

LAW OF MARRYING DAUGHTER OUT OF WEDLOCK BY BIOLOGICAL FATHER IN SHAFT'I AND HAMBALI MADHHABS

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Abstract

This study aims to explore the views of the two main madhhabs in Islam, namely Shafi'i and Hambali Madzhabs, regarding the law of marrying daughters out of wedlock by their biological fathers. This research is done to understand the Islamic legal perspective of such marriages, a complex and challenging issue in Muslim societies.

This study used normative and comparative legal methods. The normative method of law is focused on the analysis of Islamic law from the perspective of Shafi'i and Hambali Madhhabs related to the marriage of an extramarital daughter by her biological father. Meanwhile, the comparative method compares the views of the two madhhabs related to the same case. Data sources include primary legal materials, such as the Quran and hadith, and books, as well as secondary legal materials, such as data from the book of 4 madzhab and other books. The data collection techniques used were literature studies and interviews with Islamic jurists from both madhhabs.

From the research conducted, it was found that, according to Madzhab Shafi'i, the law of marrying a daughter out of wedlock by her biological father is invalid. Imam Shafi'i argued that a child born out of wedlock has no sexual relationship with his biological father, so a marriage between an adulterous daughter and her biological father is considered valid in his view. Meanwhile, according to Imam Hambali, if a woman becomes pregnant out of wedlock and is married by a man who impregnates or does not impregnate her, then the marriage is invalid or void because a pregnant woman, due to adultery, has an iddah period that is until her child gives birth. The child born cannot be sacrificed to his biological father but is still sacrificed to his mother and her family.

Keywords: Biological Fathers, Extramarital Children, Marital Guardians

ملخص البحث

تهدف هذه الدراسة إلى استكشاف آراء المذاهب الرئيسية في الإسلام، وهما المذهب الشافعي والحنبلي، فيما يتعلق بقانون تزويج البنات خارج إطار الزواج من قبل آباءهن البيولوجيين. يتم ذلك لفهم المنظور القانوني للإس. استخدمت هذه الدراسة الأساليب القانونية المعيارية والمقارنة. تركز الطريقة المعيارية للقانون على تحليل الشريعة الإسلامية من منظور المذاهب الشافعية والحنبلية المتعلقة بزواج ابنة خارج نطاق الزواج من والدها البيولوجي. وفي الوقت نفسه، يقارن المنهج المقارن آراء المذاهب فيما يتعلق بالقضية نفسها. تشمل مصادر البيانات المستخدمة المواد القانونية الأولية، مثل القرآن والحديث والكتب، بالإضافة إلى المواد القانونية الثانوية، مثل البيانات من كتاب 4 madzhab والكتب الأخرى. كانت تقنيات جمع البيانات المستخدمة عبارة عن دراسات أدبية ومقابلات مع فقهاء إسلاميين من كلا المذاهب.

من البحث الذي أجري، وجد أنه وفقاً لمذهب شافعي، فإن قانون تزويج الابنة خارج إطار الزواج من قبل والدها البيولوجي غير صالح. جادل الإمام الشافعي بأن الطفل المولود خارج إطار الزواج ليس له علاقة جنسية مع والده البيولوجي، لذلك يعتبر الزواج بين الابنة الزانية ووالدها البيولوجي صحيحاً في رأيه. وفي الوقت نفسه، وفقاً للإمام الحنبلي، المرأة التي تحمل خارج إطار الزواج وتتزوج من رجل

حملها أو لم يحملها ، فإن الزواج باطل أو باطل لأن المرأة الحامل بسبب الزنا لها فترة عدة حتى تلد طفلها. لا يمكن أن ينسب الطفل المولود إلى والده البيولوجي ، ولكن لا يزال مصدقا لأمه وعائلة والدته.
الكلمات المفتاحية: الآباء البيولوجيون، والأطفال خارج إطار الزواج، والأوصياء الزوجيون

A. Introduction

As a fundamental institution in Islam, marriage has a very important role in shaping Muslim societies' social and moral structure.¹ In this context, a valid marriage recognized by Islamic law becomes the foundation for forming a solid family.² However, societies often face complex dynamics, including situations in which girls are born outside the bonds of marriage. In this context, the question of the law of marrying off a daughter out of wedlock by her biological father is a complex and challenging issue. This study explores the views of the two main madhhabs in Islam, namely the Shafi'i and Hanafi madhhabs, regarding such marriages.

Islamic law views marriage as an institution with certain criteria to be considered valid.³ However, the realities of life often bring complex challenges that require a deep understanding of religious principles. Although Islam regulates marriage in great detail, the reality is that not everyone is able or willing to follow these provisions. One of the problems that arises is the marriage of extramarital daughters carried out by biological fathers.⁴

Some factors that can cause this problem include:

1. Non-observance of Sharia: Some people may not abide by the teachings of the religion and commit acts outside the boundaries set by Islam. This can lead to marriages outside the bonds recognised by the sharia.⁵

¹ Muhammad Amin Suma, *Islamic Family Law in the Islamic World* (Jakarta: PT Raja Grafindo Persada, 2004).

²M. Fikri Hasbi and Dede Apandi, 'Marriage in Qur'anic Perspective,' *Hikami: Journal of Qur'anic Science and Tafsir*, 3.1 (2022), 1–18, <<https://doi.org/10.59622/jiat.v3i1.53>>.

³Nurul Fadhilla, 'Criteria for a Life Partner Towards a Happy Family Nurul' (lampung: academia.edu, 2008), p. 282. <[⁴Achmad Arnold and Mulyono Jamal, 'Civil Rights of Children Resulting from Zina and Extramarital Children: Perspectives on Positive Law and Islamic Law,' *Journal of Indonesian Comparative Law*, 2.1 \(2019\), 1 <<https://doi.org/10.21111/jicl.v2i1.4484>>.](https://d1wqtxs1xzle7.cloudfront.net/63587005/Kriteria_Pasangan_Hidup_Menuju_Keluarga_Bahagia20200610-109631-wvyc5u-libre.pdf?1591801032=&response-content-disposition=inline%3B+filename%3DKriteria_Pasangan_Hidup_Menuju_Keluarga.pdf&Expires=1699766066&Sig>>.</p></div><div data-bbox=)

⁵Rizka Verawati, 'Wali Nikah in Hadith Perspective' (UIN Raden Intan Lampung, 2020), <<http://repository.radenintan.ac.id/13777/1/PERPUS.pdf>>.

2. Economic Incompetence: Economic factors often cause extramarital marriage. Economic incompetence can encourage people to enter into marriages without following procedures recognized by religion.
3. Lack of Religious Understanding: Some people may need a deeper understanding of religious teachings, so they are unaware of the consequences of marriage outside the confines of Islamic law.
4. Social Stigma: Extramarital marriage, especially if it involves girls, can lead to social stigma. This can negatively affect the social and psychological life of the girl.

This paper dives into the views of Iman Shafi'i and Imam Hambali regarding this issue. Each Madhhab has its unique approach, reflecting differences in interpreting Islamic legal texts. By detailing the perspectives of Iman Shafi'i and Imam Hambali, one can understand the complexity of this issue and its impact on the views and practices of family life in Islamic societies.

B. METHODS

The type of research used is normative and comparative legal research. Normative legal research will focus on the analysis of Islamic law from the perspective of Shafi'i and Hambali Madhhabs related to the marriage of an extramarital daughter by her biological father. Meanwhile, comparative research compares the views of the two madhhabs related to the same case.

Data sources that can be used are primary legal materials, such as the Quran, hadith, and books, as well as secondary legal materials, such as data from the book of 4 madzhab and other books. In addition, secondary data that supports the data source of official documents can also be used.

The data collection techniques used are literature studies to collect primary and secondary legal materials. In addition, interview techniques with Islamic jurists from both madhhabs can also be used to gain a deeper understanding.

The analysis was conducted by comparing the views of Madzhab Shafi'i and Hambali related to the law of marrying a daughter out of wedlock by her biological father. The analysis includes comparisons to the legal nash-nash used by both madhhabs and their legal implications in the context of the case under study.

C. RESULTS

1. Understanding Marriage Guardians and Their Legal Basis

A marriage guardian acts on behalf of the bride in a marriage contract.⁶ Marriage guardians are divided into two types, namely wali nasab and wali hakim.⁷ Wali Nasab is the relative's guardian. In contrast, the guardian of the judge is an official to whom the ruler gives the right to be the guardian of marriage under certain circumstances and for certain reasons.⁸ Guardians of judges in Indonesia are marriage registrars authorized by the Minister of Religious Affairs.⁹ The requirements for a marriage guardian are male, Muslim, pretty, reasonable, and fair. The order of guardian nasab, from the strongest having guardianship rights to the weakest, is the father; paternal grandfather continues upwards; biological brother; father's brother; and biological brother's son.¹⁰ A trustee can delegate to Penghulu, PPNLN, PPPN, or another eligible person. Suppose the guardian is not present at the marriage contract. In that case, the guardian makes a letter of Taukil Wali in front of the head of KUA/Penghulu/PPNLN according to the domicile/existence of the guardian and witnesses.¹¹

The legal basis of marriage guardians is found in the verses of the Qur'an and the Hadith of the Prophet. There is not a single verse of the Qur'an that clearly (explicitly) explains the existence of a guardian in the marriage contract. However, several verses can be understood to require a guardian, such as in Sura Al-Baqarah verses 230, 231, 232, 235, 240, Ali Imran (3): 159, an-Nisa (4): 25, 34, at-Thalaq (65): 2, and an-Nur (24): 32.¹²

⁶ Muhammad Amin Suma, *Islamic Family Law in the Islamic World* (Jakarta: PT Raja Grafindo Persada, 2004), 134

⁷Rohmat, 'The Position of Guardians in Marriage: A Study of Syâfi'iyah, Hanafiyah, and Their Practice in Indonesia', *Al-'Adalah*, X.2 (2011), 165–77, <<https://doi.org/http://dx.doi.org/10.24042/adalah.v10i2.253>>.

⁸ Azwir, 'Wali Nikah Anak Born as a Result of Extramarital Relations (Comparative Study of the Hanafi School and Compilation of Islamic Law)', *Islamic Law Study Programme* (Sultan Syarif Kasim State Islamic University of Riau, 2016), <https://repository.uin-suska.ac.id/22629/5/5.201728HK-S2_ABSTRAK.pdf>.

⁹ RI Supreme Court, *a collection of legal regulations related to the compilation of Islamic Law as well as the understanding in its discussion*, RI National Library: Data Catalogue in Issue, 2011, i.e.

¹⁰ Spirit.

¹¹ (Minister of Religious Affairs of the Republic of Indonesia, 2019)

¹² Dahwadin and Muhibban, 'Tafsir of Quranic Verses on Guardians in Marriage According to Ulama', *Change Think Journal*, 1.2 (2022), 203–18, <<https://www.journal.bungabangsacirebon.ac.id/index.php/changethink/article/view/715>>.

The hadith of the Prophet Muhammad (peace be upon him) also discusses guardians in marriage, such as Some of the Prophet's hadiths marriage guardians include: "Every woman who marries without the permission of her guardian, then her marriage is void, then her marriage is void, then her marriage is void" (HR. Bukhari and Muslim), "It is not legal to marry without a guardian" (HR. Ahmad, Abu Dawud, and Tirmidhi), "The woman who has no guardian is the sultan" (HR. Abu Dawud).¹³ These hadiths show the importance of having a guardian in the marriage contract and affirm that marriage without a guardian is invalid.

2. Madzhab Syafi's Perspective

The Shafi'i madhhab is one of the four major schools of Islamic law. Imam Shafi'i defines marriage as a contract that includes the permissibility of sexual relations with lafaz nikah, tazwij, or lafaz, which has a proportional meaning. From the perspective of Shafi'i Madzhab, there are laws related to marriage, namely sunnah, obligatory, mubah, and haram. Imam Shafi'i stressed that the marriage contract is not considered before the harmony and perfection of the conditions are fulfilled.¹⁴

Imam Shafi'i, the founder of the Shafi'i Madhhab, had a special view of extramarital children in Islam. Although he lived in the 9th century AD, these views remained integral to his Madhhab. The law of marrying a daughter out of wedlock by her biological father, according to the Shafi'i Madzhab, is based on the principles of Islamic law involving marriage law, inheritance provisions, and social justice. In this context, Shafi'i Madhhab refers to Islamic teachings that emphasize the importance of maintaining the honor and dignity of the individual and justice in society.

According to the Shafi'i Madhhab, the law of marrying a daughter out of wedlock by her biological father is invalid. Imam Shafi'i argues that a child born out of wedlock is an *ajnabiyyah* (foreigner) who is not at all sanctioned and has no rights towards his biological father. Therefore, according to Imam Shafi'i, the child should not be married

¹³ (Available, 2020)

¹⁴ Hasbi and Apandi.

off by his biological father.¹⁵

There are several reasons underlying his opinion, namely:

1. Imam Shafi'i argues that a child born out of wedlock is an *ajnabiyyah* (foreigner) who is not at all sanctioned and has no rights towards his biological father
2. Imam Shafi'i argues that the Qur'anic verse surah An-Nisa verse 23 explains the absence of *mushahah* relations between adulterous children and their biological fathers.
3. Imam Shafi'i argued that the marriage of an adulterous child to his biological father was valid, and there was no *pasakh* for him.

Thus, Imam Shafi'i considered that a child born out of wedlock has no sexual relationship with his biological father, so a marriage between an adulterous daughter and her biological father is considered valid in his view.

1. Madzhab Hambali Perspective

Imam Hambali is one of the figures in the four major schools of Islamic fiqh. The Hambali school's view of extramarital daughter-daughter marriages performed by their biological fathers is largely based on their interpretation of the sources of Islamic law, namely the Qur'an, Hadith, Ijma (consensus), and Qiyas (analogy).

The views of Imam Hambali and his school are only sometimes centered on specific cases, such as the marriage of an extramarital daughter by her biological father, as Islamic law generally provides broad guidelines and general principles. Therefore, in compiling views on a case, Hambali scholars will look for references from major legal sources.

In the opinion of Imam Hambali, if a woman becomes pregnant out of wedlock and is married by a man who impregnates or does not impregnate her, then the marriage is invalid or void because a woman pregnant due to adultery has a period of *iddah*, that is until her child gives birth. If the child is born, the message cannot be sent to the biological father but to the mother and the mother's family.¹⁶

¹⁵Faisal Nikmatullah, 'The Law of Fathers Marrying Their Children from the Results of Zina (Comparative Study of Hanafi and Shafi'i Madzhab),' *Syaksia: Journal of Islamic Civil Law*, 20.2 (2020), 282 <<https://doi.org/10.37035/syaksia.v20i2.2358>>.

¹⁶ (Ocean, 2015)

Imam Hambali considers women who become pregnant for adultery to have a period of iddah, which is the period until giving birth to children. A child cannot be consecrated to his biological father. Instead, he was consecrated to his mother's family and father. The child became incompetent at reviewing Islamic law because it did not fall into the category of al-Firasy. Three conditions must be met for the child's fate to be valid. If the child remains an adulterous child, his mother's family and his mother's family are his only source of bread. Adulterous children naturally have the right to marriage, guardianship (if the woman is married to a guardian of a judge), and inheritance.¹⁷

D. DISCUSSION

Several important points can be taken as an analysis related to the perspective of Madzhab Shafi'i and Hambali regarding the law of marrying a daughter out of wedlock by her biological father.

1. Wali Nikah in Islam: A Literature Review provides a comprehensive understanding of the meaning of wali nikah, its conditions, and its legal basis in the Qur'an and the Prophet's Hadith. According to Islamic teachings, this provides a solid foundation for understanding the role of marriage guardians in the marriage process. One of the requirements for a valid marriage in Islam is the presence of a guardian. If the guardian does not meet these requirements, the marriage is invalid, and the adultery relationship will continue until the next generation. Imam Shafi'i and Imam Ahmad bin Hambal stated that, according to Islam, the legal father of a daughter is the one who has the right to be the guardian of marriage.

Shafi scholars believe that the khitab, or commandment, is contained in QS. Al-Baqarah verse 232 is the basis for the compulsory guardianship in the marriage contract. This verse is among the most emphatic in requiring a guardian in marriage. Imam Shafi'i strengthened his views by using the istiqla postulate method. Marriage has the intention of preserving sacred offspring and obedience as a form of worship to

¹⁷ Samsidar, Analisis Perbandingan Antara Perspektif Imam Mashab Dan Hukum Positif Tentang Status Anak Diluar Nikah, *Supremasi: Jurnal Pemikiran Dan Penelitian Ilmu-Ilmu Sosial, Hukum, & Pengajarannya*, XIV.2 (2019), 85–95 <<https://doi.org/https://doi.org/10.26858/supremasi.v14i2.13141>>.

Allah SWT, while the majority of women are usually subject to feelings or hearts.¹⁸

Imam Hanafi argued that marriage without a guardian (marrying oneself) is permissible as long as it is on the condition of se-kufu (equality). The argument is that the show (khitab) of Surah al-Baqarah verse 232 are husbands. Meanwhile, according to the Compilation of Islamic Law (KHI), wali is one of the pillars of marriage that must be fulfilled to be valid. The KHI adopted the Shafi'i school more. Marriage guardians are regulated in articles 19, 20, 21, 22, and 23. According to the KHI, a child who is out of wedlock can be said to be a legitimate child because he was born in a marriage relationship even though the child is the result of adultery; thus, the child's guardian is the man who married the mother.¹⁹

1. Shafi'i Madzhab Perspective: Shafi'i Madzhab emphasizes the importance of maintaining individual honor, dignity, and justice in society. In this context, Shafi'i Madzhab refers to Islamic teachings that emphasize the importance of maintaining the honor and dignity of the individual and justice in society. According to the Shafi'i Madzhab, the law of marrying a daughter out of wedlock by her biological father is invalid. Imam Shafi'i argues that a child born out of wedlock is an *ajnabiyyah* (foreigner) who is not at all sanctioned and has no rights towards his biological father. Therefore, according to Imam Shafi'i, the child should not be married off by his biological father.

Many institutions or individuals who have authority related to the matter in taking policies related to the matter refer to the views of the Shafi'i madhab; even Article 100 of the KHI has adopted this opinion of Imam Shafi'i as the basis for determining marriage guardians. According to the Fiqh of Imam Shafi'i, the guardian of the judge is responsible for the womb born less than six months after marriage. The child born is only his mother's child or is diminished by his mother.²⁰

In a study conducted by Sandimula, it was stated that the Hanafi Madzhab

¹⁸ Dahwadin and Muhibban.

¹⁹ Azwir.

²⁰ Zaenal Mutaqin and Imam Ariono, 'Review of Islamic Law of Marriage Guardians for Girls Born Less Than Six Months Old (Study of KAsus in Sukoharjo District)', *Syariat*, 7.1 (2021), 69–80.

holds the view that a child born out of wedlock has a sexual relationship with the father who impregnates his mother; in essence, a child is the child of his father because the child comes from his father's semen, so the implication is that his biological father is still forbidden to marry a child out of wedlock. While in terms of rights, although essentially between the two, there is the nasab of the child and the father, in Shar'i, the nasab of both is not considered, so the child is in the realm of guardianship, and the biological father does not have the right to him, so, in this case, the right is given to the ruler or guardian of Sulthan.²¹

2. Hambali Madhhab Perspective: The views of Imam Hambali and his school are not always centered on specific cases, such as the marriage of an extramarital daughter by her biological father, as Islamic law generally provides broad guidelines and general principles. In the opinion of Imam Hambali, if a woman becomes pregnant out of wedlock and is married by a man who impregnates or does not impregnate her, then the marriage is invalid or void because a woman pregnant due to adultery has a period of iddah, that is until her child gives birth. The child born cannot be sacrificed to his biological father but is still sacrificed to his mother and her family.

A girl born less than six months old because she has no relationship with her father cannot be guarded by her marriage guardian. This is in line with the Hadith of the Prophet (peace be upon him), which is loosely translated as "Children are proclaimed to legitimate husbands while men who commit adultery get nothing" (HR Bukhari no. 6760 and Muslim no. 1457 of Aisha). According to the Hadith, a legitimate husband is entitled to children. The child confides in his mother if he has no legal partner. A child born of adultery is not proclaimed to his biological father but to his mother. Therefore, wali nasab is the one who has the right to be the guardian; if there is none, the guardian of the judge is authorized by the ruler.

In a study conducted by Mutaqin & Ariono, he quotes Kitab Al-Muhazzab, explaining that if the child is born less than six months from the time of the marriage

²¹Nur Sadiq Sandimula, 'Status and Rights of Extramarital Children from the Perspective of Hanafi Madzhab,' *An-Nizam: Journal of Law and Society*, 14.01 (2020), 55–65.

contract, then the child is not the son of the man who married his mother. It also refers to the fiqh munakahat, which the imams of MadhhabMadhhab have approved, that the shortest time for pregnancy is six months.²²

The Qur'an gives clear instructions that babies should be born at least six months old when marriage takes place. This provision is taken from the Word of Allah in Surah Al-Ahqaf Verse 15 and Surah Al-Luqman Verse 14. In the Qur'an, verse 15 explains that the time required to conceive and wean is 30 months, and in Al-Luqman, verse 14, it is explained that it takes 2 years or more to wean a baby after its milk runs out. This indicates that the baby will be in the womb for six months. Therefore, if a baby is born under six months, by law, he cannot be consecrated to his biological father. Instead, he can only be consecrated to his mother and her family.²³

In a study conducted by Sandimula (2020), it was stated that the Hanafi madzhab, Walayah (guardianship), in marriage consists of two types: Walayah Istihbab is a guardianship that is recommended or preferred for girls or widows who have reached puberty and are intelligent; Walayah Ijbar is a guardianship imposed on young women who are girls or widows, adult women who are insane, and female sahaya servants. There are four underlying reasons for guardianship: kinship, ownership, forgiveness, and power. Guardianship: Guardianship includes close relatives, such as a father, grandfather, and child, or distant relatives, such as cousins. Guardianship over ownership is when a master marries off his sahaya servant by force (Ijbar). The guardianship of freed Sahaya enslaved people and those under pardon is divided into two categories. Guardianship over power is guardianship by a just leader or his deputy, such as a sultan or judge, who can marry a person who has no family or a disabled person on the condition that there is no guardian on his side. An out-of-wedlock child does not have guardianship rights from his relatives because relatives have severed relations with the father and his family. If the child wants to marry, then the one with the right to marry is a leader, such as the Sultan or a judge with

²²Mutakin and Erinu.

²³ OCEAN.

guardianship over power, because the child does not have a guardian.

E. CONCLUSION

Anak luar nikah tidak mempunyai hak perwalian dari pihak kerabatnya, sehingga yang berhak menikahnya adalah seorang pemimpin seperti Sultan, atau Hakim dengan perwalian atas kekuasaan, karena anak tersebut tidak mempunyai wali dari pihaknya. Perspektif Madzhab Syafi'i: Menurut Madzhab Syafi'i, hukum menikahkan anak perempuan luar nikah oleh ayah biologisnya adalah tidak sah. Imam Syafi'i berpendapat bahwa anak yang lahir di luar nikah tidak memiliki hubungan nasab dengan ayah biologisnya, sehingga pernikahan antara anak perempuan hasil zina dengan ayah biologisnya dianggap sah menurut pandangan beliau. Perspektif Madzhab Hambali: Menurut Imam Hambali, wanita yang hamil di luar perkawinan dan dinikahi oleh lelaki yang menghamili maupun yang tidak menghamilinya, maka perkawinan tersebut tidak sah atau batal karena wanita hamil akibat zina mempunyai masa iddah yaitu sampai anaknya melahirkan. Anak yang lahir tidak dapat dinasabkan kepada ayah biologisnya. Sebaliknya, dia dinasabkan kepada keluarga dan ayah ibunya. Anak tersebut menjadi ketidakberhakan dalam tinjauan hukum Islam, karena tidak termasuk dalam kategori al-Firasy.

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