati and Stijn Cornelis van Huis, "The Status of Children Born out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms," *Journal of Law and Religion* 34, no. 3 (December 2019): 356, <https://doi.org/10.1017/jlr.2019.41>. 356.

The support for family law reform in Indonesia based on religion is very strong, but changing the laws and regulations as a whole with the concept of religion is considered dangerous because it will damage the character of religion. Therefore, the alternative used is to apply tolerance to written regulations and prioritize the application of religious concepts through practices.<sup>10</sup> Similar to Nurlaelawati and Van Huis, I also intend to discuss children out of wedlock as illegitimate children but not only focus on the adulterous child. Rather, I will explore other categories of children out of wedlock. Moreover, I will use different approaches to deepen my discussion and highlight comparable aspects between Islamic family law in Islamic jurisprudence generally and Islamic family law in the Indonesian modern law. In addition, I use the comparative law method and theory of legal transplants proposed by Alan Watson.

Regarding the issue of the legal position of the child born out of wedlock, as mentioned earlier the Constitutional Court of the Republic of Indonesia has issued Ruling Number 46/PUU-VIII/2010. The ruling has been discussed in various works, including in journal articles written by Hamam. In his article, Hamam reviewed the results of the Constitutional Court's Ruling based on the opinions of prominent Islamic jurisprudence scholars, namely Abū Ḥanīfa, Mālik, al-Shāfi'ī and Aḥmad bin Ḥanbal including Dāwūd al-Zāhirī. In the view of al-Shāfi'ī and Dāwūd al-Zāhirī, the child born out of wedlock has no lineage with his or her father and his or her father's family, but only with his or her mother and his or her mother's family. In addition, according to Hamam, the stipulations of the Constitutional Court Ruling have no legal implications for the child born out of wedlock because the ruling only establishes lineage between the child and his or her father who has an unregistered marriage with his or her mother. As for the child born out of wedlock because he or she has no lineage with his or her biological father, then he or she has no rights such as inheritance and guardianship. However, his or her father had to be punished by *ta'zīr* for providing living expenses for his child.<sup>11</sup>

When it is viewed carefully, the child born out of wedlock discussed in Hamam's article is the child from adultery where the intercourse between the mother and the man as the biological father is committed based on consent. Meanwhile, the cases taken in this study are not only from adultery but also encompassing children born from other causes

---

<sup>10</sup> Nurlaelawati and Van Huis, 356.

<sup>11</sup> Hamam Hamam, "The Status of Outside Marriage Children (The Study of Constitutional Court Regulation No. 46/PUU-VIII/2010 on February 27th, 2012 Based on the Fuqaha' Perspective)," *International Journal of Educational Research and Social Sciences (IJERSC)* 2, no. 3 (June 29, 2021): 574–84, <https://doi.org/10.51601/ijersc.v2i3.85>. 574.

such as mutual repudiation (*al-li'ān*) and void marriage (*nikāh al-bāṭil*). Nevertheless, both my study and Hamam's research involved Constitutional Court Ruling Number 46/PUU-VIII/2010 as one of the references.

In line with Nurlaelawati, Van Huis and Hamam, Marilang also involved Constitutional Court Ruling Number 46/PUU-VIII/2010 in his research, even becoming the main reference using the content analysis method. Marilang argued that the presence of Constitutional Court Ruling Number 46/PUU-VIII/2010 has given additional valuable insight into family law in Indonesia. Although it causes vague about the meaning of child born out of wedlock mentioned in the ruling, according to Marilang the word should be understood as a child born not only from unregistered marriage but also from sexual intercourse such as adultery and fornication. Marilang also emphasized that according to him, although the initial submission of the ruling began with an application for the stipulation of lineage and children's rights from unregistered marriage, the result of the ruling was not limited to that as understood by many people.<sup>12</sup>

In addition to the legal position of children born out of wedlock, Marilang also discussed the legal implications of stipulating the relationship of children born out of wedlock with their biological fathers, namely limited legal relationships that are different from legal children. It can also be stipulated as long as the biological relationship between father and child can be proven through valid evidence, including the use of technology such as DNA testing. Marilang's research with my study is quite different in terms of the focus of the research studied. The absence of a legal comparative aspect in Marilang's study became one of the major differences compared to my study. While Marilang made the Constitutional Court Ruling his main data source I only used it as one of the main sources.

### **C. Research Questions**

The focus of this research is stated through the following research questions:

- 1) What is the legal position of children born out of wedlock according to Islamic jurisprudence and the Indonesian modern law?
- 2) What made Islamic family law in Indonesia concerning the issue of children out of wedlock different compared to Islamic family law in classical Islamic jurisprudence?

---

<sup>12</sup> Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law," 352.

My argument started from the fact that Islamic family law has been adopted and legitimized in the Indonesian national legal system. It encompasses many aspects including the issue of children born out of wedlock. Although the Islamic family law in Indonesia mainly adopted Islamic family law from Islamic jurisprudence, it seems that there are efforts to make an adjustment under the stated control following the diversity of Indonesian society. Not only is the diversity of Indonesian society as an internal factor, but an external factor such as the involvement of European law has also affected the enactment of family law in Indonesia.

In the case of a child born out of wedlock, the main regulations followed by Muslims in Indonesia are the Law of Marriage Number 1 of 1974 and the Compilation of Islamic Law (KHI). However, due to the hierarchy of legal system followed in Indonesia that made the Law of Marriage and KHI under the Constitutional Court Ruling, it makes stipulations concerning children out of wedlock must not be contrary to the Ruling. The Ruling itself has shown an effort to accommodate many law sources consisting of Islamic law, customary law and European law that has been applied in Indonesia to solve the issue of children born out of wedlock. This made Islamic family law in Indonesia has been modified and no longer identical to Islamic jurisprudence. This is also in favour of the notion stating that Islamic family law like other law systems is inevitable from evolution and currently derived its authority from the political will of the state.<sup>13</sup>

In addition, the enactment of Islamic family law in Indonesia concerning the legal status of children born out of wedlock has been mixed with European law. Because of that, there is an effort to recognize the concept of the biological father in Indonesia even though the definition is still under development. This concept is totally rejected by classical Islamic jurisprudence based on the popular prophetic narration stating that “*The child belongs to the conjugal bed’s and for the fornicator is stoning.*” This made family law in Indonesia undergo hybridity of law which led to the inconsistency. On the one hand, Indonesian law considers adultery as a crime (*al-jināya*) similar to classical Islamic jurisprudence. Still, on the other hand, it also attempts to accommodate the concept of the biological father which is not recognized by classical Islamic jurisprudence.

---

<sup>13</sup> Abdullahi An-Na’im, *Islamic Family Law in a Changing World: A Global Resource Book* (Zed Books London, 2002), 3.

#### **D. Research Objective and Significance**

This study proposed valuable insight and contribution towards the discussion of children born out of wedlock in Islamic jurisprudence that has been applied in Islamic family law in the Indonesian context. The study subsequently sheds light on the significant change of Islamic family law in Indonesia by comparing the provisions from the classical Islamic jurisprudence textbooks and the provisions in the Indonesian regulations concerning Islamic family law, especially in case of children born out of wedlock consisting of Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law issued by the Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (KHI). In addition, this study will explore factors that make a child considered legitimate and illegitimate including the rights of the child upon the parents. Furthermore, by delving into the legal position and status of children out of wedlock in classical Islamic jurisprudence compared to the Indonesian modern law this study will provide a comprehensive understanding in regard with the existence of legal borrowing in family law in Indonesia especially in regard with the issue of children born out of wedlock. Indeed, the topic of children born out of wedlock is a common topic that has been discussed in many works, especially in the Faculty of Shāri‘a or Islamic law in Indonesia. However, I believe that the usage of different approaches and perspectives will also provide a different result.

Not only is there an interplay between Islamic family law from classical Islamic jurisprudence and its formalization in modern Indonesian law, but this study also covers the significance of European law's influence towards the application of family law in Indonesia. Classical Islamic jurisprudence as it has become Indigenous law side by side with customary law in Indonesia together with European law as another adopted law will enrich Indonesian legal national discourse, especially in the issue of children born out of wedlock. On a global scale, this study could contribute towards the broader discourse on integrating of religious law -in this sense Islamic law- within a secular legal system. Moreover, the existence of the discussion on similar issues in other countries will provide a comparative perspective that similar debate also happens in other multicultural and multireligious societies. In addition, the result of this study could become a benchmark for further research on a similar issue which is the issue of children born out of wedlock. However, it is important to underline here that this study only covers the debate on the legal position of children born out of wedlock and does not encompass further discussion on the

legal implications of such a legal position. Therefore, the discussions such as children's rights occurring from their legal position are not elaborated more in this study.

### **E. Conceptual/Theoretical Framework**

This study uses the legal transplants theory proposed by Alan Watson. The legal transplants theory itself refers to the moving of a rule or a system of law from one country to another, or from one people to another. It could happen either by force or voluntarily. The imposition of new laws by force commonly involves the state powers. As for voluntary transplants, they could be differentiated into three categories based on their way. First when a people move into a different territory where there is no comparable civilisation and takes its law with it. Secondly, when a people move into a different territory where there is a comparable civilisation and takes its law with it. Thirdly, when a people voluntarily accept a large part of the system of another people or peoples.<sup>14</sup>

In relation to this study, it could be demonstrated that Indonesian lawmakers have transplanted family law from European law considering that the status of Islamic law in Indonesia is positioned as Indigenous law side by side with customary law. Meanwhile, the status of European law is positioned as adopted and transplanted foreign law into Indonesian law which has already united with Islamic law. European law is systematically deemed more developed and established rather than Indonesian law. In specific cases, Indonesian law has transplanted the provisions to deal with the issue of a child born out of wedlock from European law.

The reception and transplant of family law from European law into Indonesian law has been successfully conducted. Similar to a transplant in the human body that will grow in its new body and become part of that body just as European law in the Indonesian national legal system. Therefore, European law has been an inseparable part of the Indonesian national legal system.<sup>15</sup> Nevertheless, it is important to assess whether the adoption of the legal system from European law in Indonesian law has been carried out as a whole or just in certain incomplete versions which later will lead to confusion. Because the adoption of certain legal systems classified as the legal transplants required certain conditions especially when it comes to the particular background of the enactment that law.

---

<sup>14</sup> Watson, *Legal Transplants: An Approach to Comparative Law*, 21.

<sup>15</sup> Watson, 95–97.

Therefore, the legal transplant that has undergone in Indonesia apparently does not fulfil the requirements that have been proposed by Watson when it is connected to European law due to the absence of some conditions such as the involvement of the legal background of certain rules. Indeed, some of the rules from European law have been adopted in the Indonesian legal system, especially when it comes to the idea of codification and legal hierarchy. Nevertheless, the application of legal transplant from European law into Indonesian law again needs to be examined to determine whether it is a really legal transplant or just a mere legal borrowing. Moreover, the status of Islamic law in Indonesia which is positioned as Indigenous law side by side with customary law in this study has made European law adopted and transplanted foreign law into Indonesian law which has already united with Islamic law. This theoretical framework finally provides a clear and focused perspective for analysing the legal position of a child born out of wedlock in Islamic family law from classical Islamic jurisprudence compared to modern Indonesian law which has been influenced by European law and makes a comprehensive understanding regarding which aspect is adopted and changed from its origin.

#### **F. Research Method**

This study is qualitative research based on library research. Data is obtained from positive laws and regulations in Indonesia as primary data. Secondary data are collected from various Islamic jurisprudence textbooks and other written works in the form of journal articles, papers, symposium articles, and so on. Data analysis was carried out using the comparative law method by tracing regulations related to the issues studied, in this case, the legal position of children born out of wedlock based on Islamic jurisprudence and then comparing it with Islamic family law in the Indonesian context. Through this method, the author will analyse the legal provisions either from Islamic jurisprudence textbooks or Indonesian positive laws concerning the legal position of children born out of wedlock which is the main problem in this study.

#### **G. Thesis Structure**

To make the discussion in this research systematic and well-organized, I will divide it into an introduction, four chapters and a conclusion section as follows:

**Introduction**, which includes the background of the research, formulation of the research problem in the form of research questions, the objective of study and its significance, theoretical framework, research method, and thesis structure.

**Chapter I** The Concept of Child Born out of Wedlock in Islamic Family Law, in this chapter I will confer the concept of the child born out of wedlock consisting of the definition, the classifications, and the legal position according to Islamic family law. The explanation in this chapter is aimed primarily at giving an understanding of the concepts discussed in this study.

**Chapter II** Child Born from Intrafamilial Sexual Intercourse (Incest) as Part of Children out of Wedlock, in this chapter I aim to discuss a special case namely a child born from intrafamilial sexual intercourse or incest as part of children born out of wedlock. Although basically there is no significant difference between children born from incest and the rest of children out of wedlock, in certain conditions, incestuous children could be different from other children. In addition, I also involve things that make intercourse considered incest in this chapter to enrich the elaboration.

**Chapter III**, Contemporary Discourse Regarding Child out of Wedlock in Indonesian Context, after commencing the discussion on children out of wedlock in Islamic family law from general Islamic jurisprudence in Chapter I, in this chapter I move to the discussion on children out of wedlock in Islamic family law in Indonesian context. By highlighting some key features related to the primary promulgations in Indonesia concerning children out of wedlock, I also pointed out the status and civil rights of children. Apart from that, the concept of the child itself will be elaborated more in this chapter in accordance with the Indonesian context.

**Chapter IV**, Analytical Study Regarding Child out of Wedlock in Indonesian Context, which is the final chapter before the conclusion section. The chapter generally examines the provisions concerning the issue of children born out of wedlock as illegitimate children within Islamic family law from general Islamic jurisprudence and the Indonesian context. This chapter will also reveal what makes Islamic family law in Indonesia quite different under state control due to the usage of legal borrowing compared to its origin. In addition, this chapter briefly will also involve similar provisions from other Muslim countries for comparison.

**Conclusion** section as the last part of this study. I made it separated from the previous part and made it a stand-alone part to make it easier to find. This section contains a summary of key findings, implications of the research, academic contribution, and concluding remarks. In this chapter, I will also mention recommendations for future research and undiscussed aspects relating to the topic in this research for further exploration.

# CHAPTER I

## THE CONCEPT OF CHILD BORN OUT OF WEDLOCK IN ISLAMIC FAMILY LAW

### 1.1. The Definition of the Child Born Out of Wedlock

The child is part of a family with an important position as the first descendant. If we look at one of the marriage's objectives, we will find that continuing descendants and preserving family could only be implemented by the birth of a child. However, the birth of a child does not always commence with the presence of marriage. In some cases, the child is born in the absence of the marriage of the parents. The parents committed sexual intercourse out of wedlock or valid marriage in other words so-called extramarital sexual intercourse.<sup>16</sup> According to its causes, such intercourse could be classified into two categories. The first one is doubtful sexual intercourse which is intercourse done due to the lack of awareness or dubious (*shubha*) between man and woman who have no marriage relation or have marriage relationship but it is deemed as defective due to the existence of marriage impediment.<sup>17</sup> The second one is adultery which is intercourse outside of marriage, which is done intentionally and consciously, by men and women with their respective willingness, like each other's, without coercion from anyone.<sup>18</sup> The term *shubha* made a significant difference between doubtful intercourse and adultery because it denoted a state of uncertainty.<sup>19</sup>

Although there are two categories in extramarital intercourse as mentioned earlier, the child born of adultery mostly receives more attention because he or she is born from unlawful action. This is the reason why the term child born out of wedlock is mostly understood and referred to a child born from adultery.<sup>20</sup> In addition, the legal status of a child born from doubtful intercourse is not as complex as a child born from adultery due to

---

<sup>16</sup> Eva Schlumpf, "The Legal Status of Children Born out of Wedlock in Morocco," *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 4, no. 22 (2016): 2.

<sup>17</sup> Wahba Al-Zuhayli, *Al-Fiqh-l-Islām wa Adillatuh*, 2nd ed., vol. 7 (Damascus: Dār al-Fikr, 1985), 688.

<sup>18</sup> Neng Djubaedah, "Child Marriage and Zina in Indonesian Legislation in Islamic Law," *Jurnal Hukum & Pembangunan* 49, no. 1 (April 4, 2019): 206, <https://doi.org/10.21143/jhp.vol49.no1.1917>.

<sup>19</sup> Aslati et al., "Utilizing Science and Maqāsid Al-Sharī'ah in Resolving Contemporary Issues of Islamic Family Law," *Al-Manahij: Jurnal Kajian Hukum Islam*, March 16, 2024, 29, <https://doi.org/10.24090/mnh.v18i1.10571>.

<sup>20</sup> Teguh Anindito, "Weak Protection of Civil Rights Zina Children in Indonesia," *Islam Universalia: International Journal of Islamic Studies and Social Sciences* 4, no. 1 (2022): 17.

the clarity of stipulation argued by Muslim jurists. It has been stated that doubtful intercourse becomes one of the primary rationales for the establishment of a child's lineage besides valid marriage and defective marriage.<sup>21</sup> The current term child out of wedlock is often defined as a child born either from adultery or mutual repudiation/cursing (*al-li'ān*). It is influenced by the classical Islamic legal tradition that equalized a child ignored by the father through mutual repudiation with a child born from adultery which only has lineage with the mother and the mother's family.

In the classical Islamic jurisprudence textbook, the term child out of wedlock refers not only to child born outside valid marriage but also to child conceived before marriage of the parents or born less than six lunar months following the marriage between the parents.<sup>22</sup> For those who born more than two years following the time of dissolution of marriage of the parents cannot attributed to the father.<sup>23</sup> Besides the two references previously, the status of child out of wedlock could occur due to mutual repudiation proposed by the father. After several required procedures, the status of a child changes from legitimate and becomes similar to a child from adultery. Commonly, the classical Islamic jurisprudence textbook differentiates a child from adultery (*walad al-zinā*) and a child ignored by the father through mutual repudiation (*walad al-li'ān*) separately in different sections although both are constituted as children out of wedlock. It is presumably due to the different status of the parents whereas *walad al-zinā* has no marriage relation, meanwhile, in *walad al-li'ān*, there is a marriage relation between the parents. It is essential to highlight here that what the author means by classical Islamic jurisprudence in this sense is Muslim scholars' opinions from four prominent Islamic legal schools encompassing the Ḥanafī school, Mālikī, Shāfi'ī, and Ḥanbalī school. Therefore, other opinions beyond those schools are excluded from this study.

## 1.2. The Causes Making a Child Classified as a Child Born Out of Wedlock

The term child out of wedlock does not refer only to one type of child, because as mentioned earlier the child out of wedlock includes a child born from adultery, a child ignored by the father through mutual repudiation, and a child born from doubtful sexual intercourse. The opposite of a child out of wedlock is called a legitimate child which has

<sup>21</sup> Al-Zuhaylī, *Al-Fiqh-l-Islām wa Adillatuh*, 1985, 7:681.

<sup>22</sup> Euis Nurlaelawati and Stijn Cornelis van Huis, "The Status of Children Born out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms," *Journal of Law and Religion* 34, no. 3 (December 2019): 368, <https://doi.org/10.1017/jlr.2019.41>.

<sup>23</sup> 'Alī ibn Abī Bakr Al-Marghīnānī, *Al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, 1st ed., vol. 3 (Madinah: Dār al-Sirāj, 2019), 348.

an exact status related to the parents and the parent's family. On the contrary, the status of a child out of wedlock is not as clear as a legitimate child because one type of child out of wedlock does not necessarily have a similar status with another child out of wedlock and vice versa. There are several causes that make a child classified as a child out of wedlock. Those are the marriage of the parents is prohibited because it is deemed void according to Islamic law (*nikāh al-bāṭil*), the child is ignored by the father through mutual cursing/repudiation (*al-li'ān*), the child born from unlawful intercourse between the parents who have no marriage ties either valid or defective (*al-zinā*), and child born from doubtful sexual intercourse (*waṭ al-shubha*). All those causes will be discussed further as follows.

### 1.2.1. Void Marriage (*Nikāh al-Bāṭil*)

Before Islamic arrival, numerous practices of marriage were done by Arabic tribes in the Arabic peninsula including marriage practices that were prohibited by Islam later. Such practices are seen as contradictive towards Islamic values thus they are called void marriage (*nikāh al-bāṭil*). 'Ā'isha narrated several kinds of void marriage practised by pre-Islamic society (*ahl-l-jāhiliyya*) such as impregnation marriage (*nikāh al-istibdā'*), group marriage (*nikāh al-rahṭ*), and free choice marriage (*nikāh al-istikhyār*). Impregnation marriage happened when a man instructs his wife immediately after her menstruation period to go to another person and have intercourse with him. The husband would not have intercourse with her until the wife gave the signs of pregnancy. The husband then would resume his intimate relationship with her wife if he wanted to. This kind of marriage is believed to be able to bring good descents.

As for group marriage, it refers to a practice whereby a group of men, usually no more than ten, would have intercourse with a woman. If she got pregnant and gave birth to a child, she would summon all those men to gather at her place and name one of them as the father of the child and he would not be able to object.<sup>24</sup> The main consideration to determine the father usually is based on the similarities of the child appearance using physiognomy method (*al-qiyāfa*). Meanwhile, what is meant by free choice marriage is when a woman gives herself to several tribal leaders respectively hoping her children would be like them in the future in terms of position and honour.<sup>25</sup> In addition, there is the fourth

<sup>24</sup> A. Shabana, "Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts: From Physiognomy to Dna Analysis," *Journal of Islamic Studies* 25, no. 1 (January 1, 2014): 5, <https://doi.org/10.1093/jis/ett057>.

<sup>25</sup> Muḥyi-l-Dīn Al-Nawāwī, *Kitāb Al-Majmū' Sharḥ al-Muḥaḏḏab Li-l-Shirazī*, vol. 17 (Jeddah: Maktabah al-Irshad, n.d.), 202–3.

type of void marriage practice so-called prostitution (*al-zinā bi-l-ujra*).<sup>26</sup> The practice of prostitution practised by pre-Islamic society in Arabic peninsula usually done by putting signs at the prostitutes' doors. Whoever wanted to have intercourse with them, could enter from these doors and pay with certain prices. If any of them got pregnant and gave birth, she would summon all those who had intercourse with her and following the judgment of the experts on physical features, the child would be attached to the one whom these experts determine, and no one would be able to object.<sup>27</sup>

There are still numerous types of void marriage which are only discussed briefly in this research. For instance, there is swap marriage (*nikāḥ al-shighār*) which refers to a type of marriage where two men agree to marry each other's sisters or daughters without any dowry (*al-mahr*) being exchanged, because of that swap marriage is also called exchange marriage Exchange or swap marriage (*nikāḥ al-shighār*) should be annulled whatever the conditions according to Mālik as narrated by Shaḥnūn. There is no difference between a swap marriage between a free person and a slave. All types of such kind of marriage are generally considered impermissible (*ḥarām*) because it violates the requirement for a dowry as agreed by a majority of Muslim jurists and undermines the free will and consent of the women involved.<sup>28</sup> According to Mālik swap marriage is kind of void marriage and should be annulled through annulment (*faskh*), according to al-Shāfi'ī swap marriage is kind of defective marriage (*nikāḥ al-fāsīd*).<sup>29</sup> These different opinions would result to the different status of the child. If the swap marriage is constituted as void marriage which is deemed similar to adultery, the child would be constituted similar to an adulterous child which only has lineage to the mother and the mother's family. On the other hand, if the swap marriage is constituted as a defective marriage, the child status could be equalized to the legitimate child which has lineage relationship to the mother and the father.

### 1.2.2. Mutual Repudiation (*al-Li'ān*)

Mutual repudiation (*al-li'ān*) is preceded by the presence of an accusation from the husband towards his wife allegedly committed adultery. Therefore, the husband does not recognize the child born from that wife as his child. In case the husband could not present four witnesses to prove his accusation, to make him free from the prescribed punishment

<sup>26</sup> Al-Jazīrī, *Kitāb al-Fiqh 'alā-l-Mazāhib al-Arba'a*, 2003, 5:88.

<sup>27</sup> Shabana, "Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts," 5.

<sup>28</sup> Shaḥnūn bin Sa'īd al-Tanūkhī, *Al-Mudawwanatu-l-Kubrā*, vol. 4 (Saudi Arabia: Wizāra al-Shu'ūn al-Islāmiyya wa-l-'Auqāf wa al-Da'watu wa-l-'Irshād, n.d.), 2.

<sup>29</sup> 'Abdurrahmān Al-Jazīrī, *Kitāb al-Fiqh 'alā-l-Mazāhib al-Arba'a*, 2nd ed., vol. 4 (Beirut: Dār al-Kutub al-'Ilmiyya, 2003), 116–17.

of false accusation or slander (*al-qazf*), then the husband and wife say cursing oath respectively (*ḥalf al-li'ān*). The consequence of *al-li'ān* is huge because after the oath has been expressed, the child born from the wife will lose the lineage to the man who is the father. In addition, the marriage bond between the husband and the wife separated and could not be repentance forever after the stipulation of the judge according to Ḥanafī school. But if the husband comes back again to the judge and acknowledges that he was lying then he must be punished, and he is allowed to marry his ex-wife again. Because the child of *al-li'ān* lost the lineage to the father and only remained to the mother, the child constituted a child out of wedlock.<sup>30</sup>

In Ḥanafī school, the dissolution of marriage after mutual repudiation or *al-li'ān* is not automatically stipulated before it is imposed by the judge. On the contrary, according to al-Shāfi'ī the dissolution of marriage automatically stipulated with the stipulation of *al-li'ān*. The type of divorce caused by *al-li'ān* is irrevocable divorce (*ṭalāq bā'in*) due to stipulation by the judge according to Abū Ḥanīfa.<sup>31</sup> The child of *al-li'ān* only has lineage with the mother and the mother's family because the lineage of a child from mutual repudiation is cut off from the father and the father's family. This position is based on several reports from the Prophet Muhammad PBUH. Similarly, Ibn al-Qayyim (1292–1350 CE), a Muslim jurist from the Ḥanbalī school explains the diminishing of family lineage of the child from the father as a legal consequence of mutual repudiation between a husband and wife according to certain reports from the Prophet Muhammad. This view is widely held by most Muslim scholars.<sup>32</sup>

A cursing oath commonly is not done unless initiated by adultery accusation from a husband to his wife. Indeed, no provision requires the existence of child gestation to propose the accusation. In case there is a child amid that accusation, there are several detailed explanations regarding the child's lineage. The child's lineage could be attributed to both parents if a husband accused his wife of committing adultery and did mutual cursing but after that, the wife gave birth to a child less than six lunar months (*qamariyya/hijriyya*). It means that if the child is born more than six lunar months, the child's lineage could be attributed to the mother only. In addition, if the husband accused his pregnant wife of

<sup>30</sup> Al-Marghīnānī, *Al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, 3:308.

<sup>31</sup> Ibn al-Hammām Al-Ḥanafī, *Sharḥ Faṭḥ Al-Qadīr 'alā al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, 1st ed., vol. 4 (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 256.

<sup>32</sup> Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law," 351.

committing adultery five months from the day of the accusation for example, and then afterwards it is found that the pregnancy started more than five months ago, regardless the adultery could be proven or not, the child's lineage could not be avoided by the husband and sticks to both parents.<sup>33</sup>

### 1.2.3. Adultery (al-Zinā)

The measurements of an act considered adultery have been defined by many Muslim scholars in many Islamic jurisprudence textbooks. One of them is al-Jazīrī. Al-Jazīrī defined adultery as an act of a responsible individual (*mukallaf*) engaging in sexual intercourse with a consenting woman, unrelated to him by marriage or ownership.<sup>34</sup> The definition proposed by al-Jazīrī is quite complete but in certain things does not exclude the intercourse act due to doubtful and force. Adultery is an unlawful act and classified as a big sin in Islamic law that obliged the specific punishment, or penalties prescribed by Islamic law for serious crime, which are considered to be divinely ordained and non-negotiable (*al-ḥudūd*). Al-Miṣrī further explains what is meant by *mukallaf*. According to him, *mukallaf* is an adult, mentally competent, and able to select and choose without any force which includes Muslim, protected non-Muslim citizens (*al-ẓimmī*), apostate (*al-murtadd*), free (*al-ḥurr*), and slave (*al-'abd*).<sup>35</sup> From this explanation we could underline that if the act is committed by people who is not mentioned earlier like kids and insane or person mentally is unstable, the punishment cannot be implemented.

These two categories of adultery according to Islamic law are adultery committed by a married person (*zinā muḥṣan*) and adultery committed by a person who is not married (*zinā ghayr muḥṣan*). The punishment for a married person is stoning until dies (*al-rajm*) while the punishment for a person who is not married is corporal punishment or whipping (*al-jild*) a hundred times and exile (*taghrīb*) one year to a certain place with a minimum distance of that allows people to do shortening the prayer (*al-qasr*).<sup>36</sup> The number of punishments for *zinā ghayr muḥṣan* is different between a free person and slave. The slave only received half of the free person's punishment. It means that if the free person must be punished with a hundred times whipping, the slave has to be punished only fifty times and exiled for a half year. Besides all the things mentioned above, several conditions must be

<sup>33</sup> Saḥnūn bin Sa'īd al-Tanūkhī, *Al-Mudawwanatu-l-Kubrā*, vol. 6 (Saudi Arabia: Wizāra al-Shu'ūn al-Islāmiyya wa-l-'Auqāf wa al-Da'watu wa-l-'Irshād, n.d.), 110.

<sup>34</sup> Al-Jazīrī, *Kitab al-Fiqh 'alā-l-Mazāhib al-Arba'a*, 2003, 5:48.

<sup>35</sup> Ibn Naqīb al-Miṣrī, *Umdat Al-Sālik Wa 'Iddat al-Nāsik*, 1st ed. (Beirut: Daar Ibn Hazm, 2006), 444.

<sup>36</sup> al-Miṣrī, 445.

fulfilled to implement whipping in the textbook. One of them is the prohibition of adultery known by the perpetrator. But if we look at the current situation, the possibility of not knowing the prohibition of adultery is almost not found. Knowing what is meant by adultery in Islamic law will make it easier to understand what is meant by a child born from adultery.

A child born from adultery is also known as an illegitimate child in the narrow meaning. Unlike a child out of wedlock that has broader references, an illegitimate child is specifically closer to a child born from adultery. Hence the term illegitimate child is often used to substitute the term *walad al-zinā* from Arabic. Numerous scholars from al-Shāfi‘ī and Ḥanafī schools argued that it was allowed for a man who committed adultery with a woman to marry her before the purification period (*al-`istibrā`*) had over if she was not pregnant and after she gave birth if she was pregnant because there is not any prohibition found about that. However, scholars from Mālikī school expressed their agreement in which they argued that the marriage could not be conducted and considered forbidden before all traces of adulterous impurity have been completely removed if she is not pregnant and after she gave birth if she is pregnant. It is aimed to separate between permissible things and forbidden things. Some scholars also agree if the marriage contract is conducted but the intercourse is not committed until all traces of adultery have been removed from the woman’s body, the marriage contract is allowed. If a man commits adultery with a woman and marries another woman, some scholars argue that his marriage is null and void and thus, must be annulled. Some others do not perceive the marriage as null and void, but it is better to do divorce unless he has done repentance seriously.<sup>37</sup>

### **1.3. The Causes making a Child Classified as Legitimate Child**

#### **1.3.1. Wedlock/Valid Marriage**

The validity of marriage in Islamic family law is essential due to the huge legal consequences that are brought. A marriage is considered as valid marriage if it fulfils all pillars and required conditions following most of the Muslim jurists’ opinion since the early of Islam. Although there are some differences among them in determining each pillar and condition. It is required in marriage contracts committed by capable people. It means that the marriage contract is not considered valid if it is committed by incapable people such as kids, insane, or slaves. However, this requirement is not absolute because all of them still have a chance to conduct a marriage contract when accompanied by capable people. For

---

<sup>37</sup> Al-Jazīrī, *Kitab al-Fiqh ‘alā-l-Mazāhib al-Arba‘a*, 2003, 5:123.

instance, a slave could conduct a marriage contract if he or she is accompanied by the freedman (*mawālī*) or at least received permission from that freedman to conduct a marriage contract.<sup>38</sup> According to some opinions, the marriage contract could not be conducted between kids or insane people due to consideration that marriage contract is like trade contract which is an exchange contract (*mu'awāḍa*). In addition, the discussion regarding slavery nowadays seems no longer relevant considering the status of slave which is neglecting the provision of human rights.

Among the pillars of the marriage contract is the presence of the guardian (*al-walī*) from the bride's side so the marriage contract is considered invalid in the absence of that guardian. It is based on one elevated *ḥadīth* (*ḥadīth marfū'*) narrated by Abū Hurayra containing the prohibition for a woman to marry by herself or by other women. That *ḥadīth* implicitly requires the presence of a guardian man from the bride's side when the marriage contract is conducted. Similar narration is also found in one *ḥadīth* narrated by Abū Sa'īd al-Aṣṭarikhī which stated that whoever woman marrying herself without a guardian, the status of that marriage contract is null and void. Another requirement in a marriage contract to make it valid is the usage of certain words during a marriage contract. Otherwise, the marriage contract would not be considered valid. Both the groom and the bride also must agree and consent so that the marriage contract does not happen by force. Although some scholars do not require this requirement. Some of them argue that the agreement and consent from the bridegroom are not required so the agreement and consent from the guardianships seems enough especially from the guardian of the bride side.<sup>39</sup>

Scholars from the Mālikī school have formulated pillars of marriage into five pillars. Those are the guardian from the bride's side, dowry, groom, bride, and legal contract (*ṣīgha*). On each pillar, several requirements must be fulfilled. For example, the legal contract of marriage consists of two things which are a statement of offer (*al-ījāb*) from the bride's guardian or his representative and a statement of acceptance (*al-qabūl*) from the groom. What is meant by the pillar of marriage itself is something that without it, the essence of a certain law would not be found because it would be considered invalid. In Indonesia, the validity of a marriage is required by both religion (e.g. Islamic law) and the national juridical laws (marriage law).<sup>40</sup> Related to the dowry, it is important to underline

<sup>38</sup> Al-Nawāwī, *Kitāb Al-Majmū' Sharḥ al-Muḥaẓẓab Li-l-Shirāzī*, n.d., 17:203.

<sup>39</sup> Al-Qurṭubī, *Bidāyatu-l-Mujtahid wa Nihāyatu-l-Muqtasid*, 3:940.

<sup>40</sup> Bahruddin Muhammad et al., "The Inheritance Rights of Illegitimate Children Outside Marriage in the Perspective of Children's Rights," *International Journal of Sciences* 14, no. 1 (2014): 50.

that the amount of dowry depends on the agreement between the bridegroom and their guardians. So that there is no certain measurement for it as long as it is proper, valuable, and given to the bride as a person who has the right upon the groom.<sup>41</sup>

The pillar of marriage is inseparable from the conditions of marriage. There are conditions in marriage which are some of them related to legal contract (*ṣīgha*) and others related to the bridges. Besides that, the witnesses are also part of those conditions. Legal contracts in Islamic marriage as mentioned earlier require using certain words that words have denotative meaning or connotative. For the witnesses, two witnesses' men are required. Not only men, but also must be adults, free, Muslims, mentally healthy, and righteous people although the righteousness here is still debatable among Muslim jurists. If there is only one man as a witness, two witnesses' women are equivalent to substituting another witness's man. The requirement of using the words *al-nikāḥ* and *al-tazwīj* is following al-Shāfi'ī's opinion. A different opinion is proposed by Abū Ḥanīfa since he argued that the usage of the word *al-bay'* is also adequate. In al-Shāfi'ī's view, the usage of the word *al-bay'* is inadequate because that word has the meaning ownership (*al-tamlīk*), meanwhile, the marriage is not a contract of ownership (*'aqd al-tamlīk*). Although some Muslim jurists classified witnesses as one of the pillars of Islamic marriage, others classified it as the conditions.

Not in line with the opinion of al-Shāfi'ī and Abū Ḥanīfa, the witnesses are not required according to Mālik. Instead, he required the announcement of marriage with consideration that the slave did not have witnesses. Different opinion also occurs regarding the requirement of guardians and witnesses in marriage contracts. al-Shāfi'ī argued that it is required either in guardians or witnesses coming from righteous people. Meanwhile, Abū Ḥanīfa stated that righteousness is not required so that the marriage would still be valid if the guardian from the bride's side and the witnesses came from the transgressor people (*fāsiq*). The reason why al-Shāfi'ī has obliged the righteous of guardian and witnesses is because he saw that the guardianship and the witnesses are part of honour and glory. Thus, honour and glory are not suitable for transgression which is depravation. If Mālik and al-Shāfi'ī classified the guardian as part of the marriage pillars, Abū Ḥanīfa, Zafr, al-Sha'bī dan al-Zuhrī proposed different opinion. They argued that the guardian is not required in a marriage contract as long as there is suitability and compatibility between the bridegroom on various factors such as social status, financial stability, character and lineage (*kafā'a*).

---

<sup>41</sup> Al-Qurṭubī, *Bidāyatu-l-Mujtahid wa Nihāyatu-l-Muqtasid*, 3:965.

Moreover, Dāwūd gave a more detailed opinion in which he argued that if the bride is a virgin, the presence of a guardian is required, but if the bride is not a virgin the guardian is not required.<sup>42</sup>

### 1.3.2. Defective Marriage (*Nikāḥ al-Fāsīd*)

A temporary marriage (*nikāḥ al-mut‘a*) is classified as a defective marriage (*nikāḥ al-fāsīd*) after intercourse and void marriage (*nikāḥ al-bāṭil*) before intercourse. It refers to a marriage with a certain time limitation which is by the end of that time the marriage automatically is terminated. Initially, temporary marriage is part of legal dispensation (*rukḥṣa*) that is allowed by the Prophet at the beginning of Islam due to the urgent condition until that legal dispensation is abrogated (*al-naskh*). This is a held opinion either by the majority of early Muslim (*salf*) or subsequent generation (*khalf*) scholars. It is based on several evidence narrated by some prophet’s companions including Salama ibn Al-Akwā‘ and ‘Alī ibn Abī Tālib. According to al-Nawāwī, the permissibility of temporary marriage occurred twice followed by its two prohibitions. Primarily, it was allowed before the Khaybar War and prohibited afterwards. Subsequently, it was allowed again in the conquest year (*‘ām al-fath*) and then prohibited again until right now. As for the opinion stating that the permissibility of legal dispensation of temporary marriage is definitive (*qaṭ‘ī*) meanwhile the narration of its prohibition is presumptive (*ẓannī*), it is considered as an incorrect opinion according to al-Ṣan‘ānī because the narrator of both evidence (permissibility and prohibition) is the same.<sup>43</sup> There is no difference among four Islamic jurisprudence schools regarding the status of temporary marriage. All Muslim jurists from those schools agreed that temporary marriage is null and void before intercourse. Nevertheless, if the intercourse is committed after the temporary marriage contract, several provisions occur such as the obligation of dowry, the lineage of children, etc.<sup>44</sup>

Marrying a woman amid her waiting period is considered a defective marriage (*nikāḥ al-fāsīd*). Defective marriage itself happens when there is a marriage contract with the absence of some essential elements, or some requirements are not fulfilled.<sup>45</sup> In case the intercourse has been done after that defective marriage, most scholars argued that several obligations would occur including dowry, affinity, waiting period and child’s lineage. Scholars from Ḥanafī school argued that there is no prescribed punishment in

<sup>42</sup> Al-Qurṭubī, 3:949.

<sup>43</sup> Al-Jazīrī, *Kitab al-Fiqh ‘alā-l-Mazāhib al-Arba‘a*, 2003, 5:124.

<sup>44</sup> Al-Jazīrī, *Kitab al-Fiqh ‘alā-l-Mazāhib al-Arba‘a*, 2003, 4:86–88.

<sup>45</sup> Al-Qurṭubī, *Bidāyatu-l-Mujtahid wa Nihāyatu-l-Muqtasid*, 3:1039.

defective marriage because the prescribed punishment must be cancelled due to the uncertainty (*idra' l-ḥudūda bi-l-shubuhāti*) and substituted by the discretionary punishment (*ta'zīr*) if it is conducted by intent and awareness. A defective marriage contract in Ḥanafī school is regarded as resembling of valid marriage contract.<sup>46</sup> According to the majority of Muslim jurists in the Mālikī school, the defective marriage should be annulled through annulment (*faskh*) before intercourse. The annulment itself depends on the level of legal reason that makes that marriage should be annulled. Because of that, if the legal reason for that annulment is strong the marriage should be annulled either before intercourse or after intercourse. On the contrary, if the legal reason for that annulment is weak, the marriage only should be annulled before intercourse and not afterwards. From that defective marriage, if there is a child born the lineage could be attributed to both parents. However, regarding the occurrence of inheritance and divorce provision before intercourse in defective marriage, there are numerous dissenting opinions among Muslim jurists which would not be discussed here furthermore.

Defective marriage also happens when someone marries a person who has a milk-relationship due to ignorance. People with milk-relationships are forbidden to marry based on popular *ḥadīth* stating that “*what is forbidden by lineage is also forbidden by milk-relation*”. When a man has married a woman that has lineage relation and milk relation, the marriage should be terminated because it is null and void. If both husband and wife know about its prohibition the discretionary punishment should be conducted. Similar to defective marriage due to milk-relation, a man who marries a woman who is still another’s wife or still in a waiting period is considered a defective marriage and the one who knows of its prohibition after intercourse is committed should be punished. Another example of defective marriage is when a man marries two women all at once who are siblings or have an aunt and cousin relationship. If it has been done, the marriage relation of one of them should be terminated and if intercourse has been committed there is dowry as an obligation.<sup>47</sup>

The same way also prevailed in a man when he married his ex-wife after three times divorces before that wife married another man and then got divorced after she and her new husband had intercourse.<sup>48</sup> The kind of defective marriage is numerous and could

---

<sup>46</sup> Al-Jazīrī, *Kitab al-Fiqh ‘alā-l-Mazāhib al-Arba‘a*, 2003, 5:89–90.

<sup>47</sup> Ameen Hadia, *Kitāb al-Aḥkām al-Shar‘iyya fī al-’Aḥwāl al-Shakhsiyya ‘alā Mazhab al-Imām ‘Abī Ḥanīfa al-Nu‘mān*, 3rd ed. (Egypt: Fajalah, 1895), 28.

<sup>48</sup> Hadia, 29–30., p. 29-30.

vary depending on its causes, but it would not be discussed here due to the research limitation. Indeed, it is quite hard to differentiate between a void marriage and a defective marriage due to the similarities in making marriage invalid. However, it is important to underline that the key feature of void marriage itself is the existence of prohibition since the beginning because it violates and against Islamic values. In addition, there is no possibility to establish lineage from void marriage. As for defective marriage, the key feature is there is the absence of some essential elements' fulfilment or some requirements due to ignorance. Moreover, in a defective marriage, several provisions such as dowry obligation (*mahr*) and living expenses (*nafaqāt*) could occur as well as the lineage.

### 1.3.3. Doubtful Sexual Intercourse (*Waṭ' al-Shubha*)

The absence of marriage between the parents of a child born from intercourse due to dubious does not necessarily make the status of the child similar to children out of wedlock. The status and legal position of a child born from doubtful intercourse (*waṭ' shubha*) is different compared to the rest of child out of wedlock. What is meant by doubtful sexual intercourse is when a man wrongly has intercourse with a woman alleged as his wife. The intercourse is also considered doubtful intercourse when a man marries his unmarriageable kin (*maḥram*) due to ignorance (incestuous marriage). After a certain time, the status of unmarriageable kin is discovered after the intercourse has been committed. Al-Jazīrī stated that if a marriage has been carried out that is invalid due to mistake, ignorance, or unintentionality, then once discovered, the marriage must be immediately annulled. If intercourse has occurred, then it is considered *waṭ' shubhat* not considered adultery and the child born in the marriage is a legitimate child whose lineage and inheritance to the father and the mother. Because of that, when calculating the inheritance, there will be no difference in children from ordinary marriages, both in position and share. The dissolution of the parents' marriage is not the cause of the change in the status of the child's inheritance rights. However, if it is known that there is a prohibition on marriage, yet the husband and wife continue to commit intercourse, then such a relationship is adultery, and the status of the child born is illegitimate, having only lineage and inheritance ties with the mother and the mother's family.<sup>49</sup>

---

<sup>49</sup> Zainal Arifin and Zaenul Mahmudi, "Mandatory Wills for Adultery Children, Analysis of the Compilation of Islamic Law from the Perspective of Maqasid Syariah Al-Syatibi," *International Journal of Law and Society (IJLS)* 1, no. 1 (January 29, 2022): 43, <https://doi.org/10.59683/ijls.v1i1.4>.

#### 1.4. Legal Position of a Child Born Out of Wedlock in Islamic Jurisprudence

The general provision held by most Muslim jurists regarding the establishment of a child's paternity is that there is no chance of attributing a child to his father because one of these four reasons: 1) The child born less than six lunar months after intercourse between the husband and wife; 2) The Child born more than four lunar years; 3) The husband has never done intercourse with his wife; or 4) The husband does not fertile because he is still underage.<sup>50</sup> This is based on the prophetic narration stated that “*the child belongs to the bed's (firāsh) and for the fornication perpetrator is stoning*”. The jurists disagreed over the exact meaning of *firāsh* which literally means bed or bedspread. Some jurists argued that it refers to women within the context of a licit sexual relationship. Ibn Qayyim al-Jawziyya, a Ḥanbalī jurist recorded three opinions on the exact meaning of the word *firāsh* according to Abū Ḥanīfa, al-Shāfi‘ī, Aḥmad ibn Ḥanbal, and Ibn Taymiyya. Abū Ḥanīfa argued that the meaning of *firāsh* is marriage contract itself. Al-Shāfi‘ī and Aḥmad ibn Ḥanbal gave similar opinions regarding the meaning of *firāsh* whereby according to them it means marriage contract with feasibility of consummation of marriage. Meanwhile, Ibn Taymiyya argued that the exact meaning of *firāsh* is a marriage contract with the verified consummation of marriage (*tamkīn*).<sup>51</sup>

In the modern period later, the principle of *al-walad firāsh* is construed as a valid marriage relationship. However, a valid marriage is not one thing that is considered a basis for the establishment of paternity. Marriage contracts even later considered as defective marriage (*fāsīd*) still become the main method for the establishment of paternity which conforms with a standard juristic practice. Moreover, in case intercourse is done by mistake because of doubt (*waṭ' bi-shubha*) the paternity still could be established in the absence of a licit sexual relationship. Other methods of paternity establishment also have been listed by jurists including acknowledgement (*iqrār*), evidence (*bayyina*), physiognomy (*qiyāfa*), to lot-casting (*qur'a*).<sup>52</sup> On the other side, the standard method for denial of paternity is the mutual oath of cursing/condemnation (*li'ān*) which is based on scripture provision and prophetic reports.<sup>53</sup> *Qiyāfa* is considered as secondary method to resolve a dispute on lineage case is merely based on prophetic report due to the absence of other foundation. Most jurists upheld this method as long as it does not conflict with stronger proof such as

<sup>50</sup> al-Miṣr, *Umdat Al-Sālik Wa 'Iddat al-Nāsik*, 419.

<sup>51</sup> Shabana, “Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts,” 6.

<sup>52</sup> Shabana, 7.

<sup>53</sup> Shabana, 8.

a licit sexual relationship or mutual oath of cursing. Nevertheless, Ḥanafī jurists rejected *qiyāfa* as a method for paternity verification. It is not only because paternity verification using *qiyāfa* is less reliable but also due to their formal interpretation of the marital relationship solely on the basis of a valid marital contract.

A child born from adultery is considered by most Muslim jurists as foreign (*ajnabiyya*) to a man who is biologically the father. Because the child born caused an illegitimate act, the child is often called an illegitimate child. An illegitimate child has a different status and rights from a legitimate child. Adultery as one of the causes of making the child considered illegitimate according to al-Shāfi‘ī and Mālik, does not prohibit a man from getting married to the mother or the daughter of a woman committing adultery with him. Likewise, a woman to get married to a father or son of a man committing adultery with her. Abū Ḥanīfa, al-Thawrī and al-Auzā‘ī gave different opinions in that sense. They said that adultery prohibits what is prohibited by marriage.<sup>54</sup> It does not mean that adultery could establish lineage relationship and paternity because the lineage and paternity would never be established by adultery despite biologically there is a clear relation between a child from adultery and the father. The rationale is that Muslim jurists believed that lineage is a divine gift bestowed by God, whereas adultery constitutes a punishable offence under Islamic law and does not merit any gift such as lineage and paternity.<sup>55</sup> However, ‘Alī ibn ‘Aṣim narrated from Abū Ḥanīfa, he said that it is forgivable if a man did adultery with a woman until pregnant and then he married her during her pregnancy to cover the disgrace. The child from that adultery could be attributed to that man.<sup>56</sup>

Ibn Qudāma, a jurist from Ḥanbalī school explained that the status of a child from adultery in inheritance is similar to a child from mutual cursing/repudiation (*al-li‘ān*). A different opinion is stated by al-Ḥasan ibn Ṣāliḥ whereby he said that the rest of the child’s property from adultery is for Muslims as the mother does not belong to her husband since the beginning in contrary to a child from mutual repudiation. The child from adultery could not be attributed to his biological father according to the majority of Muslim jurists, but according to al-Ḥasan and Ibn Sīrīn, the child could be attributed if the punishment has been done upon the parents and the child has the right to inherit, similar with Ibrāhīm’s opinion. This opinion was narrated from ‘Urwa and Sulaymān ibn Yasār.<sup>57</sup> Nevertheless,

<sup>54</sup> Al-Qurṭubī, *Bidāyatu-l-Mujtahid wa Nihāyatu-l-Muqtasid*, 3:993.

<sup>55</sup> Aslati et al., “Utilizing Science and Maqāṣid Al-Sharī‘ah in Resolving Contemporary Issues of Islamic Family Law,” 29–30.

<sup>56</sup> Ibnu Qudāma Al-Muqaddasī, *Al-Mughnī*, vol. 2 (Beirut: Bait al-Afkār al-Dawliyya, 2004), 1503.

<sup>57</sup> Al-Muqaddasī, 2:1503.

the adulterous child is still considered innocent and remains in Islam according to Ibn ‘Ābidīn based on hadith, “*Every newborn is born according to the instinct of Islam*”. ‘Āisha has been asked regarding a child from adultery and she said the child does not bear the sins of the parents as stated in verses, “*no bearer of burdens shall bear the burden of another.*”<sup>58</sup> Thus, although the adultery is committed by the parents who are not Muslim, the status of the child remains innocent and Muslim. For instance, if the father is Christian and the mother is a Zoroaster adherent, the child remains Muslim when he/she is born. Some scholars from Shāfi‘ī school argued that if the adulterous child is born from a Muslim father and a Christian mother, the child is not considered Muslim due to the absence of relation to the father.<sup>59</sup>

Regarding doubtful intercourse, it is narrated by al-Laythī that it does not establish an affinity relationship (*muṣāhara*) including the prohibition of marriage, but this narration is considered anomalous (*shāz*). If a child was born two years after the dissolution of the marriage, such a child cannot be attributed to the ex-husband of the mother unless the husband acknowledges it through an allegation scheme (*iddi‘ā*). Something similar also applies to a child born after the demise of the mother’s husband. For a woman who has already passed the waiting period (*‘idda*), if she is pregnant no more than six months of the lunar year, the lineage of that child could be attributed to her husband. However, if the pregnancy is more than six months of lunar year after the waiting period, the child could not be attributed to her husband. In addition, if a woman who is in the waiting period for dissolution of marriage gives birth, the lineage of the child could not be attributed to her ex-husband without two bearing witnesses of two witnesses or one witness man and two witnesses’ women unless the ex-husband claims it and the pregnancy could be proven.<sup>60</sup>

If a man commits intercourse with a woman through defective marriage, that woman is prohibited for his father, his son, his grandfather, and his grandson according to Mālik, al-Awza‘ī, al-Ṭawrī, al-Shāfi‘ī, Aḥmad, Iṣḥāq, and Abī Ṭawr. The lineage also could be attributed similar to intercourse within valid marriage, although the unmarriageable kin relationship (*mahrām*) is not established between that man and woman, so the man is prohibited from seeing that woman. The same thing occurs from intercourse by adultery, but in this case, the lineage still could not be established according to Abū Ḥanīfa, Aḥmad

<sup>58</sup> “Al-Mawsū‘a al-Fiqhiyya al-Kuwaytiyya” (Kuwait: Ministry of Endowment and Islamic Affairs of Kuwait, 1980), 195.

<sup>59</sup> “Al-Mawsū‘a al-Fiqhiyya al-Kuwaytiyya,” 216.

<sup>60</sup> Al-Qurṭubī, *Bidāyatu-l-Mujtahid wa Nihāyatu-l-Muqtasid*, 3:993.

bin Ḥanbal, and some jurists from Mālikī jurists. Because of that, getting married with a child from adultery is prohibited for her biological father according to the majority of jurists. Nevertheless, for al-Shāfi‘ī and Mālik in their popular opinion in their school, it is not prohibited because there is no established lineage between them, as well as inheritance. Moreover, her biological father does not have an obligation to maintain her living expenses (*naḥqā*) because their relationship considered foreign or alien status (*ajnabiyya*). The legal reason held by them is that there is no difference between the daughter from adultery or not if she is born from a man, the man is prohibited from getting married to her because she is still considered his real daughter similar to a daughter from a valid marriage.<sup>61</sup>

The concept of children out of wedlock is a complex issue within classical Islamic jurisprudence asserting the legal considerations. Islamic law strictly as preserved from classical legal tradition prohibits any kind of unlawful sexual relations and stipulates such an extramarital relation cannot establish legal consequences including the legal relationship between children born from illicit sexual intercourse to their putative father. Therefore, only lawful intercourse can cause the establishment of paternity according to Islamic law. This general provision is based on the prophetic narration stating that “*the child belongs to the conjugal bed and for the fornicator is stoning.*” However, not all extramarital relation is considered unlawful because some of them still can establish legal relationships such as in doubtful intercourse (*waṭ‘ shubha*) which is an extramarital intercourse due to dubious. By understanding the complexity of the concept of children out of wedlock within classical Islamic jurisprudence it will be a valuable point to proceed with the discussion on the next chapter concerning incestuous children as part of children out of wedlock.

---

<sup>61</sup> Al-Muqaddasī, *Al-Mughnī*, 2:1640–41.

## CHAPTER II

### CHILD BORN FROM INTRAFAMILIAL SEXUAL INTERCOURSE (INCEST) AS PART OF CHILDREN OUT OF WEDLOCK

#### 2.1. An Overview of Intrafamilial Sexual Intercourse (Incest)

The practice of intrafamilial sexual intercourse is an unlawful act and even more constituted as an immoral action even though it is preceded by a marriage contract. In other words, intrafamilial sexual intercourse is often called incest. Incest simply refers to any sexual activity between people who have close blood relations in a family such as siblings, parents, and child. While some legal systems require the existence of blood relation for a sexual activity to constitute incest, others have broadened the notion of incest to family members who have no blood relation but due to their closeness are still considered inappropriate to engage in sexual activities (e.g. stepparents, adopted children, etc.). There are no differences between incest committed outside marriage ties or within marriage ties. Thus, the marriage conducted between people who have blood relations and are considered unmarriageable kin is often called incestuous marriage.<sup>62</sup> Moreover, having sexual intercourse with a parent, child, sibling, and other relatives either through a marriage contract or not could be considered as a crime if it is committed intentionally and knowing that it is forbidden.<sup>63</sup> Generally, incest is understood as sexual intercourse within family members who have blood relationship either initiated by marriage contract or not. Because it is forbidden by applicable norms (customary law/religious law/national law), anything related to incest is perceived taboo and uncommon to be disclosed. It could happen by consensual intercourse between two parties or by force from one of them and become a type of rape action. Since a long time ago, the incestuous relationship has been seen as an immoral action by most of society even its prohibition has been written on national positive law in many countries and constituted as a crime.<sup>64</sup>

Incest in Arabic is called *sifāh al-qurbā* or *zinā bi-l-mahārim* which is a practice of forbidden intercourse according to Islamic law due to the existence of close blood relationship as an impediment to marriage. Incest could be committed either by consent or

---

<sup>62</sup> Muh Jufri Ahmad and Fahmi Nabil, "Hak Keperdataan Anak Hasil Perkawinan Incest," *COURT REVIEW: Jurnal Penelitian Hukum* (e-ISSN: 2776-1916) 2, no. 01 (February 22, 2022): 65, <https://aksiologi.org/index.php/courtreview/article/view/311>.

<sup>63</sup> Susanna Greijer and Jaap Doek, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, 1st ed. (Luxembourg: ECPAT, 2016), 20.

<sup>64</sup> Ahmad and Nabil, "Hak Keperdataan Anak Hasil Perkawinan Incest," 65.

force. Despite the different initial causes of incest, it has a significant impact towards the stability of a family because it could bring huge damage to the status of the father, mother, children, siblings, uncle, aunt, nephew, niece, etc. Because of that, incest is not only seen as an unlawful action but also a very vile and depraved action. It does not only violate the prohibition of adultery in Islamic law as mentioned clearly and explicitly in Qur'anic verses but also blemishes the dignity of blood relationship in the family.<sup>65</sup> Incestuous marriage itself refers to any marriage whose couple have a kinship, whether towards those related by blood in an upward or downward the lineage line, or towards siblings of the same father or same mother and so on upward, or towards children of full siblings and half-siblings and so on downward. Incestuous relations become one of the reasons for the annulment of marriage bond. The children born from incestuous relations later are often called incestuous children or discordant children.<sup>66</sup>

If we look back on the prohibition of incestuous marriage, almost all religions especially divine religions (Islam, Christianity, and Judaism) prohibit such kind of marriage. Christian canon law, for instance, although more restrictive than Islamic law at one stage, in the eleventh century, forbade not only marrying one's blood relations to the seventh degree, but also one's in-laws, the in-laws of one's in-laws, and the in-laws of the in-laws of one's in-laws. In addition to consanguinity and affinity, spiritual kinship (godparents, godchildren) also formed a barrier to marriage according to Christian canon law. As for Islamic law, the relevant Islamic regulations regarding the prohibition of an incestuous relationship come from the Qur'anic verses since the Qur'an itself already provided the basic rules. Because the Qur'an only provides the basic rules, the exact meaning of verses concerning unmarriageable kin (*mahrām*) to determine possibilities of incestuous relationships is also seen as relatively unambiguous and needed little further exegesis according to some scholars.<sup>67</sup>

## 2.2. The Existing Legal Framework concerning Incest

Before the arrival of Islam, pre-Islamic society in Arabic had performed various marriage practices from practices that did not contradict Islamic values to practices that

---

<sup>65</sup> Ahmad Fatah, "Status Hukum Wali Nikah bagi Ayah Pelaku Incest terhadap Anak Kandung (Tinjauan Empat Madzhab dan Kompilasi Hukum Islam)," *Jurnal Penelitian* 12, no. 1 (2018): 184.

<sup>66</sup> Mursyid Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (June 27, 2022): 141, <https://doi.org/10.22373/sjhk.v6i1.11904>.

<sup>67</sup> Elizabeth Archibald, *Incest and the Medieval Imagination* (Oxford University Press, 2001), 29–30, <https://doi.org/10.1093/acprof:oso/9780198112099.001.0001>.

later were prohibited by Islamic law due to its violation not only towards Islamic values but also towards the basic principles of humanity. One of the practices that pre-Islamic society used to do was to be married to two sisters at the same time, or to succeed one's deceased father as husband to his wife. The one who did this is often called *dayzān*. If a man died, leaving a wife, or divorced his wife, his eldest son would stand up and throw his cloak over her if he wanted her. If he did not want her, one of his brothers would marry her, with a new bride price.<sup>68</sup>

Marrying a stepmother or two sisters simultaneously, though un-Islamic, does not amount to incest because it is out of the consanguineous union meaning (blood relationship). Because of that, it is not prohibited due to blood relationship as the legal rationale. Rather, the main objection to its prohibition is social. For marrying a stepmother, it could easily be seen as a disrespectful act towards the father meanwhile marrying two sisters simultaneously is supposed to lead to rivalry between siblings, and both forms would result in odd degrees of kinship. These provisions were not upheld by pre-Islamic society especially in the Arabic peninsula so the practice of marrying a stepmother or two sisters simultaneously was common and whether it was realized or not it has led to the disintegration within their family. Although the practice of marrying a stepmother and two sisters simultaneously was commonly found in pre-Islamic society, in general, as far as may be ascertained, incestuous marriage was still not very common, and it is difficult to obtain precise information and proof about that.<sup>69</sup> It probably makes its prohibition during the arrival of Islam become easily acceptable.

Islam strictly prohibited incestuous marriage through Qur'anic verses. It could be found in Qur'ān surah al-Nisā' verses 23 which stated: "*(Also) forbidden to you for marriage are your mothers, your daughters, your sisters, your paternal and maternal aunts, your brother's daughters, your sister's daughters, your foster-mothers, your foster-sisters, your mothers-in-law, your stepdaughters under your guardianship if you have consummated marriage with their mothers—but if you have not, then you can marry them—nor the wives of your own sons, nor two sisters together at the same time—except what was done previously. Surely Allah is All-Forgiving, Most Merciful.*"<sup>70</sup> The verse explicitly

---

<sup>68</sup> I. Manzur, *Lisan Al-'Arab* (Dar Sader, Beirut, 1990), 1170, <https://books.google.co.id/books?id=2f-EAQAACAAJ>.

<sup>69</sup> G. J. H. van Gelder, *Close Relationships: Incest and Inbreeding in Classical Arabic Literature* (London; New York; New York: I.B. Tauris; Distributed in the U.S. by St. Martin's Press, 2005), 81.

<sup>70</sup> Gelder, 82.

mentions whoever is considered as unmarriageable kin (*maḥrām*) and the prohibition of conducting marriage with them.

Based on the explicit verse, there are fourteen unmarriageable kins represented by forbidden women that indicated marriage impediments which consist of seven through consanguinity (blood relationship), two through milk relationship, four by affinity, and one by combination. Through consanguinity, there are mother, daughter, sister, paternal aunt, maternal aunt, brother's daughter (niece), sister's daughter, milk-sister, father's mother (grandmother), wife's daughter (stepdaughter), i.e. foster-daughter (adopted daughter), son's wife (daughter-in-law), father's wife (stepmother), two sisters combined and wedded women who have husbands.<sup>71</sup> In sum, altogether seven by consanguinity, two by milk relationship, six by affinity, and two by religion. Nevertheless, many Muslim jurists remark that these categories still do not cover the forbidden women to a man who is married to a maximum of four women, because for him any other free woman is forbidden. Moreover, a marriage between a Muslim and a polytheistic woman (*al-mushrika*) is also forbidden, on the basis of the verse fragment of sura al-Baqara verse 221 stating that, “*Do not marry polytheistic women until they believe; for a believing slave-woman is better than a free polytheist, even though she may look pleasant to you.*”

The critical question occurred concerning the phrase “*women that your fathers married*” in that verse. Does it refer only to a man’s legal spouses which are acquired from legal marriage and his slave women, or does it include any other women with whom he has had illegal intercourse? The authoritative Muslim jurists from various legal schools have different answers. Abū Ḥanīfa argued that the original meaning of the verb *nakaḥa* is “to copulate” rather than “to conclude a contract of marriage”. The consequence of this opinion is that the adulterous partners are included as one of the pointed-out objects within the phrase “*women that your fathers married*”. On the contrary, al-Shāfi‘ī answered the question with the opposite answer from Abū Ḥanīfa’s. In al-Shāfi‘ī’s opinion, the verb *nakaḥa* is to conclude a contract of marriage rather than to copulate. He believes that it is not difficult to find instances, either in the Qur’ān or elsewhere, where *nikah* refers to legal marriage and a good example of that could be found such as in the sura al-Aḥzāb verse 49 stating that, “*O believers! If you marry believing women and then divorce them before you*

---

<sup>71</sup> P. J. Bearman et al., eds., *Encyclopaedia of Islam, Second Edition*, electronic resource (Leiden ;Boston: Brill Academic Publishers, 2012), 509, <http://dx.doi.org/10.1163/1573-3912-all>.

*touch them, they will have no waiting period for you to count, so give them a suitable compensation, and let them go graciously.*<sup>72</sup>

The Qur'anic proscription as revealed in the sura al-Nisā' verse 23 furthermore also showed its condemnation towards marrying stepmothers. The marriage with one's father's wife has been constituted as *nikāḥ al-maqt* which literally means hateful marriage. Nevertheless, Al-Zamakhsharī's words indicated that he believed that the practice of marrying stepmothers was hated by the Arabs already before the prohibition was revealed and that thereafter a religious sanction was given to this prohibition. Fakhr al-Din al-Razi, was even more, precise than al-Zamakhsharī, whereby he justified the Qur'anic use of three negative terms by distinguishing between three domains. The marriage in question is "indecent" according to reason, "hateful" according to revealed law and an "evil" way according to custom. Jurists from the Ḥanafī school argued that if a man touches a woman lustfully, her mother and her daughter are forbidden to him. Similarly, Aḥmad ibn Ḥanbal ruled that if a man touches, kisses, or undresses a female slave lustfully, she is forbidden to his son. Al-Shāfi'ī seems to be more lenient in this matter, which proposes detailed discussions concerning what is meant by the object of lust including its categorization. His categorisation consists of a girl of nine or older, a girl of five or younger, and a girl between five and nine if she is plump.<sup>73</sup>

Additionally, it must be agreed by consensus that the prohibition as mentioned in that Qur'anic verse concerns everyone, not merely those who were present during its revelation, and that it is valid forever and not for a limited period, or only for the past, as the perfect or past tense *ḥurrimat* might suggest besides it could also be translated as "forbidden ... have been". The use of a finite verb in the past tense could also suggest that innovation is intended and that before the revelation of the verse incest was permitted.<sup>74</sup> Al-Razī, a Qur'anic commentator also pointed out that the phrase "forbidden to you are your mothers", which employs plural second-person pronouns, could theoretically mean that all mothers are forbidden to all people addressed, but that it should be understood in a personal sense, each, and his own mother, and similarly for the other categories. Based on this commentary and exegesis, all kinds of mothers including mothers whose relationships

<sup>72</sup> R.F.D.M. 'Umar, *Tafsir Al-Fakhr al-Razi: Al-Mushtahir Bi-al-Tafsir al-Kabir Wa-Mafatih al-Ghayb* (Dar al-Fikr, 2005), 398, <https://books.google.co.id/books?id=Q2c2ngAACAAJ>.

<sup>73</sup> Ibn al-Hammām Al-Ḥanafī, *Sharḥ Faṭḥ Al-Qadīr 'alā al-Hidāyah Sharḥ Bidāyat al-Mubtadī*, 1st ed., vol. 3 (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 213.

<sup>74</sup> J.A.R. As-Sayuti, *Al-Itqan Fi Ulum al-Quran* (Dar al-Kotob al-Ilmiyah, 2003), 59, <https://books.google.co.id/books?id=EpxNAQAACAAJ>.

as a result of adultery are implied within the verse, thus she is forbidden to be married by the son of a man who committed adultery with her. This indicated that the merely external or literal meaning of the wording taken by itself is not sufficient to establish the prohibition.

### 2.3. Incest and Marriage Impediments

The basic legal foundation from the Qur'anic verses containing regulations on marriage impediments is found, appropriately, in the sura al-Nisā' that has been mentioned previously. It should be acknowledged that in pre-modern discourse almost everything is usually discussed from the point of view of the man including Islamic marriage law and its regulations. Because of that, many discourses on Islamic marriage law are asymmetry. The forbidden degrees are usually expressed in the feminine. For example, the term *muḥarramāt* which refers to women that are forbidden (to a man), but normally the equivalent term *muḥarimmūn* which refers to men forbidden to a woman is not expressed explicitly. The inequality seems not only in the matter of viewpoint or terminology, for Islamic marriage laws are themselves essentially asymmetrical, most obviously in allowing polygyny but not polyandry as mentioned in verse fragment of verse 3 of the sura al-Nisā', "If you fear you might fail to give orphan women (due rights if you were to marry them), then marry other women of your choice: two, three, or four."<sup>75</sup>

The prohibition of marriage between kinships occurs either the birth of them caused by valid marriage or adultery according to Abū Ḥanīfah although the lineage could not be established. It is because the blood relationship is still steady regardless of the cause of their birth. Contrary to al-Shāfi'ī who said that only kinship from valid marriage could cause the prohibition of marriage between kinships because the lineage could not be attributed to adultery. Because of that, the meaning of kinship according to al-Shāfi'ī in Islamic scripture is kinship based on *sharī'a*. The prohibition of marriage between kinship is bless and gift, meanwhile bless and gift do not steady by sin or guilty act. The wisdom behind that prohibition is to avoid weak descendants.<sup>76</sup>

In Islamic marriage law, there are some impediments to conducting marriage. They can be divided into permanent impediments and temporary impediments.<sup>77</sup> Permanent impediments include blood relationships, relationships by affinity and fosterage. A blood relationship makes a man could not marry his certain relatives and family who have blood

<sup>75</sup> Gelder, *Close Relationships*, 82.

<sup>76</sup> Abū Zahra, *Al-Aḥwāl al-Shakhṣiyya*, 65.

<sup>77</sup> Hadia, *Kitāb al-Aḥkām al-Shar'iyya fī al-'Aḥwāl al-Shakhṣiyya 'alā Maḏhab al-Imām 'Abī Ḥanīfa al-Nu'mān*, 9.

relationships not only with him but also with his parents. As for affinity relationships, it means a man could not marry the former wife of his father and the close relatives of the father's former wife including her descendants. Moreover, with respect to the relationship by foster, the rule of relationship by blood will apply if the relationship grows by suckling milk from the foster mother. Apart from this, temporary marriage impediments prevent a man from marrying a married woman, a woman during her *'idda* (mandatory observation period after divorce or death of her husband), divorced women who have not married another man and again divorced by him for three times (triply repudiated) and observed her *'idda*, two women if one of them were male is not permitted to marry the other, and marrying a woman as his fifth wife. In addition to that, a Muslim man is not permitted to marry a non-Muslim woman unless she is *kitābiyya* (religion of Holy Book), which means that, a Muslim man is permitted to marry a Christian or a Jew woman according to some opinions. The presence of permanent impediments will make a marriage void whereas the presence of temporary impediments will make a marriage defective.<sup>78</sup>

### 2.3.1. Blood Relationship (*al-Nasab*)

Blood relationship is part of marriage impediment which is something that prevents the validity of marriage so that the marriage would never be constituted as valid as long as that thing still exists. Indeed, there are two types of marriage impediments which are permanent impediments and temporary impediments.<sup>79</sup> Abū Ḥanīfa compared intercourse in adultery to intercourse in marriage since both could produce children, and therefore, the legal rule is the same in terms of the occurrence of marriage prohibition due to resembles with unmarriageable kin (*maḥrām*). However, if such incestuous intercourse although committed in a married relationship but done by consent the status of the child born is equal to child from adultery which means children of incest could only establish lineage with their mothers while kinship with the fathers is severed.<sup>80</sup> However, al-Jazirī, a contemporary scholar, believes that if incestuous marriage is invalid due to mistake, ignorance, or unintentionality, the marriage must be annulled immediately once revealed. If intercourse has occurred, then it is seen as doubtful intercourse (*waṭ' shubha*) and the

<sup>78</sup> M Phil, "Islamic Law of Personal Status: Analysis of the Reforms of Islamic Family Law in Various Muslim Countries," n.d., 18.

<sup>79</sup> Ahmad and Nabil, "Hak Keperdataan Anak Hasil Perkawinan Incest," 64.

<sup>80</sup> Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," 147.

child born in the marriage is still considered a legitimate child whose lineage and inheritance are still related to both father and mother.<sup>81</sup>

According to Abū Ḥanīfa and his school intercourse with a daughter from adultery is considered an incestuous relationship and it is forbidden. Thus al-Kasānī, an authoritative scholar from Ḥanafī school explained that the word “*and your daughters*” in the sura al-Nisā’ verse 23 encompasses all kinds of daughter regardless of whether it is a daughter born in wedlock (*nikāḥ*) or from fornication (*sifāḥ*) because the Qur’anic text should be taken in a general sense. Aḥmad ibn Ḥanbal one time was asked by his son ‘Abdullāh about marriage with a daughter born out of wedlock, then Ibn Ḥanbal answered firmly by stating that “*God forbid that a man marry his own daughter! This is an evil doctrine*”. However, al-Shāfi‘ī holds that marrying such a daughter is not forbidden to her natural father. It is based on the logical conclusion of the well-known prophetic narration stating ‘The child belongs to the bed’s and for the fornicator is stoning’ (*al-waladu li-l-firāshi wa li-l-‘āhiri al-ḥajaru*). Because of that, according to al-Shāfi‘ī who interpreted the meaning of *al-firāsh* as merely a marriage bond in establishing the lineage, there is no prohibition to marrying a daughter from adultery irrespective of biological relationship and paternity. Thus, for the law, she is not his daughter.<sup>82</sup>

The simplest argument that could be highlighted behind the reason most Muslim jurists support Abū Ḥanīfa’s opinion concerning the prohibition of marrying an adulterous daughter upon her biological father is that she is created from his semen although her fertilisation happened due to intercourse outside the legal relationship. Thus, she resembles a daughter created from legal intercourse. In addition, a similar thing is also applied to a daughter born from doubtful intercourse (*waṭ’ al-shubha*) because it cannot be denied that she is still flesh of his flesh (*biḍ’a minhu*). Therefore, she is forbidden to him, like a daughter born in wedlock. The term sister, it includes a full sister and half-sister either a sister from the father’s side only or from the mother’s side only. As for aunts, the Qur’anic text has two Arabic words: ‘*ammāt*’ (singular: ‘*amma*’) which refers to paternal aunts and *khālāt*’ (singular: *khāla*) for maternal ones.<sup>83</sup> The implied meaning of that provision is that if conducting marriage among people who have blood relation is prohibited, committing adultery among them obliged a huge consequence and must be punished with the most

---

<sup>81</sup> Djawas et al., 152.

<sup>82</sup> A.B.M. Kasānī, *Kitab Badai’ Al-Ṣanai’ Fī Tartīb al-Sharā’i’* (Dār al-Kutub al-‘Ilmiyya, 1986), 257, <https://books.google.co.id/books?id=pXZiWAEACAAJ>.

<sup>83</sup> Abdullah Ibn Qudamah, *Al-Mughni*, 3rd ed., vol. 9 (Riyadh: Dār Alim al-Kutub, 1997), 529–30.

severe punishment. Moreover, some jurists suggested the death punishment regardless of their status whether they are *muḥṣan* or *ghayr muḥṣan*.<sup>84</sup>

### 2.3.2. Milk-Relationship (*al-Raḍā'a*)

Being suckled together creates fraternal bonds which have a widespread social and moral effect. Indeed, the Qur'anic rule is obviously based on the idea that the milk is somehow formed from the blood of the womb, while there are also statements in Hadīth reports that make a connection between the wet nurse's milk and her husband's semen.<sup>85</sup> This is following the general opinion of Muslim commentators and jurists, who have inferred from these few Qur'anic words that blood and milk are wholly equal in this respect, even though the Qur'anic formulation for the former is more detailed than for the latter. The most popular narration circulated to support this argument stated that “*What is forbidden on the basis of milk-relationship is the same as what is forbidden on the basis of blood-relationship*”. The narration is often attributed to the Prophet although whether it is fabricated or not still becomes debated among scholars.<sup>86</sup>

### 2.3.3. Affinity Relationship (*al-Muṣāhara*)

What is meant by incestuous relationship is not limited to the existence of blood relation only. The incestuous relationship also could involve another relation resembling a blood relationship such as a milk-relationship (*raḍā'a*) and affinity relationship (*muṣāhara*). In Islamic law, affinity refers to the familial relationship established through marriage, specifically the in-law relationships that arise when two individuals marry. This includes relationships such as those between a person and their spouse's parents, siblings, and other close relatives. These relationships create certain legal and social obligations and prohibitions, such as the prohibition of marriage with certain relatives by marriage. According to Abū Ḥanīfa, the affinity relationship occurs because of at least six things. First, the implementation of a valid marriage. With achieving a valid marriage, the affinity relationship would be established automatically. As a reminder, the validity of marriage is determined by many factors especially the fulfilment of its conditions (*shart*) and its essential element (*rukṅ*). Second, lawful sexual intercourse is committed within a legal relationship either a valid marriage relationship or ownership (*tamlīk*) as happened in the

<sup>84</sup> Al-Jazīrī, *Kitab al-Fiqh 'alā-l-Mazāhib al-Arba'a*, 2003, 5:90.

<sup>85</sup> Avner Giladi, *Infants, Parents and Wet Nurses: Medieval Islamic Views on Breastfeeding and Their Social Implications*, vol. 25 (Brill, 2022), 25–26.

<sup>86</sup> Gelder, *Close Relationships*, 95.

pre-modern era. Third, sexual intercourse within a defective marriage (*nikāḥ al-fāsid*) or due to dubious circumstances (*waṭ' shubha*).

Doubtful sexual intercourse itself according to al-Shāfi'ī is divided into four types, doubt concerning the actor (*shubhat al-fā'il*), doubt concerning the ownership (*shubhat al-milk*), doubt concerning the manner/method (*shubhat al-ṭarīq*), and doubt concerning the object (*shubhat al-maḥall*). Doubt concerning the actor (*shubhat al-fā'il*) refers to a situation where there is uncertainty about the identity or status of the person committing the act (*al-fā'il*), leading to doubt about the permissibility or legitimacy of the sexual intercourse. For instance, if a man had intercourse with a woman, he presumed that she was his wife and then he was wrong. Then, there is doubt concerning the ownership (*shubhat al-milk*) which pertains to uncertainty about the rightful ownership (*al-milk*) or control over the person involved, which raises questions about the legality of the sexual relationship. It happens when a man has intercourse with a slave woman (and vice versa: woman with slave man) who is jointly owned because he presumed that she was his own or when a person had intercourse with a contractual slave/slave under a contractual manumission (*'abd mukātab/ama mukātaba*) because contractual slave disallowed to be involved in intercourse with his/her master.

Subsequently, doubt concerning the manner/method (*shubhat al-ṭarīq*) involves uncertainty about the method (*al-ṭarīq*) or circumstances under which the sexual intercourse took place, creating doubt about its permissibility. It could happen when a man followed the opinion of someone that deemed reliable to be followed concerning the validity of marriage. For example, a man has married a woman without a guardian and witnesses and had intercourse with his wife from that marriage. If the man is a follower of Dāwud al-Zāhirī, the intercourse is permissible because according to Dāwud al-Zāhirī's opinion, marriage without a guardian and witnesses is valid. But, if he is not a follower of Dāwud al-Zāhirī, his intercourse is impermissible because his marriage is invalid. Finally, doubt concerning the object (*shubhat al-maḥall*) refers to uncertainty about the person with whom the sexual act was performed (*al-maḥall*), particularly regarding their marital status or other conditions that might affect the legality of the intercourse. Al-Shāfi'ī made an example of this kind of doubt by taking a case when a man had intercourse with his father's slave and at the same time his father also had intercourse with his slave. Nevertheless, other jurists only divided the kind of doubt in intercourse into three divisions by making doubt

concerning the manner/method (*shubhat al-ṭarīq*) and doubt concerning the object (*shubhat al-maḥall*) into one type.<sup>87</sup>

Fourth, touching non-*maḥram* (*ajnabiyya*) with lust (*shahwa*) or strong sexual desire occurs within a person. Fifth, staring at someone's genitals with lust. It means that staring at other parts of someone's body except the genitalia does not cause an affinity relationship according to Abū Ḥanīfa. Sixth, adultery is whereby a man and a woman or more commit illicit intercourse outside the marriage bond. Although adultery could not establish lineage, according to Abū Ḥanīfa adultery could cause affinity. This opinion is also supported by Aḥmad bin Ḥanbal. Differently, al-Shāfi'ī argued that adultery could not cause an affinity relationship, because of that the biological father who is a perpetrator of adultery is not forbidden to marry his biological daughter from adultery. Al-Shāfi'ī insisted that only lawful intercourse could cause an affinity relationship. Meanwhile, in Māliki school there are three different opinions regarding the affinity relationship caused by adultery. The first opinion is similar to Abū Ḥanīfa's opinion whereas adultery could cause an affinity relationship. The second opinion is contrary to Abū Ḥanīfa's opinion but in line with al-Shāfi'ī's opinion which stated that adultery could not cause an affinity relationship. The last opinion stated that adultery could not cause an affinity relationship but marrying a descendant from adultery should be left due to ethical considerations. Thus, the prohibition of adultery perpetrator of marrying his biological daughter from adultery is merely a discouraged action (*makrūh*) not forbidden (*ḥarām*). However, this third opinion is seen as a weak opinion.<sup>88</sup> Previous explanation makes the occurrence of affinity relationships caused by adultery become the most popular opinion among Muslim jurists. There is no difference between the child being believed born from the perpetrator's semen or only assumption as long as the perpetrator has done adultery with the child's mother.<sup>89</sup>

#### 2.3.4. Fosterage Relationship

Stepchildren are part of people who are forbidden to be married due to the fosterage relationship. It is in accordance with narration from Mālik that a man who marries a woman, her daughter is forbidden to him. Unless the mother of that daughter has not had intercourse with him and has been divorced, the daughter is not forbidden for him.<sup>90</sup> The word *rabā'ib* (singular: *rabība*) in the sura al-Nisā' as mentioned previously is derived from

<sup>87</sup> Al-Jazīrī, *Kitab al-Fiqh 'alā-l-Mazāhib al-Arba'a*, 2003, 4:112.

<sup>88</sup> Al-Jazīrī, 4:61.

<sup>89</sup> Al-Jazīrī, 4:121.

<sup>90</sup> *Al-Muwatta'*, 2nd ed., vol. 2 (Beirut: Dār al-Gharb al-Islāmī, 1997), 39.

the verb *rabba*, which means both ‘to be master of’ and ‘to raise, bring up’, and the word *ḥijr* ‘lap’ is often used metaphorically for ‘care’.<sup>91</sup> The occurrence of marriage impediment due to affinity relationship closely related to the mixing, intimacy, love and compassion (*khulṭa, ulfa, mawadda, raḥma*) that arise and which put foster-children equal with biological children. The clause “being born of your wives you have been in to”, is obviously a necessary condition to give more detail and make clear. Some Muslim jurists generally agreed that “being in to”, means sexual intercourse, although some such as Abū Ḥanīfa consider mere petting, or seeing the woman naked, a sufficient cause to make an impediment of marriage. Al-Razī, as jurists from Shāfi‘ī school, again argued that the sexual contact refers to wedlock and that the verse does not include women with whom one has illicit sex.<sup>92</sup>

Although Muslim penal law does not normally recognize gradations of incest, it is obvious that some forms are deemed worse than others in society. For instance, an incest relationship between a mother and her son presumably is deemed worse than between an uncle and his niece even though both are considered immoral actions. The Qur'an itself may not single out mother-son incest as particularly abhorrent explicitly, yet there are indications that it was considered thus.<sup>93</sup> In the Qur'anic text the various categories of incest are listed without any distinctions. It makes all kinds of incest seem similar. However, the order mentioned in the Qur'an in fact somewhat indicated something different regardless of the absence of degrees of forbiddingness. There is some semblance of order sequentially starting from consanguinity (e.g. mother, daughter, and sister), continued with milk-relationship (e.g. milk-mother and milk-sister) and lastly the affinity relationship (e.g. mother-in-law and stepdaughter).<sup>94</sup> Furthermore, it is important to underline that legal impediments of marriage are more easily created than one might think. Because naturally, marriage or sexual intercourse with a woman turns her female close kin (mother, daughter, sister) into forbidden to be married.<sup>95</sup>

#### **2.4. The Impact of Incest towards Children Born from Such a Condition**

The impacts of incestuous relationships are numerous and can be seen from various aspects. In terms of Islamic law and legal rules, it clearly violates the principle of Islamic

---

<sup>91</sup> Gelder, *Close Relationships*, 96.

<sup>92</sup> Gelder, 97.

<sup>93</sup> Gelder, 118.

<sup>94</sup> A.A.D.A.H.M.I.Y.I. Hayyān, *Tafsīr Al-Baḥr al-Muḥīṭ* (Turath For Solutions, 2013), 209, <https://books.google.co.id/books?id=BMpuQAACA AJ>.

<sup>95</sup> Gelder, *Close Relationships*, 101.

marriage rule concerning the prohibition of marriage among people who have a blood relationship. Regarding the psychological impact, it could create the distortion of psychological conditions because people who are involved in that relationship would imagine that such a taboo relationship is normal in their perspective. Not only are people involved in that relationship, but the impact of an incestuous relationship would also affect their family, especially concerning the lineage that would be discussed later from an Islamic law perspective. Because it is considered an immoral and depraved action, people who involved in an incestuous relationship would be alienated from society or even more if the action is deemed as a crime the people who are involved in such action would be punished. In addition, from the medical point of view, every incestuous relationship has a high risk of producing children with health disorders or abnormalities. As for the perpetrator and victim, they have a high risk of receiving damage to the reproductive organs and the risk of contracting sexually transmitted diseases physically and deteriorating their mental health due to the stress. Another impact of incest in terms of medical perspective is the possibility of children carrying more homozygous recessive genes which are individuals whose chromosomes have identical genes from a pair or a series of alleles/genes that have positions on the same chromosome but with varied traits caused by mutations in the original gene. Thus, the gene is covered by the more dominant gene, so that it is unable to express its attributes. This can cause death in infants, known as fatal anaemia, and visual impairments in children aged 4-7 years which can result in blindness, albinism, and so forth.<sup>96</sup>

In terms of social life, illegal sexual intercourse between close relatives especially for those who are prohibited from getting married would make everyday life difficult. One may observe how a man, struck by the charms of a strange woman, falls hopelessly into deep feelings and plunges into dangerous situations because of her. The worst thing than that presumably could be imagined by thinking that a man with such a condition must be together with that woman in daily life under one roof because they are close relatives. Indeed, generally, people are not sexually attracted to their close kin even though they are able to see their 'charms' daily. Nevertheless, nowadays, the numerous cases regarding the existence of intrafamilial sexual have proven that such general rule has been broken by many perpetrators of incest. Another negative impact of incestuous marriage between

---

<sup>96</sup> Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," 149.

relatives in terms of family life is exemplified in the case of conflict experienced by married women. A married woman, in case of conflict, normally has the support of her male relatives. If her husband were such a relative, there would be a conflict of interests and she would suffer as a result. Considering such damaging impact of incestuous marriage, it should be taken as a barrier and concrete proof of its prohibition in the Qur'anic verse, thus it must be avoided. Avoiding such kind of marriage and intercourse would keep someone away from the cutting ties of kinship. This applies, for instance, to the marriage of two sisters simultaneously, who would naturally turn into rivals.<sup>97</sup>

Illicit sexual intercourse could lead to incestuous relations and therefore would result in the feared condition of personal and social immorality, chaos, and even economic and financial dislocation.<sup>98</sup> Incestuous relationship which is an illegal practice committed by people who have close blood relation is a violation towards applicable norms within society. Many cases related to sexual abuse have involved incestuous relationships. A father impregnated his daughter, a son committed adultery with his mother, a grandfather impregnated his granddaughter, etc.<sup>99</sup> Incest marriage is prohibited and if after that marriage intercourse is committed it would be categorized as adultery and should be punished according to the majority except for Abū Ḥanīfah in al-Ṭawrī narration because there is possibility to doubtful.<sup>100</sup> When a man married his unmarriageable kin, there is an obligation to separate them. If their separation is before intercourse there is no dowry but if there is intercourse the dowry is debated by the jurists.<sup>101</sup> Illegitimacy in incest relationships could become a legal barrier for children born from such relationship to receive inheritance. Thus, the child is legally barred from inheriting from the father under Sunnī jurisprudence and even worse barred from inheriting from both the father and mother for followers of Shī'ā jurisprudence.<sup>102</sup>

However, the child born from an incestuous marriage still could have lineage either to the father or the mother if the marriage has been conducted due to the lack of awareness.

<sup>103</sup> As for extramarital intercourse between unmarriageable kin (*al-zinā bi-l-maḥārim*) due

---

<sup>97</sup> Gelder, *Close Relationships*, 116.

<sup>98</sup> Schlumpf, "The Legal Status of Children Born out of Wedlock in Morocco," 6.

<sup>99</sup> Ahmad and Nabil, "Hak Keperdataan Anak Hasil Perkawinan Incest," 70.

<sup>100</sup> Al-Muqaddasī, *Al-Mughnī*, 2:2195.

<sup>101</sup> Al-Muqaddasī, 2:1669.

<sup>102</sup> Mashood A. Baderin, "Family Law," in *Islamic Law: A Very Short Introduction*, ed. Mashood A. Baderin (Oxford University Press, 2021), 103, <https://doi.org/10.1093/actrade/9780199665594.003.0004>.

<sup>103</sup> Al-Jazīrī, *Kitab al-Fiqh 'alā-l-Maḥāhib al-Arba'a*, 2003, 5:90.

to adultery which is unlawful intercourse, the child born from it only has lineage to the mother and the mother's family. A similar thing is also applied to incestuous marriage in which the spouses acknowledge the prohibition of such marriage practice but neglect it. Because the intercourse after that kind of incestuous marriage is constituted as adultery the child born from that intercourse is considered as an adulterous child which is a child born out of wedlock.<sup>104</sup> Thus, in this sense, there is no difference among children born from adultery, mutual cursing/repudiation, and from incestuous relation whereby all of them constituted as children born out of wedlock and have no lineage relation to their biological father and only have lineage to their mother.

In addition, the dubious child or child born from doubtful intercourse (*walad al-shubha*) could be born because of the defectiveness of the parent's marriage or intercourse. The defectiveness of marriage could occur due to many things which are one of them if it is founded after a marriage contract that impedes marriage between the spouses. The impediments of marriage include blood relationships, milk-relationships, relationships by affinity and fosterage which are considered permanent impediments. If the marriage contract is conducted with the existence of such relationships, then the marriage is considered an incestuous marriage and should be annulled. However, the status of the child from that marriage is similar to legitimate child from a valid marriage in which the child has similar rights including lineage, inheritance, etc.<sup>105</sup>

Furthermore, the child does not have lineage relation with the father and the father's family and does not inherit each other. The lineage relationship only could be established to the mother and the mother's family according to the majority Muslim jurists. All conditions regarding the child born from rape action are equalized with a child born from adultery by majority of Muslim jurists in which the child only has lineage relationship with the mother and the mother's family. Indeed, in fact, the cause of their birth is different whereas the child from adultery was born as a result of intercourse by consent, meanwhile, the child from rape action born as a result of intercourse by force (commonly from the man's side). The different causes do not necessarily make the legal position different because of the complexity and the difficulty to ensure the absence of consent in rape cases.<sup>106</sup> However, al-Shāfi'ī proposed a different opinion in which he argued that the child

---

<sup>104</sup> Al-Jazīrī, 5:104.

<sup>105</sup> Aḥmad 'Abd al-Majīd Muḥammad Maḥmūd Ḥusayn, "Aḥkām Walad-l-Zinā fi al-Fiqh-l-Islāmī" (Nablus, Palestine, University of al-Najah al-Waṭaniyya, 2008), 32.

<sup>106</sup> Muḥammad Maḥmūd Ḥusayn, 35–36.

born from rape action has lineage either to the mother or the father and for the woman who become the victim of rape action there is a waiting period (*'idda*).<sup>107</sup>

Based on the brief explanation above, it is important to underline that basically there is no significant difference between incestuous children and other children out of wedlock as illegitimate children in term of legal status because incestuous children are also part of illegitimate children. Nevertheless, the detailed information related to specific conditions when an incestuous child considered illegitimate is needed. If the incestuous intercourse between the child's parents is committed due to dubious or ignorance, the status of a child born from such intercourse is similar to legitimate child in which the lineage could be attributed to both parents although the marriage between the parents cannot be performed due to the existence of marriage impediment which is unmarriageable kinship. On the contrary, if the incestuous intercourse between the child's parents is committed by consent and they know its prohibition, the child born from such intercourse is considered illegitimate. Indeed, there is different impacts related to psychological, social, and health issues. However, they are not part of main objective in this study which is only focus on legal aspect.

After highlighting the key features of incestuous children as part of children out of wedlock in this chapter, in the next chapter to contextualize this study, the discussion will move to the contemporary discussion regarding children out of wedlock within the Indonesian context. The upcoming discussion, thus, is expected to give more understanding in regard to the way how legal provisions concerning children born out of wedlock from classical Islamic jurisprudence and European law have been adopted and implemented in Indonesia through the formalization of those laws in the form of promulgation and codification. Additionally, the next chapter will also highlight the legal position of each kind of child out of wedlock including incestuous children with additional information regarding what is the difference between incestuous children from other children out of wedlock.

---

<sup>107</sup> Al-Jazīrī, *Kitab al-Fiqh 'alā-l-Mazāhib al-Arba'a*, 2003, 5:88.

### CHAPTER III

## CONTEMPORARY DISCOURSE REGARDING CHILD OUT OF WEDLOCK IN THE INDONESIAN CONTEXT

This chapter provides the discussion on contemporary discourse of child born out of wedlock in the Indonesian context. The national legal system in Indonesia mostly follows the system of the European continental law which base the law on codified and written law as primary source. However, unwritten and uncodified law are also recognized in form of jurisprudence issued by the supreme court, but it is still in a small number. As a new developing country, Indonesia has adopted many legal systems as sources of the national law consisting of customary law, European law, and Islamic law. Due to the highest number of Indonesians are Islamic adherents, Islamic law has a huge influence and a strategic position within the Indonesian national legal system. Although systematically European law has a bigger influence towards the Indonesian national legal system, essentially the substance of family law in Indonesia is more influenced by Islamic law from classical Islamic jurisprudence. It could be proven by the existence of many regulations inspired by Islamic law, especially laws concerning personal status law or Islamic family law.<sup>108</sup> The primary regulations concerning Islamic family law could be found in the Law of Marriage Number 1 of 1974 and the Compilation of Islamic Law. These regulations contain several provisions concerning children born out wedlock which is suitable for the discussion in this study and will be discussed further through following explanation.

### **3.1. Child in Indonesian National Legal System**

The national legal system in Indonesia was established from various references including Islamic law. Thus, Islamic law has a significant role in forming rules of law in Indonesia that determine many aspects of life not excluding Islamic marriage law and its related provisions.<sup>109</sup> The issue of the child is part of Islamic marriage law which is discussed regarding issues such as the origin of the child, the status of child in a family, to

---

<sup>108</sup> Afridawati Afridawati, "History, Typology, and Implementation of Islamic Law in Indonesia: Combination of Sharia and Fiqh or the Result of Historical Evolution?," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 21, no. 1 (June 30, 2021): 35–37, <https://doi.org/10.30631/al-risalah.v21i1.676>.

<sup>109</sup> Nurrohman Syarif, Tajul Arifin, and Sofian Al-Hakim, "Sharia in Secular State - The Place and Models for Practicing Islamic Law in Indonesia:," in *2nd International Conference on Sociology Education* (The 2nd International Conference on Sociology Education, Bandung, Indonesia: SCITEPRESS - Science and Technology Publications, 2017), 696–97, <https://doi.org/10.5220/0007104306920700>.

the rights and obligations. One might ask what is meant by the child in the national legal system of Indonesia. The answer is not answered simply due to the different references used in Indonesia as Indonesia adopted many references in forming the national legal law. Article 330 paragraph (3) of the Indonesian Civil Code (*Burgerlijk Wetboek voor Indonesie*) defined that the child is those who are under 21 (twenty-one) years old.<sup>110</sup> Similarly, the Compilation of Islamic Law also stated that the child refers to those who are under 21 years old because those who are above 21 years old are considered as adult. The age of 21 became the highest measurement in determining the adulthood of someone in Indonesia.<sup>111</sup>

However, the Indonesian Law Number 39 of 1999 concerning Human Rights further mentioned that the child refers to those who are under 18 (eighteen) years old and have not married yet including who is still in the womb.<sup>112</sup> In line with the Law of Human Rights, the Law Number 23 of 2002 concerning Child Protection and the Law Number 35 of 2014 concerning the Amendment of the Law Number 23 of 2002 concerning Child Protection also confirm that what is meant by the child is whoever under 18 years old and has not married yet including who is still in the womb.<sup>113</sup> Likewise, the Article 1 number 26 of the Law Number 13 of 2003 concerning the Employment also stated similar thing in which the child according to that article, the child is whoever under 18 years old. Other regulations include the Criminal Code Book (*Kitab Undang-Undang Hukum Pidana/KUHP*), the Law Number 3 of 1997 concerning the Juvenile Court, the Law Number 44 of 2008 concerning Pornography, and the Law Number 21 of 2007 concerning Criminal Acts of Human Trafficking Eradication also determine the age of 18 as the maximum age for the child.

Another different provision could be found in the Law Number 1 of 1974 concerning Marriage. Article 7 of the Law of Marriage implicitly constituted that meant by the child is under 19 (nineteen) years old for a son and 16 (sixteen) years old for a daughter.<sup>114</sup> This limitation is objected to as a minimum age for a child to conduct a marriage. Because of that, a son under 19 years old or a daughter under 16 years old could not conduct a marriage unless they received permission from the court. Here, there is a

---

<sup>110</sup> “Indonesian Civil Code (Burgerlijk Wetboek Voor Indonesie)” (1848).

<sup>111</sup> “Instruction of President of the Republic of Indonesia Number 1 of 1991 Concerning the Dissemination of Compilation of Islamic Law” (1991).

<sup>112</sup> “Law Number 39 of 1999 Concerning Human Rights” (1999).

<sup>113</sup> “Law Number 35 of 2014 Concerning the Amendment of the Law Number 23 of 2002 Concerning Child Protection” (2014).

<sup>114</sup> “Law Number 1 of 1974 Concerning Marriage” (1974).

distinction between the age of limitation for a son and a daughter whereby the maximum limitation age for a son is three years later than the maximum limitation age for a daughter. Such a distinction presumably is affected by the Islamic legal tradition as found in many Islamic jurisprudence textbooks which determine the minimum adulthood age for women. Nevertheless, after the amendment of the Law of Marriage, which was held in 2019, the limitation of marriage age for a child became equal between a son and a daughter as both have the same minimum age of 19 years old.<sup>115</sup> This minimum age of marriage indicated the maximum age for someone to be constituted as a child in the Indonesian context. Because of that, what is meant by the child in this study excludes those who exceed that age limitation.

### **3.2. The Main Promulgation concerning Child in Indonesian Islamic Family Law**

The Islamic Marriage law in Indonesia has been formulated in some national regulations following the type of Indonesian legal system which adopted the continental law system. The main source of law in the continental legal system normally must be written and promulgated in the promulgation and the statute. There are two main sources of Islamic legal marriage in Indonesia consisting of Law Number 1 of 1974 concerning Marriage including its amendment i.e. Law Number 16 of 2019 concerning the Amendment of Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*) which was promulgated based on Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. The specific provisions concerning the status of the child in the Law of Marriage can be found in Chapter IX from Article 42 to Article 44. The provisions are not comprehensive and do not appoint things such as the division of the child or the measurement of the child could be attributed to the parents in detail. However, the additional provisions regarding child - although not specific because the arrangement involves the provisions regarding the parents- could be found in the next chapter of that law from article 45 to article 55.<sup>116</sup>

The more comprehensive provisions regarding children are mentioned in Book I of KHI Chapters XIV and XV from Article 98 to Article 112. It compiles additional provisions concerning the child that are not mentioned in the Law of Marriage such as the neglected child by the father through mutual cursing/repudiation (*li'ān*) and the

---

<sup>115</sup> “Law Number 16 of 2019 Concerning the Amendment of Law Number 1 of 1974 Concerning Marriage” (2019).

<sup>116</sup> Law Number 1 of 1974 concerning Marriage.

establishment of the child lineage involved sophisticated technology like in vitro fertilization.<sup>117</sup> Although both the Law of Marriage and the KHI are influenced by Islamic marriage law, the influence of Islamic marriage law in the KHI is more obvious because it is not only adopted many Muslim jurist opinions from Islamic jurisprudence textbook but it is also addressed for Islam adherent in Indonesia. There are 38 (thirty-eight) Islamic jurisprudence textbooks from four prominent Islamic legal schools consisting of the Ḥanafī school, Mālikī, Shāfi‘ī, and Ḥanbalī school from various periods such as al-Hidāya, al-Muwatta’, al-’Umm, al-Mughnī, Faḥ al-Qadīr, al-Muḥallā, and Bidāyat al-Mujtahid that are adopted into the KHI which encompassed 160 (one hundred sixty) Islamic family law matters.<sup>118</sup>

Another source concerning children in the context of Islamic family law in Indonesia although not specific for Muslims but broader for all Indonesian citizens is the Constitutional Court ruling number 46/PUU-VIII/2010. Different from the Law concerning Marriage of 1974 and the KHI which are formulated by the House of Representatives (*Dewan Perwakilan Rakyat/DPR*) and the President, the constitutional court ruling issued by the Constitutional Court (*Mahkamah Konstitusi/MK*) in the form of court decision/ruling after a person or a group of people file certain case to the court due to the allegation that certain promulgation either partially or a whole conflicts with the Constitution of the Republic of Indonesia (Undang-Undang Dasar 1945/UUD 1945). This ruling basically annulled the provision in article 43 of the Law of Marriage of 1974 which stated that a child born outside marriage only has a civil relationship with the mother and the mother’s family. After the issuance of Ruling Number 46/PUU-VIII/2010, the article is deemed to no longer have binding legal force as long as it is interpreted as eliminating a civil relationship between the child and the man as the biological father that could be proven by science and technology or by other tools following conditions determined by promulgation that the child and the father have blood relationship. Because of that Article 43 must be read, “*A child born outside the wedlock has a civil relationship with the mother and the man as the father as long as it could be proven by science and technology or by other tools in accordance with conditions determined by promulgation that the child and the father have blood relationship including with the father’s family*”.<sup>119</sup>

---

<sup>117</sup> Instruction of President of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of Compilation of Islamic Law.

<sup>118</sup> “Model Penelitian Kompilasi Hukum Islam,” April 19, 2012, <https://uinsgd.ac.id/model-penelitian-kompilasi-hukum-islam/>.

<sup>119</sup> Constitutional Court Ruling.

### 3.3. The Status and Civil Rights of a Child in Islamic Family Law

The discourse of the child in Indonesian Islamic family law is inseparable from the classical Islamic jurisprudence because it becomes main source in establishing Islamic family in Indonesia.<sup>120</sup> Based on the classical Islamic jurisprudence textbook, the classification of child normally only divided into three categories which are a legitimate child (*walad al-shar'ī*), an adulterous child (*walad al-zinā*), and a child from mutual cursing/repudiation (*walad al-li'ān*). Wahba al-Zuhaylī even make them more general by dividing them into only two categories which are a legitimate child (*walad al-shar'ī*) and a natural/biological child (*walad al-ṭabi'ī*). A legitimate child refers to a child who has a kinship (legally) with the male parent (father). Meanwhile, a natural child refers to a child who does not have a kinship with the male parent.<sup>121</sup> The existing classification of a child from Islamic jurisprudence has influenced the division of child in the Law concerning Marriage and the KHI although both are not identical. In the Law concerning Marriage of 1974, the child is divided into two categories consisting of a legitimate child and a child out of wedlock. A legitimate child in the Law of Marriage is defined as a child born within a legal marriage or caused by a legal marriage. Although a child out of wedlock is not explicitly defined in the law, it could be understood presumably that what is meant by a child out of wedlock is all kinds of child that does not meet the requirements of a legitimate child.

The KHI further includes additional categorization of the child beyond what is already mentioned by the Law of Marriage by adding the child from mutual cursing/repudiation (*walad al-li'ān*) as a new category. This category is not a new category in Islamic jurisprudence but probably is considered as the new one in the Indonesian national legal system because it is not involved in any promulgation before the KHI. It is stated in article 101 of the KHI that a child is constituted as a child from mutual cursing/repudiation when the father neglects the child while the mother does not refute his negation. This negation occurs due to the existence of a husband's accusation towards his wife that she has committed adultery with another man and a child in her womb, or a child born to her is not from the husband's semen and belongs to another man instead. To avoid the prescribed punishment (*ḥudūd*) because the wife is accused of adultery, then she refutes

---

<sup>120</sup> Muh Haras Rasyid, "Dinamika Hukum Islam Dan Aktualisasi Teori-Teori Berlakunya Hukum Islam Di Indonesia," *DIKTUM: Jurnal Syariah Dan Hukum* 11, no. 1 (2013): 18.

<sup>121</sup> Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," 145.

her husband's accusation through cursing oath four times stating that she did not commit adultery and if she was lying, she will receive a God's curse upon her. On the contrary, to avoid the prescribed punishment because he allegedly has been accused of adultery (*qazf*), the husband also takes a cursing oath stating that his wife has done adultery and if he was lying, he will receive a God's curse upon him.<sup>122</sup>

Looking at the division and categorization of the child in the Islamic jurisprudence, the Law concerning Marriage of 1974 and the KHI, it could be found many similarities, especially when it comes to legitimate children, all the categorization includes such a child. The significant difference could be found in the Indonesian Civil Code which classified children into six categories consisting of a legitimate child, a legalized child, a legalized child by stipulation, an acknowledged child, an adulterous child, and an incestuous child.<sup>123</sup> This classification although is not mentioned explicitly in the Indonesian Civil Code but it could be understood from the provisions stated in the chapter XII from article 250 to article 289. For instance, Article 281 stated that the acknowledgement of a child out of wedlock could be conducted using an authentic certificate when it has not been written on the certificate during the marriage contract. This article refers to a legalized child by stipulation. Another example could be found such as in Article 283 which states that an adulterous child or an incestuous child cannot be acknowledged by the law because he/she was born from an unlawful action that stains the purity of blood relationship. This article is intended to mention two categories of child which are an adulterous child and an incestuous child. However, although the provision of the Indonesian Civil Code is applied nationally it is not followed by Indonesian Muslims because the Indonesian Muslims followed the Law of Marriage and the KHI. Those provisions are mostly followed by the Indonesian non-Muslims. Because of that, the Indonesian Civil Code could be ruled out from the upcoming discussion.<sup>124</sup>

The different status of the child would affect the civil rights of that child, especially the lineage. The establishment of lineage between a child and the parent has a huge impact towards the rights and obligations between them. Because it cannot be separated, whenever discussing the rights of a child the discussion about the parent's obligations could be found there. Reflecting on the well-recognized provisions in the Islamic legal tradition there are

---

<sup>122</sup> Instruction of President of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of Compilation of Islamic Law.

<sup>123</sup> Eka Benanti Polutu, Mutia Cherawaty Thalib, and Julius T Mandjo, "Tinjauan Hukum Hak Waris Anak Hasil Perkawinan Incest Menurut Hukum Perdata" 1, no. 3 (2023): 491.

<sup>124</sup> Indonesian Civil Code (Burgerlijk Wetboek voor Indonesie).

a lot of things that might be considered child rights. However, the most discussed things usually at least consisting of five rights. Those are -although not totally similar- the right to stipulate the lineage (*al-nasab*), the right to education (*al-tarbiyya*), the right to living expenses (*al-nafaqāt*), the right to breastfeeding (*al-radā'a*), the right to custody (*al-ḥaḍāna*) and the right of guardianship (*al-wilāya*).<sup>125</sup> One might find certain right is not separated and put together under another right. For instance, the Law of Marriage does not give the details of children right except custody and guardianship because the rest of children rights are considered derivative from those two rights.

### 3.3.1. The Lineage (*al-Nasab*)

The lineage is not merely established by the existence of a blood relationship but also requires the existence of a legal relationship.<sup>126</sup> Therefore, as a legal relationship, either in Islamic jurisprudence or Islamic family law in Indonesia, the lineage between a child with the parent basically could be established only through initial legal marriage between the parents. However, the special case could be exceptions such as in the case of doubtful sexual intercourse. Children born from doubtful sexual intercourse are still considered legitimate children and have lineage relationship to both parents although there is no marriage bond between their parents. Lineage is an important foundation for building a family which is based on blood unity with consideration that one is part of another. A child is part of the father, and a father is a part of his child.<sup>127</sup>

The legal tradition of Islamic jurisprudence is more likely to tend to be patriarchal by emphasizing the important lineage from the father's side.<sup>128</sup> Regarding this matter, Ziba Mir Hosseini stated that the child is entitled to the lineage to both sides of the parents either the father or the mother. Indeed, the lineage of the father is deemed more dominant than the mother due to the closeness to legitimacy in which children obtain legal identity and religion according to Islamic jurisprudence. Father usually has more impact towards the status of the child in patriarchal societies.<sup>129</sup> In the Indonesian context, the provisions concerning the child's lineage are mentioned in the Indonesian Civil Code, Law of

<sup>125</sup> Abū Zahra, *Al-Aḥwāl al-Shakṣiyya*, 387.

<sup>126</sup> Amir Syarifuddin, *Meretas Kebekuan Ijtihad: Isu-Isu Penting Hukum Islam Kontemporer Di Indonesia* (Ciputat Press, 2002), 198.

<sup>127</sup> Al-Zuhaylī, *Al-Fiqh-l-Islām wa Adillatuh*, 1985, 7:673.

<sup>128</sup> Sakirman Msi, "Indonesia Islamic Law Study on Children Nasab," *Available at SSRN 2888312*, 2016, 2.

<sup>129</sup> Z. Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (Bloomsbury Academic, 2000), 168, <https://books.google.co.id/books?id=IiASeeh2iAC>.

Marriage and KHI. Although the explanation of the lineage of legitimate children is not mentioned explicitly it could be understood from the existing provisions that explained the lineage of an illegitimate child. For instance, article 100 of the KHI stated that a child born out of wedlock only has lineage to the mother and the mother's family.<sup>130</sup> From that article, it could be understood that the lineage of a legitimate child is the opposite of the lineage of a child out of wedlock which is an illegitimate child. If the child out of wedlock only has the lineage to the mother, on the contrary, the legitimate child would have the lineage to both parents (father and mother).

### 3.3.2. The Right to Education (*al-Tarbiyya*)

As mentioned frequently in previous explanations, discussing family law in Indonesia cannot be separated to Islamic family law because it is one of the main sources and has been transplanted into national law. Thus, the discussion of the education rights of children is also inseparable from Islamic law. The Qur'anic verses have demonstrated the importance of knowledge and encouraged humankind to learn. It has been proven with the first Qur'anic verses revealed to the Prophet which are the first five verses of al-'Alq are the injunction to read starting with the verse: *“Read, in the Name of your Lord Who created. Created humans from a clinging clot. Read! And your Lord is the Most Generous, who taught by the pen— taught humanity what they knew not.”* Nevertheless, no one is born with knowledge or even the ability to read until another teaches him/her. In that condition, the most responsible to teach someone is the parents especially when he/she is a child underage.<sup>131</sup> Receiving a good education from the parent is one of the child's rights that is an obligation upon the parents. Article 45 paragraph (1) of the Law of Marriage states that *“Both parents are obliged to nurture and educate their children as well as possible.”* Moreover, in paragraph (2) of that article, it is explained that the obligation to nurture and educate children upon the parents goes continuously until the children get married and are able to nurture and educate themselves even though the marriage tie between the parent has broken.<sup>132</sup>

---

<sup>130</sup> Instruction of President of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of Compilation of Islamic Law.

<sup>131</sup> Mohammed Houmine and Khadija Loudghiri, “Exploring Child Rights and the Concept of Childhood in Islam: A Contemporary Descriptive Analysis,” *Khazanah Hukum* 5, no. 2 (2023): 139–40.

<sup>132</sup> Law Number 1 of 1974 concerning Marriage.

### 3.3.3. The Right to Living Expenses (*al-Nafaqāt*)

Living expenses (*al-nafaqāt*) referring to the Islamic jurisprudence usually encompass three main things consisting of feeding (*al-ṭa'ām*), clothing (*al-kiswa*), and housing (*al-maskana*).<sup>133</sup> The child has the right to receive all kinds of living expenses from the parent especially the father if he is able to fulfil all of them. As long as the father is capable of striving for the living expenses for his children, he is obliged to do so, and no one can replace him. The obligation to give living expenses for his children is similar to giving living expenses to himself because his children are considered as part of him.<sup>134</sup> Even if the custody right is revoked from the father, he is still obliged to support his children by giving them the living expenses as mentioned in Article 49 paragraph (2) of Law of Marriage.<sup>135</sup> Similarly, the Article 105 of the KHI imply the obligation upon the father to bear all the living expenses of his children besides to nurturing the children's soul, body, and property. Because of that, all the damage or the disadvantages that occur upon the children's property also become the responsibility of the parents, especially the father.<sup>136</sup>

### 3.3.4. The Right to Breastfeeding (*al-Raḍā'a*)

Breastfeeding must be given to the child before he/she reaches two years or two years and half of the age. Because if it is given after the child has passed two years of age it is no longer considered as breastfeeding according to the Islamic jurisprudence. This is based on the information narrated by al-Bayhaqī as cited by al-Jazīrī that breastfeeding is only within the first two years of the child's age.<sup>137</sup> A child has the right to breastfeed with natural milk from the mother or other woman for two years or less than two years based on the agreement between the father and the mother considering the interest of the child.<sup>138</sup> The obligation to give breastfeeding to the child essentially is the father's obligation. But because naturally, a father cannot produce natural milk, the mother or another woman takes responsibility for it. Therefore, the father is responsible for all the costs incurred from the breastfeeding. This is similar to what is mentioned in Article 104 paragraph (1) of the Compilation of Islamic Law which states that "*All the costs occurred from the child*

<sup>133</sup> Al-Zuhaylī, *Al-Fiqh-l-Islām wa Adillatuh*, 1985, 7:765.

<sup>134</sup> Al-Zuhaylī, 7:775.

<sup>135</sup> Law Number 1 of 1974 concerning Marriage.

<sup>136</sup> Instruction of President of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of Compilation of Islamic Law.

<sup>137</sup> Al-Jazīrī, *Kitab al-Fiqh 'alā-l-Mazāhib al-Arba'a*, 2003, 4:224.

<sup>138</sup> Houmine and Loudghiri, "Exploring Child Rights and the Concept of Childhood in Islam: A Contemporary Descriptive Analysis," 139.

*breastfeeding is a responsibility upon the father. In case the father passed away, the responsibility is taken by the guardian of the child or whoever replaced the father's position.*"<sup>139</sup>

### **3.3.5. The Right to Custody (*al-Ḥaḍāna*)**

Custody which is equivalent to the Arabic word *ḥaḍāna* literally means training or upbringing of the child. Since the classical Islamic tradition, the mother is always given preference for custody rather than the father. The basic consideration is because commonly mother has more affection towards her child than the father.<sup>140</sup> Even if the dispute of custody is filed to the court as long as the child is underage and there is no impediment for the mother to receive the right to be custodian, the mother would always be prioritised. It was narrated from Ibn Taymiyya that one day the spouses disputed concerning who had more rights to receive custody of their child. The child has chosen the father instead of the mother in front of the judge. When the judge asked that child the reason, the child answered that it was because the mother sent him/her to scholars for studying and learning every day. Meanwhile, the father gave him/her the freedom to play with her/his friends. Because of that answer, the judge then imposed the decision to give the custody right to the mother.<sup>141</sup> As long as the mother has not married again, she is the most entitled person to receive custody rights of her children according to al-Shāfi'ī. Moreover, Abū Ḥanīfa and Mālik argued that the right is not limited to the marriage status of the mother after the dissolution of her previous marriage. This is based on the narration that Umm Salama still had the right of her daughter after her marriage with the prophet.<sup>142</sup>

Either men or women are entitled to child custody. However, women are given priority over men in physical custody considering that women are more compassionate, kind-hearted, and more appropriate for the upbringing of the child. On the contrary, men are given priority in legal custody and guardianship because they are seen as more capable to protect, maintain, and preserve the child's interest. Four Islamic jurisprudence schools generally argue that the most entitled people to physical custody are maternal families

---

<sup>139</sup> Instruction of President of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of Compilation of Islamic Law.

<sup>140</sup> Aayesha Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)," *International Journal of Humanities and Social Science* 4, no. 5 (March 2014): 269–70.

<sup>141</sup> Muḥyi-l-Dīn Al-Nawāwī, *Kitāb Al-Majmū' Sharḥ al-Muḥaẓẓab Li-l-Shirāzī*, vol. 20 (Jeddah: Maktabah al-Irshad, n.d.), 222.

<sup>142</sup> Al-Nawāwī, 20:222.

although there are differences in terms of the order.<sup>143</sup> Basically, the entitlement of custody needs some requirements which consist of general requirements and specific requirements. General requirements include Islam, adulthood, mind, piety, ability to take care, and not infectious/contagious disease. Subsequently, the specific requirements are divided for male custodians and female custodians. Male custodians are required to be unmarried and have reliable women relatives according to Mālikī school. As for female custodians, they should have unmarried families, not be married to a stranger for the child, not reside with someone who hates the child under custody, and if a female custodian is qualified to breastfeed the child, she should not refuse it.<sup>144</sup>

In terms of the dispute of custody being filed to the court, the most affected factors in determining child custody in the court commonly are determined by the age and sex of the child with the circumstances of the parent. Indeed, there is no exact agreement among Muslim jurists regarding the custody matter. For instance, jurists from the Shāfi‘ī school insist that the infant daughter must be under the custody of her mother until she reaches puberty which is not defined. In line with the Shāfi‘ī school’s opinion, jurists in the Ḥanbalī school also proposed a similar argument except that in the Ḥanbalī school, there is an exact measurement until the daughter reaches seven. When the infant daughter reaches seven, she can choose between the father and mother. The jurists from the Mālikī school extend the period of custody beyond the measurement from the Ḥanbalī school by stating that a mother generally has custody rights over the infant daughter until she marries. Regardless of the differences among the Muslim jurists in terms of the period of custody, in terms of custodian all agreed that the custodian must be a Muslim.<sup>145</sup>

Whereas classical Islamic jurisprudence has determined various maximum periods of child custody, the Law of Marriage in Indonesia has determined the age of eighteen as the maximum period of child custody. Article 47 paragraph (1) of the Law of Marriage states that as long as the child is under eighteen by age or has not gotten married, the child is still under parent’s custody. Furthermore, the KHI extend the custody period of the child until the child reaches the age of twenty-one. This provision is mentioned in Article 98 paragraph (1) of the KHI which states that the child is considered an adult if the child has reached the age of twenty-one or has got married. This implied that throughout those

---

<sup>143</sup> Nahida Bibi et al., “Child Physical Custody Law in Islamic Jurisprudence: An Analytical Study in The Context of Four Schools of Thought,” n.d., 149.

<sup>144</sup> Bibi et al., 151–52.

<sup>145</sup> Euis Nurlaelawati, “The Legal Fate of Indonesian Muslim Women in Court: Divorce and Child Custody,” in *Religion, Law and Intolerance in Indonesia* (Routledge, 2016), 522–23.

conditions the child still has custody rights of the parents. However, there is an exception in case the child has a physical disability. In such a condition the custody period could be extended and has no limitation depending on the child's interest, welfare, and necessity as implied in Article 98 of the KHI.

### 3.3.6. The Right of Guardianship (*al-Wilāya*)

The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property. It is equivalent to the Arabic word '*wilāya*' which literally means to protect or to defend. In the principles of preserved Islamic traditional law, the father is the natural guardian (*wālī*) of the person and property of the child.<sup>146</sup> If the preference of custody is given to the mother, on the contrary, the preference for guardianship is given to the father. It is based on the presumption that the father could protect his children more than the mother.<sup>147</sup> If the father is unable to become the guardian of the child due to certain circumstances, his position could be replaced by other male relatives of the child from the nearest one such as grandfather, brother, and uncle.<sup>148</sup> However, the different provision is found in Article 345 of the Indonesian Civil Code in which it determined a mother -although does not explicitly- as the first replacement to take the guardianship over the child in case the father has passed away by stating that, "*If one of the parents has passed away, the guardianship of the child belongs to another living parent.*"<sup>149</sup> It means that if the father has passed away the guardianship belongs to the mother herself and vice versa if the mother has passed away the guardianship belongs to the father himself.

### 3.4. The Child out of Wedlock in Indonesian Context

In the positive laws of Indonesia including the Law concerning Marriage of 1974 and the Compilation of Islamic Law (KHI), there is no explicit definition regarding a child out of wedlock. The law only defined the legitimate child as stated in Article 42 that a legitimate child is a child born in a valid marriage or caused by a valid marriage. It could be understood from that article although not comprehensive that the meaning of child out of wedlock is the opposite of a legitimate child which is a child born out of a valid marriage

---

<sup>146</sup> Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)," 268.

<sup>147</sup> Mashood A. Baderin, *Islamic Law: A Very Short Introduction*, 1st ed. (Oxford: Oxford University Press, 2021), 89.

<sup>148</sup> Al-Zuhaylī, *Al-Fiqh-l-Islām wa Adillatuh*, 1985, 7:747.

<sup>149</sup> Indonesian Civil Code (Burgerlijk Wetboek voor Indonesie).

or not caused by a valid marriage. The Constitutional Court ruling number 46/PUU-VIII/2010 also does not mention what is meant by a child out of wedlock. Therefore, the definition depends on the interpreters. Some of them could perceive the meaning as solely a child born out of wedlock and others perceived it as a child born from an unregistered marriage.<sup>150</sup> Because of that, it is frequently understood in Indonesia that the definition of child out of wedlock is child born from marriage which does not fulfil the requirements of being registered legally by the state as arranged in Article 2 paragraph (2) of the 1974 Marriage law.<sup>151</sup>

Indonesian law at a glance has made a distinction between valid marriages according to religious laws and valid marriages based on national law which refers to registered marriage. Because of that, the definition of children out of wedlock in Indonesia presumably overlap, on one hand it refers to children born from illicit intercourse such as adultery and on the other hand also be interpreted as children born from unregistered marriage although religiously the marriage is valid. Although the primacy of marriage registration as one of the requirements in Islamic law remains questionable, the Indonesian government through the Constitutional Court Ruling seems to be lenient toward violations of marriage registration by introducing the option of backdated registration of religious marriages whose retroactively affects the status of children born from such marriages.<sup>152</sup>

Besides Article 2 paragraph (2) of Marriage Law, the requirement of marriage registration is also obliged by Article 27 of Law Number 23 of 2006 concerning Population Administration which stipulates that inhabitants of Indonesia are obliged to register a child in the birth registry within sixty days of the child's birth, then the parents will receive a birth certificate. This birth certificate could be received if the marriage of the parents is registered, otherwise, the child would be considered a child born out of wedlock due to the absence of an authentic marriage certificate as legal proof of their marriage. However, religiously valid marriage could still be formalized, and the child born from such marriage could be legitimized afterwards. There are procedures found in Article 7 of the Law of

---

<sup>150</sup> Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law," 340.

<sup>151</sup> Erlina, "Access to Justice 'Anak Di Luar Perkawinan' (Analisis Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Pengujian Pencatatan Perkawinan Dan Status Hukum Anak Yang Dilahirkan Dari Perkawinan Yang Tidak Tercatat Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan)," *Jurnal Konstitusi* 1, no. 1 (2012): 52.

<sup>152</sup> Nurlaelawati and Van Huis, "THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA," 363.

Marriage to validate unregistered religious marriage through *ithbāt al-nikāh* mechanism filed to the religious court.<sup>153</sup>

The absence of an explicit and specific explanation in Constitutional Court Ruling Number 46/PUU-VIII/2010 regarding the term out of wedlock has caused various interpretations among law experts, especially Islamic law experts.<sup>154</sup> They questioned how the ruling defines the term children born out of wedlock, the term illegitimate children, and to what extent the relationship between biological fathers and their children. Although the answers are still debatable, some of them believe that what is meant by children out of wedlock in the ruling refers to children born from extramarital intercourse without legal marriage/wedlock and not born from unregistered marriage which is religiously valid. Subsequently, the term illegitimate children according to them refers to children born out of wedlock or children born less than 180 days (6 months) counted from the marriage of the parents or more than 300 days (10 months) counted from the dissolution of marriage of the parents. As for the scope of the relationship between biological fathers and their children, it includes living expenses, educational costs, healthcare, and obligatory bequest.<sup>155</sup>

Based on the decision of the ruling, it could be underlined that the registration of marriage does not influence the legality of a marriage. The registration of marriage is required only for administrative purposes. The legality of marriage is determined by the requirements set by the religious rules in this sense Islamic rules. Because of that, unregistered marriage is also a valid and legal marriage as long as religious rules consider it legal. In this regard, it could be highlighted that what is meant by children out of wedlock in the ruling is children born from extramarital intercourse without any wedlock. This is in line with the opinion of Akil Mochtar and Mahfud MD, both of them are former judges in the Constitutional Court and former Chief of the Constitutional Court respectively. They are suggested that Machica Muchtar's son which is Muhammad Iqbal Ramadan as an initial filed case to the court is a legal son of Moerdiono since the beginning because the marriage was conducted based on Islamic rules and in accordance with Article 2 paragraph (1) of

---

<sup>153</sup> Stijn Cornelis Van Huis and Theresia Dyah Wirastri, "Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws.," *Australian Journal of Asian Law* 13, no. 1 (2012): 13–14.

<sup>154</sup> Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law," 339.

<sup>155</sup> Marilang, 336–37.

Law of Marriage.<sup>156</sup> In addition, because the filed object to the court is Article 43 paragraph (1) which regulates the issue of children out of wedlock as illegitimate children born from unlawful intercourse, it has indicated that the meaning of children out of wedlock in the ruling should be similar to what Article 43 paragraph means. Indeed, Article 2 paragraph (2) also becomes a filed object to the court, but it does not regulate the issue of children out of wedlock, it regulates the issue of unregistered marriage.<sup>157</sup>

A different opinion interestingly is proposed by Chatib Rasyid, a judge of the religious high court of Central Java in which he believes that the legality of a marriage also is determined by whether the marriage is registered or not. Therefore, according to him, the definition of the term “children had born out of wedlock” in Constitutional Court Number 46/PUU-VIII/2010 cannot be interpreted as children born from adultery or fornication.<sup>158</sup> Moreover, Oyo Sunaryo Mukhlas, an Islamic law scholar, has challenged the definition of children born out of wedlock in the ruling as children born from extramarital intercourse such as adultery. He argued that the ruling is confusing and has ignored religious values because it attempts to grant equal treatment between a lawful act and an unlawful act. Furthermore, in his point of view, the grant of biological relationship status as stated in the ruling could be interpreted as vary in a wide range.<sup>159</sup>

The extended definition of a legitimate child can be found in Article 99 of the KHI. In the KHI, the meaning of legitimate child also encompasses a child as a result of a spouse’s lawful action outside the wife’s womb but still given birth by that wife (in vitro fertilization). This definition involves the usage of technology in the pregnancy process. In sum, what is meant by a child out of wedlock is a child born out of a valid marriage, not caused by a valid marriage, or born in a valid marriage but the minimum period of pregnancy after the marriage of the parent is less than six lunar months.

---

<sup>156</sup> Erlina, “Access to Justice ‘Anak Di Luar Perkawinan’ (Analisis Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Pengujian Pencatatan Perkawinan Dan Status Hukum Anak Yang Dilahirkan Dari Perkawinan Yang Tidak Tercatat Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan),” 51.

<sup>157</sup> Marilang, “Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law,” 343.

<sup>158</sup> Chatib Rasid, “Anak Lahir Di Luar Nikah (Secara Hukum) Berbeda Dengan Anak Hasil Zina, Kajian Yuridis Terhadap Putusan MK No. 46/PUU-VII/2012” (Seminar on the Status of Children Born Out of Wedlock and Other Civil Rights, IAIN Walisongo Semarang, April 10, 2012).

<sup>159</sup> Marilang, “Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law,” 345.

The general provision concerning Illegitimate children in Indonesia subsequently could be found in Article 43 paragraph (1) of the Law of Marriage of 1974. According to that article, an illegitimate child only has a civil relationship with the mother and the mother's family. Article 43 paragraph (1) of the Law of Marriage states, "*A child born out of wedlock only has the civil relationship with his/her mother and his/her mother's family*". This provision has affected the rights of an illegitimate child. He or she has no rights to civil rights like a legitimate child that has civil rights and relations with the biological father, such as living expenses (*al-nafaqāt*), inheritance (*al-irṭh*) and guardianship (*al-wilāya*).<sup>160</sup>

Because the Shāfi'ī school is the most adopted in Indonesia, it has an impact towards the pattern of thought in Islamic family law in Indonesia including in illegitimate child matters. The majority of scholars in the Shāfi'ī school agreed that the child born from adultery only has lineage with the mother and the mother's family and there's no prohibition for the father to marry the child if the child is a girl. The father and the child also do not have any relation including inheritance and guardianship so the father could not be a guardian when the child is married because the guardian of the woman is one of the absolute requirements in the marriage contract according to the Shāfi'ī school. Not only inheritance and guardianship but also other relationships that become rights for the child and obligations to the father such as custody and living expenses. This thought has already been adopted in national family law in Indonesia as stated in Article 43 paragraph (1) Law Number 1 of 1974 concerning Marriage (Marriage Law). This indicates that Shāfi'ī school has influenced many shades of Islamic family law in Indonesia, especially in terms of the relationship between children with their biological parents as discussed in this research.<sup>161</sup> However, al-Rāfi'ī, one of the scholars from Shāfi'ī school proposed different opinion in which he argued that if it is trusted that child from adultery is a result from a man's semen, that man who becomes the biological father of that child is prohibited to marry that child if that child is a girl. Regardless of some of the different opinions, Taqīyyu-l-Dīn al-Subkī stated that the correct opinion or authentic statement in the Shāfi'ī school (*al-qawl-l-ṣaḥīḥ*)

---

<sup>160</sup> Ahmad Rizza Habibi, "The Dynamics Of Illegitimate Child Status In Sharia And National Law Of Indonesia: Is There A Harmonization?," *Al-Manhaj: Journal of Indonesian Islamic Family Law* 3, no. 1 (July 10, 2021): 71, <https://doi.org/10.19105/al-manhaj.v3i1.4787>.

<sup>161</sup> Nur Shadiq Sandimula, "The Status and Rights of An Illegitimate Child According to Mazhab Asy-Syafi'i Perspective on The Development of Islamic Family Law in Indonesia," *Jurnal Ilmiah Al-Syir'ah* 17, no. 2 (December 18, 2019): 126–27, <https://doi.org/10.30984/jis.v17i2.952>.

permitted the biological father to marry with his adultery daughter because there are considered as foreign (*ajnabiyy*).<sup>162</sup>

There is a difference between what is meant by an adulterous child in the Indonesian Civil Code and Islamic family law. Although there is no exact definition regarding adulterous child in the Indonesian Civil Code, Satrio as cited by Teguh has argued that what is meant by an adulterous child in the Indonesian Civil Code is a child born from an extramarital relationship between a man and woman where one or both are married to another person. This definition excluded extramarital relationships between men and women who have not married. Meanwhile, Islamic family law considers all extramarital relationships whether the perpetrator is married or not as long as intentionally and without any force it is still considered adultery. Furthermore, Islamic family law differentiates between adultery committed by a married person and an unmarried person in which adultery committed by a married person is called *zinā muḥṣan* and by an unmarried person is called *zinā ghayr muḥṣan*. Such differentiation is impactful to the type of punishment in terms of Islamic prescribed punishment.<sup>163</sup>

### **3.5. The Issue of Incestuous Child as Part of Child Born out Of Wedlock in Indonesian Context**

The incest cases are generally hard to reveal and continue to the court. It is because the perpetrator is a family member of the victim. If the case is disclosed to society, it could be considered a disgrace from the public perspective. Thus, the incest case is not received an optimal completion and is left as it was including the child born from such a case.<sup>164</sup> The common form of incest mostly is a rape case where the perpetrator who is well-known by the victim is in a situation that leads him to the rape act due to the existence of a chance. In such a situation many cases have occurred but only a small number could be revealed. It is aimed to minimize the risk that must be faced not only by the child born from that harassment but also by the family in the social life.<sup>165</sup>

In the Indonesian Civil Code, it is stated that a blood relationship is a family relation among people in which one is an ancestor or descendant from another or in the broad sense has a similar ancestor. Then, the relation is calculated by the number of degrees

---

<sup>162</sup> Sandimula, 125.

<sup>163</sup> Anindito, "Weak Protection of Civil Rights Zina Children in Indonesia," 19.

<sup>164</sup> Khairi Ayumi Hasan, "Pertanggungjawaban Orang Tua Terhadap Anak Incest Menurut Hukum Islam," *Premise Law Journal* 11 (2016): 3.

<sup>165</sup> Muhammad Khairul, Emilda Firdaus, and Erdiansyah Erdiansyah, "Perlindungan Anak Sebagai Korban Incest Dalam Peraturan Perundang-Undangan Di Indonesia" (Riau University, 2015), 3.

through a straight line from up to down and to the side until a relationship like father-daughter, uncle-niece, and so on is found (father as ancestor and daughter as descendant).<sup>166</sup> The number of unmarriageable kin is stated in Article 8 of Law of Marriage. However, neither the Law of Marriage, the Compilation of Islamic Law (KHI), nor the Indonesian Civil Code explains the legal status of a child born from an incestuous relation nor the civil rights.<sup>167</sup> If it is found after the marriage contract that the marriage contract is invalid due to the existence of marriage impediment such as there is blood relationship between husband and wife (incestuous marriage), it would not affect the status of child born from that marriage. The reason is that the annulment of marriage retroactively does not affect the status of the child. Because of that, the child born from such marriage is still considered as a legitimate child considering the marriage between the parents clearly could be proven. The legal consequence is the husband is in charge towards living expenses, guardianship, and inheritance because the lineage of a child cannot be ignored.<sup>168</sup>

The provision concerning incestuous child furthermore is clearly mentioned in Article 272 of the Indonesian Civil Code. The article stated that: *“Except for the children born from adultery or incestuous relation, all gestated children outside wedlock, with the marriage of their parents would be legitimate children if both parents have acknowledged the children before the marriage contract in accordance with law provisions or if that acknowledgement acknowledged after marriage contract and written on the certificate of marriage.”* Based on that article, incestuous children would never be legitimate children although there is an acknowledgement from their biological parents.<sup>169</sup> Although later the parents attempt to perform a marriage contract in order to legitimize their child, the marriage is null and void. Incestuous marriage is one of the forbidden marriage types due to the existence of a marriage impediment which is a blood relationship as mentioned in Chapter VI Compilation of Islamic Law (KHI).<sup>170</sup>

As for the Constitutional Court ruling NO.46/PUU-VIII/2010, it does not classify between child born out of wedlock from adultery and from an incestuous relationship so

---

<sup>166</sup> Ahmad and Nabil, “Hak Keperdataan Anak Hasil Perkawinan Incest,” 65.

<sup>167</sup> Ahmad and Nabil, 60.

<sup>168</sup> Indah Sukma Ramdhini, Felicitas Sri Marniati, and Yurisa Martanti, “Kepastian Hukum Status Anak Karena Pembatalan Perkawinan dan Akibat Hukumnya Dalam Sistem Hukum Di Indonesia,” *JOURNAL of LEGAL RESEARCH* 4, no. 3 (August 8, 2022): 612, <https://doi.org/10.15408/jlr.v4i3.27546>.

<sup>169</sup> Ahmad and Nabil, “Hak Keperdataan Anak Hasil Perkawinan Incest,” 70.

<sup>170</sup> Ahmad and Nabil, 64., p. 64.

that both could be included within the ruling.<sup>171</sup> Nevertheless, the Indonesian Civil Code attempt to differentiate between premarital children, children born from adultery, and children born from an incestuous relationship. That provision is also found in Article 272 of the Indonesian Civil Code which stipulates that a premarital child can be legitimized following a marriage by the father and mother and the acknowledgement of the father, but a child born from adultery and a child born from incestuous relationships cannot. Thus, children born from adultery or from incestuous relationships will retain the status of a child born out of wedlock even after the acknowledgement of the father.<sup>172</sup> This provision is obviously contrary to the Islamic family law whereby in Islamic family law, the child born from premarital relationship is also considered as an incestuous law. Because of that, commonly Islamic adherents in Indonesia do not follow the provisions of the Indonesian Civil Code related to family law. Instead of the Indonesian Civil Code, they follow the Law of Marriage of 1974 and the Compilation of Islamic Law (KHI).

It is important to underline that not all incestuous children are considered illegitimate children. This is because a child born from an incestuous marriage that was previously unknown after the annulment of that marriage is still considered a legitimate child.<sup>173</sup> Regarding the status of an incestuous child as part of children out of wedlock, many Muslim jurists agreed that the child only has lineage to the mother and the mother's family. Because of that, the obligation to fulfil the child's right is also charged to the mother and the mother's family. The status of an incestuous child could be equalized with adulterous child, thus, the legal consequences upon that child would be as follows:

1. There is no lineage between the child and the father. The child only has lineage with the mother. The father is not obliged to fulfil living expenses although biologically the father has a blood relationship with the child. Therefore, the relationship between them is only limited to natural relationships and human relationships, not legal relationships.
2. The father and the child do not inherit each other because one of the causes to inherit is a lineage. Because the incestuous child does not receive any inheritance from the father and the father's family, when the child receives property from the father after his demise, it is not considered an inheritance, it is considered a gift (*hiba*) instead.

---

<sup>171</sup> Rodiatun Adawiyah et al., "Inheritance Rights of Outside Marriage Descendants After the Ruling of The Constitutional Court Number 46 of 2010," *IBLAM LAW REVIEW* 4, no. 1 (2024): 599.

<sup>172</sup> Nurlaelawati and Van Huis, "THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA," 370.

<sup>173</sup> Atika Sunarto, "Kedudukan Anak Akibat Hubungan Incest Perspektif Hukum Perdata Dan Hukum Islam," *Kalam Keadilan* 4, no. 2 (2016): 157.

3. The father cannot be a guardian for a child out of wedlock as well as for an incestuous child. If that incestuous child is a girl when she would conduct a marriage, the father does not have a right to become her guardian.<sup>174</sup>

The discussion above has explicitly shown that basically there is no significant difference between incestuous children and the rest of the children out of wedlock as illegitimate children in terms of legal position in the Indonesian context. The main difference could only be found in terms of other aspects apart from the legal aspect. Those aspects consist of psychological aspects, medical aspects, and social aspects. After elaborating on the legal aspects of children out of wedlock from classical Islamic jurisprudence and Indonesian law, in the fourth chapter, I will attempt to analyse the similarities and differences between Islamic family law from classical Islamic jurisprudence and modern Indonesian law using a comparative method. This discussion is expected to reveal the kind of adoption that has been undergone by Indonesian law related to Islamic jurisprudence and European law by employing the theory of legal transplant.

---

<sup>174</sup> Sunarto, 161.

## CHAPTER IV ANALYTICAL STUDY REGARDING CHILD OUT OF WEDLOCK IN THE INDONESIAN CONTEXT

### 4.1. Legal Precedent Adopted from Islamic Jurisprudence

It has been mentioned in the previous chapters that Islamic family law in Indonesia has adopted the Islamic family law from the Islamic jurisprudence. Therefore, many provisions related to Islamic family law from Islamic jurisprudence are also adopted in Indonesian promulgation such as in Law Number 1 of 1974 concerning Marriage and in the Compilation of Islamic Law based on the Presidential Instruction Number 1 of 1991. A similar thing is also applied towards the incestuous child matter whereby since the classical Islamic jurisprudence has been equalized with illegitimate children from adultery (*walad al-zinā*) and children from mutual cursing/repudiation (*walad al-li'ān*). According to classical Islamic jurisprudence, children from adultery and mutual repudiation only have lineage to their mother and their mother's family. Because of that, in terms of inheritance division, they only receive inheritance from the mother and the mother's family because the lineage relation with the father has cut off.<sup>175</sup> In Islamic inheritance law, there are three reasons someone could receive inheritance which are marriage (*al-nikāḥ*), emancipation (*al-walā'*), and lineage (*al-nasab*). From here, it could be understood that the absence of such reasons makes someone cannot receive the inheritance. In relation to the incestuous child as an illegitimate child, due to the absence of lineage with the father, the right to inherit from the father and vice versa also does not exist.

The majority of Muslim jurists argued that the lineage is established with the existence of intercourse possibility after the marriage contract whether it is valid marriage or defective marriage. Nevertheless, Abū Ḥanīfa proposed a different opinion in which according to him, the existence of a marriage contract is enough to establish the lineage. Because of that, if after the marriage contract the husband and wife live separately and then the child is born from that wife, the status of the child is still considered a legitimate child and has lineage to both parents.<sup>176</sup> The discussion regarding the establishment of lineage or paternity in Islamic jurisprudence, however, is not limited to three instruments consisting of valid marriage, defective marriage, and doubtful sexual intercourse. Not only through

---

<sup>175</sup> Wahba Al-Zuhaylī, *Al-Fiqh-l-Islām wa Adillatuh*, 2nd ed., vol. 8 (Damascus: Dār al-Fikr, 1985), 431.

<sup>176</sup> Al-Zuhaylī, *Al-Fiqh-l-Islām wa Adillatuh*, 1985, 7:675.

those instruments, the lineage or paternity is also could be established through two other ways which are recognized by Islamic legal tradition as long as these are preceded by the legal marriage. First, through acknowledgement (*iqrār*) from the father, he stated that the child born is his child. The establishment of lineage through this recognition needs affirmation from another party. Second, through evidence (*bayyina*) which is considered stronger than mere acknowledgement from one party.<sup>177</sup>

Although the discussion on illegitimate children in Islamic jurisprudence seems restricted to its normative precedent to avoid high risks of distortion, the elaboration has included a broader aspect. For instance, the discussion of a child from adultery is not only limited to the matters consisting of the lineage or inheritance which are part of the legal status within the family, but also encompasses the discussion of the status within Muslim society such as the validity to become a leader in the congregation of five obligatory daily prayers. Muslim jurists have different opinions regarding the leadership/imamate (*al-imāma*) of a child from adultery. According to jurists from Ḥanbalī school, there is no problem within the leadership of a child from mutual repudiation as long as he has good religiosity and is valid to become a leader. This opinion is based on the general meaning of hadith, “*The people led by a most fluent person in reading the scripture.*” Meanwhile, jurists from Ḥanafī, Mālik, and Shāfi‘ī school considered the leadership of an adulterous child in prayer as a discouraged act if there is another person who has more appropriate.<sup>178</sup>

#### **4.2. Transformation and Adjustment under the Indonesian State Control**

Although in Islamic family law, children out of wedlock cannot be attributed to their biological fathers, Indonesian law has provided an instrument to protect the children’s interests by issuing Constitutional Court Ruling Number 46/PUU-VIII/2010 which revised the provision on Article 43 paragraph (1) of the Law of Marriage.<sup>179</sup> Constitutional Court Ruling Number 46/PUU-VIII/2010 actually did not specify whether its decision applies only to children whose parents were married in religious terms but had not registered their marriage following the state administration, or also to children whose parents had never married. Some argued that the Ruling’s revision of Article 43 paragraph (1) seems to indicate that it applies to both. The ruling furthermore will lead to more children born

---

<sup>177</sup> Al-Zuhaylī, 7:692–96.

<sup>178</sup> “Al-Mawsū‘a al-Fiqhiyya al-Kuwaytiyya,” 217.

<sup>179</sup> Harisa Sheila Binti Basri, “The Filiations of Illegitimate Children to Biological Father (Comparative Study between Perlis Fatwa and Indonesian Constitutional Court Decision Number 46/PUU-VIII/2010)” (Malang, State Islamic University of Maulana Malik Ibrahim, 2023), 35.

outside of a valid marriage receiving support or in terms of living expenses. This is a good point, but it is important to highlight that the Islamic legal tradition does not justify the attribution of children out of wedlock to men as their biological fathers. But, regarding the stipulation to bear the living expenses of those children upon their biological fathers, it seems there is no single provision in Islamic legal tradition that forbids it especially when the men as their biological fathers are capable of fulfilling it.

The rapid development of technology is involved as one of the considerations in the constitutional court ruling. DNA testing technology currently can be used as a method to prove the existence of a blood relationship between a child and his/her parents, especially his/her father. Indeed, DNA testing is not widely available in Indonesia and the cost is still not affordable for most Indonesians. Because of that, the only remaining way that is usually used to prove the relation of a child to his/her father or paternity is with other forms of 'legally recognised evidence', which, in Indonesia, are witness testimony and documents. This verification of recognised evidence is important in the Indonesian context to give the court a legal basis to impose the men as the biological fathers of children out of wedlock to get involved and participate in fulfilling the living expenses of those children so that the burden of responsibility is not covered by their mother only. However, with such beneficial aspects of that ruling for the children's interests, the application of that ruling cannot be confirmed. It is because that ruling only has jurisdiction to ensure that statutes (including the Marriage Law) comply with the Constitution. It cannot review the validity of lower-order regulations such as the Compilation of Islamic Law (KHI) which is issued by the presidential instruction.<sup>180</sup>

The creation of a new law through the issuance of the constitutional court ruling by Indonesian lawmakers has indicated the success of legal transplants in the Indonesian legal system. However, it is important to pay attention to enacting of Islamic family law in Indonesia. Indonesian law has adopted Islamic law not as a whole with its particular background, rather, it only took certain rules partially without considering the historical background or the philosophical background. For instance, the codification of Islamic family law in Indonesia in the form of the Compilation of Islamic law (KHI) only took certain rules concerning children, especially the general provisions without further detailed explanations. *Sharī'a* as a general normative system of Islam is believed to have steady

---

<sup>180</sup> Simon Butt, "Asia-Pacific: 'Illegitimate' Children and Inheritance in Indonesia," *Alternative Law Journal* 37, no. 3 (September 2012): 197, <https://doi.org/10.1177/1037969X1203700314>.

principles derived from the most authoritative religious scripture.<sup>181</sup> Nevertheless, the adjustments that have been carried out by the Indonesian lawmakers frequently disregard the important parts of the legal sophistication of Islamic law and sometimes represents it in the incomplete version.

Islamic family law which deals with the issue of children out of wedlock as one of the legal aspects of *sharī'a* has to maintain its application based on the virtue of *sharī'a* which is represented by the religious authority. Nevertheless, the enforcement of Islamic family law by the state as it happens in Indonesia has made its application based on the virtue of the state action. To make certain provisions in Islamic family law legally binding it needs enforcement by the state through either enactment as law by the legislative organs of the state or enforcement by its courts. It could be understood that apart from the virtue of religious authority, the application of Islamic family law in Indonesia also relies on the political will of the state.<sup>182</sup> The issuance of Constitutional Court Ruling Number 46/PUU-VIII/2010 therefore, being conclusive evidence how the political will of the state attempt to accommodate many legal sources to overcome the issue of children out of wedlock.

One might argue that the issuance of that ruling is a good step to protect the children out of wedlock from any violation or harassment as a result of the father's neglect towards their relationship. However, it is important to highlight that what happened in Indonesia is not totally a legal transplant, rather, it seems to be suitable to called as legal borrowing. This legal borrowing has been taken from various sources not only one and results in the diverse legal system in Indonesia. In the case of children out of wedlock, Indonesia has adopted the law from Islamic law, European law, and customary law. This diversity sometimes leads to confusion or even contradiction. For instance, Indonesian law seems to attempt to accommodate the attribution of children out of wedlock in this sense from adultery to their biological fathers which is inspired by European law.<sup>183</sup> In European law, such thing is based on the consideration that the adultery between unmarried people is not prohibited. On the contrary, although adultery in Indonesia is prohibited as it is adopted from Islamic law, Indonesian law attempts to use the provision concerning the acknowledgement of children out of wedlock from European law partially by excluding

---

<sup>181</sup> An-Na'im, *Islamic Family Law in a Changing World: A Global Resource Book*, 2.

<sup>182</sup> An-Na'im, 2.

<sup>183</sup> Sheila Binti Basri, "The Filiations of Illegitimate Children to Biological Father (Comparative Study between Perlis Fatwa and Indonesian Constitutional Court Decision Number 46/PUU-VIII/2010)," 35.

the legal consideration behind that. This thing has indicated the legal hybridity which will lead to the inconsistency in the Indonesian law.

Therefore, the issuance of Constitutional Court Ruling Number 46/PUU-VIII/2010 has led the Indonesian 'Ulamā Council (MUI) to give a response. To prevent a misunderstanding among ordinary Indonesian people, MUI issued the Fatwa of MUI Number 11 of 2012 concerning child born from adultery based on the majority opinion of four Islamic jurisprudence schools which are cited from several Islamic jurisprudence textbooks such as I'āna al-Ṭālibīn of Sayyid al-Bakri, al-Muḥallā of Ibn Ḥazm, al-Baḥr al-Raīq Sharḥ Kanz ad-Daqāiq of Ibnu Nujaim, Radd al-Muḥtarr 'alā-l-Durr al-Mukhtār of Ibn 'Ābidīn, al-Fatāwā al-Kubrā of Ibnu Taymiyyah, and Aḥkam al-Aulād al-Nātijīn 'an-l-Zinā of Wahbah al-Zuhailī. From those various textbooks, similar opinions could be found which stated that the stipulation of lineage to both parents only occurs from a valid marriage so that a child born from adultery only could be attributed to his mother and not to the man who committed adultery with the mother. The child born from adultery is a child born out of wedlock and adultery is considered as an offence (*jināya*) according to religious rules. Therefore, the general provision in the Fatwa of MUI stated that the child born from adultery does not have lineage, guardianship, inheritance, or living expenses with the man who caused his/her birth. The child born from adultery only has lineage, inheritance, and living expenses with his mother and his mother's family. However, the government was authorised to impose sanctions on the man who caused the child's birth to fulfil the child's necessity and give obligatory bequest (*waṣiyya wājiba*) after his decease. Such sanction aimed to protect the child's rights, not to validate lineage between the child and the man who caused the child's birth.<sup>184</sup>

### **4.3. Comparative Study Involving Similar Provisions from Different Countries**

#### **4.3.1. Malaysian Islamic Family Act 303 of 1984**

The issue of illegitimate children is not an issue that receives special attention only in Indonesia. Many other countries especially Muslim countries experienced such an issue, therefore, the issue of illegitimate children including incestuous children -although not specifically mentioned- has been regulated in their own regulations. In Malaysia, there is Act 303 of 1984 concerning Islamic Family Law which is applied in Federal Territories. In relation to the illegitimate child, that act determines several things such as the meaning of

---

<sup>184</sup> "Fatwa of Indonesian Ulama Council Number 11 of 2012 Concerning Position of Children Born from Adultery and the Treatment of Them" (2012).

illegitimate child, the measurement of an illegitimate child, and the custody rights of an illegitimate child. It is stated in Section 80 paragraph (1) that, illegitimate in relation to a child means born out of wedlock but not as a result of doubtful intercourse (*waṭ 68hubha*). As for doubtful intercourse, it means intercourse performed on the erroneous impression that the marriage was valid or intercourse by mistake and includes any intercourse not punishable by prescribed punishment (*ḥadd*) in Islam.<sup>185</sup>

In terms of child custody and living expenses, the Malaysian Act determined that the mother of an illegitimate child to take responsibility rather than the man as the biological father. This is proven by the subsequent Section 80 paragraph (1) stating that *“If a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the Court, upon due proof thereof, may order the woman to make such monthly allowance as the Court thinks reasonable.”* In addition, there is no consideration to give the responsibility of living expenses explicitly upon a man as the biological father. Because of that, Section 85 states that, *“The custody of illegitimate children appertains exclusively to the mother and her relations.”* From this section it is clear that the man as the biological father of an illegitimate child is not involved in custody as well as in living expenses.<sup>186</sup>

Besides stipulating the responsibility of an illegitimate child upon the mother and the mother’s family, the Malaysian Act also mentioned several categories that make a child considered illegitimate. Section 111 explicitly confirms that a child born more than four lunar years after the dissolution of the marriage of the parent is considered illegitimate by stating, *“Where the child is born more than four lunar years after the dissolution of the marriage either by the demise of the man or by divorce, the paternity of the child shall not be established in the man unless he or any of his heirs asserts that the child is his issue.”* As for doubtful intercourse, if a woman committing doubtful intercourse gives birth to a child within the minimum and the maximum period of gestation, the child born from such intercourse could be attributed to the man as the biological father. Therefore, section 113 of the Malaysian Act 1984 stated, *“Where a man has 68hubha (doubtful) sexual intercourse with a woman, and she is subsequently delivered of a child between the period of six lunar (qamariyya) months to four lunar years after the intercourse, the paternity of the child shall*

---

<sup>185</sup> “Malaysian Islamic Family Act,” 303 § (1984).

<sup>186</sup> Malaysian Islamic Family Act.

*be ascribed to the man.*<sup>187</sup> However, there is no specific provision in this act concerning an incestuous child.

Another regulation in Malaysia related to the illegitimate children issue is the State Fatwa from Kelantan, Negeri Sembilan, Terengganu, Pulau Pinang, Kedah, Melaka, Sarawak, and Selangor state regions. The fatwa stated that all children born after six lunars (*qamariyya*) months and two moments (*lahza*) from the date of marriage could be attributed to the mother's husband. However, the Perlis state region allowed the attribution of lineage even the childbirth is less than six lunar months and two moments from the date of marriage on the condition that the father does not deny his relationship with the child. Moreover, the National Council for Islamic Affairs (MKI) in its 64<sup>th</sup> Meeting on 27 July 2004 issued the fatwa stating that an illegitimate child is: 1) A child born out of wedlock either as a result of illegal sexual relation or rape and not from doubtful sexual intercourse or from slavery, 2) A child born less than six months and two moments (*lahza*) from the time of marriage consummation (*tamkīn*) based on the lunar calendar (*qamariyya taqwīm*), 3) A child born after six months and two moments from the time of marriage consummation based on the lunar calendar after a legitimate marriage and accompanied by confession/acknowledgement (*iqrār*) from both or either one of the parents that the child is conceived before the marriage or testified by four witnesses that fulfil the criteria of the Islamic law.<sup>188</sup>

#### **4.3.2. Moudawana: Moroccan Family Code**

The provision concerning the paternity of children either legitimate or illegitimate can be found in Chapter II from Article 150 to Article 155 of the Moroccan Family Code or Moudawana. Paternity itself according to Article 150 of Moudawana is interpreted as the legitimate bond between the father and the child that is transmitted through generations. There are three alternatives to establish paternity according to Moudawana consisting of the conjugal bed, acknowledgement, and sexual intercourse by error/doubtful as mentioned in Article 152. Although Moudawana also recognises the establishment of paternity by presumption such an instrument only be refuted by judicial decision. The conjugal bed here refers to the marital relationship. Therefore, the conjugal bed under a marital relationship that meets the required conditions is irrefutable proof of paternity. The child born from that

---

<sup>187</sup> Malaysian Islamic Family Act.

<sup>188</sup> Md Zawawi Abu Bakar, Wan Ibrahim Wan Ahmad, and Mahyuddin Abu Bakar, "Registration Problems of Illegitimate Children among Muslims in Malaysia," *Journal of Islamic Studies and Culture*, 2017, 12–13, <https://doi.org/10.15640/jisc.v5n1a2>.

conjugal bed furthermore automatically has lineage to both parents either mother (maternity) or father (paternity). However, the paternity could be refused by the father through a sworn allegation of adultery committed by his spouse or the child's mother.<sup>189</sup>

To prove the sworn allegation of adultery committed by the spouse, or utilizing of an irrefutable expertise one of two conditions must be fulfilled. The husband must present solid proof of his allegations, or the court must issue a judicial decision ordering the expertise. Regarding paternity by the conjugal bed, Article 154 of Moudawana stated that it could be applied if the child is born within six lunar months after the marriage contract between the parent was concluded including the opportunity for sexual intercourse exists whether the marriage contract is valid (*ṣaḥīḥ*) or defective (*fāsid*). In case the dissolution of marriage occurs, the paternity by the conjugal bed could be stipulated if the child is born during the year that follows the date of separation. Because of that, if the child is born beyond that year, the child presumably would be considered illegitimate. Furthermore, Moudawana also mentioned the provision in regard to doubtful sexual intercourse. Article 155 states that if a pregnancy results from sexual intercourse by error/doubtful and the woman delivers within the minimum and the maximum statutory pregnancy period, the child's paternity could be stipulated by the issuance of a judicial decision ordering the attribution of child's paternity to the man committed intercourse as the biological father. Thus, at the end of Article 155, it is stated that "*Paternity due to sexual relations by error is established by all legal means.*" However, Moudawana also does not mention clearly the paternity of incestuous children either preceded by the incestuous marriage between the parent or by adultery between them including adultery by force in the form of a rape action.<sup>190</sup>

#### **4.3.3. Personal Status Law of Kuwait Number 51 of 1984**

Kuwait has a specific regulation concerning personal status law which is Qānūn Number 51 of 1984 concerning Personal Status Law (Qānūn al-Aḥwāl al-Shakhṣiyyah al-Kuwaytiyya). According to the Personal Status Law of Kuwait, the minimum gestation period is six lunar months, and the maximum is three hundred sixty-five days as mentioned in Article 166. Because of that, a child born less than six lunar months after the parent's marriage or exceeding the maximum period after the dissolution of the parent's marriage could be considered an illegitimate child. What is meant by the maximum period in this

---

<sup>189</sup> "Moudawana - The Moroccan Family Code" (2004).

<sup>190</sup> Moudawana - The Moroccan Family Code.

provision is three hundred and sixty-five days as mentioned in Article 172 paragraph (1). In this law, it is also mentioned in Article 167 that the lineage of an adopted child cannot be attributed to the adoptive parents whether the real parent is known or unknown. Thus, the stipulation of lineage for an adopted child to the adoptive parents is null and void.

One of the most outstanding provisions in the Personal Status Law of Kuwait in determining the paternity rather than a merely conjugal bed is the fertility of a man or a husband. The absence of fertility from a man could affect the establishment of paternity towards him. It is mentioned in Article 168 that, "*Paternity from a man is not proven if it is proven that he is not fertile, or if a child cannot come from him due to a congenital or pathological impediment.*" Therefore, the paternity of an infertile man cannot be proven. As for other provisions, it seems that the personal status law of Kuwait still adopted the general provisions from the classical Islamic jurisprudence. For instance, in terms of the establishment of lineage from a defective marriage and doubtful intercourse, the child born from those causes could be attributed to the father and the mother as long as it could be proven that the birth is no less than six lunar months from the date of the actual consummation. Another example could be found in provisions concerning children born from adultery or mutual cursing/repudiation as they only inherit from the mother and her relatives and vice versa. The children born from adultery and mutual repudiation are not explained they could be attributed to their biological father through acknowledgement in Kuwaiti Personal Status Law nor through other instruments such as evidence (*bayyina*). Therefore, there is no chance for an adulterous child or child born from mutual repudiation as illegitimate children to receive paternity from their father in this provision. This personal status law also adopted opinions from the Mālikī and the Shāfi'ī school which argued that a person is forbidden for his descent of adultery and other illicit intercourse as stated in Article 15.

#### **4.4. Legal Analysis on Children out of Wedlock in Indonesian Law compared to Islamic Family Law in Classical Islamic Jurisprudence**

Islamic law guarantees the rights of a child since he/she is in the womb. It could be proven by the prohibition of killing the baby through abortion based on basic Islamic law. But in case the child is born in death, the child is deemed never to exist as well as the rights. Although a child born from adultery is considered as illegitimate naturally there is no difference between a child born from legal marriage and out of wedlock according to Indonesian national law. Both are legal subjects and have the same position before the law. Indeed, the issue of illegitimate children is complex and sensitive, especially among

ordinary society. Because of that, every new interpretation regarding such an issue felt taboo in Indonesian society even after the issuance of Constitutional Court ruling number 46 which is colouring new episodes of how the government through its promulgation attempt to accommodate many sources either from Islamic law or European law concerning the issue of children born out of wedlock.<sup>191</sup>

Indonesian law recognizes the acknowledgement instrument for children out of wedlock by their putative father. There is no significant difference whether the acknowledgement is given voluntarily or by coercion. This acknowledgement is not aimed to establish the lineage between an illegitimate child and his/her biological father, rather, it is for stipulating the obligation upon the biological father to be responsible for the survival of that illegitimate child. This is in accordance with the provision of the Constitutional Court Ruling Number 46/PUU-VIII/2010 which obliged the biological father of illegitimate children to be responsible for the survival of the illegitimate children including the right to receive living expenses. The ruling made a serious effort to ensure the survival of the illegitimate children so that the children could be safe from any violence and discrimination and could live, grow, and develop in an environment that respects their inherent dignity as human beings similar to other children. In addition, in the Indonesian context, it is aimed to foster a prosperous, honourable, and excellent generation of Indonesian children.

Along with the promulgation of the Constitutional Court Ruling Number 46/PUU-VIII/2010, the rights of illegitimate children apparently receive more attention and protection including living expenses. As part of civil rights, the living expenses right are now guaranteed by the national law of Indonesia confirming the principle of equality before the law for every individual including children born out of wedlock in the Indonesian context. They are part of vulnerable people who are recognized as legal subjects similar to other children whom the state must protect.<sup>192</sup> Therefore, regardless of their different legal status and position according to Islamic family law, it should not undermine their status as Indonesian citizens.

Regarding incestuous children, the invalidity of incestuous marriage between their parents according to religious law in this case Islamic family law or state law makes the

---

<sup>191</sup> Anindito, "Weak Protection of Civil Rights Zina Children in Indonesia," 15.

<sup>192</sup> Nabila Wahyu Fitria, Arief Suryono, and Noor Saptanti, "Legal Certainty of The Rights of Children Born out of Wedlock to Their Biological Fathers," *International Journal of Educational Research and Social Sciences (IJERSC)* 5, no. 1 (2024): 20.

marriage must be annulled as mentioned by Article 22 Law of Marriage of 1974. The status of the child in Indonesian national law could be determined by the existence of a birth certificate. The birth certificate could be issued by the government if there is a valid marriage between the parents. Thus, the absence of valid marriage between the parents makes the child cannot receive the birth certificate or the birth certificate only mentions the mother without the father of the child. This provision could be found in Articles 42 and 43 Law of Marriage of 1974 and Article 99 of the Indonesian Civil Code.<sup>193</sup> Due to legal consideration stating that the incestuous marriage is null and void, the incestuous marriage must be annulled as mentioned in article 22 Law of Marriage stating that, “*A marriage could be annulled if the parties (husband and wife) do not fulfil the required conditions.*” One of the marriage impediments that prevent the validity of marriage is the existence of a close blood relationship.<sup>194</sup> Therefore, the legal status of a child born from an incestuous marriage basically is illegitimate because the parent’s marriage is clearly prohibited. However, if the incestuous marriage is conducted due to ignorance (doubtful intercourse/*waṭ’ 73hubha*), the child born from such a marriage is considered a legitimate child although the marriage bond between the parents cannot be continued.<sup>195</sup>

In that case, it could be simplified that although the marriage between the child’s parent is annulled, the status of the child must be seen as similar to a legitimate child because the annulment of the parent’s marriage retroactively does not affect the status of the child. Thus, the child has a lineage relationship with both parents. Moreover, if the child is a girl, her biological father could be her guardian when she conducts marriage as well as her father’s male relatives including her uncle, her grandfather, etc. sequentially from the nearest one as mentioned in Article 21 paragraph (1) KHI. In addition, in terms of inheritance, the child could inherit each other with the family members of the father and the mother as long as they are considered as the heirs according to Islamic inheritance law.<sup>196</sup> Besides that, the child also has rights to receive the nurture and education from the parents. Article 45 Law of Marriage of 1974 states, “*The parents are obliged to nurture and*

---

<sup>193</sup> Rindi Putri Afifah, Nindya Prasetya Wardhani, and Aura Shava Dhinda Salsabila, “Perlindungan Hukum Terhadap Hak Anak Incest Berdasarkan Hukum Negara Indonesia,” *Jurnal Hukum Lex Generalis* 2, no. 6 (2021): 504.

<sup>194</sup> Afifah, Wardhani, and Salsabila, 500.

<sup>195</sup> Afifah, Wardhani, and Salsabila, 505.

<sup>196</sup> Afifah, Wardhani, and Salsabila, 506.

*educate their children well and the obligation continues although their marriage ends up until the children are considered adults and capable of taking care of their selves.”*<sup>197</sup>

Muslim jurists have agreed that the stipulation of child lineage to the mother is based on the birth and to the father based on the conjugal bed, acknowledgement (*iqrār*) and evidence (*bayyina*) and could not be neglected except by mutual repudiation/cursing (*li‘ān*).<sup>198</sup> As for the child from adultery only has lineage to the mother and the mother’s family as well as the inheritance.<sup>199</sup> This stipulation also applies to child from mutual repudiation/cursing.<sup>200</sup> According to the Constitutional Court Ruling Number 46/PUU-VIII/2010 illegitimate child could receive inheritance from the biological father if their blood relation could be proven by science and technology with the existence of evidence.<sup>201</sup> This provision is different from what is usually written in the most Islamic jurisprudence textbooks which constituted that one of the reasons a person could receive the inheritance right is the existence of lineage whereas the illegitimate child does not have the lineage to his/her biological father.

Indeed, an effort to open the gate for children out of wedlock to be attributed to their biological father actually has occurred in Islamic jurisprudence far from the issuance of Court Ruling Number 46/PUU-VIII/2010 in Indonesia. It could be found for instance in Ibn Qayyim’s opinion narrated from ‘Urwa bin Zubayr and Sulaymān bin Yasār which stated that adulterous children could be attributed to their biological fathers after their fathers have received the prescribed punishments (*ḥadd*) as mentioned in the qur’anic injunctions. This opinion is considered anomalous or irregular (*shāḏ*). While the legal consideration of this opinion is based on the principle of repentance (*al-tawba*) which implies that the perpetrator of a certain sin should be forgiven for what happened after repentance, the legal consideration of the court ruling is merely for the children’s interest (*maṣlahah*).<sup>202</sup> Not only different in terms of the principle that is followed, the Indonesian court ruling also involve the usage of technology by involving DNA testing which has not been discussed in the classical Islamic jurisprudence.

---

<sup>197</sup> Afifah, Wardhani, and Salsabila, 507.

<sup>198</sup> “Al-Mawsū‘a al-Fiqhiyya al-Kuwaytiyya,” 196.

<sup>199</sup> “Al-Mawsū‘a al-Fiqhiyya al-Kuwaytiyya,” 204.

<sup>200</sup> “Al-Mawsū‘a al-Fiqhiyya al-Kuwaytiyya,” 205.

<sup>201</sup> Ahmad Rezy Meidina, “Anak Di Luar Kawin Dalam Hukum Kewarisan Islam: Sebuah Ragam Perspektif Dan Analisa,” *El-Aqwal: Journal of Sharia and Comparative Law*, 2022, 11.

<sup>202</sup> Ibn Qayyim al-Jawziyya, *Zād Al-Ma‘ād Fī Hadyi Khayr-l-‘Ibād*, 3rd ed., vol. 5 (Beirut: Dār Ibn Hazm, 2019), 583.

The DNA testing usage as a method of paternity verification In modern Islamic jurisprudence depends on several considerations such as the scientific accuracy of DNA results, the percentage of error in these results, the extent to which results are equally reliable for both establishment and negation of paternity, the need for confirmation of results, the types of technical and procedural safeguards to ensure accuracy of results, need for governmental control and oversight, etc.<sup>203</sup> Although it is a very useful method, Muslim jurists stress the importance of understanding the scope of the changeable and unchangeable under Islamic law especially when it comes to paternity matters which is rooted in scriptural foundations and tied to the Islamic vision of family and society.<sup>204</sup> Because of that, the jurists differentiated between paternity and maternity. Maternity could be proven by DNA testing and could be established but the paternity is not necessarily established within an extramarital relationship even though DNA testing confirms the accuracy of blood relationships, especially if the child is a result of illegal insemination which is not legally recognized. However, what Muslim jurists have stressed seems does not affect too much towards the Indonesian court ruling.

The tendency of Islamic family law In Indonesia to recognize a new category of biological fatherhood whose definition is still developing has indicated that although the general provisions of Islamic family law in Indonesia have roots in Islamic jurisprudence the application has shown the development which sometimes seems distorted from its origin. This is in accordance with the argument proposed by Alan Watson in his legal transplant theory that just like the transplantation of a part of the human body that will grow in a new body of receptors as well as a legal system and rules.<sup>205</sup> Moreover, what happened in Indonesia is not a mere legal transplant, rather it tends to become a legal borrowing due to the selection of certain rules partially without involving the particular background from its origin. This kind of legal borrowing from numerous sources while disregarding the particular background sometimes leads to legal uncertainty, confusion or even contradiction as an odd result.<sup>206</sup> It could be seen for example in the issue of children out of wedlock in Indonesia whereby the provisions apparently are mixed from two different sources which are Islamic law and European law. This caused the legal hybridity that led to the inconsistency in Indonesian national law. It is because, on the one hand, Indonesian

---

<sup>203</sup> Shabana, "Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts," 15.

<sup>204</sup> Shabana, 20.

<sup>205</sup> Watson, *Legal Transplants: An Approach to Comparative Law*, 27.

<sup>206</sup> Watson, 57.

law recognises the concept of biological father which is adopted from European law but on the other hand still considers adultery between unmarried people as a prohibited action similar to Islamic law.

Because the legitimization of illegitimate children by stipulating the concept of biological fatherhood will be seen as a deviation from preserved Islamic legal tradition, to avoid that, some Indonesian scholars have proposed a middle way through the stipulation of obligatory bequest for illegitimate children.<sup>207</sup> Muslim jurists have different opinions regarding obligatory bequest (*waṣiyya wājiba*) for the kins that do not inherit but most of them argued that it is encouraged (*mandūb*) and not mandatory (*wājib*). The legal foundation is because the Qur'anic verses on the mandatory of obligatory bequest have been abrogated by inheritance verses which are revealed afterwards according to the narration from Ibnu Abbās. This opinion is supported by 'Ikrima, Mujāhid, Mālik, and al-Shāfi'ī. However, some Muslim jurists argued that the mandatory of obligatory bequest verses are not abrogated by the inheritance verses. Because of that, according to them, obligatory bequests still become an obligation in case there are relatives who do not inherit. This opinion is supported by Ibnu ḥazm, Abū Bakr 'Abd al-'Azīz, and Dāwūd.<sup>208</sup>

Different from what is usually discussed in Islamic jurisprudence textbooks which stipulates the obligatory bequest (*waṣiyya wājiba*) for the kin who do not receive the inheritance, in the Indonesian context the illegitimate children become one of the candidates to receive that bequest has been part of the discussion object. This could be seen in the Fatwa of MUI Number 11 of 2012. Although this fatwa is merely a legal opinion and has no legal force in the Indonesian legal system, this fatwa which stipulates the obligatory bequest could be one of the legal considerations in order to overcome the issue of illegitimate children in Indonesia. Therefore, although the lineage of children out of wedlock cannot be established to their biological fathers, their property rights could still be strived in the form of obligatory bequest in case their biological fathers have been deceased.<sup>209</sup>

The discussion on the establishment of lineage to the father or paternity especially in the case of illegitimate children has given more attention than the maternity in Islamic family law. It is because of the complexity of legal provisions concerning paternity which

---

<sup>207</sup> Nurlaelawati and Van Huis, "THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA," 381–82.

<sup>208</sup> 'Alī Jum'a, *Al-Bayān Li Mā Yushghil al-Azhān*, vol. 2 (Kairo: Diyār al-Miṣriyya, 2008), 268–69.

<sup>209</sup> Nurlaelawati and Van Huis, "THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA," 381.

is unlike maternity that its evidence could be proven easily by childbirth. Paternity basically is only established based on the existence of a licit sexual relationship which denotes sanction by Sharī‘a either through marriage or in the past ownership of a slave-woman.<sup>210</sup> Although linguistically lineage (*nasab*) is established through both parents, the legal lineage is traced through one’s agnatic line of descent which is male descents. The importance of lineage is proven by the fact that it defines and determines several rights and obligations in the family such as inheritance, property rights, to leadership positions in a family which is implemented in the form of guardianship.<sup>211</sup> Considering the importance of lineage, it has made the verification of lineage become important for protecting and preserving of progeny by restricting the establishment of lineage within the framework of a licit sexual relationship to guard against the mixing of genealogies (*ikhtilāf al-nasab*) because of unlawful sexual intercourse such as adultery.<sup>212</sup>

That consideration which has been established in classical Islamic jurisprudence has also affected the discussion on the father in the Indonesian context to become more complex. The father status could be divided into two categories which are juridical father and biological father. A juridical father is a father whose rights and obligations are legally related to the child. Those rights and obligations are recognized by the law. As proof, the recognition is written and stated clearly on the birth certificate in terms of Indonesian law. Meanwhile, the biological father has relations with the child merely based on blood relations. He does not have any other relations juridically and is considered foreign to the child. A juridical father is not necessarily the biological father and vice versa. It is because although the child was born from legal marriage, there is no guarantee that the husband of the child’s mother is really the biological father of the child. Thus, the status of the juridical father could be annulled if the father for instance neglected the child through mutual repudiation by assuming that his wife has committed adultery with another man. On the contrary, even though the fertilisation of a child in a woman’s womb has resulted from adultery with another man, not with her husband, as long as the husband does not negate the child born from such adultery, the child’s lineage could be attributed to him.<sup>213</sup>

It is also essential to highlight that the principle of legitimacy (*shar‘iyya*) in Islamic law refers to the legality and validity of certain actions, rules, and authority within the

---

<sup>210</sup> Shabana, “Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts,” 1.

<sup>211</sup> Shabana, 3.

<sup>212</sup> Shabana, 4.

<sup>213</sup> Anindito, “Weak Protection of Civil Rights Zina Children in Indonesia,” 18.

framework of Islamic law. Because it is closely related to *sharī'a*, its authenticity lies in the preserved *sharī'a* as exemplified in the prophetic traditions and the companions.<sup>214</sup> As a legal matter, it cannot be blended and intervened by something beyond the legal affairs including biological issues. Whenever *sharī'a* constitute something legal it means that is legal and whenever *sharī'a* stipulate something is illegal it means such thing is illegal. Therefore, the legality in Islamic law is determined by what *sharī'a* constitutes and does not rely on other things beyond *sharī'a*. For instance, adultery as an illicit intercourse is constituted as illegal action according to *sharī'a*, thus, it cannot establish legal consequences similar to licit intercourse i.e. legal marriage which can establish legal consequences such as the establishment of lineage, inheritance, etc.

Based on a brief explanation above, it could be revealed that there is the complexity of the adoption of law within Indonesian law either from classical Islamic jurisprudence or European law. By utilizing the legal transplant theory proposed by Alan Watson, what has undergone in Indonesia cannot be classified as legal transplant due to the lack of fulfilment of some requirements in legal transplant theory. One of them is the disregard of some philosophical background from adopted rules and provisions. This kind of adoption tends to be a mere legal borrowing rather than a legal transplant. Moreover, such legal borrowing can lead to legal hybridity which makes legal provisions concerning children out of wedlock in Indonesian law confusing or even contradictive.

---

<sup>214</sup> I. Nassery et al., *The Objectives of Islamic Law: The Promises and Challenges of the Maqasid al-Shari'a* (Lexington Books, 2020), 239–40, <https://books.google.co.id/books?id=NexLDwAAQBAJ>.

## CONCLUSION

The discussion on the issue of children out of wedlock as illegitimate children in Indonesia cannot be separated from the discussion on Islamic family law from classical Islamic jurisprudence. Islamic family law as personal status law in Indonesia has taken a significant position within the Indonesian legal system. It can be proven by the existence of many regulations that have adopted and transplanted legal provisions from Islamic jurisprudence textbooks such as Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law issued by Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (KHI). In the general provisions either Islamic jurisprudence or Indonesian family law generally constitutes that a child out of wedlock only has lineage to their mother and their mother's family. Because of that, there is no lineage relationship between children out of wedlock and men as their biological fathers. Therefore, unlike legitimate children, children out of wedlock do not have similar rights to legitimate children. The rights such as the stipulation of lineage (*al-nasab*), breastfeeding (*al-radā'a*), custody (*al-ḥadāna*) and guardianship (*al-wilāya*) cannot be received by children out of wedlock.

Unlike in the classical Islamic jurisprudence textbooks, those rights are not explicitly explained in the KHI. Not only in terms of children's rights, the distinction and classification of children out of wedlock are also not mentioned clearly in the KHI as in classical Islamic jurisprudence. This indicates the over-simplicity of the KHI that disregarded different types of certain concepts including the concept of children out of wedlock as illegitimate children. Meanwhile, classical Islamic jurisprudence divided children into divisions of more than two types which are legitimate children and illegitimate children with children from mutual cursing/repudiation as an additional. Moreover, the KHI also does not mention in detail the causes of making children classified as legitimate except legal marriage.

However, an effort to attribute children out of wedlock has occurred by the issuance of Constitutional Court Ruling Number 46/PUU-VIII/2010 which implied the concept of the biological fatherhood by involving the usage of DNA testing technology which the definition is still under development. This endeavour seems like a deviation from what is always preserved in classical Islamic jurisprudence. Classical Islamic jurisprudence does not recognize the concept of biological fatherhood which could be attributed to children out of wedlock. Based on that ruling, children born from adultery have a chance to be

attributed to their biological father. Therefore, the enactment of family law in Indonesia is no longer similar to what is written in Islamic jurisprudence textbooks, rather it seems closer to European law in terms of children out of wedlock issues since the issuance of the court ruling.

Indeed, far before the issuance of the Indonesian court ruling, the opinion that allows children out of wedlock to be attributed to men as their biological fathers has been founded from anomalous opinion (*shaz'*) narrated from 'Urwa and Sulaymān ibn Yasār. The children out of wedlock could be attributed to their fathers after their fathers have received the prescribed punishment (*hadd*) considering the principle of repentance (*al-tawba*). Differently, the main consideration in the Indonesian court ruling is based on the children's interest (*maṣlahah*). In addition, the Indonesian court ruling also involved the usage of technology in form of DNA testing which has not been discussed in the classical Islamic jurisprudence textbook.

I suggest that the Constitutional court decision law took some Western laws for granted in this case, even without considering the adaptation of the Indonesian Indigenous culture that should accompany any process of legal implants. This resulted in an inconsistency in the concept of legitimacy within the Indonesian law. While adultery is still illegal, the adulterous is still liable to the parental responsibilities that results from the consequences of his illegal act. This stands in contrast to the Western laws which seem more self-consistent, considering that adultery is not a crime in most of those laws. The Indonesian law's recognition of the concept of biological fatherhood while still prohibiting and considering adultery as a crime obviously has indicated an inconsistency. Different from legal transplant which requires the adoption of particular rules or provisions as a whole, this kind of legal borrowing in Indonesia in regard to children out of wedlock as illegitimate children has mixed and blended two different legal systems adopted from European law and Islamic law which led to legal hybridity and inconsistency. Moreover, if there are more than two legal systems that are adopted with their various philosophical backgrounds, it will lead to the diversity of legal institutions in Indonesia regarding the legal position of children out of wedlock which sometimes confusion or even contradiction.

While this study strives to provide a comprehensive analysis of the comparative legal position of children out of wedlock between Islamic family law from classical Islamic jurisprudence and Indonesian law, it is important to acknowledge certain limitations. The evaluation and interpretation concerning certain legal rules presumably vary depending on which point of view is used. Thus, it could cause biases, uncertainty, and inconsistency

even though in the same case. This indicates that the result of this study cannot be generalized and if it is interpreted using another approach could result in a different interpretation or even contradictive. Because of that, further research discussing the different approaches or points of view is needed. Not only for an evaluation and assessment but also for deepening analysis regarding the partial adoption of Islamic family law in Indonesia particularly related to the legal position of children born out of wedlock.

## BIBLIOGRAPHY

- Abu Bakar, Md Zawawi, Wan Ibrahim Wan Ahmad, and Mahyuddin Abu Bakar. "Registration Problems of Illegitimate Children among Muslims in Malaysia." *Journal of Islamic Studies and Culture*, 2017. <https://doi.org/10.15640/jisc.v5n1a2>.
- Abū Zahra, Muḥammad. *Al-Aḥwāl al-Shakhṣiyya*. 3rd ed. Kairo: Daar al-Fikr al-Arabi, 1957.
- Adawiyah, Rodiatun, Muhammad Arif Prasetyo, Eric Ongko, Stefani Wibowo, and Julius Kamal. "Inheritance Rights of Outside Marriage Descendants After the Ruling of The Constitutional Court Number 46 of 2010." *IBLAM LAW REVIEW* 4, no. 1 (2024): 585–600.
- Afifah, Rindi Putri, Nindya Prasetya Wardhani, and Aura Shava Dhinda Salsabila. "Perlindungan Hukum Terhadap Hak Anak Incest Berdasarkan Hukum Negara Indonesia." *Jurnal Hukum Lex Generalis* 2, no. 6 (2021): 498–509.
- Afridawati, Afridawati. "History, Typology, and Implementation of Islamic Law in Indonesia: Combination of Sharia and Fiqh or the Result of Historical Evolution?" *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 21, no. 1 (June 30, 2021): 33–47. <https://doi.org/10.30631/al-risalah.v21i1.676>.
- Ahmad, Muh Jufri, and Fahmi Nabil. "Hak Keperdataan Anak Hasil Perkawinan Incest." *COURT REVIEW: Jurnal Penelitian Hukum (e-ISSN: 2776-1916)* 2, no. 01 (February 22, 2022): 57–75. <https://aksiologi.org/index.php/courtreview/article/view/311>.
- Al-Ḥanafī, Ibn al-Hammām. *Sharḥ Faṭḥ Al-Qadīr 'alā al-Hidāyah Sharḥ Bidāyat al-Mubtadī*. 1st ed. Vol. 4. 10 vols. Beirut: Dār al-Kutub al-'Ilmiyyah, 2003.
- . *Sharḥ Faṭḥ Al-Qadīr 'alā al-Hidāyah Sharḥ Bidāyat al-Mubtadī*. 1st ed. Vol. 3. 10 vols. Beirut: Dār al-Kutub al-'Ilmiyyah, 2003.
- Al-Jazīrī, 'Abdurrahmān. *Kitāb al-Fiqh 'alā-l-Mazāhib al-Arba'a*. 2nd ed. Vol. 5. 6 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 2003.
- . *Kitāb al-Fiqh 'alā-l-Mazāhib al-Arba'a*. 2nd ed. Vol. 4. 6 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 2003.
- Al-Marghīnānī, 'Alī ibn Abī Bakr. *Al-Hidāyah Sharḥ Bidāyat al-Mubtadī*. 1st ed. Vol. 3. 7 vols. Madinah: Dār al-Sirāj, 2019.
- "Al-Mawsū'a al-Fiqhiyya al-Kuwaytiyya." Vol. 27. Kuwait: Ministry of Endowment and Islamic Affairs of Kuwait, 1980.
- Al-Muqaddasī, Ibnu Qudāma. *Al-Mughnī*. Vol. 2. Beirut: Bait al-Afkār al-Dawliyya, 2004.
- Al-Muwaṭṭa'*. 2nd ed. Vol. 2. Beirut: Dār al-Gharb al-Islāmī, 1997.
- Al-Nawāwī, Muḥyi-l-Dīn. *Kitāb Al-Majmū' Sharḥ al-Muḥaḏḏab Li-l-Shirazī*. Vol. 17. 23 vols. Jeddah: Maktabah al-Irshad, n.d.
- . *Kitāb Al-Majmū' Sharḥ al-Muḥaḏḏab Li-l-Shirazī*. Vol. 20. 23 vols. Jeddah: Maktabah al-Irshad, n.d.
- Al-Qurtubī, Ibn Rushd. *Bidāyatu-l-Mujtahid wa Nihāyatu-l-Muqtasid*. 1st ed. Vol. 3. 4 vols. Beirut: Dār Ibn Ḥazm, 1995.

- Al-Zuhaylī, Wahba. *Al-Fiqh-l-Islām wa Adillatuh*. 2nd ed. Vol. 7. 8 vols. Damascus: Dār al-Fikr, 1985.
- . *Al-Fiqh-l-Islām wa Adillatuh*. 2nd ed. Vol. 8. 8 vols. Damascus: Dār al-Fikr, 1985.
- Anindito, Teguh. “Weak Protection of Civil Rights Zina Children in Indonesia.” *Islam Universalia: International Journal of Islamic Studies and Social Sciences* 4, no. 1 (2022).
- An-Na’im, Abdullahi. *Islamic Family Law in a Changing World: A Global Resource Book*. Zed Books London, 2002.
- Archibald, Elizabeth. *Incest and the Medieval Imagination*. Oxford University Press, 2001. <https://doi.org/10.1093/acprof:oso/9780198112099.001.0001>.
- Arifin, Zainal, and Zaenul Mahmudi. “Mandatory Wills for Adultery Children, Analysis of the Compilation of Islamic Law from the Perspective of Maqasid Syariah Al-Syatibi.” *International Journal of Law and Society (IJLS)* 1, no. 1 (January 29, 2022): 36–47. <https://doi.org/10.59683/ijls.v1i1.4>.
- Aslati, Armi Agustar, Silawati, Arisman, and Siti Arafah. “Utilizing Science and Maqāsid Al-Sharī’ah in Resolving Contemporary Issues of Islamic Family Law.” *Al-Manahij: Jurnal Kajian Hukum Islam*, March 16, 2024, 17–36. <https://doi.org/10.24090/mnh.v18i1.10571>.
- As-Sayuti, J.A.R. *Al-Itqan Fi Ulum al-Quran*. Dar al-Kotob al-Ilmiyah, 2003. <https://books.google.co.id/books?id=EpxNAQAACAAJ>.
- Baderin, Mashood A. “Family Law.” In *Islamic Law: A Very Short Introduction*, edited by Mashood A. Baderin, 0. Oxford University Press, 2021. <https://doi.org/10.1093/actrade/9780199665594.003.0004>.
- . *Islamic Law: A Very Short Introduction*. 1st ed. Oxford: Oxford University Press, 2021.
- Bearman, P. J., Thierry Bianquis, Clifford Edmund Bosworth, E. J. van Donzel, and W. P. Heinrichs, eds. *Encyclopaedia of Islam, Second Edition*. Electronic resource. Leiden ;Boston: Brill Academic Publishers, 2012. <http://dx.doi.org/10.1163/1573-3912-all>.
- Bibi, Nahida, Badshah Rehman, Maryam Noreen, Bakht Mina Sughra, Fawad Khan, and Sadaf Parveen. “Child Physical Custody Law in Islamic Jurisprudence: An Analytical Study in The Context of Four Schools of Thought,” n.d.
- Butt, Simon. “Asia-Pacific: ‘Illegitimate’ Children and Inheritance in Indonesia.” *Alternative Law Journal* 37, no. 3 (September 2012): 196–98. <https://doi.org/10.1177/1037969X1203700314>.
- Constitutional Court Ruling, 46/PUU-VIII/2010 § (2012).
- Djawas, Mursyid, Gamal Achyar, Nusyirwan Bustanul Arifin, Masri Reza, and Baharuddin Umar Yakub. “The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law).” *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (June 27, 2022): 139. <https://doi.org/10.22373/sjhhk.v6i1.11904>.

- Djubaedah, Neng. "Child Marriage and Zina in Indonesian Legislation in Islamic Law." *Jurnal Hukum & Pembangunan* 49, no. 1 (April 4, 2019): 210. <https://doi.org/10.21143/jhp.vol49.no1.1917>.
- Erlina. "Access to Justice 'Anak Di Luar Perkawinan' (Analisis Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Pengujian Pencatatan Perkawinan Dan Status Hukum Anak Yang Dilahirkan Dari Perkawinan Yang Tidak Tercatat Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan)." *Jurnal Konstitusi* 1, no. 1 (2012): 33–58.
- Fatah, Ahmad. "Status Hukum Wali Nikah bagi Ayah Pelaku Incest terhadap Anak Kandung (Tinjauan Empat Madzhab dan Kompilasi Hukum Islam)." *Jurnal Penelitian* 12, no. 1 (2018).
- Fatwa of Indonesian Ulama Council Number 11 of 2012 concerning Position of Children Born from Adultery and the Treatment of Them (2012).
- Fitria, Nabila Wahyu, Arief Suryono, and Noor Saptanti. "Legal Certainty of The Rights of Children Born out of Wedlock to Their Biological Fathers." *International Journal of Educational Research and Social Sciences (IJERSC)* 5, no. 1 (2024): 18–22.
- Gelder, G. J. H. van. *Close Relationships: Incest and Inbreeding in Classical Arabic Literature*. London; New York; New York: I.B. Tauris; Distributed in the U.S. by St. Martin's Press, 2005.
- Giladi, Avner. *Infants, Parents and Wet Nurses: Medieval Islamic Views on Breastfeeding and Their Social Implications*. Vol. 25. Brill, 2022.
- Greijer, Susanna, and Jaap Doek. *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*. 1st ed. Luxembourg: ECPAT, 2016.
- Habibi, Ahmad Rizza. "The Dynamics Of Illegitimate Child Status In Sharia And National Law Of Indonesia: Is There A Harmonization?" *Al-Manhaj: Journal of Indonesian Islamic Family Law* 3, no. 1 (July 10, 2021): 70–80. <https://doi.org/10.19105/al-manhaj.v3i1.4787>.
- Hadia, Ameen. *Kitāb al-Aḥkām al-Shar'iyya fi al-'Aḥwāl al-Shakhsiyya 'alā Mazhab al-Imām 'Abī Ḥanīfa al-Nu'mān*. 3rd ed. Egypt: Fajalah, 1895.
- Hamam. "The Status of Outside Marriage Children (The Study of Constitutional Court Regulation No. 46/PUU-VIII/2010 on February 27th, 2012, Based on the Fuqahas' Perspective)." *International Journal of Educational Research & Social Sciences* 2, no. 3 (2021): 574–84.
- Hamam, Hamam. "The Status of Outside Marriage Children (The Study of Constitutional Court Regulation No. 46/PUU-VIII/2010 on February 27th, 2012 Based on the Fuqaha' Perspective)." *International Journal of Educational Research and Social Sciences (IJERSC)* 2, no. 3 (June 29, 2021): 574–84. <https://doi.org/10.51601/ijersc.v2i3.85>.
- Hasan, Khairi Ayumi. "Pertanggungjawaban Orang Tua Terhadap Anak Incest Menurut Hukum Islam." *Premise Law Journal* 11 (2016): 162479.
- Hayyān, A.A.D.A.H.M.I.Y.I. *Tafsīr Al-Baḥr al-Muḥīṭ*. Turath For Solutions, 2013. <https://books.google.co.id/books?id=BMpuQAACA AJ>.

- Houmine, Mohammed, and Khadija Loudghiri. "Exploring Child Rights and the Concept of Childhood in Islam: A Contemporary Descriptive Analysis." *Khazanah Hukum* 5, no. 2 (2023): 130–47.
- Ibn Qudamah, Abdullah. *Al-Mughni*. 3rd ed. Vol. 9. 15 vols. Riyadh: Dār Alim al-Kutub, 1997.
- Indonesian Civil Code (Burgerlijk Wetboek voor Indonesie) (1848).
- Instruction of President of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of Compilation of Islamic Law (1991).
- Jawziyya, Ibn Qayyim al-. *Zād Al-Ma'ād Fī Hadyi Khayr-l- 'Ibād*. 3rd ed. Vol. 5. 7 vols. Beirut: Dār Ibn Hazm, 2019.
- Jum`a, `Alī. *Al-Bayān Li Mā Yushghil al-Azhān*. Vol. 2. Kairo: Diyār al-Miṣriyya, 2008.
- Kasānī, A.B.M. *Kitab Badai' Al-Ṣanai' Fī Tartīb al-Sharā'i'*. Dār al-Kutub al-'Ilmiyya, 1986. <https://books.google.co.id/books?id=pXZiwAEACAAJ>.
- Khairul, Muhammad, Emilda Firdaus, and Erdiansyah Erdiansyah. "Perlindungan Anak Sebagai Korban Incest Dalam Peraturan Perundang-Undangan Di Indonesia." Riau University, 2015.
- Law Number 1 of 1974 concerning Marriage (1974).
- Law Number 16 of 2019 concerning the Amendment of Law Number 1 of 1974 concerning Marriage (2019).
- Law Number 35 of 2014 concerning the Amendment of the Law Number 23 of 2002 concerning Child Protection (2014).
- Law Number 39 of 1999 concerning Human Rights (1999).
- Malaysian Islamic Family Act, 303 § (1984).
- Manzur, I. *Lisan Al-'Arab*. Dar Sader, Beirut, 1990. <https://books.google.co.id/books?id=2f-EAQAACAAJ>.
- Marilang. "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law." *Journal of Indonesian Islam* 10, no. 2 (2016): 335–54.
- Meidina, Ahmad Rezy. "Anak Di Luar Kawin Dalam Hukum Kewarisan Islam: Sebuah Ragam Perspektif Dan Analisa." *El-Aqwal: Journal of Sharia and Comparative Law*, 2022, 1–14.
- Mir-Hosseini, Z. *Marriage on Trial: A Study of Islamic Family Law*. Bloomsbury Academic, 2000. <https://books.google.co.id/books?id=IiIASeeh2iAC>.
- Miṣr, Ibn Naqīb al-. *Umdat Al-Sālik Wa 'Iddat al-Nāsik*. 1st ed. Beirut: Daar Ibn Hazm, 2006.
- "Model Penelitian Kompilasi Hukum Islam," April 19, 2012. <https://uinsgd.ac.id/model-penelitian-kompilasi-hukum-islam/>.
- Moudawana - The Moroccan Family Code (2004).
- Msi, Sakirman. "Indonesia Islamic Law Study on Children Nasab." *Available at SSRN 2888312*, 2016.
- Muhammad, Bahruddin, Thohir Luth, Abdul Rachmad Budiono, and Jazim Hamidi. "The Inheritance Rights of Illegitimate Children Outside Marriage in the Perspective of Children's Rights." *International Journal of Sciences* 14, no. 1 (2014).

- Muḥammad Maḥmūd Ḥusayn, Aḥmad ‘Abd al-Majīd. “Aḥkām Walad-l-Zinā fi al-Fiqh-l-Islāmī.” University of al-Najāḥ al-Waṭaniyya, 2008.
- Nassery, I., R. Ahmed, M. Tatari, A. Emon, C. Ademi, H. Ahmed, J. Auda, A.S. Chaudhry, A. Duderija, and M.H. Kamali. *The Objectives of Islamic Law: The Promises and Challenges of the Maqasid al-Shari’a*. Lexington Books, 2020. <https://books.google.co.id/books?id=NexLDwAAQBAJ>.
- Nurlaelawati, Euis. “The Legal Fate of Indonesian Muslim Women in Court: Divorce and Child Custody.” In *Religion, Law and Intolerance in Indonesia*, 353–68. Routledge, 2016.
- Nurlaelawati, Euis, and Stijn Cornelis Van Huis. “The Status of Children Born out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms.” *Journal of Law and Religion* 34, no. 3 (December 2019): 356–82. <https://doi.org/10.1017/jlr.2019.41>.
- Phil, M. “Islamic Law of Personal Status: Analysis of the Reforms of Islamic Family Law in Various Muslim Countries,” n.d.
- Polutu, Eka Benanti, Mutia Cherawaty Thalib, and Julius T Mandjo. “Tinjauan Hukum Hak Waris Anak Hasil Perkawinan Incest Menurut Hukum Perdata” 1, no. 3 (2023).
- Rafiq, Aayesha. “Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis).” *International Journal of Humanities and Social Science* 4, no. 5 (March 2014).
- Ramdhini, Indah Sukma, Felicitas Sri Marniati, and Yurisa Martanti. “Kepastian Hukum Status Anak Karena Pembatalan Perkawinan dan Akibat Hukumnya Dalam Sistem Hukum Di Indonesia.” *JOURNAL of LEGAL RESEARCH* 4, no. 3 (August 8, 2022): 599–614. <https://doi.org/10.15408/jlr.v4i3.27546>.
- Rasid, Chatib. “Anak Lahir Di Luar Nikah (Secara Hukum) Berbeda Dengan Anak Hasil Zina, Kajian Yuridis Terhadap Putusan MK No. 46/PUU-VII/2012.” Presented at the Seminar on the Status of Children Born Out of Wedlock and Other Civil Rights, IAIN Walisongo Semarang, April 10, 2012.
- Rasyid, Muh Haras. “Dinamika Hukum Islam Dan Aktualisasi Teori-Teori Berlakunya Hukum Islam Di Indonesia.” *DIKTUM: Jurnal Syariah Dan Hukum* 11, no. 1 (2013): 15–23.
- Sandimula, Nur Shadiq. “The Status and Rights of An Illegitimate Child According to Mazhab Asy-Syafi’i Perspective on The Development of Islamic Family Law in Indonesia.” *Jurnal Ilmiah Al-Syir’ah* 17, no. 2 (December 18, 2019): 121. <https://doi.org/10.30984/jis.v17i2.952>.
- Schlumpf, Eva. “The Legal Status of Children Born out of Wedlock in Morocco.” *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 4, no. 22 (2016): 1–26.
- Shabana, A. “Islamic Law of Paternity Between Classical Legal Texts and Modern Contexts: From Physiognomy to Dna Analysis.” *Journal of Islamic Studies* 25, no. 1 (January 1, 2014): 1–32. <https://doi.org/10.1093/jis/ett057>.
- Sheila Binti Basri, Harisa. “The Filiations of Illegitimate Children to Biological Father (Comparative Study between Perlis Fatwa and Indonesian Constitutional Court Decision Number 46/PUU-VIII/2010).” State Islamic University of Maulana Malik Ibrahim, 2023.

- Sunarto, Atika. "Kedudukan Anak Akibat Hubungan Incest Perspektif Hukum Perdata Dan Hukum Islam." *Kalam Keadilan* 4, no. 2 (2016).
- Syarif, Nurrohman, Tajul Arifin, and Sofian Al-Hakim. "Sharia in Secular State - The Place and Models for Practicing Islamic Law in Indonesia:" In *2nd International Conference on Sociology Education*, 692–700. Bandung, Indonesia: SCITEPRESS - Science and Technology Publications, 2017. <https://doi.org/10.5220/0007104306920700>.
- Syarifuddin, Amir. *Meretas Kebekuan Ijtihad: Isu-Isu Penting Hukum Islam Kontemporer Di Indonesia*. Ciputat Press, 2002.
- Tanūkhī, Saḥnūn bin Saʿīd al-. *Al-Mudawwanatu-l-Kubrā*. Vol. 4. Saudi Arabia: Wizāra al-Shuʿūn al-Islāmiyya wa-l-ʿAuqāf wa al-Daʿwatu wa-l-ʿIrshād, n.d.
- . *Al-Mudawwanatu-l-Kubrā*. Vol. 6. Saudi Arabia: Wizāra al-Shuʿūn al-Islāmiyya wa-l-ʿAuqāf wa al-Daʿwatu wa-l-ʿIrshād, n.d.
- ʿUmar, R.F.D.M. *Tafsir Al-Fakhr al-Razi: Al-Mushtahir Bi-al-Tafsir al-Kabir Wa-Mafatih al-Ghayb*. Dar al-Fikr, 2005. <https://books.google.co.id/books?id=Q2c2ngAACAAJ>.
- Van Huis, Stijn Cornelis, and Theresia Dyah Wirastri. "Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws." *Australian Journal of Asian Law* 13, no. 1 (2012): 17p.
- Watson, Alan. *Legal Transplants: An Approach to Comparative Law*. Second. Athens: University of Georgia Press, 1993.

## CURRICULUM VITAE

### Personal Information

Full Name : Muhammad Mufti  
 Nickname : Mufti  
 Gender : Male  
 Office Address : Jl. Let. Jend. S. Parman No. 106, Sintang 78611,  
 West Kalimantan  
 Email : muhammad.mufti@uiii.ac.id

### Education Background

#### A. Formal Education

1. Kebon Jeruk State Elementary School, Cianjur (2004-2010)
2. Tanwiriyyah Islamic Junior High School, Cianjur (2010-2013)
3. Baitulhikmah Islamic Senior High School, Tasikmalaya (2013-2016)
4. Islamic Family Law Program, Faculty of Shārī' a, Sunan Gunung Djati State Islamic university, Bandung (2016-2020)
5. Arabic Literature Program, Faculty of Cultural Sciences, Padjadjaran University, Bandung (2017-2021)

#### B. Non-formal Education

1. Sirajul Atfal Islamic School, Cianjur (2007-2009)
2. Al-Mitsaali Islamic School, Cianjur (2009-2010)
3. Al-Muzakarah Islamic Boarding School, Cianjur (2009-2010)
4. Tanwiriyyah Islamic Boarding School, Cianjur (2010-2013)
5. Baitulhikmah Islamic Boarding School, Tasikmalaya (2013-2016)
6. Al-Mu'awanah Traditional Islamic Boarding School, Bandung (2016-2021)

### Publications

1. Redrawing the Diverse of Muslim Politics: Study on Political Attitude of Islamic Political Parties in Indonesia | Mufti | Ushuluna: Jurnal Ilmu Ushuluddin (uinjkt.ac.id)
2. Riwayatul Hadith baina al-Mushāfahah wa al-Kitābah: Dirāsah al-Tārīkhiyyah li al-Bidāyah al-Mubakkirah | Tahdis: Jurnal Kajian Ilmu Al-Hadis (uin-alauddin.ac.id)
3. Tolerant From Below: Grassroots Movement and Interfaith Collaboration for Religious Moderation in Indonesia | Jurnal Penelitian (uingusdur.ac.id)
4. UTILIZATION OF OME TV VIDEO-CALL APPLICATION AS DA'WAH MEDIA: Review on Ome TV Content from Alif Dz's YouTube Channel | An-Nubuwwah: Journal of Islamic Studies (iaimkotamobagu.ac.id)
5. Perlindungan hak-hak istri dalam putusan cerai talak di Pengadilan Agama Cianjur pada tahun 2018: Studi kasus di Pengadilan Agama Cianjur