

## THE LEGAL STATUS OF A CHILD BORN OUT OF WEDLOCK IN THE PERSPECTIVE OF SYAFI'I AND HANAFI SCHOOLS

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### Abstract

*Promiscuity among young people, as happened today, often leads to unexpected things, namely the occurrence of pregnancy before marriage. If a child was born illegitimately, he was usually called a child born out of wedlock (natural child). As a result, he cannot be connected to his father but only to his mother. According to Syafi'i School, a child born out of wedlock is born less than six months after intercourse with a legal husband. The child's legal status does not have a lineage relationship with his biological father because he was born outside of a legal marriage. Meanwhile, according to the Hanafi School, a child born out of wedlock is born less than six months after the marriage contract. The legal status of children born out of wedlock is the same as children born in a legal marriage because the Hanafi School considers the existence of lineage in essence. The main difference between the two is in their understanding and interpretation of the sources of Islamic law related to the status of a child born out of wedlock. There is a difference because in term of history, in term of sociology, and in term of culture.*

**Keyword: Born Out of Wedlock; Children; Legal Status.**

## A. INTRODUCTION

Based on The Act No. 1 of 1974 about marriage, chapter 1, marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on the One Supreme Godhead. Chapter 2(1), marriage is legal if it is carried out according to the law of each religion and belief. (2) Every marriage is recorded according to the prevailing laws and regulations.<sup>1</sup>

Marriage is an essential problem for human life because, in addition to marriage as a means to form a family, marriage does not only contain elements of human relations with humans but also involves civil relations. Marriage also contains an element of sacredness, namely the human relationship with God. Because of that relationship to carry out a marriage, it must meet the requirements and pillars of marriage, that marriage must be recorded and carried out to obtain legal certainty.<sup>2</sup>

Regarding marriage, it has been regulated by the rules of marriage law, but in today's modern era, lust always comes first by ignoring existing norms and etiquette in society. Phenomena that occur at this time are caused by moral decline such as promiscuity between men and women resulting in adultery,

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<sup>1</sup>Central Government, "The Act No. 1 of 1974", chapter 1-2, *Official Website Central Government*, <https://peraturan.bpk.go.id/Home/Details/47406/uu-no-1-tahun-1974> (10 April 2022)

<sup>2</sup>Wasman dan Wardah Nuroniyah, *Hukum Perkawinan Islam di Indonesia Perbandingan Fiqh dan Hukum Positif*, (Yogyakarta: CV. Citra Utama 2011), 29.

pregnancy outside of marriage which is finally forced to be married to cover the family's disgrace.

In fact, adultery in society is growing. The indicators are seen in the number of abortions caused by illicit relations, babies who are dumped on the streets or even sold by their biological mothers, localization of prostitutes, the number of discotheques that provide facilities for immoral acts, the number of hotels and lodging places that are not selecting male and female visitors who are not married to stay in one room, and so on.<sup>3</sup> The prohibition against approaching adultery has been regulated in Surah al-Isra' verse 32:

وَلَا تَقْرُبُوا الزَّوْجَ إِتْنَهُ، كَانَ فَحِشَةً وَسَاءَ سَبِيلًا

It means: “And come not near into adultery. It is an abomination and an evil way.”<sup>4</sup>

From here Allah SWT has explained how vile is the practice of adultery and the word (*fahishah*) which has the meaning of a heinous act or dirty act where the act has reached the highest level and is recognized by every reasonable person for what abominations are caused by adultery.<sup>5</sup> Then continue with how Allah SWT also informs about the consequences of adultery in an act or a very bad way. The existence or occurrence of the act of adultery results in opening the way to

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<sup>3</sup> Rahmawati, *Tindak Pidana Perzinaan Dalam Perspektif Perbandingan Antara Kitab Undang-Undang Hukum Pidana Dan Hukum Pidana Islam*, Jurnal An-Nisa'a, Vol. 8 No. 1, Juni 2013, 13.

<sup>4</sup> Religion Department RI, *Al-Qur'an, Terjemah dan Tafsir untuk Wanita*, (Bandung: Marwah, 2010), 285.

<sup>5</sup> Al-Imam Ibnu Qayyim Al-Jauziyah, *Jangan Dekati Zina*, (Jakarta: Darul Haq, 2016), 3.

destruction, disintegration, and humiliation in the world, and the most terrible thing is in the hereafter in the form of torment and punishment.<sup>6</sup>

Adultery is a major disaster in society, corrupting morals and causing the birth of children out of wedlock. Children born out of wedlock get a nickname in society as illegitimate children. It causes psychological disturbances for the child. Although legally, the child does not have legal consequences from the actions of his parents, many problems arise due to pregnancy outside of marriage, such as lineage relationships between children and their biological fathers, and so on from various legal perspectives.<sup>7</sup>

In the Hanafi School regarding children out of wedlock, they perform a separation, which means an action that prohibits children out of wedlock to be married by biological father and marrying people who become their mahram, but at the same time, they both do not inherit each other.<sup>8</sup> Children out of wedlock in the perspective of the Syafi'i School are foreigners (*ajnabiyyah*) who do not have any relationship with their biological father, in which case the biological father can marry his child if it is a girl, with the argument that the loss of all laws relating to lineage Islamic relations for children born out of

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<sup>6</sup> Al-Imam Ibnu Qayyim Al-Jauziyah, *ibid*, 4.

<sup>7</sup> Jumni Nelli, *Nasab Anak Luar Nikah Perspektif Hukum Islam dan Hukum Perkawinan Nasional*, (Pekanbaru: UIN Suka, t.t), 3.

<sup>8</sup> Muhammad Jawad Mughniyah, *Fiqh Lima Mazhab*, terj. Masykur A.B, Afif Muhammad, Idrus Al-Kaff (Jakarta: Lentera, 2011), 428.

wedlock, such as maintenance, inheritance, guardianship and so on.<sup>9</sup>

National Commission On Violence Against Women's Annual Report for the period 2012 - 2021 (10 years) shows that there are at least 49.762 reports of sexual violence cases. From January to November 2022, National Commission On Violence Against Women received 3.014 cases of gender-based violence against women, including 860 cases of sexual violence in the public sector and 899 cases in the private sector. The number of complaints will continue to grow, including to service provider institutions managed by civil society and UPTD P2TP2A (Integrated Service Center for Women and Children Empowerment).<sup>10</sup>

The phenomenon of teenagers getting pregnant outside of marriage, especially in Indonesia, is increasing. Proven by the 34.000 marriage dispensation applications submitted to the Religious Courts from January to June 2020, 97% were granted. Of the 700 marriage dispensations granted, 80% were due to pregnancy outside marriage. Promiscuity that causes pregnancy

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<sup>9</sup> Muhammad bin Al-Khatib Asy-Syarbiniy, *Mugni al-Muhtaj*, Juz 3 (Beirut: Dar al-Ma'rifah, 1997), 233.

<sup>10</sup> National Commission On Violence Against Women, "Siaran Pers Komnas Perempuan Tentang Peringatan Kampanye Internasional Hari 16 Anti Kekerasan terhadap Perempuan," *Official website National Commission On Violence Against Women*. <https://komnasperempuan.go.id/siaran-pers-detail/siaran-pers-komnas-perempuan-tentang-peringatan-kampanye-internasional-hari-16-anti-kekerasan-terhadap-perempuan> 25november 10desember2022 #:~:text=Komna s%20Perempuan %20pada% 20Januari%20s.d ,899%20kasus%20di%20ranah%20personal. (24 December 2022).

outside of marriage is a trend in today's youth called MBA (Married by Accident). The more widespread this makes, the values and norms upheld by society gradually fade away.<sup>11</sup> Based on available data, the number of children born out of wedlock in Indonesia in 2017 was 2.9 million. This data is obtained from the Indonesian Central Statistics Agency report, which states that the number of children out of wedlock has increased yearly.<sup>12</sup>

## B. DISCUSSION

Legal status is the status or position held by an entity as determined by the law. It is the standing of an entity. For example, citizenship and marital status. Citizenship is the status of a citizen with rights and duties. Marital status is the condition of being married or unmarried.<sup>13</sup> It includes or entails a set of privileges, obligations, powers or restrictions that a person or thing has as encompassed in or declared by legislation.<sup>14</sup> Children out of wedlock is a child born to a woman, while the

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<sup>11</sup> Anisa Putri Alifah, Nurliana Cipta Apsari, Budi Muhammad Taftazani. 2021. *Faktor Yang Mempengaruhi Remaja Hamil Di Luar Nikah*. Jurnal Penelitian dan Pengabdian Kepada Masyarakat (JPPM) Vol. 2 No. 3. Desember 2021, 530-531.

<sup>12</sup> Indonesian Central Statistics Agency. "Jumlah Anak Luar Nikah di Indonesia Mencapai 2,9 Juta." *Official Website Indonesian Central Statistic Agency*. <https://www.bps.go.id/pressrelease/2017/09/29/1750/jumlah-anak-luar-nikah-di-indonesia-mencapai-29-juta.html> (24 December 2022)

<sup>13</sup>"Legal Status and Legal Definition," *Official Website of Uslegal.com*. <https://definitions.uslegal.com/1/legalstatus> (8 March 2023)

<sup>14</sup>Flavia Rita, "Simple Definition of Legal Status," *Blog Flavia Rita*. <https://blog.flaviarita.com/simple-definition-of-legalstatus/#.ZAdHGnZBzIU> (8 March 2023).

woman is not in a legal marriage with the man who had intercourse with her. While the notion of out of wedlock is the relationship of a man with a woman who can give birth to children, while their relationship is not in a legal marriage according to positive law and religion embraced.<sup>15</sup>

According to the terms used in Civil Law, children born out of wedlock are called *natuurlijk kind* (children naturally). The approach to the term adulterous child as a child born outside of a legal marriage differs from the notion of an adulterous child known in civil law. In civil law, the term adulterous child is a child born from the relationship of a man and a woman who are not husband and wife, where marriage with another person binds one or both of them. Therefore, children out of wedlock are referred in civil law as those who are seeded and born out of wedlock, in other terms that are not interpreted as adulterous children.<sup>16</sup>

Children out of wedlock can be divided into two types. *First*, the fertilized child is not in lawful marriage but is born in lawful marriage. According to Imam Malik and Syafi'i, a child born six months after the marriage of his mother and father, the child was bequeathed to his father. If the child is born before six months, then the child is bequeathed to his mother.

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<sup>15</sup> Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana, 2008), 80.

<sup>16</sup>R. Soetoyo Prawirohamidjojo, *Hukum Waris Kodifikasi*, (Surabaya: Airlangga University Press, 2000), 16

Contrary to the opinion of Imam Abu Hanifah that a child out of wedlock is still bequeathed to his father as a legitimate child.<sup>17</sup> *Second*, children are fertilized and born out of wedlock. The status of children out of wedlock in the second category is equated with the status of children of adultery and cursed.

### 1. The Legal Status of a Child Born Out of Wedlock in the Perspective of Syafi'i School

In Arabic, a child out of wedlock is called *وَلَدُ الزَّانَا*, a child of adultery, or *مَخْلُوقَةٌ فِي مَعِهِ*, which means a creature (child) that comes from the semen of the biological father. The jurists agreed that the child of adultery only refers to a child born from adultery, not from a legal marriage or damaged or faint intercourse (intercourse between a man and a woman who thought they were legally married).<sup>18</sup>

According to Imam Syafi'i, a child out of wedlock is born less than six months after intercourse with a legal husband from the marriage contract. Thus creating sure that the child born is not the child of the legitimate husband. As mentioned by Ibn Kasir in his Tafsir, Ali bin Abi Talib argued with the Qur'anic verse about the minimum pregnancy period of six months, said in Surat Al-Ahqaf verse 15:

وَحَمْلُهُ وَفِصْلُهُ ثَلَاثُونَ شَهْرًا ۗ

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<sup>17</sup> M. Ali Hasan, *Azas-azas Hukum Islam: Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: Raja wali Press, 1997), 81.

<sup>18</sup> Wahbah az-Zuhayliy, *al-Fiqh al-Islamiy wa Adillatuhu*, Juz 7 (Damaskus: Dar al-Fikr, 1985), 675.



It means: "...the period from conception to weaning is thirty months..."<sup>19</sup>

From the verse above, the provisions regarding the minimum pregnancy period are obtained. It is stated that the period from conception to weaning is thirty months, or two years and six months. Hence, six months is the minimum period for pregnancy.

According to the Syafi'i school of thought, children out of wedlock are foreigners who are not civilized and have no rights to their biological fathers. It is permissible for their biological father to marry children born out of wedlock if they are women, with the argument that all laws relating to marriage are repealed for children born out of wedlock, such as inheritance and so on.

A child out of wedlock may be married by her biological father because the child's status is as a foreigner, who is not considered a mahram by his biological father except his mother with the argument that all legal provisions have been cut off with the lineage for children out of wedlock for their biological father. The law of inheritance of children out of wedlock is the same as that of cared children, namely not inheriting from the biological father and the child due to the severance of the lineage, along with the family members of the biological father, namely the father, mother, and children of the biological father. The child only inherits from the mother and the mother's

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<sup>19</sup>Religion Department RI, *Al-Qur'an, Terjemah dan Tafsir untuk Wanita*, (Bandung: Marwah, 2010), 504.

family.<sup>20</sup> According to Imam Syafi'i, if a child of a wedlock or a child out of wedlock dies, then only his mother and his sisters from the mother's side are entitled to inherit his property.<sup>21</sup>

In the Syafi'i school of thought, the reason for the obligation of maintenance on three things, namely marriage, relatives, and ownership. Children out of wedlock do not receive maintenance from their biological father, because the lineage is broken between the two, so they are not included in the category of relatives who receive maintenance. As for the child out of wedlock who does not have a lineage with the biological father, then the biological father is not entitled to be a guardian for her. The guardian of a woman is an absolute requirement according to Imam Syafi'i because it is not permissible for a woman to marry herself without a guardian.

## **2. The Legal Status of a Child Born Out of Wedlock in the Perspective of Hanafi School**

According to Imam Abu Hanifah, a child out of wedlock is a child born less than six months after the marriage contract.<sup>22</sup> In essence, the law on establishing lineage is due to intercourse with a legal husband, but the obvious reason is because of the existence of a (contract) marriage, while intercourse is a veiled

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<sup>20</sup> Yahya bin Syaraf an-Nawawiy, *Rawdah at-Talibin*, Juz 5 (Beirut: Dar al-Kutub al'Ilmiyyah, 2003), 448.

<sup>21</sup> Asy-Syafi'iy, *al-Umm*, Juz 5, 177.

<sup>22</sup> Wahbah az-Zuhayliy, *al-Fiqh al-Islamiy wa Adillatuhu*, Juz 7 (Damaskus: Dar al-Fikr, 1985), 676.

matter, so the existence of marriage shows the determination of lineage, as the Prophet said:

الْوَلَدُ لِلْفِرَاشِ وَ لِلْعَاهِرِ الْحَجَرُ (رواه المسلم)

Meaning: "The child born is the right of the owner of the firasy, and for the adulterer it is a stumbling block (gets nothing)."

Therefore, even though there has been a marriage between a man and a woman, then they split between the areas in the east and west and gave birth to a child, then the lineage of the child is crescent towards that man, even though the substance was not found, namely that there was intercourse, but it has been one can see the reason, namely the marriage.<sup>23</sup>

According to Imam Abu Hanifah, a child born outside of a legal marriage is created from the semen of his biological father, so the status of the child is the same as a child born in a legal marriage. A child is considered a child of his father because the child is the result of his father's semen.<sup>24</sup>

In the opinion of the majority of scholars other than Imam Syafi'i, it is forbidden for biological fathers to marry children who are the result of his semen. They believe that marrying a child resulting from adultery is a damaged marriage, it is illegal to marry a child from the result of the husband's

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<sup>23</sup> Ala' ad-Din Abu Bakr bin Mas'ud al-Kasaniy, *Bad'ai as-Sana'i*, Juz 3 (Beirut: Dar al-Kutub al-Ilmiyyah, 2003), 607.

<sup>24</sup> Muhammad Amin asy-Syahin Ibnu Abidin, *Radd al-Mukhtar*, Juz 4 (Riyadh: Dar Alam al-Kutub, 2003), 101.

semen, namely without distinguishing between children born in a legal marriage or out of wedlock.<sup>25</sup>

It is forbidden to marry, namely their children, grandchildren, and continue down even if they were born out of wedlock.<sup>26</sup> Most of the majority of scholars other than Imam Syafi'i argue with the evidence of naqli (nash) and aqli (reason) on the prohibition of marrying a child of adultery, as the evidence of naqli is in al-Qur'an surat an-Nisa verse 22, God says:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ ۗ إِنَّهُ كَانَ فَحِشَةً  
وَمَقْتًا وَسَاءَ سَبِيلًا

It means: "And do not marry women who have been married to your fathers, except in the past. Verily, that is an abominable deed, hated by Allah, and the worst of paths"<sup>27</sup>

The evidence mentioned in the noble verse above is the textual decree that it is prohibited to marry every child that is attributed to the parents, whether shar'i or essential. As for the aqli evidence, he argued that if a child is born from the semen of his biological father, then the child is part (flesh and blood) of his biological father, so it is not permissible for the biological

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<sup>25</sup> Muḥammad Amin asy-Syahin Ibnu Abidin, *Radd al-Mukhtar*, Juz 4 (Riyadh: Dar Alam al-Kutub, 2003), 101.

<sup>26</sup> Kamal ad-Din Ibn al-Hammam, *Syarh Fath al-Qadir*, Juz 3 (Beirut: Dar al-Kutub al-‘Ilmiyyah, 2003), 199.

<sup>27</sup> Religion Department RI, *Al-Qur'an, Terjemah dan Tafsir untuk Wanita*, (Bandung: Marwah, 2010), 81.

father to marry the child, just as it is not permissible for him to marry his child born in a legal marriage.<sup>28</sup>

The inheritance of children out of wedlock is the same as cared children, namely not having a father in inheritance. A hadith states that the Prophet connects the child of cared to his mother and does not have a relative relationship with the father, so the only obliged to inherit from him is his mother's relatives, and they inherit him. According to Imam Abu Hanifah, the obligation of maintenance from parents to their children is due to the existence of a shar'i relationship. As for children out of wedlock do not get a lineage of shar'i to their biological father. So he is not entitled to maintenance.

According to Imam Abu Hanifah, the presence of a guardian is not a condition for the validity of marriage for free women who are in puberty and intelligent, except for women under age, women who lack sense, and bondservant.<sup>29</sup> According to Imam Abu Hanifah guardianship in marriage consists of two categories, the first is recommended or preferred guardianship namely guardianship of girls, or widows who have reached puberty, and are wise. The establishment of guardianship for four reasons, namely; kinship, ownership, favor, and power.<sup>30</sup>

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<sup>28</sup> Muḥammad Amin asy-Syahin Ibnu Abidin, *Radd al-Mukhtar*, Juz 4 (Riyadh:Dar Alam al-Kutub, 2003), 102.

<sup>29</sup> Muḥammad Amin asy-Syahin Ibnu Abidin, *ibid*, 155.

<sup>30</sup> Ibn al-Hammam, *Syarh Fath al-Qadir*, Juz 3, 246.

### C. CONCLUSION

Based on the explanation above, it can be concluded that according to the Syafi'i School, a child born out of wedlock is born less than six months after intercourse with a legal husband. As for the legal status, the child does not have a lineage relationship with his biological father but has relation to his mother because the child was born outside of a legal marriage. Meanwhile, according to the Hanafi School, a child born out of wedlock is born less than six months after the marriage contract. A child is called the child of her father because the child is born from the semen of his father. The legal status of children out of wedlock is the same as children born in a legal marriage because the Hanafi School of thought considers the existence of lineage by nature.

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