

Attribution of Illegitimate Child's Nasb to the Biological Father: Analysis from the Perspective of Malaysian Law, Muzakarah Fatwa Committee, State Fatwas and Maqasid Al-Shariah

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ABSTRACT

A ruling by Malaysia's Court of Appeal in 2017 that Muslim children conceived out of wedlock can carry their father's name has sparked a debate over the civil court's jurisdiction to set aside a fatwa. But this decision was overruled by Federal Court in 2019. This study aims to analyse the constitutional issues between statutory law and fatwa, followed by the analysis of whether the denial of the right to carry biological father's name is in line with the Maqasid al-Shariah. This study was carried out using qualitative research method. The collection of data is derived from an unstructured interview with two experts in the field of constitutional law and fatwa. Secondary data analysis was obtained from National and state fatwas, legal documents, court cases, articles from the journal, book, and newspaper. This study concludes that whether the judgment is constitutional or unconstitutional depends on the interpretation made by the learned judges of the provisions in the Statutes. From the Maqasid al-Shariah point of view, Muslim scholars who disallow the ascription of paternity to the illegitimate children's biological father, uphold to preserve the purity of lineage (hifz nasb), while the group who allows it chose to prevent harms and preserve dignity (hifz al-irdh). This study contributes by providing insights on the relevancy of illegitimate children's attribution in the constitution and Maqasid al-Shariah point of view.

Keywords: *Illegitimate child, constitution, nasb, Maqasid al-Shariah*

1.0 INTRODUCTION

The issue of illegitimate children's status is not new in Malaysian law. From a religious and legal standpoint, illegitimate children must be protected from any harm. Thus, this matter should be seriously prioritized by the government to safeguard their welfare. Unfortunately, negative perception and prejudice by the community towards illegitimate children still prevail. Regarding this matter, among the significant contributors is the legal ban to attribute the paternity of illegitimate children towards their biological father. This legal prohibition is well supported by Malaysia Muzakarah Fatwa Committee and the majority state fatwas. Few studies had suggested that Muslim scholars should consider the reality and allow the attribution to neutralize the social stigma. Prophet SAW as narrated by al-Bukhari had reminded us to 'fear God and treat your child fairly'. Explicitly, al-Quran explains 'no bearer of burden will bear the burden of another' (Isa, Azizah & Norlia, 2019). However, to set aside the fatwa solely based on the stigma and psychological impact to the illegitimate child is unjustifiably and seems inappropriate. Hence, this study aims to analyse legal issues between statutory law and fatwa, and whether it is in line with the Maqasid al-Shariah.

2.0 LITERATURE REVIEW

The Muzakarah Fatwa Committee and the majority of the State fatwa council had decided that illegitimate children shall be attributed to Abdullah or any from 99 names of Allah. Only Perlis State Fatwa Council allows children born out of wedlock to carry their fathers' name even if the birth is less than six months and two lahzahs from the date of marriage on a condition that the father does not deny his association with the child. In an unusual Malaysian case of Zafrin Zulhilmi bin Pauzi vs Noor Aini binti Nasron, case no: 11300-006-0033-2020, the grounds of judgment which had been decided by Terengganu Syariah High Court, the Terengganu Chief Syariah Judge had permitted an illegitimate child to carry her biological father's name that married her mother based on conventional laws and worldly norms, with the provision that the man does not declare the child from his fornication (Irwan, Zulkifli & Lukman, 2015).

According to the Moroccan State Law, a legitimate father is considered as the paternity of the child. Consequently, this will affect the naming, maintenance, and guardianship of the child. Moroccan law tends to uphold this policy to protect the lineage and the child's right of nationality (Schlumpf, 2016). On the other hand, Egyptian State Law stands by the concept of al-walad lilfirash. Any paternity claims will not be heard by the court if there was no marriage relationship or if a

child was born one year after the divorce of parents or the father's death. The other means of establishing nasab is acknowledgment (iqrar) and evidence. Similarly, the United Arab Republic has set up legal marriage as a condition to establish the lineage of the father. Birth beyond human nature is a form of crime (Büchler & Kayasseh, 2018). The laws of Morocco, Egypt, and the UAE strongly uphold the sanctity of lineage, as well as securing the welfare and rights of a child. Besides, the Kafalah system for orphans or illegitimate children has been well-practiced, providing them a form of social security.

On the other hand, Republic of Indonesia Law, No. 1 of 1974 Regarding Marriage of clause 43 states that a child born out of wedlock only has a civil relationship with his mother and his mother's family. Similarly, Mufti of Brunei also decided that an unknown son of his father could not be allowed to any man except Abdullah or Abdul Rahman or any from 99 names of Allah and should be ascribed to his mother (al.Ahkam.net). Few studies indicate that the lineage of children born out of wedlock can be attributed to their biological mother and father as long as his or her relationship can be proved by scientific and technological evidence that they have blood relation, including his or her father's families, using deoxyribonucleic acid (DNA) test to prove their paternity (Zaenul, 2018). However, several rights remain limited such as guardianship or prohibited such as inheritance. From Maqasid al-Shariah perspective, the father should be considerate by giving his property to his illegitimate child through a will (wasiyah) or gift (hibah) (Mzee Mustafa, 2016).

Generally, there are numbers of research that have been carried out related to the right of an illegitimate child from fiqh and law perspectives. But, little is known about the Maqasid al-Shariah and its relationship towards maslahah for an illegitimate child. Not to mention the negative implications as a result of the prohibition of carrying the biological father's name for an illegitimate child. There are differences of opinion from various aspects related to the problem of naming the child. Based on the particular issues on illegitimate child previous studies, it was found that there is no research has been conducted regarding whether the nasab of the illegitimate child can be attributed to biological father's name in connecting from the Malaysian Law, Muzakarah Fatwa Committee, State Fatwas, and Maqasid Al-Shariah perspectives under one roof.

3.0 RESEARCH METHODOLOGY

This study takes a socio-legal form, which is a research method that unites two key areas of study, namely social science and law. Based on the problem of the study, the method used is qualitative. It involves both primary and secondary data. These

two methods are chosen after sorting the best possible method that can answer the research question and research objective. The primary data is derived from unstructured interviews to probe the additional information from the journal entry. The unstructured interview allows the research to use inductive analysis because there are no set predetermined questions or hypotheses during the interview. The interview was conducted at a different time with informants who are experts in the field of constitutional law and fatwa. The information of the interview emphasized the justice for illegitimate child cases due to the contradiction between Islamic law and federal.

In this study, sources of secondary data are obtained from official National and state fatwa, legal documents, court cases, journal articles, books, and news articles sources that are related to the research. Content analysis was used to examine and clarify the interpretation of the documents. Therefore, the collected data analysed in detail, taking into account all relevant proofs, facts, and supporting material. The analysis of this data was done using a descriptive and thematic approach.

4.0 DISCUSSION OF FINDINGS

4.1 Interpretation of Illegitimate Child in Malaysian Law

The Federal Constitution in Article 74 (2) and the Ninth Schedule of the Second List of States have given the Legislative Assembly absolute authority to legislate laws relating to Islam for Muslims including personal and family law matters, such as inheritance, zakat, and waqf. The provisions relating to the legitimacy of a child are subject to the State Islamic Family Law Enactment and the powers of the states in relation to Islamic law. Among the provisions herein are Section 2, Interpretation of illegitimate children, Section 81, Duty to maintain illegitimate children, Section 86, Custody of illegitimate children, Section 111, Ascription of paternity, and Section 112, Birth more than four years after the dissolution of marriage (Islamic Family Law (State of Johore) Enactment, 2003). Enactment 17, section 2, Islamic Family Law (State of Johore) Enactment 2003 defines an illegitimate child as a child born out of wedlock but not because of syubhah intercourse. The same provisions and definitions are similar to Section 2 (Interpretation) of Islamic Family Law in other states such as Kelantan, Selangor, Federal Territory, Malacca, Perlis, Perak, Penang, Kedah, Sabah, and Sarawak.

Regarding the ascription of paternity for an illegitimate child, Section 111 of the Islamic Family Law (State of Johore) Enactment 2003 states that the *nash* or paternity of the child can be established if the child is born to a woman who is

married to a man more than six qamariah months from the date of the marriage or within four qamariah years after the dissolution of the marriage either by the death or by divorce, and the woman not having remarried. This indirectly shows that if the child is born less than six months from the date of marriage or the father denies the lineage in court, paternity cannot be established. A similar provision can be seen in other States Enactment under different sections for example Section 110, Act 303 of the Islamic Family Law (Federal Territories) Act 1984, Section 109, Islamic Family Law (Perlis) Enactment No.4, 1992, and Section 115 of Enactment No.15, Islamic Family Law Enactment 1992 of Sabah. Differences in the section do not affect the meaning of the provisions.

4.2 Interpretation of Illegitimate Child in Muzakarah Fatwa Committee and State Fatwas

The Secretariat of the Muzakarah Fatwa Committee is placed under the Department of Islamic Development Malaysia (JAKIM). A ruling may be made either unanimously or by the majority of two-thirds votes from the Mufti or other representatives and members, except the Chairman and members of the Judicial and Legal Services or from the legal profession. Fatwa decided by the Muzakarah Fatwa Committee of the National Council for Islamic Religious Affairs is not legally binding. It is only binding at the state level if the state adopts and gazettes the ruling. Fatwa issued by the state Fatwa Committee when gazetted is legally binding on Muslims in the state only (Mohamed Azam, 2018). The 57th Muzakarah Fatwa Committee of the National Council for Islamic Religious Affairs (MKI) on 10th June 2003 detailed the definition of illegitimate children as follows:

Due to adultery or rape and he is not from the syubhah intercourse or a child from slavery.

Children born less than 6 months 2 years by qamariah calendar from the date of tamkin (intercourse).

An illegitimate child cannot carry the name of the man who caused his/her birth or the name of anyone who claims to be the father of the child. Consequently, they are not legible for an inheritance, are not considered as mahram, and cannot be a wali (Bahagian Pengurusan Fatwa JAKIM, 2015).

In general, the States Fatwa Committee in Malaysia has approved and adopted the meaning of illegitimate child from Muzakarah Fatwa Committee into their

respective states fatwa with slightly different versions or pronouncements. Referring to the issue of whether an illegitimate child can carry his biological father's name or establishing paternity, the majority of states fatwa have taken the approach to forbid it, except Perlis. Other states such as the Federal Territories, Penang, and Sarawak have declared that it must be bin Abdullah or any of the 99 names of Allah or Asmaul Husna (Maklumat al-Ahkam al-Fiqhiyyah (e-SMAF), 2020). Johor Fatwa Committee in 2004, on the other hand, gazetted the interpretation of illegitimate child without mentioning the issue of enabling the child by the name of Abdullah. But later in 2018, it was amended to allow illegitimate children to be named with the 99 names of Allah or Asmaul Husna, in addition to the name of Abdullah. The Johor Mufti Datuk Yahya Ahmad said the amendment was meant to prevent the illegitimate child from any possible harm in the future. However, the Fatwa Council of Perlis has made a different ruling in a fatwa gazetted in 2012 that "a child born less than 6 months after his mother is married, could be registered with 'bin' his/her mother's husband, unless otherwise denied by the husband". This fatwa applies only to Muslims in Perlis and not to other states (Md Zawawi, Wan Ibrahim & Mahyuddin, 2017).

Implementation and Practice of Births and Deaths Registration Act 1957 (Act 299) (BDRA 1957) Regarding Paternity of Illegitimate Child

Prior to 2009, the practice of the National Registration Department (NRD) did not include the father's name on the birth certificate even though the parent claimed that the child was his/her. The NRD would clear the father's name and record it as "unknown" in the father's information section. However, this practice was abolished by compliance with section 13A of BDRA1957 (Pekeliling JPN, 8/2009). Sections 13 and 13A of this Act authorized the name of the person claiming the father of the illegitimate child to register the surname or surname next to the mother or next to the father on condition that the child's mother gives her consents. No clause in this provision remarks the exclusion of its practices to the Muslims, so it is implicitly applicable to Muslims and non-Muslims.

However, the NRD does not accept any birth registration that would like to 'bin' his child to biological father if the documents are incomplete such as loss of marriage certificates, or marriage involving births less than six months from the date of marriage. In practice, the NRD will ask the applicant to refer the case to the Syariah Court and obtain an Order for Child Ascription (Mohamed Azam, 2018).

4.4 Case analysis of 'Bin Abdullah' (The National Registration Department & 2 Ors v A Child & 2 Ors)

The case lasted five years and eleven days from February 2nd, 2015 until February 13th, 2020. It has been noted as a controversial issue among academics, legal practitioners, and religious leaders such as the Mufti as it deals with the matter of the Court of Appeal's decision on July 25th, 2017 that enables illegitimate children to be named (bin Abdullah) with after the biological father while this decision clearly contradicts the States Fatwa.

Several State Muftis, including SahibusSamahah Tan Sri Harussani bin Zakaria, Perak Government Mufti, SahibusSamahah Datuk Mohamad Shukri Mohamad, Kelantan Government Mufti disagree with the Court of Appeal's decision on the grounds that, the Federal Constitution recognized the position of Islam as the religion of the Federation, fatwa gazetted (in the state) is legal and binding, it will also cause confusion and various problems such as marriage and distribution of inheritance. In addition, the decision on this issue should be made as prescribed by Shafi'iMazhab as the majority State official Mazhab in Malaysia. This view was also supported by Datuk Seri Dr.Zulkifli Mohamad Al-Bakri (2018), former Wilayah Persekutuan Mufti (currently holding the position of Minister in the Prime Minister's Department (Religious Affairs)).

However, SahibusSamahah Prof. Dr. Dato 'Arif Perkasa Mohd Asri Zainul Abidin, Perlis State Mufti, agreed with the decision of the Court of Appeal saying that the decision could overcome humiliation, awarding people the opportunity to repent and avoiding punishing innocent children along with the 'Islamic religion of punishment' mentality because Islam is merciful in nature ("Larangan 'bin Abdullah'", 2017).

Chronologically, it started on February 2nd, 2015 when the parents of a 7-year-old child, was born 5 months 24 days (or 5 months 27 days according to the qamariah calendar) after his parent's marriage. They had applied to the NRD pursuant to Section 13 of BDRA 1957 to have the child to be registered with 'bin' his father's name ("bin MEMK") in his birth certificate, but the NRD refused it on the grounds that the child is illegitimate. The parents then filed a judicial review application in the High Court but were rejected on August 4th, 2016. Then, the couple appealed to the Court of Appeal on May 25th, 2017. The Court of Appeal unanimously allowed their judicial review to direct the Director-General of NRD to replace 'bin Abdullah' with the child's father's name in the birth registration. On August 21st, 2018, the Federal Court granted an application by the National Registration

Department (NRD) to delay the execution of the Court of Appeal's decision. As this judgment could lead to problems for Muslim illegitimate children, the NRD's Director General and the Government of Malaysia have appealed to the Federal Court to dismiss the judgment of the Court of Appeal. The Federal Court heard the appeal on 14th November 2019 and on February 13th, 2020, the supreme court in a 4-3 majority decision, dismissed the Appeals Court's decision and decided that Muslim children who were born out of wedlock or illegitimate, could not bear his father's name ("bin Abdullah' case", 2020).

4.5 Argument on Legal Issues

Three legal issues will be analysed in this study; the use of family name (surname), legally binding effect of Muzakarah Fatwa Committee and state fatwas, as well as whether the decision is constitutional or not.

The Court of Appeal had decided in their judgment to allow Muslim illegitimate children to take on their biological father's name, and not necessarily to carry "Abdullah" as their surname. This decision was reached in line with section 13A (2) of the Birth and Death Registration Act (BDRA) 1957 (Act 229) which does not distinguish between a Muslim child and a non-Muslim child. This provision had been discussed by the Court of Appeal and ruled that the National Registration director-general cannot deny the rights of the father to attach his name to his child's name.

In presenting the results of the majority Federal Court decision, Justice Datuk Rohana Yusof had pointed out that Section 13A of the Births and Deaths Registration Act of 1957 (BDRA) shall not be applied to the registration of the birth of Malay Muslim children as Malays do not carry any surnames. Thus, the provision has no application to the Malay system and did not enable the children to be named with the personal name of a person acknowledged to be the father of the children. The Federal Court also ruled that surname is additional information, not a must. If the applicant has a surname, it can be entered. In fact, Section 13A does not discriminate between Muslims and non-Muslims but does discriminate between persons with surnames or not. In addition, the use of surnames is very different and has not been reviewed by the Court of Appeal before ("bin Abdullah' case", 2020). Accordingly, the Director-General of NRD should name 'bin Abdullah' in his birth certificate. However, Federal Court judge Datuk Nallini Pathmanathan in her dissenting judgment is of the view that if the literal meaning of the word surname is to be adopted by the court, this would defeat the objective and intention of Section 13 of BDRA (Press Summary, n.d.).

The second issue is regarding the legally binding effect of the Muzakarah Fatwa Committee and state fatwas. The majority of the states have adopted the Fatwa by the Muzakarah Fatwa Committee and gazetted it in their respective states (except Perlis) that forbade the attribution of illegitimate child's nasb to their biological father. Justice Abdul Rahman Sebli (currently Federal Court Judge) in his written judgment released on July 25th, 2017, said that the National Registration Department (NRD) director-general was not bound by the fatwa or religious edict issued by the Muzakarah Fatwa Committee to decide on the surname of a Muslim child born out of wedlock. The court said that the director-general's jurisdiction was civil and limited to determine whether the child's parents had fulfilled the requirements under the BDRA, which covers illegitimate children without any distinction between Muslim and non-Muslim. The court had held that a fatwa had no force of law and could not form the legal basis for the National Registration Department (NRD) director-general to decide on the surname of an illegitimate child under Section 13A (2) of the BDRA 1957.

The majority ruling read out by Datuk Rohana was of the view that the national registration director-general had erred by referring to the fatwa made by the Muzakarah Fatwa Committee concerning "bin Abdullah" because it had not yet been gazetted and cannot form part of a valid law to be applied as provided by Section 49 of the Administration of the Religion of Islam (State of Johor) Enactment 2003 (Press Summary, n.d.). In summary, the court ruled that it was not wrong for the National Registration Department to refer to the Islamic institution in determining any issue related to the Muslim and if any fatwas were gazetted, it would bind the parties. This shows that the court also recognizes the position of the fatwa as a source and reference to civil law if it is legally gazetted. However, for this case at that time bin Abdullah's fatwa had not been gazetted. Therefore, the illegitimate child cannot be justified by his biological father or 'bin Abdullah'. Therefore, the court issued an important order for the Director-General of NRD to remove 'bin Abdullah' from the birth certificate. On May 21st, 2018, a ruling to put bin Abdullah's name and 99 other names of Allah was gazetted in Johor. According to Datuk Ikbal Salam who represented the Johor Islamic Religious Council, this fatwa will remove any confusion regarding illegitimate child-related issues in the future. Zainul Rijal Abu Bakar (2020) had voiced his view on how interesting the judgment made by the Federal Court in this issue that reference can be made to Islamic bodies in deciding the validity of a matter related to Islam.

The majority ruling by the four judges in the Federal Court also decided that the National Registration director-general acted correctly when refusing the application to let the Johor child take on his father's name of "bin MEMK" and to remove

the “bin Abdullah” portion in the birth certificate. This is because the Johor-born child and his Muslim parents were bound by Johor’s state Islamic law, specifically Section 111 of the Islamic Family Law (State of Johor) Enactment 2003 which provides that an illegitimate Muslim child cannot be ascribed to his father’s name. The refusal made by the NRD director-general to replace “bin Abdullah” with “bin MEMK”, is considered reasonable as he was complying with the relevant written law and merely giving effect to the Islamic family laws applicable to the Johor family (Press Summary, n.d.).

Thus, it can be concluded that the decision made by the Federal Court was constitutional as it is in line with the provision provided in Schedule 9, List II, (State List) Para 1 of Federal Constitution and the implicit meaning of Article 3 as the Court of Appeal Judge in the case of Special Islamic Position In Constitution of Internal Security & 8 Ors vs Titular Roman Catholic Archbishop Of Kuala Lumpur Civil Appeal No. W-01-1-2010 highlighted that Article 3 of the Federal Constitution that the position of Islam as the religion of the Federation is not a mere declaration, but it imposes a positive obligation on the Federation to protect, defend, promote Islam and to give effect by appropriate state action, to the injunction of Islam and able to facilitate and encourage people to hold their life according to the Islamic injunction spiritual and daily life.

According to Emeritus Professor Datuk Dr. Shad Saleem Faruqi (2017) as Tunku Abdul Rahman Professor of Law at Universiti Malaya, in his personal view for this case, believed that Islam as a source of law has indeed been given an exalted position as the religion of the Federation. Islamic law applies compulsorily to all Muslims but only in 24 areas specified in Schedule 9, List II, Para 1. National registration is a federal, civil matter in List I, Para 3(e), and the court ruled rightly that rules of syariah are not applicable, unless the 1957 federal law specifically mentioned so, which it does not. In other words, the decision made by the Appeal Court was constitutional. On the other hand, the Federal Court Judge, Datuk Nallini, in her dissenting judgment also examined the issue of whether state laws enacted by state governments such as laws governing Muslims’ personal lives apply to federal laws enacted by the federal government such as the BDRA1957. She highlighted that the BDRA1957 is a federal matter as provided by the Constitution’s Federal List’s Item 3(e) which is national registration and Item 12(a) covering census and registration of births and deaths. Article 3(1) meanwhile provides Islam as the religion of the federation with other religions to be practiced in peace and harmony, and Article 3(4) which provides that nothing in Article 3 would diminish other constitutional provisions meant that the constitutional arrangement under Article 74 which divides the federal and state law-making powers continue to apply. Thus,

Islamic law has no application in so far as the registration of deaths and births is concerned. She concluded that the contents of Johor's Islamic Family Law (State of Johor) Enactment 2003 cannot be imported and applied in interpreting BDRA which is a federal law (Mahkamah Persekutuan, 2020).

In a nutshell, the decisions made by both courts, the Court of Appeal and the Federal Court can be considered constitutional and unconstitutional depends on the interpretation made by the learned judges of the provisions in the Statutes. From a practical standpoint, the Federal Court took the middle ground that could benefit everyone. The court forbids the child to carry the biological father's name because it is against the principle of lineage in Islam. In a nutshell, the decisions made by both courts, the Court of Appeal and the Federal Court can be considered constitutional and unconstitutional depends on the interpretation made by the learned judges of the provisions in the Statutes. From a practical standpoint, the Federal Court took the middle ground that could benefit everyone. The court forbids the child to carry the biological father's name because it is against the principle of lineage in Islam.

4.6 Maqasid al-Shariah Point of View

Regarding the issue of the attribution of illegitimate child nasb to the biological father, Muslim scholars had differed in opinions. The majority of Muslim scholars including scholars of the major mazhab, namely Malikiyyah, Shafi'iyah, and Hanabilah together with Zahiris (literalists) had forbidden it (Abdul Karim, 2000). This is also the stand of Syaikh Ibn Bazz (2004) and by the standing committee Fatwa Lajnah Daimah (Zulkifli, 2018). While the second opinion has resorted to allowing the attribution of nasb of illegitimate children to their biological father. This is the view of Ishak Rahuyah, UrwahZubayr, Sulaiman Yasar, Hasan al-Basri, Ibn Sirin, Ibrahim al-Nakhaie (Ibn Qudamah, 1969 & Muhammad Thayyar, 2011), Ibn al-Qayyim (1991), Ibn al-Taymiyah (1995), Rasheed Ridha (1990) and Ibn Uthaymin (2005). These two different views are two scholarly views that carry weight. This issue is a matter that opens to the ijihad of Muslim scholars. Both views have a basis and arguments that support their view.

The majority of the Muslim scholars relied on literal understanding from the hadith in which Prophet SAW mentioned 'al-waladulilfirash'. This opinion is also based on the idea of preserving the purity of lineage (hifz nasb/nasl) by upholding family institutions through valid marriage (Ibn Ashur, 2004 & Mustafa, 2006). By allowing the attribution of nasb to the adulterer, we might open the floodgates

that consequently will increase the rate of social problem cases such as adultery, especially among the young generation. On this basis, there lies the reason for 'haddzina' to the adulterer as prescribed by Quran and Sunnah.

Meanwhile, the second opinion which allows the attribution of nasb to the adulterer (biological father) is further explored through Maqasid al-Shariah and the wisdom behind the revealed text. They unanimously agreed that in the case of conflict between two claimants over the right of a child, the right must be given to the person in the wedlock, which is in line with the words of the Prophet SAW 'al-waladulilfirash'(al-Kasani, 1986 & al-Sarkhasi, 1993). In the case of the unavailability of marriage, the biological father can be attributed to his illegitimate child. This is to preserve the masalah over the child and safeguard the child from any harm (Muhammad Thayyar et al., 2011 & Ibn Taymiyah, 1995). Ironically, fatwas regarding illegitimate child have never been the factor that leads to the increased rate of social problems such as adultery. In reality, millions of pornographic and sexual content are widely accessible to the online user. The advancement of ICT and technology as well as the idea of a borderless world made it difficult to control and filter the harmful content from spreading. On top of that, immoral values and attitudes that were portrayed through films and dramas are also accountable for shaping the personality and morality of teenagers. If we are serious to eradicate social problems among teenagers, we must find appropriate solutions and mechanisms to manage harmful and unhealthy material through online and mass media.

By not allowing attribution of nasb to the biological father, the mafsadah (harm) is even greater (Ibn Qudamah, 1969). Negative impressions from the surrounding people are unavoidable when they realized that the child's paternity name is not his or her father's.

This would create a cynical perception of the previous immoral act of the parent even if they had already repented from their sinful deeds a long time ago. But because of the ascription of paternity issue, their past will be revealed to the people continuously from time to time out of their will. Unfortunately, there will be the moment when the child will personally ask the parents what they have done wrong in the past since the negative outlook and contemptuous remark from the surrounding people are also shared by the child even though he or she was not involved in any of their parents' past issue. This situation will create tension between the child and the parents. The child will lose respect for the parents and look down upon them. Some Muslim scholars added protection of dignity (hifz al-'irdh) as part of 'kulliyat al-khams' (al-Ghazali, 1994 & al-Shatibi, 2001). Islam

urges its followers to cover or hide the disgrace of others as Allah SWT will cover yours. Prophet SAW says in a hadith narrated by Imam Muslim:

“Whosoever relieves from a believer some grief pertaining to this world, Allah will relieve from him some grief pertaining to the Hereafter. Whosoever alleviates the difficulties of a needy person who cannot pay his debt, Allah will alleviate his difficulties in both this world and the Hereafter. Whosoever conceals the faults of a Muslim, Allah will conceal his faults in this world and the Hereafter. Allah will aid a servant (of His) so long as the servant aids his brother.....” (Nawawi, 2001)

According to Imam al-Nawawi (2001), covering and hiding the disgrace of others refer to those who do not disclose their previous sins to others. Prophet SAW also prohibited the sinner to reveal his sins and wrongdoings. Prophet SAW says:

“All my community will be excused except those who commit sins openly. Committing them openly includes a man who does something shameful at night and when morning comes tells someone that they did such-and-such, while Allah had concealed it for them. They slept under the cover of Allah, and they removed Allah’s covering from themselves in the morning” (al-Asqalani, 2000 & Nawawi, 2001)

If the sin belongs to the individual and does not negatively affect others, so we cannot reveal or expose it to others (Ibn al-Taymiyyah, 2001). Acts such as adultery and wine drinking are both individual sins, hiding them from the knowledge of others is mandub (recommended) in Islam (Wizarah al-Awqaf, 2006). This is originated from the practice of the Prophet SAW regarding hudud case on Ma’iz bin Malik as he confessed to the Prophet SAW for committing adultery. But Prophet SAW told him to withdraw the confession by saying to him “maybe you just kissed her or maybe you just groped her”. This clearly shows that hiding it is better (Wahbah, 2002). But if the sin affects the right of others, it must be disclosed to return the right to the owner (Ibn Taymiyyah, 2001).

5.0 CONCLUSION AND RECOMMENDATION

The decision of the Court of Appeal and the Federal Court in the case discussed has drawn many parties to come up with suggestions including religious leaders, academicians, legal practitioners, non-government organizations (NGOs), and even political figures.

Among the suggestions that should be taken into consideration is to amend the Births and Deaths Registration Act 1957 (BDRA) to include special provisions for naming Muslim children in accordance with Muzakarah Fatwa Committee related to the matter. This amendment is vital to avoid disputes in the future. This issue would be less complicated if it is resolved through the amendment of the Act (Zanariah, 2020). There is a significant need to strengthen State Islamic laws to make them legally binding as well as harmonization of Islamic Law among states. Last but not least, illegitimate children were not accountable for the wrongdoing of others. They deserved respect and privacy as given to others.

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REFERENCES

- 'bin Abdullah' case: Federal Court says illegitimate Muslim child cannot bear father's name. (2020, February 13). TheStar Online. Retrieved from <https://www.thestar.com.my/news/nation/2020/02/13/bin-abdullah-case-federal-court-says-muslim-child-cannot-bear-father039s-name>.
- Abdul Karim Zaydan. (2000). *Al-Mufassal Fi Ahkam al-Mar'ah Wa Bait al-Muslim Fi al-Shariah al-Islamiyyah*. Beirut: Muassasah al-Risalah.
- Al-Asqalani, Ibn Hajar. (2000). *Fath al-Bari*. Beirut: Dar al-Kutub al-Ilmiyyah.
- Al-Ghazali, Abu Hamid. (1994). *Al-Mustasfa*. Beirut: Dar al-Kutub al-Ilmiyyah.
- Al-Kasani, Abu Bakar. (1986). *Badai' Sanai' Fi Tartib al-Sharai'*. Beirut: Dar al-Kutub al-Ilmiyyah.
- Al-Sarkhasi, Muhammad bin Ahmad. (1993). *Al-Mabsut*. Beirut: Dar al-Ma'rifah.
- Al-Shatibi, Ibrahim. (2001). *Al-Muwafaqat*. Beirut: Dar al-Kutub al-Ilmiyyah.

- BahagianPengurusan Fatwa, JabatanKemajuan Islam Malaysia (JAKIM). (2015). *Kompilasi Pandangan Hukum Muzakarah Jawatan Kuasa Fatwa Majlis KebangsaanBagi Hal EhwalUgama Islam Malaysia*. pp. 206-20. Malaysia: JAKIM.
- Büchler, A. &Kayasseh, E.S. (2018). Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates. *Electronic Journal of Islamic and Middle Eastern Law*. Vol. 6, pp. 31-55. University of Zurich: Switzerland. doi: 10.5167/uzh-157736
- Ibn al-Qayyim, Muhammad. (1991). 'Ilam al-Muwaqi' in 'An Rabb al-'Alamin. Beirut: Dar al-Kutub al-Ilmiyyah.
- Ibn al-Qayyim, Muhammad. (1994). *Zaad al-Ma'ad Fi Had'yKhair al-'Ibad*. Beirut: Muassasah al-Risalah.
- Ibn al-Taymiyyah, Taqiy al-Din. (1995). *Majmuk al-Fatawa*. Madinah: Majmak Malik Fahd Li Tiba'ah al-Mushaf al-Sharif.
- Ibn al-Taymiyyah, Taqiy al-Din. (2001). *Jami' al-Rasa'il*. Riyadh: Dar al-'Ata'.
- Ibn Ashur, Muhammad Thahir. (2004). *Maqasid al-Shariah al-Islamiyyah*. Qatar: Wizarah al-AwqafWaShuun al-Islamiyyah.
- Ibn Baz, Abd al-Aziz. (2004). *MajmukFatawaWaMaqalat al-Mutanawwi'ah*. Riyadh: Dar al-Qasim.
- Ibn Qudamah, Abdullah. (1969). *Al-Mughni*. Cairo: Maktabah al-Qahirah.
- Ibn Uthaymin, Muhammad Bin Soleh. (2005). *Syarh Riyadh al-Salihin*. Riyadh: Dar al-Wathan al-Nashr.
- IrwanMohdSubri, Zulkifli Hassan & Lukman Abdul Mutalib. (2015). Keputusan Mahkamah Tinggi Syariah Terengganu TentangNasab Anak Tak Sah Taraf: Krisis Perundangan?. *Al-Qanatir International Journal of Islamic Studies*. Vol. 1. No. 1. Retrieved from <http://www.myjournal.my/public/article-view.php?id=96733>
- Isa Abdur-RazaqSarumi, AzizahMohd&Norlia Ibrahim. (2019). A Polemical Discourse Over the Legitimation of Illegitimate Children Under Islamic Law. *IUM Law Journal*, Vol. 27 No. 1, 151 – 179. doi: 10.31436/iiumlj.

v27i1.413

Islamic Family Law (Federal Territory) Act 303, Act 1984

Islamic Family Law (Kedah Darul Aman) Enactment No.11, 2008

Islamic Family Law (Perak) Enactment No. 6, 2004

Islamic Family Law (Sabah) Enactment No. 15, 1992

Islamic Family Law (State of Johore) Enactment, No. 17, 2003

Islamic Family Law (State of Kelantan) Enactment No. 6, 2002

Islamic Family Law (State of Malacca) Enactment No.12, 2002

Islamic Family Law (State of Penang) Enactment No.3, 2004

Islamic Family Law (State of Selangor) Enactment No. 2, 2003

Islamic Family Law Ordinance, Chapter 43, 2001

Islamic Family Laws (Perlis) Enactment No. 4, 1992

Larangan 'bin Abdullah': Mufti Perlis Sambut Baik Keputusan Mahkamah. (2017, July 29). Free Malaysia Today. Retrieved from <https://www.freemalaysiatoday.com/category/bahasa/2017/07/29/larangan-bin-abdullah-mufti-perlis-sambut-baik-keputusan-mahkamah/>

Mahkamah Persekutuan Putus Anak Tak Sah Taraf Tidak Boleh Dibinkan, Binti Nama Bapa. (2020, February 13). Berita Harian Online. Retrieved from <https://www.bharian.com.my/berita/kes/2020/02/655225/mahkamah-persekutuan-putus-anak-tak-sah-araf-tidak-boleh-dibinkan-binti>

Md Zawawi Abu Bakar, Wan Ibrahim Wan Ahmad & Mahyuddin Abu Bakar. (2017). Registration Problems of Illegitimate Children among Muslims in Malaysia. *Journal of Islamic Studies and Culture*, Vol. 5, No. 1, pp. 9-15. doi: 10.15640/jisc.v5n1a2

- Mohamed Azam Mohamed Adil. (2018). *Perlaksanaan Undang-Undang Islam di Malaysia, Khayalan Atau Realiti?* Kuala Lumpur, Malaysia: International Institute of Advance Islamic Studies (IAIS).
- Mohamed Azam Mohamed Adil. *Protection of Lineage: Nasab of Illegitimate Child from Fiqh and Law Perspective* (2019, September 12). International Institute of Advanced Islamic Studies (IAIS), Kuala Lumpur, Malaysia [Interview]
- Muhamad Rozaimi Ramle. *Protection of Lineage: Nasab of Illegitimate Child from Fiqh and Law Perspective* (2019, October 17). Jabatan Pengajian Islam, Fakulti Sains Kemanusiaan, Universiti Pendidikan Sultan Idris (UPSI), Perak, Malaysia [Interview].
- Muhammad Thayyar, Abdullah et. Al. (2012). *Al-Fiqh al-Muyassar*. Riyadh: Madar al-Wathan al-Nashr.
- Mustafa Zuhayli. (2006). *Al-Wajiz Fi Usul Fiqh al-Islami*. Damsyiq: Dar al-Khair Li Tiba'ah Wa Nashr Wa Tawzi'.
- Mzee Mustafa Mzee. (2016). *Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of Deceased Father: A Tanzanian Case Study*. *Journal of Law, Policy and Globalization*. Vol. 45. Retrieved from <https://www.iiste.org/Journals/index.php/JLPG/article/view/28461/29203>
- Nawawi, Abu Zakariya. (2001). *Sahih Muslim Bi Syarh al-Nawawi*. Cairo: Dar al-Hadith.
- Press Summary. (n.d.). Civil Appeal No.: 01-43-09/2017(W). Retrieved from http://www.kehakiman.gov.my/sites/default/files/2020-02/Press%20Summary%20-%20Majority%20Judgment%20Bin%20Abdullah%20case%20-%20Civil%20Appeal%20No%2001-43-09-2017_Compresed.pdf.
- Rasheed Ridha, Muhammad. (1990). *Tafsir al-Manar*. Cairo: Al-Hai'ah al-Misriyyah al-'Ammah Li al-Kitab.

- Schlumpf, E. (2018). The Legal Status of Children Born out of Wedlock in Morocco. *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)*. Vol. 4, pp. 1-26. University of Zurich: Switzerland. doi: 10.5167/uzh-120614
- Shad Saleem Faruqi. (2017, August 3). Constitutional View on Bin Abdullah Case. *The Star Online*. Retrieved from <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2017/08/03/constitutional-view-on-bin-abdullah-case-islam-is-like-a-mansion-with-many-rooms-and-diversity-about>
- Syed As-Saqqa. (2015). *Naq al-Mauruth al-Feqh Walad Az-zina Annamuzuja*. Landon: Kutb Landon.
- WahbahZuhayli. (2002). *Al-Fiqh al-IslamiWaAdillatuhu*.Damsyiq: Dar al-Fikr al-Mu'asir.
- Wizarah al-AwqafWaShuun al-Islamiyyah Kuwait. (2006). *Al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah*. Misr: Dar al-Sofwah.
- Zaenul Mahmudi. (2018). The Status of Children Born Out of Wedlock in Indonesian Context with Special Reference to Their Inheritance Right Perspective of Maqasid Al Shariah. *Proceedings of the 1st International Conference on Indonesian Legal Studies (ICILS 2018)*. *Advances in Social Science, Education and Humanities Research*, Vol. 192. doi: 10.2991/icils-18.2018.21
- ZainulRijal Abu Bakar. (2020, Februari 13). *PresidenPersatuanPeguam-Peguam Muslim Malaysia*. Retrieved from https://www.facebook.com/permalink.php?story_fbid=831372574001786&id=273403396465376
- Zanariah Abd Mutalib. (2020, February 14). *Kerajaan Disaran Pinda Akta Berkaitan Penamaan Anak Orang Islam*. *BeritaHarian Online*. Retrieved from <https://www.bharian.com.my/berita/nasional/2020/02/655527/kerajaan-disaran-pinda-akta-berkaitan-penamaan-anak-orang-islam>
- Zulkifli Mohamad Al-Bakri. (2018). *Bayan Linnas*. Selangor: Grup Buku Karang kraf Sdn. Bhd.