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## The Law on Marriage of Girls Out of Wedlock by Their Biological Fathers from the Perspective of Imam Syafi'i and Imam Hanafi

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### Abstract:

The aim of this research is to analyze the opinions of the Hanafi school and the Shafi'i school regarding the law of marrying children resulting from adultery with their biological father. Apart from that, to find out the reasons for the law regarding the marriage of a child resulting from adultery with her biological father. The results of the research show that according to the view of the Hanafi school, children born out of wedlock or outside a valid marriage are *makhluqoh* (children created) from the semen of their biological father, and it is forbidden for their father to marry his adulterous child. Meanwhile, according to the Shafi'i school of thought, adulterous children or children born outside of a legal marriage are *ajnabiyyah* (foreigners) who are completely alienated and have no rights to their biological father, and it is permissible for the biological father to marry his adulterous child if she is a girl. The Hanafi School interprets it to mean linguistically or essentially or also called in general, which means sexual intercourse in a broad sense without any distinction between halal sexual intercourse and haram sexual intercourse. Meanwhile, the Syafi'i school of thought interprets the word an-nikah in Surah an-Nisa' verse 22 only as a marriage bond that is valid according to the Shari'a. Then from the word *banatukum* in surah an-Nisa' verse 23, the Hanafi school believes that the word Banatukum in surah An-Nisa': 23 already includes children of adultery because children of adultery are also "children" of their father. Meanwhile, the Shafi'i school of thought says that the *banatukum* in this verse does not include children of adultery it because something that is haram cannot have a legal impact on something that is halal such as marriage.

**Keywords:** Marriage; Biological; Wedlock

### A. INTRODUCTION

In Indonesian, marriage comes from the word "*nikah*" which according to the language means forming a family with the opposite sex, having sexual relations, or having intercourse. Marriage comes from the word *nikah* which according to the language means gathering, so marriage can be interpreted as *aqdu al-tazwij* which means marriage contract. Law no. 1 of 1974 chapter I article I states that: "marriage is a physical

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and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Almighty God". Marriage is something noble and sacred, meaningful worship to Allah, following the Sunnah of the Prophet and carried out on the basis of sincerity, responsibility, and following the provisions of the law that must be obeyed. Islam strongly encourages its followers to carry out marriage, especially for those who are ready to carry it out. Islam even forbids leaving marriage because behind a marriage there are many benefits, including strengthening relationships between fellow human beings, maintaining offspring, protecting from sin and multiplying rewards. Not only that, marriage is also able to maintain a person's nobility and maintain rights and obligations. The sacred bond between a man and a woman in marriage is a noble bond that provides a safe and protected place to channel one's desires. Marriage is an agreement between a man and a woman to live a household life. Since making an agreement starting from the *akad*, both parties have been bound. Islam has ordered us to uphold a household life with affection, love and peace, this is intended to develop offspring, give birth to a generation given by Allah SWT.

## B. METHOD

This type of research is literature, including in the type of library research. Library research is research whose data collection is carried out by collecting data from various literatures. The literature studied is not limited to books but can also be in the form of documentation materials, magazines, journals, and newspapers. The emphasis of library research is to find various theories, laws, propositions, principles, opinions, ideas and others that can be used to analyze and solve the problems being studied, (Sarjono. 2004).

The approach used in this study is a qualitative approach, namely research conducted by examining library materials consisting of primary legal materials and secondary legal materials, studied and then conclusions are drawn regarding the answers to the problems being studied. Qualitative research is an approach that produces descriptive data in the form of written words from people being observed that are not expressed in terms used in quantitative research. (Saifuddin Azmar, 2001).

Primary data, Primary data used in this thesis is based on, namely books, *safinah, riyadul badi'ah, fathul qarib, fathul mu'in, bulughul marom, ushul fiqh, fiqh sunah*, which contain the opinion of Shafi'iyah Fiqh regarding the law of marrying off a child out of wedlock by her biological father.

Secondary data, Secondary data is data obtained through literature by reading, and reviewing various literature and other references such as scientific books, journals, laws and regulations, and articles related to the object being studied. (Soekanto, 2007). The secondary data that the author took consisted of law books including theses, and law journals, as well as scientific articles that were relevant to this thesis research.

The data collection technique in writing this thesis was based on manuscript and library research, namely by collecting data that discussed the law of marrying off a daughter out of wedlock by her biological father.

After the data is collected from various sources, the author will present and then analyze the data. Technically, the writing of this thesis is guided by the book "Guide to

Writing Scientific Papers for Lecture Assignments, Articles, and Theses of the Faculty of Islamic Studies, Ibn Khaldun University 2018". The analysis is a series of simple efforts on how research data is in turn developed and processed into a simple framework. (Zed, 2008) This study uses a data analysis technique in the form of qualitative analysis, which focuses on a systematic explanation of the facts obtained when the research is conducted.

### C. RESULTS AND DISCUSSION

The Law of Marrying a Child Resulting from Adultery by a Biological Father According to the Hanafi School of Thought argues that adultery is the name for unlawful sexual intercourse in the *qubul* (genitals) of a woman who is still alive and without coercion in a just country carried out by people to whom Islamic law applies, and the woman is not his (his wife) and there is no *Syubhat* in her ownership.

Every scholar has his own view regarding the definition of adultery, but from all the opinions of scholars about the definition of adultery, it refers to one thing, namely that adultery is a heinous and cursed act. As a normal human being and aware of his place as a creature that Allah created most perfectly because he has reason, he must think that freely channeling sex (free sex) is the same as what animals do.

The Law of Marrying Children Resulting from Adultery by Biological Fathers According to the Shafi'i School The Shafi'i School defines adultery as follows, "adultery is inserting the penis into the vagina which is forbidden because its substance is without any doubt and according to its nature it causes lust." Although this definition is different from that defined by the Hanafi school, the Shafi'i school still has the same intention regarding the understanding of adultery itself which is a forbidden and very disgusting act. As explained in the previous chapter, the opinions of the two schools, Hanafi and Shafi'i, have quite different opinions in assessing the status of adultery children, where followers of the Shafi'i School argue that adultery children or children born within a period of less than 6 months in the legal marriage of both parents only have bloodlines with the mother and her mother's family. In this case, the relationship between the biological father and his child is called *ajnabiyyah* (stranger). According to the Shafi'i school of thought, adultery is not a reason for mahram. So according to the Shafi'i school of thought, the marriage between the child of adultery and his biological father is permissible because the status of the child of adultery with his father is *ajnabiyyah*.

#### 1) Status of Adultery Daughters with Their Biological Fathers.

Hanafi School of Law: Adultery daughters are creatures of their biological fathers, so they have a relationship as a true lineage (lineage due to blood relations). The word *an-nikah* from Surah An-Nisa' verse 22 "In the view of Hanafiyah scholars, they interpret the word *an-nikah* with the meaning in language or in essence or also called in general, which means one body in a broad sense without any difference between a halal body and a haram body". The word *banatukum* from Surah An-Nisa' verse 23 "Imam Abu Hanifah gave a broader definition to the word *banatukum* in the verse, namely including children born from adultery and also children born from a legitimate marriage"

Syafi'i School of Law "A daughter from adultery does not have a lineage relationship with her biological father, because their relationship is *ajnabiyyah*

(strangers)". The word *an-nikah* from Surah An-nisa' verse 22 "Imam Syafi'i has another view regarding the meaning contained in the word *an-nikah*, that the word has a narrow meaning or only a valid marriage. Does not include adultery.," The word *banatukum* from Surah An-Nisa' verse 23 "Imam Syafi'i interprets the word *banatukum* in the verse as not including children of adultery, only from the results of a valid marriage. Those are some of the summary explanations that are the reasons why the Hanafi school of thought forbids children of adultery from marrying their biological father, while the Syafi'i school of thought allows it.

Those are some of the summary explanations that are the reasons why the Hanafi school of thought forbids children of adultery from marrying their biological father, while the Syafi'i school of thought allows it. In this case, the author leans towards the legal provisions from the Hanafi school of thought, this refers to its relevance to today's life.

The progress of the development of the era is one of the currents of globalization. The development of the era is very rapid along with the discovery of sophisticated objects and the existence of social media. The culture of free sex is very rampant in Indonesia today, there is no adultery of the eyes, but adultery and even opening services that lead to adultery in order to get some money.

Basically, a child of adultery or a child born outside of a legal marriage, if the biological father marries her, then it can be proven by conducting a DNA (Deoxyribonucleic Acid) test which is alternative evidence in the crime of adultery which is difficult to manipulate the results. However, its position in terms of determining the law on the crime of adultery is only as secondary evidence. However, a DNA test is absolutely necessary if the primary evidence has many weaknesses so it is doubtful.

In the era of the Prophet Muhammad SAW, there was a science that could determine lineage through the similarity of the feet and seen from the veins of the feet, this is usually used for cases of determining missing children, both biological lineage and sharia lineage.

Currently, in the view of material law, since the Constitutional Court Decision (hereinafter read MK) No.: 46/PUU/-VIII/2010 dated February 27, 2012, stated that children born from unregistered marriages will have the same status and civil rights as those from registered marriages. The decision gave rise to various legal implications and became a polemic, whether it included children born from adultery or not. However, based on the case that occurred, the Chief Justice of the Constitutional Court at that time, Mahfud M.D., clarified by stating: "that the child referred to by the panel with the phrase "child outside of marriage" is not a child from adultery but a child from an unregistered marriage.

If the Constitutional Court Decision No. 46/PUU/-VIII/2010 is applied to the child of adultery, it will be contrary to Islamic law. Although the results of this Constitutional Court decision still do not make the child of adultery have a lineage and civil relationship with his biological father so that there is no law prohibiting marriage that occurs to the female child of adultery with her biological father, the author has the same opinion as the view held by the Hanafi school that the marriage is a marriage that should not be carried out and if it has occurred then it should not be continued, this is reviewed from one of the rules of *fiqh* *يزال الضرر* which means "harm (danger) must be eliminated". In

Islam, all forms of harm are forbidden, and it is obligatory to prevent the occurrence of all harm that will occur (preventive), as this sharia also requires eliminating harm after it occurs (repressive).

## 2) Implications for Children Born Out of Wedlock

The scholars agree that adultery is not the cause of the emergence of a child's lineage relationship with the father, so that the child of adultery should not be connected to the father's lineage, even though biologically comes from the seed of the man who committed adultery with his mother. Their reason is that lineage is a gift and a blessing, while adultery is a criminal act (Jarimah) that does not deserve any reward of blessing, but rather a reward in the form of punishment, either stoning or a hundred lashes and banishment, besides that the strong reason is the words of the prophet in a hadith. Meaning: "From Abu Hurairah, the Messenger of Allah said: The child is for the one who sleeps with the wife (legally) namely the husband, while for the adulterer he only deserves stones". (HR. Muslim).

The hadith above has been agreed upon by scholars from various schools of thought as the reason, that adultery will never affect the reasons for the determination of lineage between the child and the biological father who committed adultery with his mother. The implications of the absence of a blood relationship between a child and a father will be very apparent in several legal aspects, where the man who is biologically the biological father is in the position of another person, so he is not obliged to provide maintenance, there is no inheritance relationship, even if the child of adultery is a girl, her biological "father" is not allowed to be alone with her, and the adulterous man is not a guardian in the marriage of his adulterous daughter, because there is no relationship at all between the two in Islamic law. Because the biological father cannot act as a guardian who will marry her off, the guardian in the marriage contract is the judge guardian.

Based on the explanation above, there are Implications for the Rights of Children Born Outside of Marriage according to the opinions of the Syafi'i school of thought and the Hanafi school of thought, namely:

### a. Inheritance

According to the Hanafi school of thought and the Syafi'i school of thought regarding the inheritance of illegitimate children, illegitimate children do not inherit from their biological father, but only from their mother and their mother's family. According to the Shafi'i school of thought, there is an exception, that an illegitimate child may receive inheritance from his biological father on the condition that the child is recognized by all his heirs, there is a possibility of a person claiming (*Mustalhiq*) the child to the deceased (Heir), there is no known possibility of lineage other than the heir, and the party claiming (*Mustalhiq*) the child is a sane person and has reached puberty

### b. Maintenance

According to the opinion of the Hanafi school of thought, and the Shafi'i school of thought regarding maintenance, an illegitimate child does not receive the right to maintenance from the biological father, because the status of the child's lineage

according to the Shari'a view is severed from the biological father, so the biological father is not burdened with the obligation to fulfill the right to maintenance for his illegitimate child.

c. Guardianship

According to the Hanafi and Syafi'i schools of thought regarding guardianship of illegitimate children, illegitimate children do not have the right to guardianship from their biological father, and the biological father does not have the right to be their guardian because the Sharia lineage between the two has been severed which is a condition for determining the right to guardianship. The one who has the right to be their guardian is the guardian judge.

#### D. CONCLUSIONS

The law of marriage of a daughter born out of wedlock with her biological father is permitted in the view of Imam Syafi'i. This is because there is no lineage/legal relationship between a daughter born of adultery and her biological father. According to Imam Syafi'i, adultery is not a cause for mahram, or in other words, the relationship between a child of adultery and her biological father is *Ajnabiyyah* (foreigner). Therefore, Imam Syafi'i allows such marriage.

According to Imam Hanafi's view, a daughter born of adultery is a creature (result of sperm) from her biological father. The status of the child born of adultery is the same as a child born in a legitimate marriage. Therefore, according to the followers of the Hanafi School, it is forbidden for a biological father to marry a daughter born of adultery.

The difference in law between the two Imams' views can be seen from the difference in the legal *istinbath* they use. This is found in Surah An-Nisa' verse 23 about who is forbidden to marry. There are differences of opinion regarding the meaning of the word *Banatukum* according to the two schools of thought. Imam Syafi'i said that *Banatukum* in that verse does not include children of adultery because something that is forbidden cannot have a legal impact on something permissible such as marriage. Meanwhile, Imam Hanafi believes that the word *Banatukum* in Surah An-Nisa': 23 already includes children of adultery because children of adultery are also "children" of their father. Furthermore, there are differences of opinion regarding the meaning of the word *Nakaha* (an-nikah) contained in Surah An-Nisa' verse 22 where Imam Syafi'i thinks that the word an-nikah in Surah An-Nisa' verse 22 is only for marriage bonds that are valid according to sharia. Meanwhile, Imam Hanafi has another opinion regarding the word *Nakaha* (an-Nikah) in Surah an-Nisa verse 22. In the view of Hanafi scholars, interpret the word an-Nikah with a linguistic meaning or in essence also called in general, which means sexual intercourse in a broad sense without any difference between halal sexual intercourse and haram sexual intercourse which means adultery is included in it.

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