



**THE STATUS OF NASAB AND THE RIGHTS OF
CHILDREN BORN OUT OF WEDLOCK AND
CHILDREN FROM UNREGISTERED MARRIAGES
IN INDONESIA: A COMPARATIVE STUDY WITH
THE LAW IN MALAYSIA**

BY

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**A dissertation submitted in fulfilment of the requirement
for the degree of Master of Comparative laws**

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ABSTRACT

The study is comparison of the laws that discuss the status of *nasab* and rights of children born out of wedlock and children who are unregistered marriage in two countries, namely Indonesia and Malaysia. Analysis focuses on the status *nasab* of a child according to Islamic law, the concepts and provisions of the law on paternity based on several relevant statutes in Indonesia, as well as the rights of children born out of wedlock and unregistered marriage. Then, the concept of *nasab* of a child born out wedlock in Indonesia is compared with the provisions of paternity in the Malaysian law. The concept of paternity in Islamic law is examined based on the validity of marriage, evidences and acknowledgment. The study further analyzed the status of DNA test in order to determine paternity status and it can be found that according to Muslim Jurists, DNA test cannot be used as evidence, but only as a support to the evidence. The classical Muslim Jurists recognized that the paternity for a child born out of wedlock cannot be ascribed to his/her biological father. The consequence is a child born out of wedlock does not get his/her rights from the putative father. However, the child is allowed to receive a gift or a will from his/her biological father. The study also examined that the status of a child born out of wedlock or whose parent's marriage was unregistered, thus were unable to obtain any rights of his/her biological father. However, after the decision of judicial review on Constitutional court, a child born out of wedlock is allowed to get paternity and rights from his/her biological father, even though there is no clear definition can be found in the provision of Islamic Family Law and Compilation of Islamic Law. In Malaysia however, there are clear provisions and statutes on the status or *nasab* of a child born out of wedlock and unregistered marriage. These comparisons can help to identify the weaknesses of the provision for paternity law in Indonesia and use as a guideline for improving the law. The study reveals the need for a clear definition of a child born out of wedlock and from unregistered marriage as the rights of these children should be protected. These children require an appropriate alternative in order to get their rights from their putative father without contradictions with the Islamic law. This study further proves that the limited provisions on paternity of illegitimate children and from unregistered marriage in Indonesian legislation are not sufficient to govern the status or *nasab* of these children if it is compared with Malaysian law. Finally, the study reveals that Indonesia should improve on *nasab* and rights for illegitimate children and children of unregistered marriage. The law is hoped that this study provides an insight of the paternity of children born out of wedlock and children from unregistered marriages, in order for these children to get the rights that they truly deserve.

ملخص البحث

هذه الدراسة هي المقارنة بين القوانين التي تناقش وضع نسب و حقوق الأطفال المولودين خارج نطاق الزوجية، والاطفال المولود خارج إطار الزواج المسجل في البلدين، وهي إندونيسيا وماليزيا. ويركز التحليل على وضع نسب الطفل حسب الشريعة الإسلامية، مفاهيم وأحكام القانون على النسب القائمة على عدة قوانين خاصة في إندونيسيا، وكذلك حقوق الاطفال المولودين خارج نطاق الزوجية أو الزواج العربي. ثم مقارنة مفهوم نسب الأطفال المولودين خارج نطاق الزوجية في إندونيسيا مع أحكام النسب في القانون الماليزي. تمت دراسة مفهوم النسب في الشريعة الإسلامية على أساس صحة الزواج، والشواهد و الاعتراف. في هذه الدراسة ، تحليل اختبار الحمض النووي DNA لتحديد حالة أبوة ، و يمكن العثور حسب الفقهاء المسلمون ، ان اختبار الحمض النووي لا يمكن استخدامه كدليل، ولكن كوسيلة لدعم على الأدلة فقط. الفقهاء الكلاسيكية من المسلمين أقروا أن الطفل المولود خارج إطار الزواج لا يمكن أن يعزى الأبوة مع الأب البيولوجي ولا يناقش حول تسجيل الزواج. ونتيجة لذلك، فإن الطفل المولود خارج إطار الزواج لا تحصل على حقوقها من الأب المفترض. بيد أن الطفل مسموح بالحصول على هبة أو وصية من الأب البيولوجي. كما بحثت الدراسة حالة الاطفال المولودين خارج نطاق الزوجية أو الذي كان أحد الوالدين في الزواج العربي، ومن ثم لم يتمكنوا من الحصول على أي حقوق له الأب البيولوجي. ومع ذلك، بعد قرار المراجعة القضائية في المحكمة الدستورية، الاطفال المولودين خارج نطاق الزوجية مسموح بالحصول على حقوق الابوة، من الأب البيولوجي، حتى وإن كان لا يوجد تعريف واضح يمكن العثور عليها في هذا الحكم من قانون الأسرة الإسلامي وجمع من الشريعة الاسلامية. خلاف ماليزيا التي يوجد بها أحكاما واضحة بشأن وضع القوانين أو نسب من الأطفال المولودين خارج نطاق الزوجية أو الزواج العربي. هذه المقارنات يمكن أن يساعد على تحديد نقاط الضعف في الحكم على قانون الأبوة في إندونيسيا، استخدم كدليل تحسين القانون. تكشف دراسة عن الحاجة إلى وضع تعريف واضح للطفل المولود خارج نطاق الزوجية، من الزواج العربي حقوق هؤلاء الأطفال . هؤلاء الأطفال يحتاجون إلى بديل من أجل الحصول على حقوقهم من الأب المفترض دون تناقضات مع الشريعة الاسلامية. هذه دراسة تثبت أن عدداً محدوداً من الأحكام على أبوة الأطفال غير الشرعيين من الزواج العربي في التشريع الاندونيسي لا يكفي للحكم على حالة أو نسب هؤلاء الأطفال إذا قورن مع القانون الماليزي. وأخيراً، تكشف الدراسة تحسين نسب حقوق الاطفال غير الشرعيين والاطفال من الزواج العربي في إندونيسيا. يأمل القانون أن تقدم هذه الدراسة فكرة أبوة الأطفال المولودين خارج نطاق الزوجية، والاطفال من الزواج العربي هي من أجل حصول هؤلاء الأطفال على الحقوق التي تستحق حقاً.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative laws.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degree at IIUM or other institutions.

Gushairi bin H. Sarkawi

Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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Kelantan Islamic Family Law Enactment 2002
Law No. 1 of 1974 about Marriage Law
Penang Islamic Family Law Enactment 2004
Perak Islamic Family Law Enactment 2004

LIST OF ABBREVIATIONS

CIL	Compilation of Islamic Law
Ibid	Ibidem (same as above)
IFLA	Islamic Family Law (Federal Territories) Act 1984
IIUM	International Islamic University Malaysia
MLJ	Malayan Law Journal
n.d.	no date
No.	Number
PBUH	Peace Be Upon Him
RG	Regulation of Government
s.	Section
Vol.	Volume

TRANSLITERATION TABLE

Table of system of transliteration of Arabic words and name used by the
International Islamic University Malaysia

Arabic term	Transliteration	Arabic term	Transliteration	Arabic term	Transliteration
ء	'	ز	Z	ق	Q
ب	b	س	S	ك	K
ت	T	ش	Sh	ل	L
ث	Th	ص	ṣ	م	M
ج	J	ض	ḍ	ن	N
ح	ḥ	ط	ṭ	ه	H
خ	kh	ظ	ẓ	و	W
د	D	ع	'	ي	Y
ذ	Dh	غ	Gh		
ر	R	ف			

Short Vowels		Long Vowels	
Arabic term	Transliteration	Arabic term	Transliteration
اَ	A	اَ + ِ	Ā
اِ	I	اِ + ِ	Ī
اُ	U	اُ + ِ	Ū
اِي	ay	او	Aw

CHAPTER ONE INTRODUCTION

1.0 BACKGROUND OF THE STUDY

Marriage is one of the most important family institutions in Islam. In general, it refers to a contract between a man and a woman and it further entitles each of the parties to the enjoyment of certain rights and obligations in a lawful manner.¹

The *Sharī'ah* had prescribed rules to regulate the functioning of the family so that both spouses live together in love, security, and tranquility. As a result, a rule of law is needed in order to regulate their rights and duties among themselves. Among the objectives of marriage are to legalize sexual relationship between a man and a woman, procreation of children, mutual love and affection, and to follow the practice of the Prophet.² The al-Qur'an states,

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً
وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

Among His signs is that He has created spouses for you from among yourselves so that you may console yourselves with them. He has planted affection and mercy between you; in that are signs for people for those who know.³

Everybody hopes to have children to make their home pleasant and happy. Without them, a home will be desolate and joyless. Children are not only described as successors of their parents, but they are also *amānah* or trust from Allah SWT to us. Therefore, Islam has forbidden adultery. Islamic law incurs punishment for whoever commits adultery. This is because adultery will affect parentage of children. In

¹ Raffia Arshad, *Islamic Family law*, (London: Thomson Reuters, 2010), 41.

² Slamet Abidin and Aminuddin, *Fiqh Munākahāt 1, cet 1*, (Bandung: Pustaka Setia, 1999), 12-18.

³ Al-Qur'ān Ar-Rum (30): 21 and see Dr. Thomas B, Irving, *The Noble Qur'an Arabic Text and English Translation*, (Beirut: Dar An-Nahda Al-Arabiya, 1992), 406.

contrast, parentage of child whose parents were rightfully married, will be legally established, and the child will be ascribed to the father and mother who are married to one another.

Allah SWT said in the Qur'an that;

وَلَا تَقْرُبُوا الزَّوَاجَ إِنَّمَا كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

Do not commit adultery. It is shocking and an evil way (to behave).⁴

The Prophet Muhammad (Peace be upon him) said that:

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّهَا قَالَتْ اخْتَصَمَ سَعْدُ بْنُ أَبِي وَقَّاصٍ وَعَبْدُ بْنُ زَمْعَةَ فِي غُلَامٍ فَقَالَ سَعْدٌ هَذَا يَا رَسُولَ اللَّهِ ابْنُ أَخِي عُتْبَةَ بْنِ أَبِي وَقَّاصٍ عَهْدَ إِلَيَّ أَنَّهُ ابْنُهُ انظُرْ إِلَى شَبْهِهِ وَقَالَ عَبْدُ بْنُ زَمْعَةَ هَذَا أَخِي يَا رَسُولَ اللَّهِ وَوُلِدَ عَلَيَّ فِرَاشِ أَبِي مِنْ وَلِيدَتِهِ فَانظُرْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَى شَبْهِهِ فَرَأَى شَبْهًا بَيْنًا بَعْتَبَةَ فَقَالَ هُوَ لَكَ يَا عَبْدُ بْنُ زَمْعَةَ الْوَلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الْحَجَرِ وَاحْتَجِي مِنْهُ يَا سَوْدَةَ بِنْتَ زَمْعَةَ قَالَتْ فَلَمْ يَرَ سَوْدَةَ قَطُّ.

(رواه البخارى ومسلم)

Ai'shah reports that Sa'ad b Abī Waqqāṣ and 'Abd b Zam'ah disputed with each other over a young boy. Sa'ad said, Messenger of Allah, he is the son of my brother, 'Utba b. Abī Waqqāṣ made it explicit that he was his son. Look at his resemblance. 'Abd b Zam'ah said, Messenger of Allah, he is my brother, as he was born on the bed of my father from his slave-girl. Allah's Messenger (peace be upon him) looked at him and found a clear resemblance with 'Utba, but he said, "He is your brother 'Abd b Zam'ah for the child is to be attributed to the one whose bed it is born and stoning for a fornicator. Sawda bint Zam'ah, you should veil from him. So he did not see Sawdah at all.⁵

⁴ Al-Qur'ān al-Isra (17): 32

⁵ Bukhari, *Sahih Bukhari*, vol. VII (Beirut: Dar al-Kutub 'Ilmiyah, n.d.), see also al- San'āni, *Subul al-Salām- Sharh Bulūgh al-Marām*, 4th edn, (Cairo: Sharikat Maktabat wa Matba'at al-Halabī wa Awlāduhu, 1979), 328.

Free sex between man and woman without marriage occurs in our society⁶. This may be caused by changes in the society, culture, negative development of technology, and lack of education. As a result, we can see both man and woman living in the same house without a marriage contract.⁷ In other words, many children were born without knowing their parents.

The Indonesian Commission on Child Protection (KPAI) revealed that in 2010 almost 32% of adolescents between the age of 14 and 18 committed free sex.⁸ In addition, 21% of the teenagers who got pregnant performed abortions.⁹ In Malaysia, around 17.303 of children born out of wedlock were born from Muslim women in 2009.¹⁰ This means that many babies were born without their parents' valid marriage contract.

Society has always had negative perceptions towards illegitimate children.¹¹ Thus, this negativity will affect their psychology, even though the children have not committed any sin. Unfortunately, not only will the child's psychology be affected, the *nasab* of the child also becomes illegitimate and his/her rights of relationship with his/her biological father are limited.

⁶ Misbahol Munir, "Tiap Tahun, Remaja Seks Pra Nikah Meningkat" *Oke Zone*, 20 June, 2013, <http://news.okezone.com/read/2010/12/04/338/400182/tiap-tahun-remaja-seks-pra-nikah_meningkat> (accessed on 13 July 2013).

⁷ Yatimul Ainun, "Dua Remaja "Kumpul Kebo", Orangtua Lapor Polisi", *Kompas*, 5 Juni, 2012, <<http://regional.kompas.com/read/2012/06/05/00005368/Dua.Remaja.Kumpul.Kebo.Orangtua.Lapor.Polisi>> (accessed on 13 July 2013).

⁸ Syaiful W. Harahap,, "32 Persen Remaja Pernah Melakukan Hubungan Seks," *Berita Jakarta*, 25 February, 2011,

⁹ <http://dunia.pelajar-islam.or.id/dunia.pii/arsip/63-persen-remaja-berhubungan-seks-di-luar-nikah.html>, (accessed 29 April 2013)

¹⁰ Khairul Anuar Bin Ismail, "Statistik kes zina dan anak luar nikah di Malaysia, <http://suaramuhajirin313.blogspot.com/2013/01/statistik-kes-zina-dan-anak-luar-nikah_1.html> (accessed 29 April 2013)

¹¹ Roshdan Sujak Rafie, "Anak luar nikah bernasabkan bapa undang implikasi buruk", *Berita Harian*, 14 September, 2011, <http://www.bharian.com.my/bharian/articles/PeguamSyarieMenulis_Anakluarnikahbernasabkanbapau-ndangimplikasiburuk/Article/> viewed on 13 July, 2013.

Marriage Law No.1 of 1974 regulates all matters relating to marriage in Indonesia. Other than this law, Presidential Instruction has codified a Compilation of Islamic Laws as a special guidance for Muslims. The Compilation also becomes a guide for judges in deciding the problems in *Shārī'ah* Court. In Marriage Law, the status of child can be divided into two kinds; (i) legitimate child and (ii) child of outside marriage.

According to the Marriage Law No. 1 of 1974¹², a legitimate child is a child born in or caused by a valid marriage. It can be also seen in the Compilation of Islamic Law¹³, which states that:

- a. A legitimate child is a child born in or caused by a valid marriage.
- b. The conception of the child by a valid marriage outside the womb and be borne by the wife.

Definition of a legitimate child above is ambiguous because there is no clear interpretation, such as on cases when a man and woman have committed adultery prior to marriage, then the man marries the woman during her pregnancy and the child is born thereafter. Based on the case, it can be understood that the child is considered legitimate when the woman is pregnant more than six months after a valid marriage contract.

The meaning of child born outside marriage is a child born from parents who had relations outside the marriage contract to one another. According to Marriage Law, children who are born out of wedlock only have a civil relationship with her mother and her mother's family.¹⁴ Thus, the child only has rights and duties with his

¹² Marriage Law No. 1 of 1974, section 42

¹³ See Compilation of Islamic Law or Kompilasi Hukum Islam (KHI), section 99

¹⁴ Marriage Law No. 1 1974, article 43 verses 1

or her mother and there is no relationship between the child and his actual biological father in terms of *nasab*, maintenance and inheritance respectively.

In the Compilation of Islamic Law, a child born outside marriage can be interpreted as a child born from an unregistered marriage.¹⁵ Therefore, children of an unregistered marriage will also face the same problem. Children of an unregistered marriage will have no birth certificate from the Indonesian authorities because their parents were not married in front of an officer of the Religious Affairs Department (Kantor Urusan Agama). As a result, both spouses cannot register their marriage and obtain their marriage certificate. Without this document, children are not entitled to any rights from their biological father.

This was evident in the case of a judicial review filed by a dangdut singer, Aisyah Mochtar (popularly known as Machica Mochtar), who was married to the late Moerdiono, a former Secretary of State. Machica filed the review to obtain the civil rights of her 16 years old son, Muhammad Iqbal Ramadhan bin Moerdiono, Machica's son with Moerdiono. They married in a religious ceremony but she failed to register the marriage in the Civil Registration Agency.¹⁶

Even though the Constitutional Court partially granted the petition by Machica Mochtar, The ruling body stated that a child born out of wedlock only has a civil relationship with their father and family.¹⁷ There are still many children who cannot claim their rights from their biological fathers because of their status.

¹⁵ Compilation of Islamic Law, article 100

¹⁶ Mahfud MD, "RI's constitutional court to arrange illegitimate child rights", *Jakarta ANTARA News*, 27 February, 2012, <<http://www.antaranews.com/en/news/80195/ris-constitutional-court-to-arrange-illegitimate-child-rights>> (accessed on 28 June 2013)

¹⁷ Ida Nurcahyani, "Illegitimate child rights and its problems in Indonesia", *Antara news*, 29 February, 2012, <<http://www.antaranews.com/en/news/80263/illegitimate-child-rights-and-its-problems-in-indonesia>> (accessed on 11 May 2013)

Nevertheless, this regulation seems to be in conflict with the Islamic Law because the decision in Machiha Mochtar's case seems to acknowledge the rights of an illegitimate child in relation to his biological father. On the other hand, in classical Islamic Law, the child from adultery is only related to his mother and relatives.¹⁸

The above discussion on the rights issues and problems of these children needs to be examined especially on their status of *nasab* and rights. The law on children born out of wedlock and unregistered marriage in Malaysia will also be examined in order to provide a comparison and see what Indonesia can learn from Malaysia.

1.1. STATEMENT OF PROBLEM

This study is undertaken based on the premise that there is no clear rules and provision regulating the status of *nasab* and the rights of a child born out of wedlock and unregistered marriage in Indonesia. This has led to an inadequacy of the law which requires reform and amendment.

1.2 OBJECTIVES OF THE STUDY

The research is undertaken based on the following objectives:

1. To examine the status of *nasab* and the rights of a child born out of wedlock and born out of an unregistered marriage in Indonesia.
2. To compare between the status of *nasab* and the rights of a child born out of wedlock and unregistered marriage under Indonesian law and Malaysian law.

¹⁸ Ibid

3. To provide certain suggestions and recommendations for the improvement of the law relating to the status of *nasab* and the rights of a child born out of wedlock and unregistered marriage in Indonesia and Malaysia.

1.3 LITERATURE REVIEW

Studies on children born out of wedlock and children in unregistered marriages have been done before. However, the discussion was done separately when it comes to the law in Indonesia and the law in Malaysia. For children born out of unregistered marriage, many researchers prefer to examine the unregistered marriage more than the status of the child. Even though there are some writings about the topic, in this study, both topics are combined and some comparison of the law on this topic is examined between Indonesia and Malaysia.

Al-Imam ‘alā addīn Abī Bakr bin Su’ūd al-Kāsānī¹⁹ who belongs to Hanafī jurists wrote about divorce, *li’an*, maintenance, and other subjects of family law under the *Sharī’ah*. He also wrote quite a lengthy discussion on *nasab* including *nasab* of children born out of wedlock (*walad zinā*) and children born out of *li’an*. However, he did not discuss issues on the paternity of a child and status of a child born out of an unregistered marriage.

Imam Mālik²⁰ also discussed types of divorce, including *li’an*. He also discussed the rights of children born out of *li’an* in relation to inheritance. However, the discussion was brief and not extensive. On the other hand, Ibnu Rusyd²¹ who belongs to the Malikī schools, discussed in detail on the issue of children born out of

¹⁹ Al-Imam ‘Alā Addīn Abī Bakr bin Su’ūd al-Kāsānī, *Badā i’u Shanā’i fi Tartīb asy-Syarā’I* juz 3, (Beirut-Lebanon: Dar Ehia Al-Tourath al-Arabi: 2000), 376.

²⁰ Imam Malik, *Al-Muwatta’*, (Cairo: Darul Hadis: 1992), 286.

²¹ Ibnu Rusyd, *Bidāyatul Mujtahid*. Jilid 4. (Beirut, Darul Ma’rifah, n.d),

wedlock and their rights. However, nothing was mentioned on children born out of unregistered marriage.

Imam Nawāwī²² examined the issues of marriage. However, he did not explain a child's paternity and the status of children born out of wedlock clearly. Imam Abī Muhāsīn Abdul Wahid bin Ismail Ar-Ruyānī²³ also did not discuss the issue of paternity of these children.

According to Ibnu Qudāmah from Hanbalī²⁴, when a woman has committed adultery, and later becomes pregnant, the child would be illegitimate, no matter whether the woman married the man she committed adultery with or not. The *nasab* of the child refers to his mother and does not belong to the father. This also affects the rights of inheritance where the child cannot claim his rights of inheritance from the biological father.

There are many contemporary writings on *nasab* in Islamic law in general. These works include al-Jazirī,²⁵ and Wahbah al-Zuhaylī²⁶. Their books discussed *nasab* of children born out of wedlock but provided no discussion on *nasab* of children born out of unregistered marriage.

Books on the specific subject of Islamic family law have also been written by contemporary writers. Among them are the works written by the following writers, Abd Al-Aziz Amir, Ahmad Ibrahim Bek, and Imām Muhammad Abū Zahrah.

²² Imam Nawawi, *Minhaj et Talibin a Manual of Muhammadan Law, according to the school of Shafi'I*, (New Delhi: Adam Publisher and Distributors, 2005), 273.

²³ Abi Muhasin Abdul Wahid bin Ismail Ar-Ruyani, *Bahrul Mazhab fi Furū' i Mazhab Asy-Syāfi'ī*, Juz 10, (Beirut: Dar Al-Kotob Al-ilmiyah, 1971), 307. See also Syamsuddin Muhammad bin Muhammad Al-Khatib Asy-Syarbaini, *Mugni al-Muhtaj*, Juz 5, (Beirut: Dar al- kotob ilmiyyah, 1994), 60.

²⁴ Ibnu Qudamah, *Al-Mughni*, Juz 9, 529-530, see also Ibnu Taimiyah, *Majmu Fatawa*, Jilid 32, 134-152, it can be also see in *Majmu Syarah Muhadzdzab*, Juz 15, 109-113

²⁵ Abdurrahman Al-Jaziri, *Al-Fiqh 'Ala-Mazāhib Al-Arba'ah*, vol 5. (Beirut: Dar Al-Fikr, 1996),

²⁶ Wahbah Al-Zuhaili, *Al-Fiqh al-Islām wa adillatuhū*. vol. VII. (Beirut: Dar al-Fikr, 1997), 691.

The rights of children were discussed by Imām Muhammad Abū Zahrah.²⁷ He stated that the right of paternity is the most important right for children. This is because it will lead to other rights and duties between the child and his biological father. For example, rights to good education for the child, maintenance, suckling and custody by mother and support from the father. However, the book did not discuss the rights of children from unregistered marriage.

The same discussion can also be found in book of Syaikh Hasan Ayyub,²⁸ which highlighted about *li'an*. The book includes a short discussion about maintenance and custody of a child. However, there was no discussion on paternity and rights of children born out of wedlock and children born out of an unregistered marriage.

Abdul 'Azīzī 'Āmir examined the differences between paternity through a valid marriage, paternity by an invalid marriage, by acknowledgment, and denial of paternity by *li'an* according to Islamic law.²⁹ Nevertheless, the registration of marriage and effects of the non-registration of marriage were left out in the discussion.

Dr. Hasanīn Al-Muhammadi Bawādī³⁰ in his book compared rights of children in Islamic law and the legislation in a country (convention rights of children). It is interesting to note that in his discussion, he divided the rights of a child before and after the child is born. Those rights include the right to have a good father and mother, the right to life, the right to good name, the right to paternity, right to custody, maintenance, education and inheritance. The discussion, however, was general and

²⁷ Imām Muhammad Abū Zahrah, *Al-Ahwāl al-Syakhsyyah*, (Cairo: Dar al-Fikr, 1950), 385.

²⁸ Syaikh Hasan Ayyub, *Fiqhul Ushratul Muslimah*, (Cairo: Dārus Salām, 2002), 273.

²⁹ Abdul 'Azīzī 'Āmir, *Al-Ahwāl al-Syakhsyyah fī al-Syarī'ah al-Islāmiyyah Fuqahā wa Qadā', an Nasbu, ar-Ridā', al-Hadhānah, Naḡqatul Aqārib*, (Cairo: Dar al-Fikr, 1976), 3.

³⁰ Hasanīn Al-Muhammadi Bawādī, *Huqūq al-Tifl baina al-Syarī'atil Islamiyyah wal Qānūnad Daulī*, (Iskandariyyah: Dar Al-Fikr, 2006), 45.

nothing was discussed on the rights of children born out of wedlock and unregistered marriage.

Sujimon, Mohamad M. S wrote on legitimacy; *al-Walad li al- Firāsh*, theory and provision in the Islamic Family Law.³¹ According to him, Islamic law is very concerned with the establishment of *nasab* of a person which makes him be regarded as legitimate. The establishment of *nasab* of the child's legitimacy from his/her father can be based on the doctrine *al walad li al-firāsh*, proof (*bayyinah*), doubtful intercourse (*wat' shubhah*) and the acknowledgement of paternity. However, according to the author, the provision of the Act relating to the child's legitimacy in Islamic Family Law Act and enactments in Malaysia is not detailed as what had been discussed in his article.

In another article, Md. Som Sujimon³² explored the concept of illegitimate children according to a classical view of Islamic law. It included an explanation on how illegitimacy is established, the moral/religious and legal position of the *walad zina*, and other legal aspects of the *walad zina*. However, he only examined the issues of illegitimate children from the opinions of the classical Muslim jurists without exploring further the status of illegitimate children in Indonesia and Malaysia.

Dr. Jamal, J. A. Nasir wrote that parentage can only be established by spouses³³, the natural father and mother, and it confers legitimacy upon the child. Therefore, the parents should provide maintenance for the child's needs in all these

³¹ Mohamad M. S. Sujimon, Legitimacy: Al-Walad li al-Firash – Theory and provisions in the Islamic Family Law (Federal Territory) Malaysia, *Isu Syariah dan Undang-undang Siri 7: Keluaran Khas Memperingati Prof. Tan Sri Datuk Ahmad bin Mohamed Ibrahim/ Penyunting Abdul Basir bin Haji Mohammad dan Jafril Khalil*

³² Md Som. Sujimon, "Implications and Consequences of Illegitimate Child (Walad Al-Zina) in Islamic law: A Classical View". *Jurnal Syariah*, vol. 7, no.2 (1999): 1-2.

³³ Jamal, J. A. Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*. (Boston: Brill, 3th edn., 2009), 169.