

**THE POSITION OF ILLEGITIMATE CHILD UNDER ISLAMIC
LAW AND CIVIL LAW**

Hanisah binti Md. Shofi
(Matric No. P000003)

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Perpustakaan KUIM



1000012307

Faculty of Syariah and Judiciary
KOLEJ UNIVERSITI ISLAM MALAYSIA
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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

Date: 19 March 2003

Signature: 

Name: Hanisah Binti Md. Shofi

Matric No: P000003

Address: No. 21, Taman Cempedak,
08700, Jeniang, Gurun, Kedah.

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ABSTRAK

Kertas projek ini akan menfokuskan tentang kedudukan anak tak sah taraf menurut undang –undang Islam dan undang-undang sivil. Seterusnya, kajian ini akan diperkukuhkan dengan dalil daripada Al-Quran, hadith, pendapat ulama daripada pelbagai mazhab dan enakmen serta akta. Untuk memperolehi data, beberapa teknik kajian telah digunakan iaitu kajian perpustakaan, meneliti dokumen yang berkaitan, temubual dan internet. Hasil kajian menunjukkan bahawa anak tak sah taraf mempunyai kedudukan tertentu menurut undang-undang Islam dan undang-undang sivil seperti kedudukan nasab, nafkah dan penjagaan, perkahwinan dan hak untuk perwarisan. Kedudukan lain yang akan dipaparkan di dalam kajian ini ialah mengimami sembahyang, memberi penyaksian dan sembahyang jenazah.

ABSTRACT

This academic project will focus on the position of the illegitimate child under Islamic Law and Civil Law. Subsequently, this research will be strengthening and supporting by the Holy Quran, Hadith, the opinion of the different School of thought and legal sources. The library research, reviewing relevant document, interview and internet were the tools employed for data gathering purposes. The finding indicate that the illegitimate child has a certain positions in Islamic Law and Civil Law such as the position in the parenting, maintenance and custody, marriage and position in the inheritance of the illegitimate child. Other legal positions that also will be viewed in this research are leading the prayer, giving testimony and funeral prayer of the illegitimate child.

ملخص البحث

تهدف هذه الدراسة إلى بحث مكانة ولد الزنا في السياسة الشرعية والقانون الوضعي. بالنظر إلى ما جاء في القرآن الكريم، والحديث الشريف، وآراء فقهاء المذاهب الأربعة ثم ما ورد في (Enakmen). وإن المنهج المتبع في الدراسة هو البحث المكتبي، والرجوع إلى الدراسات السابقة، ثم اعتماد المقابلات الشفوية وأخيرا شبكة الإنترنت. وقد بيّنت الدراسة أن السياسة الشرعية والقانون الوضعي وضّح مكانة ولد الزنا في المجتمع ببيان وضعه في النسب والحضانة والنفقة والنكاح والميراث. بالإضافة إلى بيان مقامه كإمام في الصلاة وشهادته و مكانته في صلاة الجنازة.

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CHAPTER ONE

CHAPTER 1

ILLEGITIMATE CHILD UNDER ISLAMIC LAW AND CIVIL LAW

1.1 BACKGROUND OF RESEARCH

This research will discuss the position of illegitimate child under the Islamic Law and Civil Law. The society has a negative perception towards illegitimate child since a long time ago. In Islam, everybody is of the same level, as stated in al-Quran:

إن أكرمكم عند الله أتقكم إن الله عليم خبير

(Al-Quran. Surah Al-Imran 3:13)

Surely, the most honored of you, in the sight of Allah is (He who is) the most righteous of you. And Allah has full knowledge And is well acquainted (with all thing).

(Pr.(Dr.) Syed Vickar Ahamed, 1999,)

So, illegitimate child also have special rights and legal position as other children. That means, they also have a right and position, and this is similar to legitimate child such as enjoy the education, peaceful life and love and affection.

1.2 AIM OF RESEARCH

The aim of this research is to give knowledge to the society about the position of illegitimate child under the Islamic Law and Civil Law. The argument among Traditionist and jurist such as Imam Shafie, Imam Malik, Imam Hanafi, Imam Hanbali and their follower have focused on the following rights as nasab, maintenance and care (hadanah), marriage and inheritance of illegitimate child.

1.3 OBJECTIVE OF RESEARCH

Objective of this research are:

- 1) To identify the definition of illegitimate child under Islamic Law and Civil Law.
- 2) To identify the position of illegitimate child under Islamic Law and civil law.
- 3) To analyze and to compare the actual position and their rights which have been provided in Al-Quran and Hadith and under Civil Law.
- 4) To illustrate the different opinions from previous ulama such as Imam Shafie, Imam Malik, Imam Hanafi and Imam Hambali, their followers also Modern ulama and expert in this field.
- 5) To study the statutes that may be legitimized an illegitimate child under Civil Law of Malaysia.

1.4 SCOPE OF RESEARCH

This research will focus on the position of illegitimate child under the Islamic Law and Civil Law or as stated in Legitimacy Act 1961, Evidence Act 1950, and Law Reform (Marriage and Divorce) Act 1976, such as in the parenting, maintenance and custody of the illegitimate child, marriage and in the inheritance.

1.5 RESEARCH METHODOLOGY

a) Library Research:

This refers to the libraries of Islamic University College of Malaysia, National University of Malaysia, International Islamic University of Malaysia, University of Malaya and Syariah Court cases.

The purpose of the library research is to find the relevant books, which discussed the topic generally or specifically. For example, the book that have discussed this topic such as *Nizom Al-Usrah Fil Islam*, written by Dr. Ali Yusuf As-Subki, *Haza Huwal Islam*, written by Dr. Mustafa As-Sibaie', and many more.

b) Field Work:

Which some of the information, data or statistics are available at the certain department or institutions such as Department of Social Welfare, Selangor Islamic Religious Council and Syariah Court.

1.6 LITERATURE REVIEW

Studies on illegitimate child have been done before. Previously, writers have discussed the topic separately between Islamic Law and Civil Law. But, due to my research, I will combined both of the topics and make some comparison in one chapter. Some of the books, journals, and articles that I have referred to are on follows:

Legitimacy of the child in Islam is based on the establishment of legal paternity. The status of a child begotten through legitimate relationship would be regarded as legitimate; hence, he or she would be entitled to receive maintenance, guardianship, marriage and inheritance (Dr. Md. Som Sujimon, n.d).

Under the common law, a child is considered illegitimate if his parents are unmarried at the time of his conception or at the time of his birth.(Mimi Kamariah Majid, 1992).

According to the Imam Shafie, illegitimate child is born to a woman who is married to a man (a) after six months from the date of the marriage; or (b) within four years of the termination of the marriage, the mother not having remarried, the paternity of the child is established with the husband. If the child is born within six month of the marriage the paternity of the child would not be so established unless the man assert that the child is his and does not say that the child is the result of fornication.(Ahmad Ibrahim, 1997).

Based on the Internet data, that I have observed from homepage <http://www.muis.gov.sg>, on 5 February 2003, stated that, “ In Islam, the illegitimate child cannot be *wali* by anyone except *wali hakim* to solemnize their wedding ceremony (akad nikah).

CHAPTER TWO

CHAPTER 2

ILLEGITIMATE CHILD

2.1: Definition

Legitimate Child:

The condition of being born in lawful wedlock. Every child born of a married woman during the subsistence of the marriage is presumed to be legitimate but this presumption may be rebutted.

Illegitimate Child :

Illegitimate child or the son of nobody is born illegitimate or considered as *filius nullius* could not inherit even from the mother. They should allow maternal inheritance no marital child. (Bryan A. Garner, 1999).

" A child that was neither born nor begotten in lawful wedlock, nor later legitimized. This consider as born of parent not lawfully married to each other".(Judy Pearsall, 1998).

Illegitimate child is referred to an illegitimate genealogical relationship in Muslim Family denotes any child whose status is not legitimized on the basis *al-walad lil firash*. This is because the majority of Muslim and non-Muslim scholar of Muslim family law have identified the made of affirming a legitimate *nasab* under the doctrine the child belongs to the beds. This normally comes about through either a valid marriage or concubinage.

Dictionary: illegitimacy is referred to the illegitimate child that not born of lawful wedlock. He is not legitimized by subsequent marriage of parties.(KJ Aiyer's, 2001, 175)

According to the Dictionary of Law from Sherman, (1998) stated that, Illegitimate Child is born out of lawful wedlock.

“ References (however expressed) to any relationship between two person shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other ”.

2.2: Dalil on Illegitimate Child according to the Al-Quran, Al-Hadith and legal sources.

Allah said in the Al-Quran that:

والذين يرمون المحصنت ثم لم يأتوا بأربعة شهداء فاجلدوهم ثمانين جلدة و لا تقبلوا لهم شهادة ابداواؤلئك هم الفسقون*إلاالذين تابوا من بعد ذلك و أصلحوا فإن الله غفور الرحيم* والذين يرمون ازواجهم و لم يكن لهم شهداء إلا أنفسهم فشهادة احدهم اربع شهدت بالله إنه لمن الصادقين* والخامسة أن لعنة الله عليه إن كان من الكذابين* ويدرؤا عنها العذاب ان تشهد اربع شهدت بالله إنه لمن الكذابين* و الخامسة ان غضب الله عليها إن كان من الصادقين* ولو لا فضل الله عليكم و رحمته و أن الله تواب حكيم*

(Al-Quran. An_Nur 24 : 4-10)

“ And those who accuse honorable woman but bring not four witnesses, scourge them with eighty stripes and never afterward accept their testimony. They indeed are evildoers. Save those who afterward and make amends. For such lo! Allah is Forgiving Merciful. As for those accuse their wife's but have no witnesses except

themselves, let the testimony of one of them be four testimonies, (swearing) by Allah that he is of those who speak the truth. And yet a fifth, invoking the curse of Allah on him if he is of those who lie ". (Pr. (Dr.) Syed Vickar Ahamed, 1999, 423)

Al-Hadith:

- i) *" Abu Ubaydah Bin Harbawayh who held the post of a judge in Egypt adjudicated that the child born to a wife of eunuch (majbub) should be affiliated to his father. The report says that the eunuch (mamsuh) carried his son on his shoulder and wandered about in the Egyptian market and said, " Look at the judge i.e. , Abu Ubaydah Bin Harbawayh who has agreed to affiliating illegitimate children or bastard to slaves. He also agreed to affiliate the child to its father even though the father is a eunuch (majbub) or a castrate (al-khasi). Thus the waiting period of the woman whose marriage has been dissolved by talak or the death of a husband who is a eunuch or a castrate, is by delivery of the child since despite the lack of both testicles, the instrument of the semen remains. The availability of both testicles merely enhanced the proceeding of blood circulation. If a dead castrate, at the time of this death leaves a pregnant wife, the child who is born to the woman thereafter, maybe affiliated to that man. The waiting period of such a woman therefore, is until delivery because his male sexual organs still remained. Moreover, if the husband extensively penetrates his male sexual organ into his partner, the emission may occur even if with little sperm". (Imam Muslim, 1987, 212)*

b) According to the same reference book written by Imam Muslim, there were a well known hadith that narrated by Abdullah and he reported: *we were on the night of Friday staying in the mosque when a person from the Ansar came there and said: If a person finds his woman along with other man, and he speaks about it, you would lash him, and if he kills, you will kill him, and if he keeps quiet he shall have to consume anger. By Allah, I will definitely ask about him from Allah's Messenger (may peace be upon him). On the following day he came to Allah's Messenger (may peace be upon him) and asked him thus: If a man were to find with his wife a man and if he were to*

talk about it, you would lash him, and if he killed you would kill him, and if he were to keep quiet, he would consume anger, whereupon he (the Holy Prophet) said: Allah, solve this problem and he began to supplicate (before him), and then the verses pertaining to li'an were revealed: " Those who accuse their wives and have no witnesses except themselves ". The person was then put to test according to these verses in the presence of the people. There came he and his wife in the presence of Allah's Messenger (may peace be upon him), and they invoked curses (in order to testify their claim). The man swore four times in the name of Allah that he was one of the truthful and then invoked curse for the fifth time saying: Let there be curse of Allah upon him if he were among the liars. Then she began to invoke curse. Allah's Messenger (may peace be upon him) said to her: Just wait (and curse after considering over it), but she refused and invoked curse and when she turned away, he (Allah's Apostle) said: It seems that this woman shall give birth to a curly haired black child. And so she did gave birth to a curly-haired black child.

The book titled " Family Law in Malaysia ", written by Ahmad Ibrahim, explained on the definition of illegitimate child. The illegitimate child is the child that born within six months of the marriage and such child is the result of fornication (zina).

Previous Ulama :

Illegitimate child is child that born less than six month from the date of the marriage. Illegitimate child as known as *walad zina* is a children that born after sexual intercourse between man and woman out of legal marriage (*nikah sohiih*) or occurs through illicit sexual relations-fornication in which both parties are unmarried, or adultery when one or both parties are married .It is same with the *walad lian* or a children that born by as an oath which brings about divorce. This will be happen whenever the husband may without legal proof (four witnesses seeing the act), allege adultery by his wife without becoming liable to punishment to qazaf or the legally unsubstantiated allegation of adultery) and deny the paternity of a child born to his wife.

2.3 The Factors That Contribute to Illegitimate Child.

Legitimacy of the children in Islam is based on the establishment of legal paternity (*nasab sharie*). The status of a child begotten through a legitimate relationship would be regarded as legitimate; hence, he or she would be entitled to receive maintenance, guardianship and inheritance.

An illegitimate genealogical relationship, in Muslim family law denotes any child whose status is not legitimized on the basis of *al-walad lil firash*. According to all of jurist, there are three categories, which bring about the illegitimacy of a child. The factors will be explain as follows:

2.3.1 Zina (Fornication, Adultery, illicit sexual intercourse)

Zina or sex outside marriage is regarded as the strongest reason for the illegitimacy of a child born as a result. Islam requires all sexual activity to be within the bounds of a marriage relationship, and condemns sex before marriage or sex with any person outside the marriage. *Zina* was punished by death in many pre-Muslim societies, including Jewish ones, it is recovered in the hadith that the Prophet also reluctantly allowed the death penalty in his time. Adultery is regarded as so dishonourable a matter that it still risks the death penalty in some religion. The actual penalty laid down in the Al-Quran was a flogging not the death sentence, proved by the ruling that persons who had committed adultery should not be allowed to marry non-adulterers, presumably because they had shown that they could not be trusted. A person had to produce four witnesses to accuse another of adultery, and if they made up false charges, they were flogged four perjury. Stoning someone without proof would count as murder. If one spouse accused another without witnesses, they had to swear four times that it was true, and the fifth oath brought a curse on themselves if they were lying. (Ruqaiyyah Waris Maqsood, 1998, 238)

Beside that, *zina* is an Arabic word means both adultery and fornication, sin strongly condemned in the Al-Quran. (Ian Richard Netton, 199, 265)

Strictly speaking, *zina* in Islam occurs through illicit sexual relation- fornication in which both parties are unmarried, or adultery when one or both parties are married. While both parties if the act is properly witnessed, i.e. four witnesses seeing the act will be punished by *hadd* penalty, only the unmarried woman will be punished if she becomes pregnant without the act having been witnessed. The resultant offspring will be illegitimate (*walad zina*).

Beside that, the other factor concerns the offspring arising within a legitimate union when certain features occur, which render certain offspring illegitimate. In this category, Muslim jurist have determined four features where if one of them is fulfilled, the child's illegitimacy is confirmed.

2.3.2 *Li'an*

Li'an is the situation where a husband accuses his wife of *zina* without witnesses, they each have to swear four times that they say is true, and the fifth oath brings a curse on themselves. If the wife swears the fifth time that she is innocent, she is not condemned, but the couple are irrevocably divorced, and can never remarry. (Ruqaiyyah Waris Maqsood, 1998, 130)

Li'an is derived from *la'na*, which meaning "curse". *Li'an* and *mula'ana* signify literally mutual cursing. Technically, however, the words indicate that particular form of bringing about separation between the husband and the wife with the help of four oaths and one curse upon oneself if one tells a lie. This is meant to support one's own truthfulness. The four oaths stand for four witnesses in order to prove the charge of adultery. The Holy Quran says: "And as for those who accuse their wife's and have no witnesses except themselves, the evidence of one of these should be taken four times, calling Allah to witnesses that he is of the truthful ones. And the fifth time that the wrath of Allah be upon her if he is one of the truthful".

Imprecation or *li'an* can be defined as an oath which brings about divorce. A husband may without legal proof (i.e. four witnesses seeing the act) allege adultery by

his wife without becoming liable to punishment of qazaf (the legally unsubstantiated allegation of adultery) and deny the paternity of a child born to his wife. The process of li'an is an oath sworn by the husband that his wife has committed adultery. This might involve adultery where no pregnancy ensues or the husband might wish to disown the conception of the wife. In her turn, the wife takes an oath to deny it. As already stated, in order to validate the charge made by a husband against his wife, the allegation would normally have to be supported by four witnesses and would involve the *hadd* punishment. By the process of li'an the solitary evidence of the husband can be accepted for the purpose of divorce if he bears witness four times followed by an oath before Allah that he is solemnly telling the truth. And the oath should solemnly invoke the curse of Allah on himself if he is telling a lie. The wife, in her turn, follows the same practice in her denial. As the Qur'an clearly states:

والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء فاجلدوهم ثمانين جلدة و لا تقبلوا لهم شهادة ابداواؤلكم هم الفسقون* إلا الذين تابوا من بعد ذلك و أصلحوا فإن الله غفور الرحيم* و الذين يرمون ازواجهم و لم يكن لهم شهداء إلا أنفسهم فشهادة احدهم اربع شهادة بالله إنه لمن الصادقين* و الخامسة أن لعنة الله عليه إن كان من الكذابين* و يدروا عنها العذاب ان تشهد اربع شهادة بالله إنه لمن الكذابين* و الخامسة ان غضب الله عليها إن كان من الصادقين* و لو لا فضل الله عليكم ورحمته و أن الله تواب حكيم

(Al-Quran.An-Nur 24:4-10)

“ And those who accuse honorable women but bring not four witnesses, scourge them with eighty stripes and never afterward accept testimony. They indeed are evildoers. Save those who afterward repent and make amends. (For such) lo! Allah is forgiving, Merciful. As for those who accuse their wife's but have no witnesses except themselves, let the testimony of one of them be four testimonies, (swearing) by Allah

that he is of those who speak the truth. And yet a fifth, invoking the curse of Allah on him if he is of those who lie".(Pr.(Dr.) Syed Vickar Ahamed, 1999, 424)

The conjunction of these two rules in the Qur'an, i.e. the punishment for qazaf and the rule for li'an, indicate that li'an was intended to be a means for a husband to divorce his wife when he was sure that she had committed adultery but could not legally prove it.(Dr. Som Sujimon, n.d)

It must be stressed that although a divorce through li'an involve the accusation of adultery, no *hadd* penalty is involved. Thus, the reason for the husband using this form of divorce, when other forms are readily available to him, must be that he wants to publicly stress his wife's adultery.(Dr. Md. Som Sujimon, n.d)

This might come about as a result bitterness of being cuckolded or in other words, his wife is having an affair with other man. (Collins Cobuild, 1999, 397)

However, he would also be drawing the attention of society in general to his spurned position and with the easy availability of the ordinary form of divorce there would no reason for him to undergo such humiliation. On the other hand, if his wife is pregnant as a result of the adultery, then the true nature of his li'an form of divorce becomes more apparent because according to the doctrine of *walad lil firash*, the child of the wife's adultery would be legally entitled to claim paternity from her husband.(Dr. Som Sujimon)

As a result of li'an, this is no longer possible because, according to all the jurists, there would be no blood relationship between the husband and the child. The disjunction of the child's *nasab* from a paternal relationship with the husband would be regarded as absolute and this was the reason that the Prophet Muhammad has adjudicated that the son of the fornicating woman could not be acknowledged by the husband, if the husband claimed that the conception of the child was a result of adultery.(Dr. Som Sujimon,n.d)

According to al-Shafie, if the husband feels the child who was born by his wife is not his, it is his duty to disown the child immediately. The child of li'an is publicly shown to be illegitimate, the cuckolded husband has no involvement in its maintenance and care and all the other legal provisions which normally exist between father and child. Thus, when there is a legal union between the husband and the wife, as in the case of li'an, the child would be regarded as illegitimate unless the child is acknowledged by the husband, when it would be considered as legitimate. The descent of a child born in a legal union is established from the claimant, i.e. the father, master or the acknowledger, so long as the claimant has sufficient proof. (Dr. Som Sujimon, n.d)

Thus, any child born to any woman where there is a legal union with the husband or master and the husband does not disown the child, the child should be regarded as his even if the wife has been disowned on the basis of li'an. (Dr. Som Sujimon, n.d)

It is reported that the first li'an occurred when Hilal b. Umayyah accused his wife of committing adultery with Sharik b. Samha. The allegation made by Hilal is reported to have been true because the Prophet Muhammad confirmed dissolution of the marriage between Hilal and his wife. This is because it is reported that Hilal's wife refused to invoke the curse, thus, confirming Hilal's allegation. The Prophet Muhammad predicted that Hilal's wife would deliver a curly-haired black child. (Abdul Hamid Siddiqi, 1987)

It should be noted here that if the husband knew that his wife had been unfaithful and that the child born to her was not his, he was not required to use the process of li'an. In terms of strict observance of the letter of the law as interrelated by the jurist, if he did not use the process of li'an, the child would be regarded as his according to the doctrine of *walad lil-firash*. The wife's adultery, would then, only have effect if it had been witnessed four witnesses or if she, for some reason, made a fourfold confession of it to the authorities. Thus, although contrary to the religious spirit of Islam, *nikah al-istibda'* could still continue. The matter was then, one involving the consciences of the participants and their relationship with Allah. (Dr. Som Sujimon, n.d)

سهل بن سعد الساعدي أخيره : أن عويمرا العجلاني جاء إلى عاصم بن عدي الأنصاري فقال له : أ رأيت , يا عاصم ! لو أن رجلا وجد مع امرأته رجلا , أ يقتله فتقتلونه ؟ أم كيف يفعل ؟ فسئل لي عن ذلك , يا عاصم ! رسول الله صلى الله عليه و سلم , فسأل عاصم رسول الله صلى الله عليه وسلم , فكره رسول الله صلى الله عليه وسلم المسائل و عابها , حتى كبر على عاصم ما سمع من رسول الله صلى الله عليه و سلم , فلما رجع عاصم إلى اهله جاؤه عويمرا فقال : يا عاصم ! ما ذا قال لك رسول الله صلى الله عليه و سلم ؟ قال عاصم لعويمر , لم تأتي بخير , قد كره رسول الله صلى الله عليه وسلم المسألة التي سألته عنها , قال عويمر : والله ! لا أنتهي حتى أسأله و جد مع امرأته رجلا , أ يقتله فتقتلنه ؟ أم كيف يفعل ؟ فقال رسول الله صلى الله عليه وسلم : (قد نزل فيك و في صاحبك فاذهب فأت بها) قال سهل : فتلاعنا , و أنا مع الناس , عند رسول الله صلى الله عليه و سلم , فلما فرغا قال عويمر : كذبت عليها , يا رسول الله ! إن أمسكتها . فطلقها ثلاثا , قبل أن يأمره رسول الله صلى الله عليه وسلم .

(Imam Mahyuddin An-Nawawi, 1999, 359)

Sahl b. Saad al-Saidi reported that Uwaimir al-Ajlani came to Asim b. Adi al-Ansari and said to him: Tell me about a person who finds a man with his wife; he kill him, and be killed in retaliation; or how should he act? Asim ask for me (religious verdict about it) from Allah's Messenger (may peace be upon him). So, Asim asked Allah's Messenger (may peace be upon him) and he did not like this question and he disapproved of it so much that Asim felt aggrieved at what he heard from Allah's Messenger (may peace be upon him). When Asim came back to his family, Uwaimir came to him and said: Asim what did Allah's Messenger (may peace

be upon him) say to you? Asim said to Uwaimir : You did not bring something good. Allah's Messenger (may peace be upon him) did not like this religious verdict that I sought from him. Uwaimir said: By Allah, I will not rest until I have asked him about it. Uwaimir proceeded until he came to Allah's Messenger (may peace be upon him) as he was sitting amidst people, and said: Messenger of Allah, tell me about a person who found a man with his wife. Should he kill him, and then you would kill him, or how should he act? Thereupon Allah's Messenger (may peace be upon him) said: (verses) have been revealed concerning you and your wife; so go and bring her. Sahl said that they both invoked curses (and further said): I was along with people in the company of Allah's Messenger (may peace be upon him). And when they had finished, Uwaimir said: Allah's Messenger, I have told a lie against her if I keep her now. So he divorced her with three pronouncements before Allah's Messenger (may peace be upon him) had commanded him.(Abdul Hamid Siddiqi, 198, 101)

In another hadith, Ibn Shihab narrated about the invokers of curses and the practice of (li'an) based on the authority of Sahl b. Sa'd, by the tribe of Sa'ida, that a person from the Ansar came to Allah's Apostle (may peace be upon him) and said: Allah's Messenger, tell me about the person who found a man with his wife. The remaining part of the hadith is the same but with this addition: They invoked, curses in the mosque and I was present there. And he narrated in the hadith: He divorced her with three pronouncements before Allah's Messenger (may peace be upon him) commanded him to get separation. He separated from her in the presence of Allah's Apostle (may peace be upon him), whereupon he said: There is a separation between all the invokers of curses.(Abdul Hamid Siddiqi, 198, 102)

2.2.3 The Period of Gestation

The period of gestation after the divorce by talak or the death of a husband or master. Most Muslim scholars agree that in order to determine a child to be considered as legitimate, the child must have been born at least six months after the marriage took place.

According to the Shafie's, the Maliki's and Ahmad Ibn Hanbal, the wife must give birth at least six months after the marriage contract takes place, the husband and the wife must have been able to be together at the beginning of the period, because six months is the minimum period of pregnancy.

Thus the child of a divorced woman who had observed *iddah* should be regarded as legitimate so long as the conception was not more than two years or four years for the Shafie's and the Hanbali's respectively and five years for the Maliki's. Thus, if conception takes place after more than the maximum period of gestation, the *nasab* of the child would be regarded a illegitimate child as it must have arisen out of *zina*.(Dr. Som Sujimon, n.d)

CHAPTER THREE

CHAPTER 3

THE POSITION OF THE ILLEGITIMATE CHILD UNDER ISLAMIC LAW

3.1 THE NASAB OF THE ILLEGITIMATE CHILD UNDER ISLAMIC LAW.

The Prophet S.A.W have said to the effect from Imam Muslim that:

قال : (الولد للفراش و للعاهر الحجر)

In Islamic law the Muslim jurist determined that the *nasab* of the child of *walad li'an* or *walad zina* or illegitimate child would be attributed to his / her mother kinsfolk. This is because, as already stated, the illegitimate child has no relationship of *nasab* from the father and there would be no *wala'* from the father side.(Abdullah Al-Hamam Maulana Sheikh Nizam, 2000, 174)

Therefore, according to the entire jurist, the illegitimate child would be associated to his / her mother's side.(Ibn Rushd, n.d, 266)

The mother's *wali*, before her marriage, if she had been married, would be child's *wali*. The child would also be associated to her *wala'*, if she was a *mawla*.(Ibn Rushd, n.d, 266)

Therefore, when a man committed *zina* with a woman and give birth a son, even if he claims that he is the father, this would not be accepted because the descent of the illegitimate child is established from the woman by birth.(Ibn Rushd, n.d, 266)

Accordingly, when a man claims the paternity of such a child, whose mother is a slave and in the possession of another, the child's *nasab* is not established from him

because such a child is considered to be illegitimate.(Abdullah Al-Hamam Maulana Sheikh Nizam, 2000, 174)

However, the man should subsequently, by any means, be proved to be the proprietor of its mother, the child is emancipated although the mother of the child would not become mother of the child. However, if he said, “ This is my son of wickedness ” or, “ I did wickedly with her and she gave birth to this child ”, or, “ This is my son by what is not right ”, or, “ He is my son ”, without adding, “ *by zina* ”, the child having no other father and should be afterwards become his proprietor, the child descent from the claimant would be established, and the child would be free. Therefore, if the man should say, “ He is my son by an invalid (*fasid*) marriage, or she should claim him under problematic intercourse (*wat’ shubhah*), his descent would not be established so long as he continues in the possession of another. But if the man himself should afterwards become the proprietor of the child, the child descent from him would be established, and the child would be free, and his mother also. If she should come into the man’s possession, would become his *umm al-walad*. (Abdullah A-Hamam Maulana Sheikh Nizam, 2000, 174)

In the words of Subhi Mahmassani, the status of the child of *zina* must be ascribed to its mother and the *nasab* of the mother.(Subhi Mahmassani, n.d, 182)

Some may consider that it is somewhat strange that it is the mother’s *nasab* that the child takes and not the actual father, i.e. the other party to the adultery.(Subhi Mahmassani, n.d, 182)

However in legal terms, the only way that such a situation might have been able to occur was by the actual father admitting his adulterous act and the child of that act being confirmed as his by the process *Qiyafah* or is the proving of the person’s *nasab* or paternity based on apparent similarities between that person and another person.(Mahmud Saedon, 2000, 135)

In other hand, proper admission of adultery, for example four separate confession of it by the actual father, would result in him receiving the *hadd* penalty. Therefore,

there was no encouragement for any but a “ pious ” adulterer only can make the confession. The woman accusation that he was the father would have no effect in law without four witnesses to their adultery. Therefore, the same would have to be case in the matter of adultery outside the doctrine of *al-walad al- firash*. Thus, the *nasab* of illegitimate child should be attributed to the mother whose birth of the illegitimate child.(Dr. Md. Som Sujimon, n.d, 6)

3.2 THE MAINTENANCE AND CUSTODY (HADANAH) OF THE ILLEGITIMATE CHILD UNDER ISLAMIC LAW

Maintenance could be defined as the action of maintaining someone or something of being maintained. This is very important part for children to survive. Without parent who be there for them or to be beside them, who will take care of their school, or their future time.(A. S Hornby, 1998, 708)

In despite of this, according to Dictionary of Law, maintenance is includes in all cases provision for food, clothing, residence, education, and medical attendance and treatment.(n.a, 2000, 248)

However, according to Ustaz Abdul Latif Muda in his book “ Pengantar Fiqh ”, stated that custody or *hadanah* is bring up children, protect, breed or keep from harm or injure, protect, provide with food, love and care and other necessities since they very young or babyhood until they can manage their self. All Muslim jurists agreed that, the matured child is around seven years old. So, they have to be in custody or protection by their parents generally or mothers specially.(Ustaz Abdul Latif Muda, 1997, 224)

Islamic Law determines the priority in custody to the mother’s side firstly. In other words, mother is more entitled to look after the child than a father. This is because mother has the true love to take care of their baby or child. And, that nature or instinct of the baby or child that always need to the mother as a place to feel great fondness for, warm and friendly and suckling.(Ustaz Abdul Latif Muda, 1997, 224)

3.2.1 The Person Who Is Entitled to Custody:

According to the same reference, Ustaz Abdul Latif Muda also stated that, there was certain person who is entitled to particular custody. Among those who are entitled to child custody in priority such as mother and the grandmother from the mother's side and above, grandmother from the father side's and above and the sibling from the mother's side (auntie).(Ustaz Abdul Latif Muda, 1997, 224)

The Condition and Regulation of Custody Child:

Islamic Law holds that the conditions of custody child upon illegitimate child or other children are same. Those who are entitled to child custody according to the priority must have these conditions, there are

- 1) Muslim. Therefore the Muslim child shall not be given to a non-Muslim woman.
- 2) Sane
- 3) Adult
- 4) Matured and ability to give the best attention to the child
- 5) Have a good manner and moral values.(Ustaz Abdul Latif Muda, 1997, 351)

Illegitimate child also like other children need the attention and love from their mother. That clear from he previous discussion of the *nasab* of the *walad zina* and *walad li'an*, that the responsibility for care and maintenance must reside with those to whom the child's *nasab* is attributed. Thus just as the *nasab* of *walad zina* and *walad li'an* belongs with the mother and her family, so does the responsibility for care and maintenance.(Vesey Fitzgerald, n.d, 98)

In the case of li'an, the Maliki's are quoted as saying that a woman who was divorced by her husband through li'an has no right to claim maintenance. The maintenance cannot be claimed from her husband, even she is pregnant. This is because the inviolability of the woman has been regarded as having been terminated as a result of the alleged activities, which led to li'an. This is so because, a woman would be entitled to claim maintenance from her husband as long as her pregnancy. It is associated with him as the owner of the waiting period (*sahib al-iddah*). (Vesey Fitzgerald, n.d, 98)

Therefore, according to the Maliki's, a husband, who accused his wife of committing adultery (*mula'in*) which had resulted in pregnancy but then he acknowledged paternity of the child, would be liable for *hadd* punishment for slander (*qadzif*) but the child could be affiliated to him (*al-mula'in*). (Dr. Md. Som Sujimon, n.d, 7)

Hence, the mother would be liable for providing maintenance of the child before the acknowledged of paternity was made even though the father was rich at that time. (Al-Nafrawi, n.d, 98)

On the other hand, the Shafie's, are reported to have said that if a father disowned the child born to his wife but later acknowledged the child's paternity, the mother for the child would still be responsible for providing maintenance and care for the child. This responsibility would not be to the father forever and ever. (Al-Nafrawi, n.d, 98)

Thus, they make the first statement of the husband invalidate his second statement. This will occur if he changes his mind. This would be similar to the case of the mother having to provide maintenance for the child of li'an who was not acknowledged by her former husband. (Al-Nafrawi, n.d, 98)

In the event of the mother providing maintenance for the child without a judge's sanction and she needed to borrow money from her former husband, the amount paid by her husband would be regarded as the woman's debt owed to that husband. Thus, if

her loan was witnesses, the judge has to adjudicate that the husband has the right to recover the sum from his former wife.(Al-Khatib, n.d, 481)

Strictly speaking, according to the Maliki's in the same book, a pregnant woman who has been divorced by li'an cannot be entitled to maintenance because her pregnancy does not affiliate the child to her husband.(Ahmad Al-Sawi, n.d, 523)

Therefore, as far as the maintenance of the child is concerned, li'an is based on the situation of a witnessed adultery, as if four witnessed had been present.(Ahmad Al-Sawi, n.d, 523)

However, if the wife was already six month pregnant when the li'an or the actual witnessing of her adultery took place, the child is entitled to maintenance from the husband. Presumably, this is on the ground that the belatedness of the li'an of witnessed adultery after conception has taken place means that there is a strong possibility that the child is his, despite the mother's later adultery.(Ahmad Al-Sawi, n.d, 523)

Consequently, the situation will be changed if the husband who had caused the *walad zina* to be illegitimate by li'an. The *walad zina* would not be responsible for providing maintenance for the husband (since he was not his father, according to the law). The responsibility of providing maintenance on the basis of parentage could not be applied as the child has been disowned by his or her father and was regarded as a child of li'an. Therefore, it is means that the responsibility of father is prevailed. There is no legal relationship between the father and the son.(Abdul Aziz Amir, n.d, 141)

According to Abu Hanifah, if a pregnant is a proved guilty of *zina*, the *hadd* punishment cannot be inflicted on her until she has delivered the child. Furthermore, *hadd* penalties cannot be carried out on her immediately after delivery unless the newborn baby would have someone else able to give suckling.(Dr. Md. Som Sujimon, n.d, 8)

In all of these cases, there is a strong probability that the woman who has to provide maintenance for the illegitimate child would not have the means to do so. As the illegitimate child's *nasab* has been associated with the mother, as already mentioned, the mother's *wali*. Among them are father, brother, uncle, or cousin would take over the responsibility. (Dr. Md. Som Sujimon, n.d, 3)

This is because, they are involved with the particular mother would mean that the mother's *wali* would become the illegitimate child's *wali*. This would seem to be the theoretical legal background to the maintenance of the illegitimate child. However, this may not have always actually taken places as the result of the shame that the adultery or fornication of the woman brought to her family. Therefore, both of the mother and the child would live in the unhappy life such as in poverty and starveness.(Dr. Md. Som Sujimon, n.d, 8)

The responsibility of the mother to the child such as suckling it, feeding it and providing it with as comfortable environment, although her husband is the one who should provide these all.

Further more, in the case of illegitimate child, thus the duty of care (*hadanah*) is still required of the mother. In the case of the mother divorced by li'an or those whose illegitimate children have been born as a result of fornication by consent, they were unmarried virgins previously, this duty still rest upon the mother's who should be supported by her family and her *wali*.(Dr. Md. Som Sujimon, n.d, 8)

However, in the case of a woman who has been married being convicted *zina*, they are given a remission of two years to nursing the child before they are stoned to death. The responsibility for care *hadanah* will then fall on the woman's family, particularly her close female relatives, like mother, grandmother and sister's.(Al-Khatib, n.d, 489-493)

The Islamic Jurist do not seem to have discussed what would happen if the woman's family rejected her and her child. It seem that, in this case, it should be the

duty of *baitul-mal* or the state to intervene but this not explicitly stated. (Al-Khatib, n.d, 489-493)

In cases of a child being born as a result of rape, the jurist appear to be silent on whether the child would be regarded as legitimate or illegitimate. However, it would seem impossible that the child should be regarded as a legitimate.(Al-Khatib, n.d, 489-493)

There are report in the *Al-Muwatta'* stated that what would happen to the woman committing *zina* by force or rape. . The *hadd* punishment would be inflicted on her if she could not provide proof that she really been forced to commit *zina* but the raped woman is entitled to receive dower (*mahar*) from rapist.

Al-Muwatta' reports:

“ Malik related to me from Ibn Shihab that ‘Abdul al-Malik Ibn Marwan gave a judgement that the rapist had to pay the raped woman her bride-price. Yahya said that he heard Malik say, “ What is done in our community about the man who rapes a woman, virgin or non-virgin, if she is free, is that he must pay the bride-price of the like of her. If she is a slave, he must pay what he has diminished of her worth. The *hadd* punishment in such cases is applied to the rapist, and there is no punishment applied to the raped woman. If the rapist is a slave, that is against his master unless he wishes to surrender him”.(Al-Muwatta', n.d, 630)

According to Imam Hanafi's, Imam Shafie's and Imam Hambali's, Ibn Qudamah says:

“ The hadd punishment cannot be inflicted on woman who having no husband or is not under the ownership of a sayyid gets pregnant. If she claims that she has been forced to commit zina, or has had problematic sexual intercourse or she does not admit committing zina. This is the view of Imam Hanafi and Imam Shafie's. But, Imam Malik holds the contrast opinion that a woman should be punished if she is resident and not a stranger. However, if there are signs that the woman has been forced for

zina, like she comes screaming for help or shrieking, the hadd cannot be inflicted on her".(Ibn Qudamah, n.d, 192)

That means in the same reference book, Imam Malik hold the different view, which needs specific evidence in rape cases than Imam Hanafi's, Imam Shafie's and Imam Hambali's. It would appear that when the rape is established, the raped woman receives the appropriate dower.(Dr. Md. Som Sujimon, n.d, 10)

This would help towards the maintenance of the child but it would appear that the rapist is escaping much of his responsibility, whether or not the *hadd* of stoning is administered on him because the child he brought into existence by his violent sexual act is not being paid for out of his wealth.(Dr. Md. Som Sujimon, n.d, 10)

So, under Islamic Law there was provision and the right to maintenance and who will be responsible to provide the maintenance. The first category is those born to married mother's who conceived them in a properly witnessed act of adultery. Their mother's will be liable to the *hadd* punishment of stoning after the children have been suckled.(Dr. Md. Som Sujimon, n.d, 10)

Therefore, their maintenance and legal status will then belong to the families of the mother's. The second category is those born to the widower or that is a divorcee who has not remarried. In her case, she would be condemned to the *hadd* punishment of stoning. But, if she was properly witnessed in the act of adultery or if she gave birth to a child outside the possible limit's of her *iddah*.(Dr. Md. Som Sujimon, n.d, 10)

So, any child that she gave birth to would become the responsibility of her *wali* and her family. The third category are children whose illegitimacy has been made known by *li'an*.(Dr. Md. Som Sujimon, n.d, 11)