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## THE RIGHTS OF THE ILLEGITIMATE CHILD UNDER PERSPECTIVES OF SHARIAH LAW IN SELECTED STATES IN MALAYSIA

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### ABSTRACT

The issue of an illegitimate child is a pressing matter for the Muslim community in Malaysia. Due to the stigma of society mostly denied the rights of an illegitimate child and though that an illegitimate child does not have the rights like legitimate child received. The fact is an illegitimate child have their own right that has been stated in Islam under the state provisions of Islamic Family Law Act 1984. Consequently, this research intends to examine Shariah regulations and the rights of an illegitimate child and also to analyse the challenges and resolution of the rights of an illegitimate child in Malaysia. This research uses a qualitative research method, collecting data from the research through journals, articles, legal acts, fatwa websites in Malaysia and recent studies or thesis. The findings indicate the issue of an illegitimate child, which is an illegitimate child have their own rights according to Shariah law in Malaysia. The expected outcome is to expose an illegitimate child and society regarding the rights of illegitimate child with the existence of regulations and to help an illegitimate child realize their own rights that entitled to them like other people.

**Keywords:** *Illegitimate child, wali, nasab, Islamic perspective, Malaysia*

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## Introduction

Recognition of the status of a child born, whether considered as a legitimate child or an illegitimate child are dependent on the existence of a marriage bond between the mother and the father of the child. Day by day, the issue of adulterous children becoming a hot issue in our society. In general, adulterous children who are mostly entitled as illegitimate still have the right to live, even though he was born as an illegitimate child. Although an illegitimate child is born from adultery, their birth is blameless because they are sinless and does not bear the sins of his parents and still has the right to live a normal life like other people. Therefore, the society cannot punish them by denying the rights that they deserve as a human being.

Illegitimate child generally means a child born to parents who are not legally married. According to Muzakarah of Sabah State Fatwa Council No. 3/2017 (2017), an adulterous children are a child born out of wedlock either because of adultery or rape and not from *syubhah* intercourse or not from the child of slavery.

In Islam, adultery child will enter to *jannah* when he dies as a Muslim, and the status of adultery does not affect him because the act of adultery is not his act, and this is based on verse 15 in surah Al-Isra':

Translation: And We would never punish a people until We have sent a messenger to warn them.

(Surah Al-Isra', 17:15)

The verse explains that a person will not bear the sins of others, this means that in the afterlife (*akhirah*) the illegitimate child is not responsible for the status of adultery, but that position and status will cause many consequential issues that involve his own life, for example the issue of their rights.

Indirectly, this article discusses the rights of illegitimate child under provision of Shariah law in Malaysia. Shariah law is a matter included in Ninth Schedule of List II-State List of Federal Constitution that related with state matters regarding about Islam. In addition, from the shariah perspective, an adulterous child has the right to get custody, protection and maintenance with several certain differences and conditions (Berita Harian, 2019). Therefore, this study will discuss the rights of illegitimate children, are an illegitimate child have the same rights as legitimate child or have differences according to Shariah law in Malaysia.

## Literature Review

### *The Concept of Illegitimate Child*

The research that was found are according to Wan Ismail et al., (2020) the article focuses on the definition of 'illegitimate children' in Muslim society in Malaysia based on its perspective of Shariah law, Islamic family law, civil law in Malaysia, and the existing perception of the Muslim society in Malaysia. Meanwhile, this research more focus on the rights of the illegitimate child and mostly in Malaysia, illegitimate child known as a child conceived from adultery act without a legal marriage.

According to Wan Ismail et al., (2020) the research focuses on the concept of illegitimate child according to Islamic law and provisions of the law adopted by the National Registration Department (JPN) and also identified the factor and solution for illegitimate child issue among Muslims in Malaysia. The author also stated there are different concept illegitimate child according to Islamic law and provisions of the law adopted by the National Registration Department (JPN), where are illegitimate child under Section 13, 13 (A) and Act 299 of Births and Deaths Registration 1957. This difference has a very significant impact both in terms of the law and also the public's perception of the term illegitimate child itself. However, the authors not examine the effect that will arising from illegitimate child issue that was registered under National Registration Department (JPN), which are the effect through lineage (*nasab*) that was registered is huge because it does not only involve the guardian's right to determine whether a marriage is legal or not but it is also related to the right of inheritance. Hence, the researcher will discuss in this study about the issue of the illegitimate child's rights.

### *The Rights of Illegitimate Child*

Research findings by Mas'ad and Mohamed Zamri (2018) focuses the rights of illegitimate child according to perspective of fiqh Islamic and Islamic Family Law in Malaysia. Among the rights of the illegitimate child that the authors mentioned are *nasab*, guardianship (*wali*) and maintenance. The connection between this study is both studies discuss about the rights of illegitimate child but the weaknesses that might be found in the study are the author not mentioned the *hadhanah* of illegitimate child whereas it is also one of the illegitimate child's rights that already mentioned under Section 85 of Islamic Family Law Act Federal Territory 1984. Therefore, the researcher will more focuses the *hadhanah* of illegitimate child in this study.

According to Roslan et al., (2021), the objective of the study is to understand the rights of an illegitimate child in Malaysia. The authors stated the impact of illegitimacy on a child born out of wedlock does not only concern the rights to inherit paternal wealth but in some cases, it might affect the child's right to a name, identity and nationality. The rights of illegitimate child stated by the authors are too general and not specific whether under perspective of syariah or civil law. The comparison between both studies is the rights of illegitimate child that mentioned by the authors are too general and not specific whether under perspective of syariah or civil law and therefore, this research will discuss the details of illegitimate child's rights under Syariah law with specific provision that already existed.

Research findings by Embi & Ismail (2017) found that the authors discussed the causes, implications and resolution of the birth of illegitimate children through public policy that has been implemented especially in the State of Pulau Pinang. There are various issues the authors mentioned and one of them are about the implications of illegitimate children including issues related to *nasab*, maintenance, *hadhanah*, management of inheritance as well as its relation to public policy management in Pulau Pinang. The connection between both studies are regarding about the issue of the rights of an illegitimate child, but the rights that the authors mentioned are too general and only focuses in the state of Pulau Pinang. Therefore, this research will discuss about the same issue but with specific perspective and analysis the differences of fatwa of each state especially the issue of *nasab*.

### *Protection of Illegitimate Child*

According to Noor (2019), the objective of the study is to discuss the protection of the abandoned children or foundlings (*al-laqīṭ*) which is mentioned from the aspects of custody, maintenance and others. This study more focused to abandoned children or foundlings (*al-laqīṭ*) which normally known as illegitimate child, according to the stigma of Malaysian society. In that research, the writer mentioned about the priority of custody should not necessarily be handed to the people who finds it and there is no clear provision of enactment for abandoned children or foundlings (*al-laqīṭ*), meanwhile this research more focus to illegitimate child whereas the right of custody of illegitimate child already mentioned under the provision of Islamic family law in Malaysia.

### *The Calculation of Lineage (nasab) under Scholar's Perspective and Fatwas*

According to Daud et al., (2015), the study explained how the *nasab* of illegitimate child based on scholar's perspective only in multiple situations and not mentioned or linked with provision of Islamic law in Malaysia. As we know, cases that happened in Malaysia that related with the illegitimate child still using the provision of Islamic family law in Malaysia and the Islamic *hukm* based on scholars' perspective or Committee of National Fatwa Council for Islamic Affairs of Malaysia (JFMK).

Research findings by Bakar et al., (2017) explained the issue of illegitimate child pertaining to fatwa on *nasab* in Malaysia with details of fatwas in every state. Therefore, the connection between this study is both studies discuss the calculation of *nasab* but the researcher more focuses the details about the effects that will arising from the *nasab* issue such as the rights of illegitimate child.

Research findings by Disa (2018), found that the study discussed the importance of *nasab*. The authors stated that the value of preserving lineage ranks high in the value chain in the Shariah system because the recognition of lineage is the anchor for many other rights such as inheritance and guardianship (*wali*). It is true that the determination of *nasab* will affect the rights of the illegitimate child, so this

research will discuss how the exact calculation of *nasab* according to Islamic perspective to give the knowledge related with the issue of the illegitimate child's rights that will arise.

According to Mutalib and Yahya (2016), the authors discussed the issue of illegitimate child's lineage (*nasab*) given to their biological father. This article mentioned there are three views scholars related to this matter and the views have been analysed and commented from the point of view of *syar'iyyah* to see the most appropriate solution is taken. The connection between both studies is the author discussed the details about the issue of *nasab* based on Islamic perspective only and in this study the researcher focusses on both perspective, that is through Islamic perspective and Shariah legal perspective.

## Methodology

Methodology refers to ways of obtaining, organising and analysing data. The chosen methodology in this research uses qualitative methods. Qualitative research is multimethod in focus, involving an interpretative, naturalistic approach to its subject matter (NK Denzin, 2005). This research uses a qualitative research method which is case study, whereas collecting data from the research through journals, articles, legal acts, fatwa websites in Malaysia and recent studies or thesis. Case study method is the most widely used method in academia for researchers interested in qualitative research (Baskarada, S., 2014). This method is very suitable with the research in order to discuss the data collection and data analysis.

### Data Collection

Data collection is the process of gathering and measuring information on variables of interest, in an established systematic fashion that enables one to answer stated research questions, test hypotheses, and evaluate outcomes (Sutrisna, 2009). The researcher collects the data from articles and fatwa websites in Malaysia to obtain an information and strengthen the explanation presented in this research. The information from collected data was categorized and the data were formed based on the subtopic. This research is more focused on regulation of Islamic Family Law in Malaysia that relates with the rights of illegitimate child. This research has its own scope limitations that was focusses in order to collect the data. This research was based on the Islamic law in Malaysia with more focuses on the provision of Islamic Family Law Act 1984 of Wilayah Persekutuan and Perlis. The selected states have been chosen because of the different fatwas and also different provisions regarding the rights of illegitimate child as follow:

**Table 1.** The Difference of Fatwas of Selected States

States	Fatwa
Wilayah Persekutuan, Kelantan, Negeri Sembilan, Terengganu, Pulau Pinang, Kedah, Melaka, Sarawak, Selangor, (National Fatwa Committee)	All children born after six months and two <i>lahzah</i> from the date of marriage can be <i>nasab</i> to its mother's husband
Perlis	Allow a <i>nasab</i> even the birth is less than six months and two <i>lahzah</i> from the date of marriage on a condition that the father does not deny his association with the child

Source: Sumber Maklumat Al-Ahkam as-Fiqhiyyah (e-SMAF): 2003 & 2012

Based on the table 1, the fatwa of Wilayah Persekutuan stated if a child is born after six months from the date of its mother's marriage to a man, then the child is considered as legit and can be *nasab*, legally associated to the man (mother's husband), even though the child is a result of an illegitimate sexual relationship. It means that the child still can be *nasab* to his father even though through illegitimate sexual relationship with the condition that a child must born after six months from the date of marriage. Besides, the Syariah Committee of Perlis has decided the *nasab* of a child in the duration of its parents' marriage is less than 6 months are allowed to be associated unless it was denied by the husband.

### *Data Analysis*

Data analysis in qualitative research is defined as the process of systematically searching and arranging the observation notes or other non-textual materials that the researcher accumulates to increase the understanding (Bogdan & Biklen, 1997). Qualitative data analysis is the range of processes and procedures whereby we move from the qualitative data that have been collected, into some form of explanation, understanding or interpretation of the people and situations we are investigating (Cohen et al., 2007). Based on the data that was gained from the article, journals and others, the researcher determined it will answer all the issue that was arising from the focus topic.

## **Results and Discussion**

### ***Shariah Regulation regarding Illegitimate Child in Malaysia***

There are several provisions provided under Islamic Family Law Act 1984 related to an illegitimate child. According to Section 2 of Islamic Family Law Federal Territory Act 1984 define an illegitimate child as a child means born out of wedlock but not as a result of *syubhah* intercourse.

Furthermore, according to Section 110 of Islamic Family Law Federal Territory Act 1984 examine ascription of paternity, where a 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 dissolution of the marriage either by the death of the man or by divorce, the woman not having remarried, the *nasab* or paternity of the child is established in the man, but the man by way of *li'an* or imprecation, disavow or disclaim the child before the Court.

Based on the above provision, it can be understood that when a child is born to a woman as a result of his marriage to a man whether after six months of marriage *qamariah* or within four years of *qamariah* after divorce, then a child born within that same period of time is considered to be a legitimate child, unless the father denies the child's *nasab* in the Shariah Court.

The case that related with Section 110 of Islamic Family Law Federal Territory Act 1984 are case of *Mohd Hairy bin Hamdan v. Rabiah binti Ishak* [2013] 2 JH 36. In this case, the husband as the plaintiff has applied to the court to make the order that the daughter that was born by his wife on 24 Mac 2003 are his legitimate daughter. The plaintiff was married with the respondent on 25 September 2002 and was divorced on 7 July 2003. During married, the respondent was pregnant and then was born her daughter less than six months of her marriage. Throughout the duration of the marriage, the plaintiff and the respondent never do sexual intercourse and both of them are not living and sleep together. The court held that the daughter is illegitimate child and cannot *nasab* to the plaintiff as stated in birth certificate, Nurul Fatihah binti Mohd Hairy. The registration of father's name using the plaintiff's name as stated in birth certificate have to cancel and this order by the court are based on the agreement of both parties and effective immediately.

The case above was interesting because of the court order, which is illegitimate child not only cannot lineage (*nasab*) to the plaintiff but the registration of child's name that has been *nasab* to the plaintiff have to cancelled and the judge has taken pro-active way, where the judge urges to cancel the registration of the father's name contained in the birth certificate.

Moreover, Section 111 of Islamic Family Law Federal Territory Act 1984 also explains that if a child is born after four years of *qamariah* from the date the marriage of his mother is dissolved whether it is by death or divorce, then the man is not entitled to be the father of the child unless the man or any of his heirs insist that the child is his son or daughter.

In the case of *Mohd Hanif Farikullah v. Bushra Chaudri* [2001] 5 MLJ 533, the respondent, a foreign wife, sought maintenance for her baby girl that was claimed to be an illegitimate child by the appellant, the husband. The respondent is a Pakistani and the appellant is a citizen of Malaysia. On 6 October 1986, the appellant married the respondent and they both had a son together named Muhammad Osman bin Mohd Hanif. The appellant filed divorce papers against the respondent at the Syariah Subordinate Court in the Federal Territory. On 23 October 1990, the appellant received a divorce order and was directed to pay RM50 per month for maintenance to the son by the court's order. The respondent then

gave birth to a daughter named Natasha binti Mohd Hanif on 6 October 1996 after the divorce. The respondent filed an application for maintenance for her baby girl and seeking maintenance after the birth of the baby girl, claiming RM1050 a month. The court entered judgement against the appellant for the sum of RM1050 and ordered an attachment of salary against the appellant's employer for deduction of the appellant's salary. Given that, the appellant filed a notice of application requesting that the maintenance payment of RM1050 owed to the afore mentioned baby girl be reduced but the magistrate dismissed the application.

The presiding judge of this case found that the Married Women and Children (Maintenance) Act 1950 is the only legislature respondent could resort to. The judge added that as it is federal legislation with inherent jurisdiction, this act is adequately relevant to the situation at hand. This is because the Syariah Courts lack inherent jurisdiction, thus the respondent is unable to seek relief from the Shariah Courts. Particularly as there is no specific provision of the Islamic Family Law Federal Territory Act 1984 to which she can refer. As a result, the judge in this case concludes that section 111 of Islamic Family Law 1984 does not apply to this case. Thus, the appeals that was made were dismissed and the decision from the Magistrate court Kuala Lumpur upheld and affirmed.

Whereby if a child is born after the completion of the iddah period, Section 112 of Islamic Family Law Federal Territory Act 1984 stated where a woman, not having remarried, makes a declaration that the period of *'iddah* has been completed, whether the period is for death or divorce, and she is subsequently delivered of a child, the paternity of the child shall not be ascribed to her husband unless the child was born less than four *qamariah* years from the date of the dissolution of the marriage either by the death of the husband or by divorce.

Based on the section above, if the child was born less than four *qamariah* years after the date of the marriage's dissolution, by a woman who not remarried, that declared the period of *'iddah* has been completed whether by the husband's death or by divorce, so the paternity of the child cannot be attributed to the man.

However, when a man has *syubhah* sexual intercourse with a woman and subsequently that woman delivered a child between the period of six *qamariah* months to four *qamariah* years after such intercourse, the paternity of the child shall be ascribed to the man. It is based on the regulation of Section 113 of Islamic Family Law Federal Territory Act 1984.

In the case of *Ismail Bin Ishak v. Kalam Binti Mamat* (1995) 10 JH 41, is a case for a declaration that a child born to the defendant is not the plaintiff's child. The plaintiff also requested the court to declare that since the child is not his child, the maintenance of the child is not the responsibility of the plaintiff. The parties were divorced on 28 September 1985. Then on 23 September 1989, the defendant gave birth to a child which the defendant claims the child is the plaintiff's son. This allegation is based on the reason that the parties have *ruju'* and were together during the period of the *iddah's* defendant. However, this claim was denied by the plaintiff. The court in this case have decided that the child was born after four years from the date of divorce. Therefore, based on Islamic law, the child cannot be attributed to the plaintiff.

Based on the case above, according to the Shafie's school, a husband who wants to *ruju'* to his wife should do by pronouncing the *ruju'* (Bakri, 2020). However, the defendant in that case could not prove that the *ruju'* had occurred during the iddah period. As a result, the judgement was accurate that the child cannot be attributed to the plaintiff and since the child is not the plaintiff's child and the plaintiff also not responsible for the maintenance of the child.

### ***The Rights of the Illegitimate Child under Perspectives of Shariah Law in Malaysia***

The rights of the illegitimate child should not be denied by the society. There are some perceptions of society that illegitimate child does not have the same rights as legitimate child such as the rights of custody (*hadhanah*), maintenance and others. However, the fact is an illegitimate child do have their rights and already stated in Islam and in provision of Islamic Family Law Act 1984.

*The Right of Lineage (nasab)*

The rights of the *nasab* for an illegitimate child are the most important rights that can affect all of the rights. It is because through the lineage will decide the rights that illegitimate child is entitled to receive.

There are four main conditions for the conviction of lineage:

- i. The pregnancy that occurs in the woman is a real pregnancy according to *uruf*.
- ii. The second is a woman gives birth after a period of at least six *qamariah* months and two *lahzah* from the date of the valid marriage contract. This is because the minimum period of pregnancy agreed by the majority of scholars is at least six *qamariah* months. This matter is accepted by all scholars because the period of six *qamariah* months is the shortest period that allows a premature baby to be born alive.
- iii. A woman who gives birth to a child within a maximum period of not more than two years from the date of her separation with her husband.
- iv. The woman's husband never denied of lineage on a baby born through *li'an*.

The four above are the reasons that confirm the *nasab* of an illegitimate baby to his father through the recognition of the marriage bond.

In the case of *Wan Khairi Wan Azmi v. Farah Nurliliana Jauhari* [2011] 1 CLJ 344, the plaintiff, a husband applied to the court in order to ascribe the *nasab* of his son to his name. In this case, the court held that the son that was born by plaintiff's wife on 7 December 2010 are legitimate child according to Shariah law and have to *nasab* to the plaintiff's name. According to the judge's estimate, the son was born after six months four days after the date of marriage. Even though the status of child's legitimacy was being a question due to the period of his birth, the judge found that the plaintiff's wife had given birth to her son within a period of more than six months and two seconds (*lahzah*) from the date of her marriage with the plaintiff.

It can be concluded that a child born in a way that does not comply with the requirements of Islamic ruling cannot be convicted his lineage with his biological father, so consequently the child cannot "*bin*" or "*binti*" with her biological father. This opinion is a fatwa by the Sarawak State Fatwa Board Meeting No. 23/2013 convened on 5 September 2013:

- i. An illegitimate child born must be '*bin*' or '*binti*' to Abdullah which means 'servant of God'.
- ii. If the man who caused the birth of the child is named Abdullah, the child should be '*bin*' or '*binti*' to another name "al-Asma al-Husna" by including the word Abdul at the base such as Abdul Rahman or Abdul Rahim.

Furthermore, based on Table 1, it can conclude that almost all of the states' fatwa are identical to the National Fatwa. However, the Perlis's National Registration Department *nasab* verification practice seems to be different. This is due to two contradictory fatwas that are in effect; one is the state's fatwa and the other is the National Fatwa. The National Fatwa is merely a decision or opinion that does not bind any state to compel to it. According to opinion of Mufti of Perlis, Asri Zainul Abidin that Abdullah's name on the illegitimate child exposes the child's shame more. This clearly shows that the Perlis's Mufti Office is entitled to overrule the National Fatwa in favour of its own fatwa. In fact, the Federal Constitution dictates that the states in Malaysia have the power to exclusively exercise its religious authority on its Islamic affairs.

Therefore, any dispute regarding birth and *nasab* related issues at National Registration Department, the agency has an advantage to choose on which authority should they refer to and if it's the National Fatwa, then the registration of birth in Perlis practice is similar to other National Registration Department states branches but if it follows the Perlis's fatwa then there is leniency in its practice (Bakar, 2017).

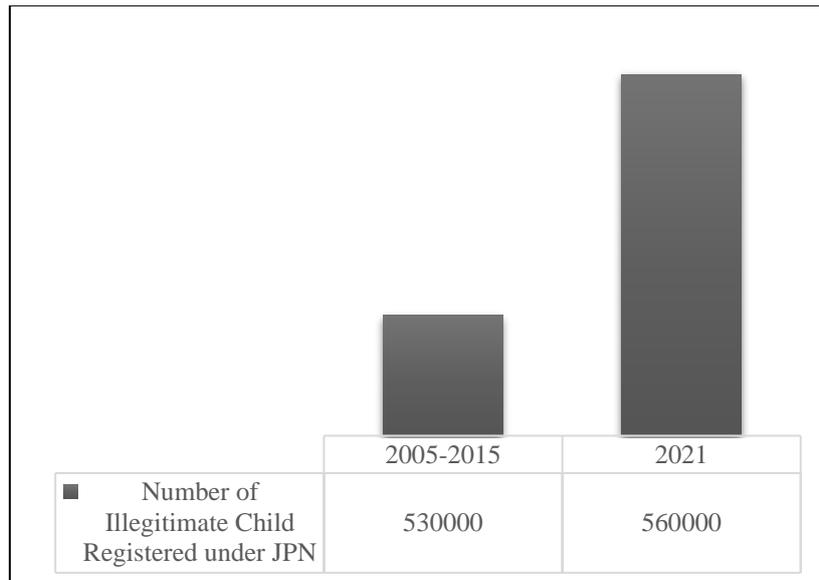
However, in the case of *Zafrin Zulhilmi bin Pauzi v. Noor Aini binti Nasron* [2013] 2 SHLR 39, the application to *nasab* his child from using the name of Abdullah to his name as biological father. The fact of the case is his daughter was born on 3 September 2010 and the applicant was married to his wife, the respondent on 16 April 2010. The respondent also support the application that was made by the applicant in order to lineage their daughter as legitimate child, according to *hukm syarak*. The daughter was born less than six months from the date of marriage, which is only 4 months 24 days. The court held that the daughter can *nasab* to the applicant as her biological father. The judgement of court said that illegitimate child can *nasab* to his biological father even though the child was born less than six months from the date of marriage but the court held that the applicant can not carry out his responsibility as a guardian (*wali*) to his child and also not allowed to inherit property.

Furthermore, in the case of *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-Kanak & Ors* [2020] MLJU 328, a child can *nasab* to his father even though was born less than six months in Johor. The respondent, MEMK applied to register his son's birth according to Section 13A of Birth and Deaths Registration Act 1957 on 2012. The relevant section is related to the application of registration of illegitimate child to insert surname in child's name. On 2012, the Director General of National Registration ("DGNR") issued the respondent child's birth certificate and in that birth certificate the child's full name was given as "*bin Abdullah*" instead of "*bin MEMK*" and only entered the name of MEMK in the column on particulars of the father. The Child's Birth Certificate also contained a notation "*Permohonan Seksyen 13*" which was an explicit acknowledgement that the application for the registration of birth is for an illegitimate child. On 2 January 2015, MEMK applied to correct the Child's name from "*bin Abdullah*" to his name. However, the application was rejected by the DGNR on 8 May 2015 on the basis that the child is an illegitimate child, cannot be ascribed to the name of his biological father and the child has to be named "*bin Abdullah*" in line of the fatwa issued on the subject. The court rejected the respondent's application with the reason that the action of DGNR is relying on *fatwa* while rejecting the application is not illegal. This case was brought to the court of Appeal and the court held that the DGNR's action relying on the *fatwa* in this application are not in accordance with the law because the *fatwa* does not have legal authority.

In the above case clearly can be seen that the judgement is contradict with the *fatwa* due to Fatwa Committee of Johor had not adopted the *fatwa* of the National Fatwa Committee, and the action of DGNR decided that the fatwa of the National Fatwa Committee is the applicable to the respondents are not reasonable.

The issue here are the National Registration Department binding the *fatwa* that was gazetted and are *fatwa* that was gazetted have a legal position as a body authoritative that binding any agency of Federal or State. Court of Appeal interpret Section 13 (2) of Births and Deaths Registration Act 1957 are in own context regardless of any opinion of any *fatwa* and *fatwa* has no legislative power. Even if the fatwa has legislative force, being made pursuant to a state law, it cannot prevail over the Births and Deaths Registration Act, which is a federal law. There is no reference whatsoever in the Births and Deaths Registration Act to any fatwa or Islamic law that can be construed as having the effect of diluting or qualifying the legislative force of section 13A (2) of Births and Deaths Registration Act in its application to an illegitimate Muslim child.

Generally, the procedures of birth registration are under the jurisdiction of the National Registration Department. This matter is provided under the Births and Deaths Registration Act 1957. Through this act, the National Registration Department has the authority to make regulations and registration method that must be followed by all parties dealing with such as Rules of National Registration and Procedures of Registration of Birth and Deaths. The National Registration Department also have records and keep all information regarding birth and it included the birth's registration of illegitimate child. In Malaysia, the statistic of illegitimate child released by the National Registration Department show an increased every year.

**Table 2.** Statistic of Illegitimate Child Registered under NRD

Source: Malaysian Muslim Solidarity Portal (ISMAWEB): 2020

Based on Table 2, the statistic shows the of number of illegitimate children was born, registered under National Registration Department. Among of year 2005 until 2015, 53,0000 illegitimate child was born and it shows increase in 2021 which is as much as 30,000 of illegitimate child was born during those 6 years. The increase of number of illegitimate children that registered can cause bigger issues when the children grow up, such as causing symptoms of social problems regarding the naming of an illegitimate child's lineage to Abdullah. These children are victims of circumstances when their lineage naming cannot be attributed to their biological father. They were accused of committing various social problems during their growing up period due to confusion over the naming of their lineage (Roslan, 2023).

#### *The Right of Maintenance*

The obligation to provide the maintenance for the children and wife is the responsibility of a father, based on the verse:

Translation: The child's father will provide reasonable maintenance and clothing for the mother during that period.

(Surah Al-Baqarah, 2:233)

Based on the verse above, it clear stated that the father has their responsibility to give the maintenance to his children. However, in the issue of illegitimate child, the obligation in providing the maintenance is on mother's responsibility due to the relationship between the child and the father has been disconnected. The obligation in order to provide the maintenance by the mother has been stated in the Section 80 of Islamic Family Law Federal Territory Act 1984. According to the section, if a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself other than a child born as a result of rape, the court, upon due proof thereof may order the woman to make such monthly allowance as the court thinks reasonable. Based on the provision, it means that illegitimate child's maintenance is the mother's responsibility except for a child born as a result of rape.

In the case of *Wan Azmi v. Nik Salwani* [1991] 9 JH (2) 192 on 29 June 1987 the parties were married and was divorced on 21 December 1987. According to the fact of the case, the plaintiff filed a claim for maintenance of her child and maintenance during her pregnancy. The issue in this case is the *nasab* of the child that was born on 18 Mac 1988, after eight months of the date of marriage. The defendant has denied that the child is his biological child and applied an order from the court to declare that the child was not his biological child. The court held that the child is biological child to the defendant, where the judge makes the decision due to the explanation that defendant has sexual intercourse with the plaintiff and the child was born more than six months after sexual intercourse. Therefore, the child has been

considered as legit and can be *nasab* to the defendant. In this case, even though defendant knew that the plaintiff was born his child but he not denied for a long time and only denied it when the plaintiff was claimed the maintenance of the child. The denial was not accepted by the court and the judge was held the *nasab* of the child are belong to the defendant and it was the opinion that has been written in the Mughnil Muhtaj by As Syarbini, stated that the condition of denial against *nasab* have to do right after the child was born.

#### *The Right of Guardian (wali) for Marriage*

The rights of *wali* of an illegitimate child are belongs to his mother. However, the guardian for illegitimate daughter is held by *wali hakim* (either by Yang Dipertuan Agong or King or any person who credentials) because of her position who does not have a *nasab* to any male guardian (Mas'ad et al., 2018). The rights of guardian for marriage of an illegitimate daughter only can use *wali hakim* are based on the hadith:

Translation: Any woman whose marriage is not arranged by her guardian, her marriage is invalid, her marriage is invalid, her marriage is invalid. If (the man) has had intercourse with her, then the Mahr belongs to her in return for his intimacy with her. And if there is any dispute then the ruler is the guardian of the one who does not have a guardian.

(Ibn Majah, n.d., Hadith No. 1879)

A man who has a sexual intercourse with a woman and then the woman give birth to her son also cannot be a *wali* to this son. The guardian and *nasab* of an illegitimate daughter cannot belong to her father, it means a man who have a sexual intercourse with her mother illegally, whether married or not married with her mother after the birth the man still cannot be the guardian to his illegitimate daughter. This law is clearly based on above hadith.

There was a case where the applicant, Raisha binti Annuar Case No. 05100-006-0447-2009 applied an application to the court when his legitimacy status was doubted by the Port Dickson District Religious Office after he submitted a marriage application form with his partner. The religious office found that the applicant was born less than six months from the date of his parents' marriage. This fact is known through reference to the marriage certificate of his parents dated on 5 April 1985 while his date of birth is 1 October 1985. After examining documents and other evidence, the court confirmed that the period of marriage and birth was not enough of six months. The court held that the status of the applicant is an illegitimate child and cannot be attributed to his father. Therefore, the applicant's marriage must be under *wali hakim*.

#### *The Right of Inheritance (faraid)*

The division of inheritance or *faraid* means the ruling on the division of inheritance, the person who is entitled to receive the property of the deceased (الإرث) based on the rate that has been set by the Islam. According to the majority of scholars, including the scholars of Shafie's school, an illegitimate child and his descent are not entitled to receive any portion of the reward from his father and the heirs of his father, whether the father admit that his son or not. In the same way, the father and his inheritors of an illegitimate child also are not entitled to receive any portion of inheritance. The reason is an illegitimate child and his descent has no legal relationship with his father and his heirs.

Furthermore, according to Mufti of Pulau Pinang (2005), an illegitimate child cannot *nasab* to the man who cause his birth or to anyone who claims to be the father of the child. Therefore, it is not permissible for an inheritance and cannot become mahram between them.

Translation: Amr bin Shu'aib narrated from his father, from his grandfather, that the Messenger of Allah (S.A.W) said: Any man who fornicates with a free woman, or a slave woman, then the child born from Zina does not inherit, nor is it inherited from.

(At-Tirmizi, n.d., Hadith No. 2113)

Hadith above clearly indicates to the law that it has been stated that the illegitimate child cannot rely on his father's property. However, it is different with the problem of inheritance between the child with the mother who gave birth to him because it is clear that the child concerned, in any circumstances is his legitimate child to him. Then everything related to the position in question will happen as usual, including *faraid* issues. In other words, the rights of *faraid* will happen between them, regardless of who inherits whose property.

The reason is because the illegitimate child has a relationship with his mother who gave birth to him. Therefore, an illegitimate child and his descent are included in the general meaning that is stated in the verse 11 of Surah an-Nisa':

Translation: Allah instructs you concerning your children [their portions of inheritance] for the male, what is equal to the share of two females.

(Surah An-Nisa', 4:11)

Because of the relationship between the *nasab* is one of the causes of the inheritance, and an illegitimate child is counted by the law of the *syarak* to have a relationship with his mother, and as the result the illegitimate child and her descent is entitled to receive *faraid* from her mother and other heirs beside her mother, based on the method of Islamic *faraid*.

In Malaysia, the National Fatwa Committee (2017) stated that an unlawful child is not cut off from the relationship with her mother. Both can inherit from each other. If the mother dies, an illegitimate child is entitled to inherit her mother's *faraid* along with other heirs. Even if the illegitimate child dies first, his mother shall inherit the inheritance.

According to Section 80 of Islamic Family Law Federal Territory Act 1984 (1) if a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the court, upon due proof thereof, may order the woman to make such monthly allowance as the court thinks reasonable.

Based on the section above, all maintenance of illegitimate child is under mother's responsibility except for rape children. It is because the child's *nasab* is under his mother and not to the man who had sexual intercourse with his mother and also not to the man who caused her birth, so it is the mother's responsibility to give the maintenance.

#### *The Right of hadhanah*

The other rights of illegitimate child are the right of *hadhanah*. The right of *hadhanah* is mentioned in Section 85 of Islamic Family Law Federal Territory Act 1984. According to Section 85 of Islamic Family Law Federal Territory Act 1984, The custody of illegitimate children appertains exclusively to the mother and her relations.

The above section stated that the custody of illegitimate child belongs to the mother who is pregnant the child and her relations. In terms of Islamic law and law, the child is hundred percent owned by his mother even though the husband are the one causes the woman pregnant before marriage (Kosmo, October 2021).

In the case of *Ervin Ahabovic v. Amalya Evelyn Abdullah* [2012] 35/1 JH 49, the plaintiff filed an applicant regarding the *hadhanah* in High Court Shariah Wilayah Persekutuan in order to get custody of his two children. The defendant, Amalya Evelyn Abdullah has objected the application on the grounds that the two children are illegitimate children and cannot be attributed to the plaintiff even the plaintiff has no right to take care for or have visitation access to him. The court has examined the facts in the birth certificate of the children, the marriage register of the plaintiff and the defendant clearly shows that the first child was born approximately two years before the marriage of the parties while the second child was born approximately four months, which is less than six months from the date of the marriage of both parties.

Therefore, the judge rejected the plaintiff's claim and held that two children have to *nasab* to the defendant as the biological mother and permanent custody was given to the defendant. The court also decided that the rights of *hadhanah*, visitation, guardianship, *nasab* and maintenance cannot be realized and the court decided to reject the plaintiff's claim entirety.

In the above case, clearly can see that the plaintiff does not have the right to make an application to claim custody of the children because it is clear that the plaintiff has no lineage to the children. The decision that was made by court is accurate because it prove that the provision in Section 85 of Islamic Family Law Act Federal Territory 1984 which shows that only the biological mother or mother's relatives have rights to the child. However, the biological father can provide maintenance to his biological child on the basis of helping to ease the mother's burden in supporting the child even it is not on the basis of syariah obligation. This also happens because according to section 81(3) of the Islamic Family Law Act Federal Territory 1984 states that the right to custody of a child only applies to the *mahram*.

### **The Challenges and Resolutions of The Rights of An Illegitimate Child in Malaysia**

The challenges regarding the rights of an illegitimate child are the right of *nasab* are still maintained preserved if the child was born less than six months? Regarding of fatwa of National Fatwa in Table 1, only children born less than six months allow to *nasab* to his biological father. However, in the case that was happened in Kuala Terengganu, the case of *Zafrin Zulhilmi bin Pauzi v. Noor Aini binti Nasron* [2013] 2 SHLR 39, the court allowed the application of the applicant to *nasab* his child from using the name of Abdullah to his name as biological father. The judgement of the case are contradicted with the fatwa that was gazetted by Terengganu State Fatwa Committee, "illegitimate children cannot be attributed to the man who caused his birth or to anyone who claimed to be the father of the child, and therefore they cannot inherit, cannot become mahram and cannot be guardians and not required matters that are required for families that are valid according to Shariah". The Chief Sharie Judge of Terengganu took the position and refer to the opinion of Dr. Abd al-Karim Zaydan based on the *nas* and *hadith* related, that a child born less than six months from the time of the marriage contract can *nasab* to the man who married the pregnant mother and gave birth to the child according to the laws or worldly regulations, with the condition that the man does not state that the child is the child of adultery. The judge concluded that the issue of guardian and inheritance are not categorized as *ahkam al dunya*, where the child can only be given to his biological father but the name does not change the position from the view of guardian and inheritance.

However, any decision made by the court should be bound by the fatwa published by the Terengganu State Fatwa Committee which ruled that the illegitimate child cannot be attributed to the man who caused the birth or anyone who confessed to the child. The judgement also contradicted with *hukum syarak*, regarding the issue of Section 13 and 13A of Birth and Deaths Registration Act 1957 (Act 299) which gives the opportunity for children born less than six months to be attributed to the man who married his mother.

Furthermore, the same issue was arising from the case of *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-Kanak & Ors* [2020] 4 CLJ 731 The court allowed the plaintiff's application to register his son birth using his name. The judgement of this case the stated that the fatwa not binding the law and cannot form a legal basis regarding the action of the Director General of National Registration entered in the birth certificate the plaintiff's son full name as "*bin Abdullah*" instead of "*bin MEMK*" and only entered the name of MEMK in the column on particulars of the father. The Child's Birth Certificate also contained a notation "*Permohonan Seksyen 13*" which was an explicit acknowledgement that the application for the registration of birth is for an illegitimate child. According to statement of the court's judgement, even if the fatwa has legislative force and being if made pursuant to a state law, it still cannot prevail over Act 299, which is a federal law. There is no reference in the Act 299 to any fatwa or Islamic law that is construed having the effect of qualifying the legislative force of section 13A (2) in its (Fattah et al., 2020)

The solution of the same issue of both cases is the Act 299 should clearly state that this provision only applies to non-Muslim children and does not apply to Muslims. In terms of practice, the National Registration Department does not accept applications from Muslims to *nasab* a child that was born less than six months to his biological father even if he is married to the mother, but the application to do this is still open to any person who wants to place his name as the father on the birth certificate or identity card of his illegitimate child (Noor, Z. 2018). The government should enforce more strict law regarding the right of *nasab* of illegitimate child to prevent the same issue arising as happen in above cases that was stated before.

## Conclusion

The findings of the study concluded that an illegitimate child have their own rights as legitimate child own. The rights of an illegitimate child that stated in the Shariah perspectives have the differences fatwas especially among Perlis and other state. An illegitimate child are discriminated in terms of their rights and society's view on them. An illegitimate child is also not allowed to claim family name and inherit from their biological father which means they are usually maintained by their mother only. Other than that, most of the time when an illegitimate child is born, they are not registered straight away by their mother because of the fear of being judged by society or stigmatized when the child holds a birth certificate without the father's name. The stigma against an illegitimate child is too strong especially in Malaysia that some of the parents agree to give their child up for adoption to avoid being stigmatized and belittled by society. The recommendation is the government can amend Birth and Deaths Registration Act 1957 to determine that the provisions of Section 13A (2) that relating to the registration of illegitimate children are not applied to illegitimate Muslim children. Besides, the government should review the provision of Section 13 and 13A of Birth and Deaths Registration Act 1957 regarding the registration of illegitimate child. Moreover, an act was proposed in parliament in order to give legal authority to state fatwas to be used as a binding reference to the Civil Court in issues related to Islam (Berita Harian, 2017). More bad things will arise if the issue of *nasab* of illegitimate child into biological father continues. The Muslim community should obey the religious order to protect the *maslahah* and when it is related it should be known that the gazetted fatwa will binding the Muslims.

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