

The Lineage Status of Children and Pregnant Women Outside Marriage in Law (Islam & Conventional) by Gender Perspective

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Abstract

The increasing case of children born out of wedlock or to parents who have committed adultery is the background of this research. This is because there are people who still tarnish the meaning of marriage by committing adultery or having sex outside of marriage, causing a problem known as pregnancy outside of marriage. What is new relates to the legal status of their children, which can be communicated to society as a whole or legal experts about the legal status of children or the validity of marriages, especially in matters of guardianship. The research findings show that, although the civil court decision of the Constitutional Court separates a child who commits adultery from his biological father, the issue of guardianship in the marriage of a child who commits adultery is not discussed explicitly. As a result, children born out of wedlock do not have any rights over their parents, in this case, rights with the biological father, even though there is already evidence to show it (DNA test). This is stated in Article 43 paragraph 1 of Law No. 1 of 1974. According to religious and conventional law, children born out of wedlock do not have any legal rights because they only have a relationship with their mother and do not have blood relations (lineage) with the man who is her biological father. Such as the right to maintenance, guardianship rights over daughters, and the right to mutual respect. When viewed from a gender perspective, this is very detrimental for the child and the woman and tends to benefit the man or father for the child.

Keywords: *lineage status of children, pregnant women, Islamic and conventional law, gender perspective*

A. Introduction

Humans are servants of Allah SWT who were created to be caliphs on earth as well as social beings who have various needs and goals in their lives. These needs can be both worldly and hereafter. In the concept of the Islamic religion, that the purpose of sending humans to earth by Allah SWT is to become a caliph on earth whose job is to maintain the unity and integrity of mankind. This is stated in the Qur'an verses 10 and 13. As a result, people who are able in any way are encouraged to marry to continue their offspring so as to create continuity of life to become caliphs. Marriage is a sunnatullah as well as avoiding adultery. Of course there are special provisions regarding marriage. When a man or woman is not married, they have the right to themselves both in

terms of their rights and responsibilities in relation to their lives. However, after marriage, they have rights and responsibilities over each other's ownership in carrying out life. The obligation to marry or partner is stated in the Al-Qur'an surah ar-rum verse 21 which reads:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا
 وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ
 يَتَفَكَّرُونَ ﴿٢١﴾

“Meaning: And among the signs of His power is that He created for you wives of your own kind, so that you are inclined to and feel at ease with him, and He made them between you with love and affection. Indeed, in that there are signs for people who think.”(Nanikoe 2013)

According to the verse above, that their rights and obligations merged from that time immediately after binding themselves to each other in marriage. Marital assets are capital assets that can be used by husband and wife to meet their daily needs and those of their children in the family. In matters of marriage, contract, marriage guardian, and dowry everything has been regulated by Islam. This is done with the hope that the goal of marriage can form a family that is *sakinah*, *mawaddah*, and *warahmah* and can achieve them without difficulty in the future (Ali, 2007), besides that it also teaches Muslims to goodness as Allah SWT says in QS. Al-Mu'minun verse 5 namely:

وَالَّذِينَ هُمْ لِأَفْوَاجِهِمْ حَافِظُونَ ﴿٥﴾

“Meaning: and those who guard their genitals from things that are forbidden. (QS. Al-Mu'minun verse 5) ” (RI 2012)

This verse directs humans to keep away and protect our genitals from the impurity of lust in a way that is against the law (haram), keeps the heart away from desires that have the potential to violate the law, and keeps humans safe from lust and desires that are out of control. The harm that adultery can cause to the home and family. A child born to a woman who is not legally married to the man who impregnated her is considered a child resulting from an act of adultery. (al-Mufarraj, 2003)

In Islam, adultery is a great sin and is hated by Allah because it is only done with the intention of obtaining pleasure and escaping from all the dangers that accompany it. Naturally, this conflicts with duty and love in the relationship between a man and a woman. Marriage is the only way that can bring humanity to that goal as long as a man and a woman are in need of love

and have a duty to support each other in life, educate their children, and prepare them for a shorter life.

Those who continue to abuse marriage do so by tarnishing the meaning and purpose of marriage itself by committing adultery or having sex outside of marriage, leading to the breakdown of the marriage and causing a problem known as out-of-wedlock marriage of pregnant women, which can then lead to problems. What is new concerns the legal status or illegitimacy of their children, which can lead to disputes between members of society as a whole and jurists, both Islamic law and conventional law in Indonesia in Law no. 1 of 1974 concerning Marriage.

A child who is not born in a legal marriage will face several difficulties and challenges in the future. According to state regulations, it is mandatory for a newborn child to be reported so that there is a record, and then the child has a birth certificate as valid proof in a civil registration recognized by the state. While birth certificates can be issued when there is evidence of a marriage certificate between the parents. This ensures that children born out of wedlock will find it difficult to obtain a birth certificate in the name of both parents. Because their marriage is not registered at the Office of Religious Affairs (KUA). Therefore, children born outside of legal marriage are children born from marriages that are not registered.

B. Discussion

Marriage (tazwij) is agreed upon by fiqh experts (Fuqaha) according to the terminology, which is the permissibility of intercourse between a man and a woman. In marriage there is a term called aqad. According to Abu Zahrah, aqad is an activity that makes the relationship between men and women lawful, both related to the rights and obligations between the two.

If viewed according to language, marriage comes from the words al-jam'u and al-dhamu, which means gathering, (Hakim, 2000) and aqdu al-tazwij, which means marriage contract, which can also be used to interpret the meaning (Zawaj marriage or another word is wath'u al-zaujah which means to have intercourse with one's wife. Rahmat Hakim also offers a definition similar to the one presented above: marriage comes from the Arabic word "nikahun," which is masdar, or from the verb (fi'il madzi) nakaha. The word marriage in Indonesian is a synonym for tazawwaja. Because of its integration into Indonesian, the term "marriage" is often used. (Hamid Sarong)

The definition of marriage in the Marriage Law is an example of understanding the concept of contemporary marriage. Article 1 of the 1974 Marriage Law defines that:

“Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Supreme Leader.” (htt)

The above article explains that marriage is a union between a man and a woman with the intention of starting a family that is based on the belief in One Supreme God and is happy and eternal. According to the Compilation of Islamic Law, marriage is a very strong contract or mitsaaqan ghaliizhan to

obey Allah's commands and carry it out as worship, but the concept of marriage or what it is referred to as marriage is not. In addition, the purpose of marriage is to lead a sakinah, mawaddah, and rahmah household. The Indonesian word for "marriage", a synonym for "tazawwaja", is then translated as "nakaha" which is an amalgamation into Indonesian, the term "marriage" is often used (Hamid Sarong).

Ahmad Ashar Bashir defines marriage as a contract or agreement to bind himself between a man and a woman to justify sexual relations between the two parties, on a voluntary basis and for the pleasure of both parties to realize a virtue. This is the definition of marriage. The happiness of family life filled with love and harmony in a way that is blessed by Allah SWT.

1. The Kinds of Laws in Marriage

The state of the offender can basically change the marriage law. The marriage law in detail is as follows:

1) Required

Those who are able, have burning passions, and are afraid of falling into the pit of adultery must marry. Because it is mandatory to refrain from unlawful acts, then marriage is the best choice. According to Maliki scholars, fasting cannot be used as a substitute for marriage, but marriage is mandatory for those who want to marry and are afraid of adultery. Apart from that, the Malikiyah stipulates a number of criteria to determine whether it is obligatory for a person to marry, including (a) Is he afraid of falling into the valley of adultery; b) preventing him from being unable to fast or unable to control his lust; c) not eligible to join the abundance of people man.

Meanwhile, Hanafi researchers argue that marriage is necessary for someone with the following circumstances: (a) They think that if they don't get married, they will enter the valley of adultery; (b) unable to refrain from sexual activity; c) unable to unite people's wealth; d) able to provide a living and dowry.

2) As-Sunnah

Sunnah marriage law for those who want to get married and have strong passions, but are able to protect themselves from adultery. Hanafi scholars and Hanabilah agree that marriage is sunnah for those who like it but are not afraid of falling into the valley of adultery. For him, marriage is more important than silence in worship because living the life of an imam (anti-marriage) is not justified in Islam. According to Maliki scholars, people who do not like marriage but want children do it. that they can fulfill their responsibilities by providing lawful food and engaging in sexual relations. Although the Syafi'iah scholars believe that marriage is permissible for those who do it with the aim of getting peace and tranquility. (Sahrani, 2012)

3) **Haram**

Legal marriage is haram if a person does not want it because he is unable to support his wife financially or spiritually, is unable to satisfy his lust, or believes that if he marries, he will leave Islam.

4) **Makruh**

Even though it doesn't harm his wife because he is rich and doesn't have strong lust, the law of marriage becomes makruh for someone who has lust and is unable to support him. attend worship or study because of infertility. According to Maliki scholars, a man who has no desire to marry and is afraid of not being able to fulfill his obligations to his wife is makruh. According to Syafi'iyah scholars, marriage is makruh for those who are worried that they will not be able to fulfill their wife's obligations.

5) **Mubah**

The law is permissible for men who are not pressured for reasons that require them to marry immediately or order them to marry. Hambali scholars say that people who do not want to get married may do so.

2. *Wisdom in Marriage*

Marriage is taught and recommended by Islam because it will benefit the perpetrators, in this case all humans. The virtues of marriage include:

1. By having sex, the body becomes fresh, the soul becomes peaceful, the eyes are protected from those who see what is unclean, and the feeling of calm enjoys valuable things; marriage is the best and most suitable way to channel and satisfy the sexual instinct.
2. Marriage is the best way to raise noble children, to reproduce, to preserve human life, and to maintain destiny which is upheld by Islam;
3. In the context of living with children, the instincts of fatherhood and motherhood will develop to complement each other, and feelings of friendship, love and affection, which are good qualities that enhance one's humanity, will also develop;
4. A diligent and sincere attitude in developing one's talents and character is fostered when one is aware of the responsibilities involved in having a wife and raising children. Driven by a sense of responsibility, he will be able to work quickly. and fulfill their obligations. As a result, he will strive hard and seek sources of income that can increase production and wealth. In addition, it can encourage efforts to utilize natural resources given by God for the benefit of humans;
5. Division of work, one taking care of the house and the other working outside, in accordance with the limits of the responsibilities of the husband and wife in carrying out their respective responsibilities;
6. Marriage can result, among other things, in: Islam has indeed approved, supported, and legitimized family ties, strengthened enduring love between families, and improved community relations. and support each other.

Guardianship of children resulting from adultery in Islamic law and Law No. 1 of 1974 concerning Marriage. If examined in depth, the Compilation of Islamic Law (KHI) does not specifically and definitively classify various types

of children in Indonesia as contained in the General Civil Law. In the compilation of legal regulations in Islam, as well as understanding indicators of legitimate children (children born in legal marriage ties), as stated in Article 99 of Islamic law regulations, which classify legitimate children are:

1. Children born to or from a married mother are legitimate.
2. Results of husband and wife fertilization outside the womb and wife's birth.
3. It is common knowledge that children born without a legal marriage only have kinship with their mother and family, as stated in Article 100 of the Compilation of Islamic Law.

Which includes unmarried children, among others:

1. Children born to women who are not legally married to the man who gave birth to them;
2. Children born to women who were raped by at least one man;
3. Children born to women whose husbands disowned them;
4. A child born to a woman who is mistaken for her husband because people mistakenly think she is not pregnant;
5. Children born to women whose pregnancies are caused by illegal marriages, such as siblings who are married or breastfed.
6. In Islamic law, children numbered 4 and 5 above are referred to as subhat children, and if the subhat father acknowledges them, then the subhat lineage can be linked to them.

In addition, it also explains the position of the son from marriage to the woman who gave birth to him before the marriage. As stated in the Compilation of Islamic Law Article 53 paragraph 3: Marriage is not obligatory after a child is born because it occurs when a woman is pregnant.

Likewise, "The decision to annul a marriage does not apply retroactively to children born from that marriage" is explained in Article 75 letter (b) of the Compilation of Islamic Law concerning the status of children from an annulled marriage.

As a result of the husband's denial of the fetus and/or children born to his wife, the status of Li'an's children is explained in Article 162 of the Compilation of Islamic Law. Islamic law does not categorize the distribution of children systematically, as was done by Law Number 1 of 1974. According to Article 42 Chapter IX of Law Number 1 of 1974, children born or the result of a legal marriage are considered legitimate children. This article category includes:

1. Youth was brought into the world for women by lawful marriage.
2. Children born to married women must have at least six months between marriage and child birth;
3. Children born to married women but their births are recognized by their husbands even though their gestational age is shorter than usual.

Therefore, to define the meaning of the concept of children outside of marriage is explained through a terminological approach based on the articles in Law no. 1 of 1974 and Compilation of Islamic Law. According to Hasan Muhammad Makluf, adultery is defined as the birth of a child from an illegitimate husband and wife. Marriage between two people who are not

bound by marital ties who fulfill the elements of the pillars and conditions of marriage that have been determined is called an invalid marriage.

Unlawful sexual relations can occur consensual or can be due to rape (coercion in intimate relations) whether committed in a married relationship or not in a marital status. The Islamic Law Compilation did not adopt the term "child of adultery" to be used as a specific term in it, despite the fact that it is a popular term that is ingrained in people's lives. Meanwhile, Article 186 of the Compilation of Islamic Law states:

"The only relationship a child has out of wedlock is that with the mother and the family on her mother's side."

The meaning of the definition above is that the meaning of "child of adultery" is a child born due to an illegitimate relationship between the two parents by means of adultery. Then the child's sanad only relies on the mother and the mother's family. Civil law distinguishes between adulterous children and children out of wedlock as follows:

A child is called a child of adultery if one or both of the parents are still bound by another marriage and then have sexual intercourse and give birth to a child. A child is said to be a child out of wedlock if the parents of a child out of wedlock are still single (a young man, a virgin, a widower, or a widow), have sexual relations, and give birth to a child.

As mentioned above, if a child is found guilty of being born out of wedlock, he or she faces a number of legal consequences regarding the rights and responsibilities of the child, the mother who gave birth to it, and the offspring (genetic) of the father or father, including the following:

1) Relationship Status

As previously stated, children born out of wedlock only have kinship with their mother and family, according to Article 100 of the Compilation of Islamic Law. Even though the man who is carrying the woman who gives birth to the child is the father of the natural (genetic) father, the child cannot be legally related to the biological father.

This provision is considered to uphold the nobility of the institution of marriage while at the same time preventing environmental pollution, even though at first glance it seems inhumane and unequal between the burden that is borne solely on the mother's shoulders and has nothing to do with the man who is the genetic father of the child. wedding service.

2) Living

The law states that a child only has a kinship relationship with the mother and her family, so the only ones responsible for supporting the child are the mother and her family. Even though a biological child is a child who comes from the sperm of a biological father (genetic) but is not legally obliged to support his child, as stated in Article 100 of the Compilation of Islamic Law above.

This is not the same as children born in legal marriage, where the Compilation of Islamic Law Article 80 paragraph 4 states that the father is obliged to support his wife and children, health care, education and other needs based on his income. According to Article 105 letter (c) and Article 156 letter

(d) Compilation of Islamic Law, a father is still obliged to provide for his children as well as possible, even if the child is from the mother and who is divorced.

3) Inheritance rights

According to Article 186 of the Compilation of Islamic Law, the child only has an inheritance-inheritance relationship with the mother and her family as a further result of the stated lineage: with the mother and her family." As a result, the child is legally not related to the natural (genetic) father or father.

4) Guardianship Rights

According to Article 19 of the Compilation of Islamic Law, the natural father (offspring) is not entitled or illegal to marry the child if the child is born as a result of adultery (out of wedlock), the marriage guardian provisions in the article are:

1. In marriage, guardians of marriage are pillars that must be fulfilled by the prospective bride who will marry;
2. A man who fulfills the requirements of Islamic law—namely Muslim, Akil, and Baligh—acts as guardian of the marriage;
3. The same legal provisions as children born out of wedlock, in addition to the legal status of all children born out of wedlock, as previously mentioned.

In Article 43, the position of children born out of wedlock is regulated in Law Number 1 of 1974 which states that only civil relations exist between children born out of wedlock and their mothers and their families; The position of the child is then regulated by government regulations as referred to in paragraph (1).

The most recent legal development in Indonesia is that if a woman has an extramarital relationship with a man and gives birth to a child, the child also has a civil relationship with her biological father as long as it can be proven that the child is her biological child. In the event that the sexual relationship results in pregnancy, the child has a civil relationship with the mother and her family as well as her biological father and his family.

3. *Islamic Views on the Concept of Gender*

The diverse views of Muslims respond enthusiastically to discourses related to gender; There are those who are positive and accept it because it is a historical necessity. However, there are also those who have a negative attitude towards it and a priori reject it because it is considered as something that comes from the West and will destroy the order of Islamic teachings. However, this response is reasonable because the concept and term of gender is something new for Muslims. On the other hand, positive responses were also given by some Muslims in accepting the term gender as a concept to glorify women and build the concept of mutuality between women and men so as to create good relations between the two without dominating each other.

In the concept of the Qur'an it has been explained that men and women have a very close relationship which is then called *zauj* (pair). The concept of this teaching shows that men and women are complementary and equal

(musawa). Everything was created by God in pairs. Man and woman, husband and wife, day and night, heaven and earth, day and night, and positive and negative couples. However, pairing is not complementary but complementary.

Both men and women are obliged to foster harmony in the family and society. This implies we are expected to know the benefits and drawbacks of each, as well as the differences between the two. People who do not know these things can question and oppress many parties. He can treat women badly because he suggests things that are contrary to nature.

Al-Qur'an and Hadith exist in a cultured society. Its presence is a form of God's grace to direct humans towards a life free from violence, oppression, monopoly, destruction, and other forms of discrimination. Although both the Qur'an and the Hadith have universal ethical visions, they sometimes respond to specific events in time. In the context of the Qur'an and the Prophet's Hadith, an ethical vision is very important.

From the Islamic view above, it can be concluded that there are various principles of gender justice in Islam, namely:

1. Both as servants of God. Men and women are servants of Allah SWT, this is stated in QS. Adz-Dzariat verse 56
2. Both as caliphs on earth. Men and women as human beings on earth were created by Allah to become caliphs on earth. This is stated in QS. Al-An'am verse 156 and QS. al-Baqarah verse 30.
3. Both men and women accept the initial agreement as confirmed by QS. al-Araf: 172.
4. According to many verses, such as QS. al-Baqarah:Al-Araf, 35:Al-Baqarah, 20, 22, and 23:187, both Adam (male) and Hawa (female) actively participate in the cosmic drama. al-Baqarah:Al-Araf, 35:Al-Baqarah, 20, 22, and 23:187.
5. According to QS. Ali Imran: 195, an-Nisa: 16:124, an-Nahl: 97 and 40 and Ghafir: 40., men and women have the same potential to achieve success. (Siri,2014)

C. Conclusion

The issue of guardianship in the marriage of an adulteress child is not explicitly stated in the marriage, even though the civil relationship between an adulteress child and her biological father has been decided by the Constitutional Court. Indonesia until now in Law Number 1 of 1974), does not have the right to parents. Children born from adultery have no legal rights because they only have a relationship with their mother and are legally separated from their biological father because they have no blood relationship (nasab). In such circumstances, a child who commits adultery does not obtain material and moral rights from his father, such as the right to livelihood, guardianship rights over the daughter's marriage, and the right to inherit from each other. When viewed through a gender perspective, the family lineage status of children and pregnant women outside of marriage in law, both Islamic law and conventional state products contained in

Law number 1 of 1974, is not gender responsive, because women and children are victims. Women who have struggled to conceive, give birth, breastfeed, and care for children resulting from adultery are required to support and become guardians for their children. Meanwhile, the position of a child who knows nothing and has the right to meet and have complete parents, like other children, receives an unfair impact, even when his guardian status when he is an adult does not rely on his father and is not entitled to maintenance and inheritance from his biological father. . In this case, the position of children born out of wedlock and pregnant women is greatly disadvantaged, even though men also have a big role in it.

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