

## Bridging *Fiqh* and Positive Law: A New Paradigm for Child Legality and the Best Interest of the Child in Indonesia

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|| Received: 23-10-2023 | Revised: 05-10-2024 || Accepted: 07-10-2024

**Abstract:** This study aimed at explaining the shift in the legality of children in Indonesia in the decisions of the Religious Court and *Syar'iyah* Court regarding the determination of the origin of children. This normative legal research used a conceptual approach, legal regulations, and cases. The data were obtained from the decisions of the Religious Court and *Syar'iyah* Court as well as legal regulations in Indonesia. The data were collected through literature review. The research results showed that the judges' considerations no longer strictly adhered to *fiqh*, but referred to Indonesian positive law and even ignored both by prioritizing justice and the benefit of children. The judges' decisions that had accommodated the welfare of children were in line with *maqāṣid al-shari'ah*, which requires the maintenance of the five basic foundations for children such as religion, soul, reason, heredity, and property. This research confirmed that there has been a shift in the legality of children in Indonesia in judges' decisions from *fiqh* to positive law which prioritizes the best interests of children.

**Keywords:** Child Legality; *Fiqh*; Positive Law; The Best Interest of the Child; *Maqāṣid al-shari'ah*.

### Introduction

According to the concept of Islamic law, the minimum pregnancy limit after marriage is set at six months, which means that if a child is born six months after the marriage of the parents, the child is recognized as a legitimate child who has legal status and is therefore lineaged to his/her father. On the other hand, if it is less than six months, it means that the child is not a legitimate child, thus the child is lineaged to the mother. The definition of a legitimate child in Islamic *fiqh* is a child born in a legal marriage, in contrast to the Marriage Law (abbreviated as UUP in Indonesian) No. 1 of 1974 concerning marriage in Article 42, a legitimate child is a child born in or because of a legal marriage (Djawas et al., 2022). The definition of a legitimate child in the law has two variables, first "the result of a legal marriage," this is in accordance with the rules of Islamic *fiqh*. Meanwhile, the second "born in a legal marriage" suggests that the measure of whether a child is legitimate or not is seen at the time of birth without considering its conception, thus the definition of legitimate status of a child in the UUP is considered controversial because it does not pay attention to the conception of the child in the womb. This means that if a child is born during the marriage, while fertilization has already taken place, the child is still considered the legitimate child of the husband. Thus, the definition of a legitimate child in the UUP was criticized because it is seen as legalizing the act of adultery by broadening the definition of a legitimate child (Nelli, 2009).

The status of a legitimate child in Islam has serious consequences because it affects the determination of the child's lineage, right to live, *haḍanah* (custody), inheritance, guardianship, and others (Aini, 2012). This means that if a child's status is a legitimate child, she/he will get maximum rights and good protection from the state, for example, she/he will easily get a birth certificate, and if his/her parents neglect their care, the state can intervene and force the father to fulfill the obligations (C. Nasution, 2010). However, on

the other hand, for illegitimate children it is difficult to obtain maximum rights, and the father's obligations to his child are more into moral, and the state cannot fully defend the child's rights (H. Nasution et al., 2024; Peskind, 2004). On the other hand, in 2010, the Constitutional Court issued decision No. 46/PUU-VII/2010 concerning illegitimate children, this decision refers to the status of illegitimate children who have civil rights with their biological father, so that the child's rights are properly protected and the mistake of the child's parents cannot be charged to the child.

Children must have all their rights and the mistakes of the parents cannot be blamed on the child, but there are administrative and other consequences if the parents make mistake and their marital status is unregistered (Khalilurrahman et al., 2022), thereby affecting the rights of the child. For example, the decision of the Bukittinggi Religious Court No. 11/Pdt.P/2023/PA. Bkt. Where a young couple was married by a guardian who did not have the legal status of a guardian *nasab* or guardian judge and did not register the marriage to the Religious Affairs Office (abbreviated as KUA in Indonesia), the marriage was considered illegal and the children faced difficulties in obtaining a birth certificate. Central Jakarta Religious Court Decision 679/Pdt.P/2023/PA.JP had a case where a woman who was pregnant without prior marriage, then got married in front of a religious figure who did not have any legality in terms of guardianship and without registering it to the KUA. One or two years after the birth of their child, they were officially married in the presence of a KUA employee. Furthermore, in Banjarbaru Religious Court Decision 360/Pdt.P/2022/PA.Bjb, children were born to parents who were not married at all, but after two years they got married. In these cases, the children born did not have a clear legal status, thus it was difficult to obtain a birth certificate, but in order to obtain legal certainty and obtain their rights properly (Heaton, 2011), the parents submitted an application to the religious court to determine the origin of the child.

Several of the above cases have led this article to examine how the legality of children has shifted from the perspective of *fiqh* to positive law in Indonesia regarding the determinations of the origin of the children, which were decided by the panel of judges as to whether the petition fully prioritized the benefit of the children, or purely referred to the book of *fiqh*, or strictly referred to statutory provisions or constitutional court decisions regarding illegitimate children as seen in several religious courts decisions. On the other hand, it requires to see its relevance from the perspective of *maqāṣid al-sharī'ah* (As-Syatibi, 2010). The issue of legality of legitimate children in Indonesia is very complex, where the panel of judges can explore their own law, whether based on *fiqh* or statutory provisions (Zubaidi, 2021). Based on the results of the research, there were 8 courts decisions regarding the determination of children's origin, which were considered to have a significant impact on children's rights.

Many studies have been conducted on the status of children. This study examined, among other things, the biological origin of children in Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (Aji, 2023; Karay et al., 2023), the legality of issuing birth certificates for children born in unregistered marriages through the Declaration of Absolute Responsibility (abbreviated as SPTJM in Indonesian), which refers to the Minister of Interior's Regulation No. 9 of 2016 (Fitri & Hufon, 2023), the analysis of the Constitutional Court's decision No. 46/PUU-VII/2010 (Fitriyah et al., 2023; Gumanti, 2016; Wardana, 2017). Several studies also highlighted the judges' decision regarding the biological origin of children from different perspectives (Fatmawati, 2020; Fitriyadi et al., 2024; Laily, 2024; Mahartati, 2021; Maskuri, 2019; Rohmawati & Rofiq, 2021). Similarly, the studies on children were not only concerned with the issue of children's biological origins (Ali et al., 2024; Fathullah & Abduh, 2022), but there were also studies on children custody (Mera et al., 2024; Nasrullah, 2020; Nazah & Muslimin, 2024; Ramadhan & Muslimin, 2022; Wahyudi, 2017), adopted children (Azwar et al., 2024), underage marriage (Bunyamin, 2021; Ilhami et al., 2023), child marriage (Aprillianto et al., 2024; Aristoni, 2022; Muljan et al., 2024; Muniri et al., 2023; Nawawi et al., 2022; Rasyid et al., 2024; Supriyadi & Siti Suriyati, 2022), inheritance rights (Maulana et al., 2024) and children's rights after divorce (Ahmatnizar et al., 2022; Fitriani et al., 2023). These previous studies have not highlighted the shift in the legality of children in religious courts decisions in Indonesia. Therefore, this study sought to complement previous studies on children in Indonesia.

## Literature Review

### The Lineage of Children in *Fiqh* and Positive Law

The relationship of a child to the mother is natural, while the relationship of a child to the father is a legal relationship which is the occurrence of a previous legal event: marriage (Syarifuddin, 2005). The term lineage is linguistically defined as relatives, descendants, or established descendants. Meanwhile, according to the term, the meaning is the descendants of the heirs or family who are entitled to receive inheritance due to blood ties (Mujieb, 1994). Wahbah Zuhaili defines it as a solid foundation for establishing a family relationship based on the unity of blood or the consideration that one is part of another. For example, a child is part of his/her father, and a father is part of his grandfather. Thus, people who are of the same lineage are people who are related by blood (Al-Zuhaili, 2002). According to Ibn Arabi, lineage (*nasab*) is like the result of "mixing water" between a man and a woman according to sharia generations (Al-Zuhaili, 2002). From the various definitions above, *nasab* is a sharia recognition of a child's relationship with his/her father's lineage, so that the child becomes a member of the family and a descendant, and thus the child is entitled to rights as a result of the lineage relationship.

Meanwhile, lineage in Indonesian marriage law is a blood relationship (descent) between a child and the father based on a legal marriage contract. This can be understood from Article 42 of the Marriage Law that a legitimate child is a child born in or as a result of a legal marriage. Meanwhile, in the Compilation of Islamic Law, it has been formulated in Article 99/a that a legitimate child born to his/her father is a child born in or as a result of a legal marriage, so that these two categories (children born in a legal marriage and children born as a result of a legal marriage) set the lineage to father. Otherwise, children who are called illegitimate children or children born out of wedlock have a civil relationship with their mother. Meanwhile, looking back at the definition, it seems that there is no status of a legitimate child or a legitimate child outside of marriage, because the definition is expanded, which does not take into account the process of fertilization of the fetus.

According to Indonesian Marriage Law, as stated in Article 43 paragraph (1) of Law No. 1 Year 1974, children who are born out of wedlock only have a civil relationship with their mother and their mother's family. The determination of the child's lineage to his father in Indonesian marriage law is based on: First, legal marriage, which is a marriage performed according to the laws of each religion and belief. Determination of lineage based on legal marriage is regulated in Law No. 1 of 1974 Article 42, "legitimate children are children born in or as a result of a legal marriage" and Compilation of Islamic Law Article 99 "legitimate children are: (a) Children born in or as a result of a legal marriage. (b) The result of legal husband and wife's fertilization, fertilized outside the womb, and born to the wife. From these regulations, it can be seen that a child can be considered legitimate if it meets one of three conditions: a) A child born in a legal marriage, with two possibilities: First, the wife becomes pregnant after a legal marriage and then gives birth. Second, the wife becomes pregnant before the marriage and then gives birth after the marriage. b) A child born as a result of a legal marriage. For example, the wife becomes pregnant and then the husband dies. The child conceived by the wife is a legitimate child born of a legal marriage. And, c) children fertilized outside the womb by a legitimate married couple and then born to the wife. This provision is in response to technological advances in IVF. Second, the annulled marriage. In addition to legal marriage as a link between the *nasab* of the child to the father, an annulled marriage is also one of the determinants of the *nasab* of the child to his/her father. Article 76 of the Compilation of Islamic Law states that the annulment of marriage does not break the law between the child and parents.

In the basic *fiqh*, the determination of a child's lineage to his/her father can be based on several things: first, a legal marriage. According to Hanafiyah school, the child is born six months after the contract. A number of scholars add another condition that the husband and wife have had sexual intercourse (Al-Zuhaili, 2002). Regarding the limits of pregnancy, scholars agree that the minimum limit is six months. Second, *nasab* is determined by a *fasid* marriage, which is a marriage that takes place in a state where the legal requirements are flawed. For example, marrying a woman who is still in her *iddah* period. According to the consensus of Islamic jurists, determining the lineage of children born in *fasid* marriages is the same

as determining the lineage of children born in a legal marriage, with the first condition being that the husband has the ability to impregnate his wife. Third, the child is born within six months or more after the *fasid* contract (according to the majority of scholars) and after sexual intercourse (according to Hanafiyah scholars) (Al-Hanafi, 1979). Thirdly, *nasab* is caused by indecent sexual intercourse. Obscene sexual intercourse is the occurrence of sexual relations between a man and a woman who he believes is his wife. For example, on a dark night, a man in his room has intercourse with a woman he believes to be his wife. In such cases, if the woman becomes pregnant and gives birth six months after the sexual intercourse occurred and before the maximum period of pregnancy, then the child born is lineaged to the man who has sexual intercourse with the woman. However, if the child is born after the maximum period of pregnancy, the child cannot be lineaged to that man (Al-Zuhaili, 2002).

### **Status of Children from Marriage Due to Pregnancy**

According to the majority of scholars, it is permissible to marry a woman who is pregnant because she committed adultery with the man who has had sexual intercourse with her. If the woman gives birth at least six months after the contract, then the lineage of her child is bound to the man. However, if the birth is less than six months old, the child's lineage cannot be linked to the man unless he admits that the child is his and not the result of adultery (Qudamah, 1998). According to Hanafiyah, a child born due to pregnancy before marriage is the legitimate child of that man (Al-Syawkani, 1992). Meanwhile, according to Maliki and Syafi'i, a child who is born more than six months old has a *nasab* to his father, but if he/she is born less than six months pregnant, then the child has a *nasab* to his mother (Al-Nawawi, n.d.). Article 53 of the Compilation of Islamic Law determines the lineage of the child in the process of marriage due to pregnancy and states that marriage is permissible with the following provisions: 1) A woman who is pregnant out of wedlock may be married to the man who impregnated her. 2) The marriage of a pregnant woman referred to in paragraph (1) may take place without waiting for the birth of the child. 3) If the marriage is performed while the woman is pregnant, there is no need to remarry after the child is born.

According to Imam Malik, it is not permissible to marry a woman who is pregnant because it is adultery and this marriage is *fasid*. Imam Malik's reasoning is that a woman who becomes pregnant through adultery must undergo a period of *iddah*, and her *iddah* is three times pure after she gives birth. This is because children born as a result of adultery are not lineaged to the man who impregnated the mother (Al-Zuhaili, 2002). This is different from the opinion of Syafi'i, which states that it is permissible to marry a woman who is pregnant as a result of adultery, and it is also permissible to have sexual intercourse with her during this pregnancy. The reason is that the act of adultery does not create an unlawful law against others. There is an obligation of *iddah* for pregnant women to give birth if the child born can be attributed to the man who caused her to become pregnant. However, children conceived through adultery cannot be attributed to the man who caused the mother to become pregnant; therefore, *iddah* does not apply to the pregnant woman. Therefore, marrying a pregnant woman is legally permissible (Al-Dien, n.d.). Ahmad bin Hanbal, as stated in al-Mughni, says that it is not permissible to marry a woman who is pregnant because of adultery until she has fulfilled her *iddah*, that is, until she gives birth to a child. The reasons given are based on the Prophet's prohibition of "pouring water on another person's plants" and "the prohibition of sexual intercourse with a pregnant woman until she gives birth" (Qudamah, 1998).

From the opinions above, it can be concluded that according to the majority of Ulama it is permissible to marry a woman who is pregnant because she committed adultery with a man who had sexual intercourse with her. If the woman gives birth at least six months after the *aqad*, then the child's *nasab* is connected to the man. However, if the birth is less than six months old, then the child's fate cannot be linked to the man who married the mother, unless the man admits that the child is his own and not the result of adultery.

### **Legality of children in *fiqh* and legislation**

In Islam, there are three ways to determine lineage which is by legal marriage (*al-firāsy*); by confession (*al-iqrar*); by legal evidence (*al-bayyinah*) (Al-Zuhaili, 2002). Ulama agree that the phrase used in

determining a child's nasab is the hadith *al-walad lil-firasy* (legitimate children from a legal marriage), but *fiqh* scholars differ in interpreting this pronunciation, some interpreting the word *firasy* as "wife" while others interpret it as "husband" (Al-Syawkani, 1992).

For this reason, the scholars who understand the word "firasy" as "wife" see it as limited to the meaning of the word "*al-firasy*" itself. Meanwhile, scholars who interpret the phrase as husband interpret the meaning of the phrase "*al-walad li al-firasy*" as a whole. According to the Hanafiyyah, the "determination of *firasy*" on the wife is fulfilled by the contract even though it is known that no *wata'* occurred at all, and the *nasab* of children born in a marriage can be lineaged to their father because of the existence of the contract even though it is known that there was no sexual intercourse (Al-Syawkani, 1992). The reason is that someone who makes a contract may experience divorce before the six months of marriage. If the wife is pregnant and gives birth before six months, the child can be lineaged to her husband as long as the child is recognized, but if it is rejected, then it must be done by *li'an*. Meanwhile, according to the Hanafiyyah, the "determination of *firasy*" of slaves is lineaged to their master at birth, as long as the master does not deny the child (acknowledges the child's existence).

The reasoning of *fiqh* scholars in understanding the hadith *al-walad li al-firasy* as the basis of sharia in determining the nasab of a child means that the legal consequences of adultery are different from those of marriage. Children born of adultery can marry their biological father, according to Malik and Syafi'i. Meanwhile, according to Abu Hanifah, Ahmad bin Hanbal, and Jumhur ulama, the law of *wata'* adultery is the same as the law that arises in *wata'* marriage, meaning that the biological father cannot marry the child as is the case in a legal marriage, and vice versa.

Meanwhile, Article 42 of the Marriage Act No. 1 of 1974 states that a legitimate child is a child born in or as a result of a legal marriage. Article 43 (1) states that children born out of wedlock have a civil relationship only with their mother and her family. Article 44 (1) states that a husband may deny the legitimacy of a child born to his wife if he can prove that his wife has committed adultery and that the child is the result of that adultery. Article 44 (2) states that the court shall decide whether a child is legitimate or not at the request of the party concerned. Meanwhile, Article 55 states that the origin of a child can only be proved by an authentic birth certificate issued by an authorized official. If the birth certificate referred to in paragraph (1) is not available, the court may, after a thorough investigation, make a determination of the child's origin on the basis of evidence that meets the requirements. Based on the determination of the court's provisions, based on paragraph (2) of this article, the birth registration agency within the jurisdiction of the court issues a birth certificate for the child concerned (Peskind, 2004).

There are several things that are regulated in the above articles. First, a legitimate child is a child born in and as a result of a legal marriage. This means that the opposite is called a child born out of wedlock. Second, the opposite of a legitimate child is an illegitimate child who has only a civil relationship with the mother. Third, the husband has the right to deny the legitimacy of a child. This is when the wife is proven to have betrayed her marriage. Fourth, the child's parentage can be proved by a birth certificate (Tarigan, 2006).

## Method

The research method used is normative juridical, that is, research that examines legal doctrine and principles (Fajar ND & Achmad, 2019). The use of normative juridical law in shifting the legality of children from Islamic *fiqh* to Indonesian positive law examines the doctrine of legal experts. The approach to this research was a conceptual approach by looking at the opinions of the ulama, legislation using the Marriage Law and the Compilation of Islamic Law, and cases data obtained from the Supreme Court Directory (Marzuki, 2009). The data were obtained from secondary legal materials from copies of decisions of the Religious Court and *Syar'iyah* Court (Muzakkir, 2022), then the judges' considerations were analyzed using the concept of *maqāsid al-sharī'ah*. The data collection technique was based on a literature review by reviewing previous studies sourced from books, journals, and other legal documents (Sunggono, 2011). In

addition, interpretation techniques were used as the analysis technique to provide in-depth understanding and comprehensive explanation.

## Results and Discussion

### Religious Court Decision on Legality of Children

The Supreme Court is the institution that has the authority to adjudicate legal cases within the competence of religious courts (Susylawati, 2018). Therefore, there are several court decisions below, although the case was the same, the decisions were different, even in determining the legality of children, there are those who are referred to as “biological children”, “legitimate children”, and “children”. The status of legitimate children, biological children, and children is considered to be the same which is legitimate children who receive maximum rights and if their parents neglect them, the state can be present and force their parents to fulfill their obligations. This is different from the status of biological children, who cannot fully obtain their rights, because the emphasis is more into moral, thus the state cannot be fully present to defend the rights of the child if the father neglects and runs away from his responsibilities. In fact, according to Imam Malik and Imam Syafi’i, children born out of adultery can be married to their biological father.

This section discusses several court decisions regarding child parentage. First, the decision of the Bukittinggi Religious Court 11/Pdt.P/2023/PA. Bkt. The chronology is that Petitioner I and Petitioner II did unregistered married on December 26<sup>th</sup>, 2015. They were married by a religious figure who had no legal status such as a guardian nasab or guardian judge and it was not recorded in the KUA. After that, Petitioner II was pregnant. To be precise, on April 26<sup>th</sup>, 2016, twin boys were born. This means that the children were born only four months after the marriage. Then, on January 11<sup>th</sup>, 2017, the third boy was born. Petitioner I and Petitioner II sought a determination of the parentage of their three children and requested that their marriage be legalized by the court.

The panel of judges’ considerations regarding the twins quoted the hadith of Rasulullah, “Any woman who marries without the permission of her guardian will have her marriage annulled. Then, Syafi’iyah’s opinion is that there are five pillars of marriage (future husband, future wife, marriage guardian, two witnesses, and solemnization of a marriage or *ijab qabul*). Also, Article 23 of the Compilation of Islamic Law regarding the substitution of the guardian of the lineage to the guardian of the judge, paragraph (1) The new guardian of the judge can act as the guardian of the marriage if the guardian of the lineage is not available or it is impossible to present him or his place of residence is unknown or he is reluctant (*adlal*). According to paragraph (2) regarding reluctant guardians, the guardian judge can only act as a marriage guardian after a religious court decision has been made regarding the guardian. According to Article 2 (2) of the Marriage Act No. 1 of 1974 and Article 6 (2) of the Compilation of Islamic Law on Marriage Registration, “Every marriage shall be registered in accordance with the applicable laws and regulations”. The provisions regarding who should have the right of guardianship is the legal biological father, if the legal fact is found that any of the pillars of marriage are not fulfilled, then the marriage contract falls under the *fasid* category. The panel of judges also referred to the decision of the Constitutional Court No. 46/PUU-VIII/2010 dated February 17<sup>th</sup>, 2012, Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage must read: “Children born out of wedlock have a civil relationship with their mother and her family, as well as a man as their father who can be proven on the basis of science and technology and/or other evidence, and who according to the law has blood relations, including civil relations with his father’s family”. Therefore, the panel of judges was of the opinion that the petitioner’s first child and second children (twins) could be determined to be the petitioner’s biological children.

In its decision, the panel of judges decided: first, to determine that the twins born on April 26<sup>th</sup>, 2016 are the biological children of Petitioner I and Petitioner II; second, to determine that the petitioners’ third child, born on January 11<sup>th</sup>, 2017, is the legitimate child of Petitioner I and Petitioner II; third, to reject the petitions of Petitioner I and Petitioner II on other grounds. This means that the panel of judges rejected the legality of their marriage.

Second, the Tanjung Pati Religious Court Decision Number 25/Pdt.P/2024/PA LK. The case in this decision is that petitioner I and petitioner II were married on January 16<sup>th</sup>, 2022, their guardians were represented by the guardian judge. At the time of their marriage, Petitioner I had the status of a widower with a divorce certificate dated November 1<sup>st</sup>, 2021, while Petitioner II had the status of a widow with a divorce certificate dated December 28<sup>th</sup>, 2021. Both got their marriage contract on January 16<sup>th</sup>, 2022. This means that Petitioner II was in the *iddah* period for her divorce from her former husband at that time. Their marriage was also not registered at the KUA and Petitioner II was three months pregnant, then a daughter was born on July 1<sup>st</sup>, 2022. Petitioner I and Petitioner II wished to have the child's descent recognized by the Religious Court and to have their marriage legalized.

The panel found that the petitioners' child could be determined to be the petitioners' biological child. The remaining petitions of Petitioner I and Petitioner II were denied. This means that the legality of their marriage was not recognized by the panel of judges. Sociologically, biological children are often denied their rights in social life, even though these children are blood related and emotionally close to their biological father, thus they deserve to be protected as biological children should be. In its decision, the panel of judges rejected the legality of the marriage because it did not meet one of the requirements for marriage which is the provisions regarding petitioner II, who was still in the *iddah* period with another man.

Third, Central Jakarta Religious Court Decision No. 679/Pdt.P/2023/PA.JP. In this case, Petitioner I and Petitioner II previously had an unregistered marriage on August 17<sup>th</sup>, 2020 and from this relationship they had a daughter who was born on January 18<sup>th</sup>, 2021; then the husband and wife were officially married on August 22<sup>nd</sup>, 2022 and registered at the Religious Affairs Office. Both admitted that the child born was their biological child. Therefore, they both asked for the determination of the child's origin. The panel of judges granted the petitioners I's and II's request to determine the origin of their children. This means that the panel of judges determined that the child born was the child of the petitioner. The child was born as a result of the biological relationship between petitioner I and petitioner II. The petitioners were officially married at the KUA. Then the panel of judges also referred to the decision of the Constitutional Court No. 46/PUU-VIII/2010.

Fourth, Banjarbaru Religious Court Decision 360/Pdt.P/2022/PA.Bjb. The case in this decision is that Petitioner I and Petitioner II had a daughter who was born on December 15<sup>th</sup>, 2021, but between Petitioner I and Petitioner II there was no marriage bond, neither unregistered nor official. However, on June 6<sup>th</sup>, 2022, petitioner I and petitioner II were married in front of a marriage registrar at the Office of Religious Affairs. Petitioner I and Petitioner II then asked the panel of judges to legalize the child born as the legitimate child of Petitioner I and Petitioner II. The panel of judges ruled that the child born was the biological child of petitioner II (the mother). This means that the child will be lineaged to the mother, but the panel of judges also imposed an obligation on the father to support the child until he/she reaches the age of majority and also to provide assets after the father's death through a compulsory will, referring to the fatwa of the Indonesian Ulema Council No. 11 of 2012 regarding the position of children resulting from adultery and their treatment. The child does not have a relationship of lineage, marriage guardianship, inheritance, and *nafaqah* with the man who resulted in the child's birth, and only has a relationship of lineage, inheritance, and *nafaqah* with the mother and her mother's family which is Petitioner II.

Fifth, Kuala Simpang Syariah Court Decision 135/Pdt.P/2023/MS.Ksg. The chronology of the case is that at the time of the marriage, Petitioner II was 33 years and never got married before, and Petitioner I who was 52 years old had the status of still being married to the previous woman. The marriage took place on October 30<sup>th</sup>, 2020 with a guardian which was the biological brother of Petitioner II, without being registered at the KUA. After the marriage, they had a daughter who was born on October 31<sup>st</sup>, 2021. Then, on July 7<sup>th</sup>, 2023, Petitioner I and Petitioner II remarried and were registered at the KUA. Then they asked the panel of judges to determine the child as the legitimate child of petitioner I and petitioner II. The couple was married in an Islamic way, in harmony, and the conditions for marriage were fulfilled, but it was not registered before. Referring to the book *I'anatut Thalibin*, "and in the recognition of marriage to a woman,

one must first be able to mention the legality of the marriage and the conditions such as a guardian and two fair witnesses”; Then referring to Wahbah az-Zuhaili’s opinion, “Legal or even *fasid* marriages are a cause for determining the lineage in a case. Therefore, if a marriage has actually taken place, even if the marriage has been *fasid* (broken) or a customary marriage has taken place using certain (traditional) contractual methods without being officially registered in the marriage certificate, it can be determined that the birth of the child born to the woman is the child of the husband and the wife.

Another consideration, according to the consensus of *fiqh* scholars, is that determining the lineage of children born in legal marriages and *fasid* marriages is the same. However, the *Fiqh* scholars set three conditions for determining the lineage of the child in the marriage: a. The husband has the ability to impregnate his wife, it means he is a person who is mature and does not have any disease that can cause his wife to be unable to become pregnant; b. Sexual relations are fully possible; c. Children are born within 6 months or more after the *fasid* marriage contract is made. Another consideration, Article 55 paragraph (2) Law No. 1 of 1974 and Article 103 paragraph (2) Compilation of Islamic Law.

Sixth, Supreme Court Decision No. 32 K/Ag/2023. Application for the determination of a daughter born on May 10<sup>th</sup>, 2022, who is the biological child of the petitioners. This application was rejected by the Bantul Religious Court with decision number 213/Pdt. P/2022/PA.Btl. August 10<sup>th</sup>, 2022. The petitioners then appealed to the Supreme Court. The Supreme Court determined that the child was the child of Petitioner I and Petitioner II. The Supreme Court granted the petitioners’ cassation petition and overturned the decision of the Bantul Religious Court No. 213/Pdt. P/2022/PA.Btl. on August 10<sup>th</sup>, 2022. The panel of judges considered that Petitioner I and Petitioner II had been into an Islamic marriage, but it was not registered. There is evidence of a birth certificate from Hermina Hospital Yogyakarta dated May 10<sup>th</sup>, 2022 and three witnesses, thus this evidence met the formal and material requirements. Another consideration was that the cassation petitioners did not request that their marriage be legalized, nor did they request that the child in question be declared a legitimate child. The Supreme Court also referred to Article 7 (1) of Law No. 23 of 2002 on the Protection of Children, as amended by Law No. 35 of 2014.

Seventh, Tapak Tuan *Syar’iyah* Court Decision No. 36/Pdt.P/2023/MS.Ttn. Petitioner I, who was single and never got married before, and Petitioner II, who had the same status, got marriage on October 6<sup>th</sup>, 2021, which was not registered at the Religious Affairs Office. The marriage guardian was a religious figure who did not have the legal status of lineage guardian or judicial guardian. A son was born on July 29<sup>th</sup>, 2022, and then petitioner I and petitioner II remarried on October 6<sup>th</sup>, 2022 in the presence of the marriage registrar of the Religious Affairs Office, with the biological father of petitioner II as the marriage guardian. Subsequently, both filed a petition for determination of the child’s parentage. The panel of judges determined that the child was a legitimate child of the marriage of Petitioner I and Petitioner II, which took place on October 6<sup>th</sup>, 2021. This decision included the phrase “legitimate child” to make the legality clearer. One of the considerations of the panel of judges was that it was considered that the petitioners had complied with the provisions of Article 14 of the Compilation of Islamic Law, so that they had complied with Article 2 (1) of Law No. 1 of 1974, and had also complied with the provisions of Article 2 (2) of Law No. 1 of 1974.

Eighth, Tapak Tuan *Syar’iyah* Court Decision Number 187/Pdt.P/2022/MS.Ttn. The petitioner was a single woman who got married with a single man on May 16, 2016 (both of them never got married before). Her guardian was a religious figure with the consent of the petitioner’s older brother, and the marriage was not registered to the Religious Affairs Office. After the marriage, the petitioner and her husband had a son who was born on March 3<sup>rd</sup>, 2017. During the marriage, the petitioner and her husband immediately separated and the husband immediately left the petitioner and did not give any news (leaving his wife pregnant). In this case, it was a request to determine the origin of the child. That the petitioner and her husband were a married couple who conducted an unregistered married, but in Islamic way had fulfilled the requirements and pillars of marriage on May 16<sup>th</sup>, 2016. Another consideration was that the petitioner’s registered marriage, which took place on December 28<sup>th</sup>, 2018, had fulfilled the provisions of

Article 14 of the Compilation of Islamic Law, so that it has complied with Article 2 paragraph (1) of Law No. 1 of 1974 and had also fulfilled the provisions of Article 2 paragraph (2) of Law No. 1 of 1974.

### **For the Sake of the Children: Analysis of the Judges' Decisions on the Origin of the Children**

In the first decision, based on a number of perspectives, both philosophical, legal, and sociological, there are several aspects: First, children are born in a state of nature (pure). He/she does not know and does not participate in committing mistakes or sins. Second, the determination of the child's lineage to both parents who recognize the child, with all the legal consequences of "derivatives," can achieve *maqāṣid al-sharī'ah* in terms of maintaining offspring (*hifz al-nasl*). Third, according to Article 52 (1) and (2) of Law No. 39 of 1999 on Human Rights and Article 2 and Article 7 (1) of Law No. 23 of 2003 on the Protection of Children. Fourth, Constitutional Court Decision No. 46/PUU-VIII/2010. Fifth, the decision of the Supreme Court of the Republic of Indonesia No. 597 K/AG/2015 dated September 30<sup>th</sup>, 2015, which established the legal rule that children from unregistered marriages are declared as legitimate children of both parents. Sixth, the opinion of Ibn Qayyim al-Jawziyyah and Wahbah al-Zuhaili that the determination of a child's lineage or origin is sufficient for a marriage, regardless of whether the marriage is legal or not; Seventh, according to Ibn Abd al-Barr, children born of marriages whose legality is disputed among the ulama, the child's lineage is to his/her biological father or is considered a legitimate child, as follows: "Any marriage whose legality is disputed gives rise to a lineage relationship that inlegalates *ḥadd* (adultery) and confirms the right of inheritance." Eighth, the petitioners, as the parents of the children, admitted that the three children were their children. According to Wahbah az-Zuhaili, one of the causes of the lineage relationship is the recognition of the child's lineage. Ninth, biological children from *syubhat* marriages are often denied their rights in social life, even though these children are blood-related and emotionally close to their biological father, thus they deserve protection like other legitimate children.

The panel of judges determined that the twins were the biological children of the petitioners and that the third child was the legitimate child of the petitioners. The panel of judges rejected the legality of their marriage because it was considered that the harmony and conditions of marriage were not fulfilled, since the person acting as guardian was not a guardian of the lineage or a guardian of the judge, thus it was considered a *fasid* marriage. Regarding the status of the children, the panel of judges differed in determining the status of the three children; the twins were determined to be the biological children of the petitioners because the principles of marriage were not fulfilled and the children were born less than six months old, which is the minimum limit for pregnancy according to the concept of Islamic law. While the status of the third child was determined to be a legitimate child, even though the marriage was considered to be *fasid*, referring to the opinions of several ulama, because the faults of the parents could not be attributed to the child, since the child was born in a pure state. In the case of the twins, the panel of judges referred strictly to *fiqh* and law, but for the third child, the panel of judges referred more to positive laws related to children's rights, as well as referring to the ulama's opinions, which is looser and even refers to the *fiqh* of the Supreme Court of the Republic of Indonesia No. 597 K/AG/2015, which states that children from unregistered marriages are declared as legitimate children of both parents.

With respect to the status of the third child, the panel of judges was deemed to have considered the best interests of the child, even though the status of the third child, like that of the twins, could also be determined to be the petitioner's biological child, since the parents' marriage was deemed to be *fasid*. But the judges had other, more problematic considerations. This means that in the case of the third child, the panel of judges no longer fully referred to *fiqh*, but loosely referred to legal regulations and ulama opinions, so that the concept of *maqāṣid al-sharī'ah* is achieved regarding the status of the child. Thus, the determination of legitimate children was in accordance with the principles of Islamic law that are relevant to the preservation of the souls of children who fall under the category of *dharuriyat*. If it is not maintained, it may harm the child's spiritual existence by tormenting the child because the child does not have a civil relationship with the father. Then the child's religion is maintained so that the child does not become an apostate. Maintaining one's mind will help the person in education, if it is not protected, it can damage the mind's ability to think. The care of the offspring, which is part of the *daruriyat*, if it cannot cause harm in

the future, cannot be allowed to bear the guilt of the parents. And the child's property is also preserved so that the child has the right to receive maintenance, inheritance, and other things from the father.

However, in contrast to the status of the twins, it seemed that the panel of judges was more cautious and understood the Hadith, the opinions of the ulama, and the law as it was without making further interpretations. In principle, the *ijtihad* of the panel of judges was appropriate and determined a decision in accordance with the opinion of Islamic *fiqh* and existing regulations, but the decision was considered not to have fully accommodated children's rights, especially for the benefit of the twins, because the legal position between biological children and legitimate children had significant different consequences. If the panel of judges was consistent and wanted to provide full protection to the children and considered the psychological aspects, then it would not be wrong to determine the status of the twins as legitimate children like the third child, because in Islamic law one's lineage occur, among other things, because of a *fasid* marriage which means a marriage that is damaged or imperfect in the sense that the marriage does not fulfill the harmony and requirements of marriage in whole or in a part. In addition, there was a recognition by the petitioners that the twins were their biological children. Then, in the positive law, the definition of legitimate children is born in or as a result of a legitimate marriage, thus if the status of the twins could have determined to be legitimate children, it would have been considered to be in accordance with the regulations, even in the legal regulations, the marital status due to pregnancy is still tolerated and there is no need for remarriage.

In the second decision, the panel of judges determined that the child born was the biological child of the petitioners and therefore had civil rights to the mother and father, as stated in Constitutional Court Decision No. 46/PUUVIII/2010. In fact, this did not fully take into account the rights of the child, even though what the panel of judges decided was in accordance with existing regulations, because at the time of the marriage, the woman was in the *iddah* period of her first husband, hence her marriage was considered illegal. In essence, the panel of judges fully relied on regulations and also *fiqh* opinions that prohibit women from marrying while undergoing the *iddah* period. But in fact, there was still a gap in upgrading the status of a biological child to a legitimate child. If it was based on the official issuance of the divorce certificate, the woman's marriage really took place while she was undergoing the *iddah* period, but if it was based on the witness's statement that her first husband had left her for a year and never uttered the word divorce, then in *fiqh* if the husband left his wife, it was considered that the divorce had taken place. If it was considered, it means that the woman got married when she was not in the *iddah* period. It is just that by marrying while pregnant, according to Islamic *fiqh*, the child is lineaged only to the mother. If the child status could have been determined as a legitimate child, of course the child's position would have been even better because the definition of a legitimate child according to some scholars can be born as a result of a *fasid* marriage and also in the Marriage Law, children are born in or as a result of a legal marriage. The difference between the status of a legitimate child and a biological child has a complete impact on the rights of the child.

In the third decision, the panel of judges granted the petitioner's request regarding the origin of the child because the petitioner had previously been married in an unregistered marriage, but the copy did not explain whether it was in accordance with the provisions of Islamic law and the conditions were met, nor did it state whether the person who married was a guardian nasab or a guardian judge because some forms of unregistered marriage are legal and some are *fasid*. If the pillars and conditions are met then it is considered legal, but on the other hand it is considered *fasid* if the pillars and conditions are not met. The child was born less than six months old, which is the minimum limit for pregnancy, but the panel of judges granted the petitioner's request by determining that the child born was the petitioner's child. The panel of judges did not refer to the *fiqh* which states that legitimate children are born as a result of and from a legal marriage. This means that it is considered legal if the conditions are met and the minimum gestation period is six months, but granting the petitioner's request was considered to take into account the problems of the child, especially since the father and mother had officially remarried before the Office of Religious Affairs. This means that the decision of the panel of judges regarding the origin of the child had changed from

Islamic *fiqh* to positive Indonesian law, and one of the considerations of the judges in this case was due to the petitioner's admission that the child was born from the biological relationship of the petitioner. The determination of the child's origin as the petitioner's child provided great benefits to the child because it was considered in accordance with the *maqāṣid al-sharī'ah*, which fulfills the five basic points which are the maintenance of religion, soul, mind, lineage and property, that are included in the category of *ad-dharuriyat* (primary needs).

In the fourth decision, the panel of judges determined that the child born was not related to petitioner I (the father) because the child was born without a marriage bond between the petitioners, but that petitioner I was still morally obligated to provide for the child until the child reached the age of majority. In its deliberations, the panel of judges considered that in Islamic law and the regulations in force in Indonesia, the relationship between a child and his/her father can be established for the following reasons: 1) Because a legal marriage is a marriage that fulfills the harmony and requirements of marriage and is not hindered by certain prohibitions to perform a marriage. 2) Because a *fasid* marriage is a marriage that is damaged or imperfect, in the sense that the marriage does not fulfill the pillars and requirements of marriage in whole or in part. In this context, the marriage of a man and a woman may not fulfill one of the pillars, for example, the guardian is illegal or the witness is a non-Muslim. The nature of the marriage was identified later, not from the beginning. 3) Because dubious sexual relations are sexual relations between a man and a woman who is thought to be the wife he married. This can happen when it is found that sexual intercourse took place in a dark room and sexual intercourse took place between a man and a woman thought to be his legal wife.

Another consideration is that the birth of a child who is lineaged to his/her father by virtue of a legal marriage must meet the following requirements: 1) the husband has the actual ability to impregnate his wife; 2) the child is born within a minimum period of six months after the marriage; 3) sexual intercourse between the husband and wife is possible. In this case, there was no marriage between the petitioner and his wife, either unregistered or official, until the child was born, thus the panel of judges determined the status of the child as an illegitimate child lineaged to the mother. However, those who are biologically related are obligated to provide a living and inheritance through a binding will, citing the fatwa of the Indonesian Ulama Council number 11 of 2012 regarding the position of children resulting from adultery and their treatment, so that the daughter born does not have a birth relationship, marriage guardianship, inheritance and maintenance with the man who caused her birth, but only has a lineage, inheritance and nafaqah relationship with her mother and her mother's siblings. The panel of judges referred strictly to the legislation regarding the definition of a legitimate child, citing Article 42 of the Marriage Law, which states that a legitimate child is a child born in or as a result of a legal marriage.

The panel of judges did not cite the Constitutional Court's decision No. 46/PUU-VIII/2010 at all, but it was considered that it still provided protection for children by requiring the biological father to provide for her and to receive inheritance after death through a compulsory will. In this case, the panel of judges decided in accordance with the legislation and also the concept of Islamic law, and even took into account the welfare of the child, but it was considered serious because it could only be lineaged to the mother, thus the child did not receive maximum rights, including the issue of guardianship. If the panel of judges had made *ijtihad* with a looser interpretation, it could have determined the status of the child as a biological child, especially with the recognition of the biological mother and father, so that the rights of the child would be better protected. Because the *nasab* was only to the mother, it will certainly have serious consequences for the child's future, the child can experience psychological trauma and even easily suffer ridicule, bullying, and other things that disturb the child's psychology because the sins of the parents cannot be blamed on the child.

In the fifth decision, petitioner I was in a *siri* polygamy, and the guardian for the marriage was the biological brother of petitioner II. The panel of judges ruled that the child was born as the legitimate child of the petitioners. This decision was considered to prioritize the welfare of the child because the panel of judges no longer considered regulations strictly, in this way the rights of the child would be properly

fulfilled, so that in this case it was assessed to be in accordance with the concept of *maqāṣid al-sharī'ah*. Because based on decision of the Constitutional Court No. 46/PUU/2010 regarding children born out of wedlock, the request for judicial review by Aisyah Mochtar and Muhammad Iqbal Ramadhan, a case like this was decided as "Children born out of wedlock have a civil relationship with their mother and her family, as well as with a man as father who can be proven based on science and technology and/or other evidence according to the law to have blood relations, including civil relations with their father's family".

In the sixth decision, the Supreme Court granted the petitioner's petition, considering that there was evidence that petitioner I and petitioner II had married on the basis of the Islamic religion, but it was not registered. On the other hand, the Supreme Court found new evidence which were a birth certificate and three witnesses. Then, referring to the decision of the Constitutional Court No. 46/PUU-VIII/2010, it determined that the child was the legal biological child of Petitioner I and Petitioner II. In this case, it is considered that the Supreme Court did not strictly refer to the regulations where such a status could have been considered as a merely biological child, but the Supreme Court had fully accommodated the welfare of the child so that the child received the rights optimally, so that it was considered in accordance with the concept of *maqāṣid al-sharī'ah*.

In the seventh decision, although the marriage guardian was a religious figure who had no legal status as in the first case above, the panel of judges still decided that the child born was the legitimate child of the petitioners. This means that the judge's consideration in this case was the benefit and interest of the child so that his or her rights were properly protected. In fact, based on the regulations, it could have been determined that the child was the biological child of the petitioners, as in the original case of the twin boys, because the legality of their marriage did not fulfill the pillars of marriage because the person acting as guardian was a person who did not have legal status. Thus, the determination of a child's parentage as a legitimate child was considered to be in the best interest of the child so that he or she could properly receive their rights in accordance with the *maqāṣid al-sharī'ah*.

In the eighth decision, a young couple was married by a religious figure, with the consent of the woman's older brother, in a *siri* manner or without being registered to the Religious Affairs Office, but the husband ran away from home, leaving the wife pregnant until the child was born and the husband had not yet returned. The panel of judges ruled that the child born was a legitimate child. What was very brilliant about the panel of judges was that even though they were married by a religious figure who had no legal status as a lineage guardian or guardian of the judge, and even though the marriage was also a *siri* marriage, the panel of judges still took into account the welfare of the child. This means that the parents' marriage was considered legal, thus the child born was also a legitimate child and was lineaged to the biological father. In this case, the panel of judges did not strictly adhere to *fiqh* or legislation, but rather considered the child's sense of justice and the child's welfare, hence it was considered to have prioritized *maqāṣid al-sharī'ah*.

Based on the analysis of the eight decisions, it can be understood that what were decided by the panel of judges and their considerations were in line with the *maqāṣid al-sharī'ah*, especially in terms of the maintenance of offspring (*hifz an-nasl*). This is because children can be known (their lineage in the sense of the origin of the event) and can improve their quality of life in the future, especially with the guidance and education of their parents. However, in the fourth case above, the panel of judges adhered very strictly to the *fiqh* and Article 42 of the Marriage Law, that a legitimate child is a child born in or as a result of a legal marriage. It should have been possible to determine that they were the biological children of the petitioners, because based on the opinions of scholars such as Ishaq ibn Rawaih, that a child born to an unmarried woman is then recognized as the child of the man with whom she committed adultery, then the child is related to her. This also refers to the decision of Umar bin Khattab who condemned children born of adultery during the Jahiliyah era to people who recognized them at the beginning of Islam. Ishaq Ibn Rahawaih and other scholars who agreed with him seem to tend to understand hadiths based on 'illat considerations. According to them, when a child who is not fought over is linked to his/her mother and the mother's family, then it can also be linked to his/her father (who committed adultery with his mother),

when the father admits it, and no other party is harmed. The implication is that there is evidence that the child has a biological relationship with the woman and man, and no one is harmed or there is no dispute between the parties. According to Al Yasa' Abbakar, the understanding of Ibn Rahawaih and his group indirectly equalizes the position of father and mother in relations with illegitimate children. This understanding also, whether consciously or not, takes into account the interests of children and provides better protection to illegitimate children. There is another reason that every child has the right to receive protection from both parents, regardless of whether he/she was born from a legal marriage or not. Apart from that, children also have the right to receive the same services and responsibilities in the guardianship, maintenance, supervision, and adoption of children, as regulated in Law Number 26 of 2006 about citizenship which concerns human rights. Thus, if the panel of judges could have determined in the fourth case that the child was the biological child of the petitioner, of course the child's rights would have been better protected based on Constitutional Court decision Number 46/PUU-VIII/2010, especially when there was recognition from the parents and could be proven based on science.

## Conclusion

In several decisions of the Religious Courts and the *Syar'iyah* Courts regarding the determination of the origin of children, the panel of judges no longer fully referred to the *fiqh* and also did not strictly adhere to the regulations, but rather considered the sense of justice and the benefit of the children so that they received the rights properly, and it was in accordance with *maqāṣid al-sharī'ah*. The judges' decisions were considered to be for the benefit of the child, so that from the perspective of *maqāṣid al-sharī'ah*, the five basic needs, which are religion, soul, reason, heredity, and property (referred to primary needs), are maintained.

## Conflict of Interest

The authors declared no conflicts of interest.

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