



Status of Children Born Out of Wedlock: A Study of Constitutional Court Decision and Its Relevance to the View of Ibnu Taimiyah

Bukhari Ali,¹ Nur Wulandari,¹ Nahara Erianti¹

¹Universitas Islam Negeri Ar-Raniry Banda Aceh

E-mail: bukhariali@ar-raniry.ac.id

Abstract

The Constitutional Court Decision No. 46/PUU-VIII/2010 has introduced a new paradigm in the civil and family law systems. However, this decision has faced significant controversy among Muslims, who constitute the majority religious group in Indonesia. The majority of *ulema* (Muslim scholars) maintain that children born from *zina* (fornication) cannot be attributed to their biological fathers. In contrast, Ibn Taimiyah, a renowned Islamic scholar, has proposed the concept of *istilhaq*, which allows for the attribution of children born from *zina* to their fathers. This study aims to address three research questions: 1) What is the content of the Constitutional Court Decision No. 46/PUU-VIII/2010? 2) What is Ibn Taimiyah's opinion on children born out of wedlock? 3) What is the relevance of the Constitutional Court decision to Ibn Taimiyah's opinion? The study employed a juridical-theoretical method, utilizing both legal and Islamic perspectives. The findings reveal that the majority of *ulema* hold the view that children born out of wedlock are only attributed to their mothers. Ibn Taimiyah, on the other hand, argues that they can be attributed to their biological fathers through the concept of *istilhaq* (acknowledgment) and *qiyafah* (facial resemblance). The Constitutional Court decision does not provide a definitive clarification on the status of children born out of wedlock. Consequently, both children born from underhand marriages and from *zina* become the responsibility of the biological fathers if their paternity can be established through DNA testing. The relevance between the Constitutional Court decision and Ibn Taimiyah's opinion lies in their shared recognition of the possibility of establishing *nasab* (lineage) without solely considering the circumstances of the child's birth. This recognition can be achieved through DNA testing in the present era and through acknowledgment and facial resemblance assessments in Ibn Taimiyah's time. **Keywords:** *Ibn Taimiyah, Constitutional Court Decision, Nasab of Children Born Out of Wedlock*

Abstrak

Putusan Mahkamah Konstitusi No.46/PUU- VIII/2010 telah membawa paradigma baru dalam sistem hukum perdata dan hukum keluarga, namun putusan ini banyak mengandung kontroversi di kalangan kaum muslimin sebagai pemeluk agama mayoritas di negeri ini. Mayoritas ulama menilai bahwa anak hasil zina tidak bisa dinasabkan kepada bapak biologisnya. Berbeda dengan Ibnu Taimiyah, dalam konsep istilahnya menilai bahwa anak hasil zina dapat dinasabkan kepada ayah biologisnya. Untuk itu, masalah yang diteliti pertama, bagaimana isi putusan MK No.46/Puu-Viii/2010, Kedua, bagaimana pendapat Ibnu Taimiyah tentang anak luar perkawinan, dan ketiga, bagaimana relevansi antara putusan MK dengan pendapat Ibnu Taimiyah. Kajian ini menggunakan metode yuridis teoritis dengan menggunakan pendekatan perundang-undangan dan hukum Islam. Hasil penelitian menunjukkan bahwa, menurut mayoritas ulama anak luar kawin dinasabkan hanya pada ibunya. Sedang menurut Ibnu Taimiyah bisa dinasabkan kepada ayah biologisnya melalui istilah qiyah. Putusan MK tidak memiliki penegasan mengenai status anak luar nikah, atas dasar itu, baik anak yang lahir dari pernikahan bawah tangan maupun anak yang lahir dari hasil zina selagi dapat dibuktikan kebenarannya melalui tes DNA maka anak tersebut masih menjadi tanggungan lelaki sebagai ayah biologis anak. Relevansi antara putusan MK dan pendapat Ibnu Taimiyah ialah sama-sama memiliki kemungkinan untuk terhubungnya nasab tanpa mempermasalahkan sebab dari kelahiran anak. Selagi dapat dibuktikan melalui tes DNA pada masa saat ini dan pengakuan serta uji kemiripan pada masa Ibnu Taimiyah.

Kata Kunci: *Ibnu Taimiyah, Putusan MK, dan Nasab Anak Luar Kawin*

Introduction

Nasab (lineage) is one of the strongest pillars that supports a family, as it binds family members together through blood ties. A child is part of the father, and a father is part of the child. However, there is ongoing debate regarding the issue of *nasab* for children born out of wedlock. According to the majority of *fiqh ulema* (Islamic jurists), the *nasab* of a child born out of wedlock is attributed to the mother.¹ However, Ibn Taimiyah, a prominent Islamic scholar, holds a different view, asserting that the *nasab* of children born out of wedlock can be attributed to their biological fathers.²

The legal basis used by Ibn Taimiyah to establish his opinion is the practice of the Prophet Muhammad's companion, Umar bin Khattab. Umar once linked a

¹Ali Abubakar et al., "The Right of a Child Outside the Legal Marriage of a Biological Father: The Analysis of Hifz Al-Nafs as Law 'Illat," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, No. 1 (2021). Ibn Qayyim Al-Jauziyah, *Panduan Hukum Islam*, Translation by Asep Saefullah and Kamaluddin Sa'adiyatulharamain, (Jakarta: Pustaka Azzam, 2007), p. 823.

²Ibn Taymiyah, *Majmu' al-Fatawa*, Juz XXXII, (Madinah: Majma' Malik Fahd, 1995), p. 139.

child born out of wedlock to the biological father under the condition of *istilhāq*³ i.e., a man approaches a child and claims to be the father, admitting to having committed *zina* with the child's mother. If no other man claims the child as his own, then the child can be attributed to the man who has made the claim.⁴

Indonesia also has specific regulations regarding children born out of wedlock, as stipulated in the Marriage Law, Law No. 1 of 1974. In Chapter IX, Article 43 paragraph (1) of the Law, it is stated that children born out of wedlock only have a civil relationship with the mother and the mother's family. However, with the issuance of Constitutional Court Decision No. 46/PUU-VIII/2010, children born out of wedlock now have a civil relationship with the mother, the mother's family, as well as the father, if the paternity can be proven based on science and technology or other legal evidence that establishes a blood relationship, including a civil relationship with the father's family.⁵

However, Ibn Taimiyah's view is contrary to Article 43 of Law Number 1 of 1974 concerning Marriage, which states that children born out of wedlock only have civil relations with their mothers and their mothers' families. The view of Ibn Taimiyah is rather in line with the Constitutional Court Decision Number 46/PUU-VIII/2010, which discusses that children born out of wedlock can have blood relations, including civil relations, with their biological fathers and their families, provided that there is recognition or proof through science, technology, or other means.⁶

In light of this explanation, the study sought to examine the validity between the Constitutional Court Decision Number 46/PUU-VIII/2010 and the view of Ibn Taimiyah. The study concerned with the status of children born outside of marriage following the issuance of the Constitutional Court Decision Number 46/PUU-VIII/2010 and its relevance to Ibn Taimiyah's opinion.

A number of studies have discussed this particular issue. A study by Megawati in 2017 analyzed the Constitutional Court Decision Number 46/PUU-VIII/2010 concerning children born outside of marriage in the perspective of the Law Number 35 of 2014 on child protection and Islamic law. Megawati's study is different from the current study as her study focused on the relationship between the Constitutional

³Ibn Qayyim al-Jauziyah, *Zadul Ma'ad*, Translation by Amiruddin Djalil, Jilid 7 (Jakarta: Griya Ilmu, 2006), p. 22.

⁴Ibn Qayyim al-Jauziyah, *Zadul Ma'ad*, p. 23.

⁵Muhammad Arifin, "Kedudukan Anak Luar Kawin: Analisis Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 tentang Uji Materi terhadap pasal 43 ayat 1 UU nomor 1 tahun 1974 tentang Perkawinan," *Ahkam* 5, No. 1, (2017). Ahmad Fariz Hasanuddin, "*Anak Luar Nikah Dalam Undang-Undang Perkawinan No 1 Tahun 1974 (Analisis Putusan MK Tentang Anak Luar Nikah)*" [Bachelor's thesis], Universitas Islam Negeri Jakarta, 2014.

⁶Megawati, "Analisis Putusan Mahkamah Konstitusi Nomor 46/Puu-Viii/2010 Mengenai Anak Luar Kawin Perspektif Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan anak Dan Hukum Islam", *Jurnal QIYAS* 2, No. 2 (2017).

Court Decision Number 46/PUU-VIII/2010 with the Child Protection Law and the position of children born outside of marriage in Islamic law.⁷

Another study by Nasaiy Aziz and Muksal Mina in 2017 examined the *nasab* of children born out of wedlock based on MPU Aceh Fatwa Number 18 of 2015 and Constitutional Court Decision Number 46/PUU/VIII/2010. Their study differs from the current study in that it focused on the analysis of marriage lineage, using *fatwa* as a theoretical framework and the Constitutional Court decision as the analyzed material.⁸

Further, Siti Nurbaeti reviewed hadith on the *nasab* of children born from *zina* in the perspective of Ibn Qayyim Al-Jauziyyah. The difference of her study from the current study is that she discussed Ibn Qayyim al-Jauziyyah's opinion that children born out of wedlock still have a kinship relationship with the man who fathered them, but under certain conditions, the child is not considered related to the man for inheritance and maintenance purposes.⁹

Another study by Rokhmadi investigated the status of children born out of wedlock after the Decision of the Constitutional Court No. 46/PUU-VIII/2010. The difference of his study from the current study is that the study concerned with the status of children born outside marriage after the enactment of the Constitutional Court Decision No. 46/PUU-VIII/2010, from previously only having a civil relationship with their mother to having another civil relationship with their father. The study concludes that this decision is final and should be implemented in Indonesia.¹⁰

This present study employed a theoretical juridical method, utilizing legislative and Islamic law approaches.¹¹ The study examined and analyzed data sources comprising writings from various references, such as verses of the Qur'an, religious texts, books, journals, articles, and other references related to the research object. The study focused on three main aspects: firstly, the content of the Constitutional Court Decision No. 46/PUU-VIII/2010; secondly, Ibn Taimiyah's opinion on children born out of wedlock; and thirdly, the relevance of the Constitutional Court Decision No. 46/PUU-VIII/2010 regarding the status of children born out of wedlock to Ibn Taimiyah's view.

⁷ Megawati, "Analisis Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010.

⁸ Nasaiy Aziz and Muksal Mina, "Nasab Anak yang Lahir diluar Nikah: Analisis Fatwa MPU Aceh Nomor 18 Tahun 2015 dan Keputusan MK Nomor 46/PUU/VIII/2010," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 1, No. 1 (2017).

⁹ Siti Nurbaeti, "Hadis Tentang Nasab Anak Zina Dalam Perspektif Ibnu Qayyim Al-Jauziyyah", *Jurnal Holistic al-hadis* 4, No. 2 (2018).

¹⁰ Rokhmadi, "Status Anak Di Luar Perkawinan Pasca Putusan Mahkamah Konstitusi No. 46/Puu -Viii/2010," *Jurnal-SAWWA* 11, No. 1 (2015).

¹¹ Zainuddin Ali, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, 2015.

The Concept of *Nasab* in Islamic Law

The word *nasab* in Arabic language comes from the verbs *يُنْسَبُ* – *نَسَبًا* – *نَسَبَ* in the sentence *نَسَبَ الرَّجُلُ* meaning *وَصَفَةً وَذَكَرَ نَسَبَهُ* which describes characteristics and mentions lineage. The word *nasab* is a singular form, while its plural forms can be *nisab*, similar to the word *سِدْرَةٌ* changing to become *سِدْرٌ*, or *nasab*, which is the same as the word *عُرْفَةٌ* changing to be plural into *عُرْفٌ*.¹² Another plural form of *nasab* is *ansab*, as mentioned in the verse from the Qur'an:

فَإِذَا نُفِخَ فِي الصُّورِ فَلَا أَنْسَابَ بَيْنَهُمْ يَوْمَئِذٍ وَلَا يَتَسَاءَلُونَ¹³

“Then, when the Trumpet will be blown, there will be no *nasab* (lineage) between them on that Day, nor will they (even care to) ask about one another.”

The majority of *fiqh ulema* state that *nasab* is one of the strong foundations in establishing a marital life that binds individuals based on blood unity.¹⁴ In addition, Wahbah az-Zuhaili defines *nasab* as a strong support for establishing family relationships based on blood unity or the consideration that one is part of another, e.g., a child is part of his father and the father is part of his grandfather. Thus, people who share the same lineage also have blood ties.¹⁵ The reasons for the determination of lineage have been regulated in Islam, including valid marriage, *fasid* (void) marriage, and evidence-based.

a. Valid marriage

The *ulema* unanimously agree that the *nasab* of a child born to a woman within a valid marriage can be attributed to the woman's husband. This is in line with a hadith of Prophet Muhammad SAW:

حَدَّثَنَا مُحَمَّدُ بْنُ جَعْفَرٍ حَدَّثَنَا شُعْبَةُ عَنْ مُحَمَّدِ بْنِ زِيَادٍ قَالَ سَمِعْتُ أَبَا هُرَيْرَةَ يَقُولُ سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ الْوَالِدُ لِصَاحِبِ الْفِرَاشِ وَاللِّعَاطِرِ الْحَجَرُ¹⁶

Narrated by Muhammad bin Ja'far, narrated to us by Shu'bah from Muhammad bin Ziyad, he said: I heard Abu Hurairah said: "I heard the Messenger of Allah (peace be upon him) say, 'The child belongs to the owner of the bed (husband), and for the adulterer, the punishment is stoning.'" (Narrated by Ahmad 8934)

The hadith above emphasizes that the *nasab* of a child born in a valid or *fasid* marriage is attributed to the father. However, this rule does not apply to adulterers, as *nasab* is a great blessing and gift from Allah SWT. An adulterous man will not have the *nasab* with the child born as a result of his act. In fact, an adulterer whose

¹² Rokhmadi, "Status Anak Di Luar Perkawinan, p. 22

¹³ Kementerian Agama, Al – Qur'an dan Terjemahan, (Bandung: Sygma, 2009), p. 142

¹⁴ Kementerian Agama, Al – Qur'an dan Terjemahan, (Bandung: Sygma, 2009), p. 145

¹⁵ Perpustakaan Nasional RI, *Ensiklopedia Hukum Islam*, Ed. Abdul Aziz Dahlan, Jilid 4, Cet 6, (Jakarta: Ihtiar Baruwan Hoeve, 2003), p. 1304

¹⁶ Imam Ahmad Bin Hambal, *Musnad Al-Imam Ahmad Bin Hambal*, Translated by Adil Al-Mursyid, 1st Ed., (Beirut: Muassasah Ar-Risalah, 2001).

status is *muhsan* (married) must be punished by stoning, which is being pelted with stones until death. And if he falls into the category of *ghairu muhsan* (unmarried), then he will be punished by whipping 100 times, as Allah SWT says in the Qur'an Surah An-Nur (24) verse 2.

b. *Fasid* marriage

A *fasid* (void) marriage refers to a marriage conducted under conditions that do not meet the requirements,¹⁷ such as a marriage without a *wali* (guardian). However, according to Hanafi *ulema*, a *wali* is not a condition for the validity of a marriage, and the same applies to a marriage without witnesses, for the *madhhab* (schools of thought) that permit it. While the status of a *fasid* marriage is clearly not the same as a valid marriage, in the matter of *nasab*, *fiqh ulema* agree that the establishment of the *nasab* of a child born in a *fasid* marriage is the same as that of a child born in a valid marriage.

c. *Shubhat* sexual intercourse

Shubhat sexual intercourse is intercourse between a man and a woman outside of marriage, whether of valid or *fasid* marriage; yet, it cannot be called *zina* and its ruling is unclear between *haram* or *halal*. An example of this practice is a man marries a woman he has never met before. The woman has a twin sister who looks exactly like her, and someone informs the groom that this woman is his wife. Because he has never met or seen her in his entire life, even through photos, the groom is convinced that the woman in front of him is indeed his wife, and he has sexual relations with her. However, it turns out that the woman is not his wife, but his wife's twin sister. Therefore, in this strange case, sexual intercourse between the two is considered *shubhat* (i.e., a state of doubt about the legality of an act). Although such an example is highly unlikely to occur in modern times, it is not impossible.

Islam explains that there are several ways to establish *nasab*, which have been elaborated on in detail by the *ulema* from various *madhhab*. There are at least three ways to establish a child's *nasab* to the parents, especially to the biological father: through a valid or *fasid* marriage, through acknowledgment, and through proof.¹⁸

a. Establishing *nasab* through valid or *fasid* marriage

Valid or *fasid* marriages are among the factors that determine *nasab*. In practice, *nasab* is determined after marriage, even if the marriage is flawed.

b. Establishing *nasab* through acknowledgment

Ulema distinguish between the acknowledgment of a child and the acknowledgment of someone other than a child, such as a sibling, an uncle, or a grandfather. If a man acknowledges that a young child is his child, or conversely, a young child who has reached *baligh* (i.e., puberty in the view of *jumhur ulema*) or *mumayyiz* (i.e., age of discernment between right and wrong in the view of Hanafi

¹⁷ Wahbah Az-Zuhaili, *Fiqh Islam...*, p. 36.

¹⁸ Wahbah Az-Zuhaili, *Fiqh Islam...*, p. 38.

ulema) acknowledges a man as his father, then the acknowledgment can be justified and the child can be attributed to the man, if the following conditions are met:

- 1) The *nasab* of the child making the acknowledgment is unclear
If the father is known, the acknowledgment is invalid, because the Prophet Muhammad SAW condemned those who acknowledged and made another person's child theirs.
- 2) Logical acknowledgement
This means that the person acknowledging the fatherhood of the child is of a sufficient age to be the father of the child being acknowledged as his *nasab*.
- 3) The man acknowledging the child must assert that the child is not the result of *zina*, as *zina* cannot be the basis for establishing *nasab*.¹⁹
Thus, if the conditions above are fulfilled, then the father's acknowledgment of *nasab* is valid and the child is entitled to maintenance, education as appropriate, and inheritance as his child.

c. Establishing *nasab* through proof

The evidence that can be used to determine *nasab* is the testimony of two men, or one man and two women according to Abu Hanifah. However, according to Malikiyyah, it is sufficient with the testimony of two men, while according to Shafi'iyah, Hanabilah and Abu Yusuf, it must be with the testimony of all heirs. Regardless of the legal contradiction in determining the *nasab* of a baby, in this modern era, perhaps the question of whose baby it is and to whom it is *nasab* to, can be resolved with a laboratory test for compatibility with the father's blood. Today, DNA testing can also be carried out. Thus, DNA testing can be a tool for determining a person's *nasab*. However, even if a DNA test is conducted and there is a match between the father and the child, when the conception was made through an un-Islamic method or not in a valid marriage or as a result of *zina*, then the child's *nasab* cannot be established and is considered invalid.²⁰

Review of the Constitutional Court Decision on Children Born Out of Wedlock

Decision Number 46/PUU-VIII/2010 is a decision issued by the Constitutional Court, which emerged from a material review (i.e., judicial review) of Article 2 paragraph (2) and Article 43 paragraphs (1) and (2) of Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law). Article 2 of the Marriage Law states, "(1) *Marriage is valid if it is carried out according to the respective laws and beliefs*"; "(2) *Each marriage is recorded according to the applicable laws and regulations*". Article 43 of the Marriage Law stipulates that, "(1) *Children born outside of marriage only have a civil relationship with the mothers and the mother's family*".

¹⁹ Nurul Irfan, *Nasab Dan Status Anak...*, p. 99

²⁰ Nurul Irfan, *Nasab Dan Status Anak...*, p. 103.

The judicial review application was filed by the applicant Hj. Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim with her son named Muhammad Iqbal Ramadhan bin Moerdiono. In this case, Muhammad Iqbal Ramadhan is a son born out of wedlock (*siri* marriage) between Aisyah Mochtar and Moerdiono. However, the two later separated (divorced) and Muhammad Iqbal Ramadhan's status of being born out of unregistered marriage, and thus, not recognized by the state, became illegitimate and did not qualify to have a legal relationship with his father (Moerdiono) as intended in Article 43 of the Population Law.²¹ For this reason, Aisyah Mochtar as the applicant along with Muhammad Iqbal filed a judicial review for both Article 2 paragraph (2) and Article 43 of the Marriage Law. According to the applicant, the two articles were contrary to the provisions of the 1945 Constitution.

Aisyah Mochtar argued that the child's civil affairs described in Article 43 of the Marriage Law have been unconstitutional and conflicting with the provisions of Article 28B paragraph (2) of the 1945 Constitution, which states, "*Everyone has the right to life, to grow and develop, and to be protected from violence and discrimination.*" She argued that eliminating the legal status of a child's civil rights from the father, whose marriage was valid before religion, in accordance with the intent of Article 2 of the Marriage Law, should be considered a form of discrimination. Aisyah Mochtar stated that her marriage was conducted in accordance with Islamic law and the norms of the religion, hence it was a legally recognized marriage. The Applicant's marriage was not an act of *zina*. Likewise, the legal status of the child born from the marriage (i.e., Muhammad Iqbal) was the same as that of a child born from a legal marriage. Therefore, she demanded that by enforcing Article 43 of the Marriage Law, the constitutional rights of Aisyah Mochtar and her child (i.e., Muhammad Iqbal) be legally recognized on the grounds of her marriage under Article 2 and for the violation of the legal status of the child guaranteed by Article 28B and Article 28D paragraph (1) of the 1945 Constitution.

Referring to the Constitutional Court Decision No. 46/PUU-VIII/2010, the petition of Aisyah Mochtar has two key points, namely:

- 1) The petition concerns the validation of marriage according to state law as stipulated in Article 2 paragraph (2) of the Marriage Law.
- 2) The petition concerns the determination of the child's civil rights as stipulated in Article 43 of the Marriage Law.

If these two petitions for material review/judicial review are examined carefully, they are interrelated. On the one hand, the petition examines the establishment of marriage as a valid evidence required by positive law; while on the other hand, it examines the legal consequences of not validating the marriage as claimed by the petitioner (i.e., Aisyah Mochtar) herself. Regarding the submitted petitions, the Constitutional Court granted some of the applicant's petition and rejected another. The petition rejected by the Constitutional Court was for Article 2 paragraph (2) of the Marriage Law, while the petition accepted by the Constitutional

²¹Decision Sheet Number: 46/PUU-VIII/2010, p. 4.

Court was for material review on Article 43 of the Marriage Law. The provisions of the Constitutional Court decision have thus changed the wording of Article 43 of the Marriage Law, which previously stated that, “*children born outside of marriage only have a civil relationship with the mother and the mother’s family*”, to become, “*children born outside of marriage have a civil relationship with the mother and the mother’s family as well as with the man as the father that can be proven through science and technology or other evidence according to law, to indicate blood relations, including civil relations with the father’s family.*” With this legal basis, children born out of wedlock are still the responsibility of the man who is recognized as the biological father of the children.

The consequence of the Constitutional Court decision is that there is no confirmation by the Constitutional Court regarding the status of children born outside of marriage, whether the children in concern are children resulted from underhand (unregistered/*siri*) marriages as per a quo petition from Machica Mochtar, or children born from *zina*, or both.

From the contents of the decision and also the considerations of the Constitutional Court judges, it is indicated that children born out of wedlock (whether from unregistered marriage or from *zina*) have a civil relationship with the biological father. Even though the request for judicial review relates to the status of children born from unregistered marriages, the judges’ decision is generally applicable and also applies to children resulted from *zina*. The condition is that there is a blood relationship between the child and the biological father, which is proven by means of science, technology or other evidence as regulated by the law. The Constitutional Court decides that the child (the child born from *zina* and the child born from unregistered marriage) is not an illegitimate child and is also entitled to a birth certificate from the state and is entitled to inheritance from the father.

The Constitutional Court rules that by nature, insemination that actually causes fertilization is not possible without a contact between an ovum and a spermatozoon, either through sexual intercourse or other means in accordance with scientific and technological developments. Therefore, it is not appropriate and not fair to make legal rules that stipulate that a child born from pregnancy due to sexual intercourse outside of marriage only has a relationship with the woman as the mother. It is also inappropriate and unfair to exempt any legal liability on men who have sexual intercourse that results in pregnancy and the birth of the child from their responsibility as a father and at the same time exempt any right of the child from having relations with the man as the father. Moreover, modern technological developments have made it possible to prove that a child is the child of a certain man. The legal consequence of a legal event in which the birth of a child is due to sexual intercourse between a woman and a man includes the rights and obligations of the legal subjects, which involve the child, mother, and father.²²

²²Constitutional Court Decision Number 46/PUU-VIII/2010, p. 35.

The Constitutional Court also considers in its decision that a relationship between a child and a man as a father does not rely only on marriage bond, but also on evidence proving the blood relationship of the child and the man as a father. Regardless of the administrative procedures of marriage, a child born must receive legal protection. If there is no legal protection, the most harmed party is the child born outside of marriage, and the child is not guilty being born in this world against his or her will. Children born without clear legal status often experience unfair treatment and stigma in society. The law shall provide protection and legal certainty that is fair to the status of a child born and all parties involved, even though the validity of the marriage is still disputed.²³

From this explanation, it is obvious that the Constitutional Court decides that there is no correlation between the exemption of responsibility of the father to his child and the validity of marriage. Moreover, the biological relationship between a father and his child can be proven through a scientific research process using proper scientific knowledge and technology, e.g., DNA testing,²⁴ with an accuracy level of 99.9%.²⁵

After considering the arguments of the applicant, along with the relevant laws and regulations pertaining to the Applicant's petitions, the Constitutional Court hereby ruled on the case of Machica Mochtar as follows:²⁶

- 1) The Applicant's petitions are partially granted.
- 2) Article 43 of the Marriage Law which states that, "*A child born outside of marriage only has a civil relationship with the mother and the mother's family,*" is contrary to the 1945 Constitution, insofar as it implies excluding a civil relationship with the man who can be proven to be the father through scientific and technological means and/or other evidence according to applicable laws to have a blood relationship as a father.
- 3) Article 43 of the Marriage Law which states that, "*A child born outside of marriage only has a civil relationship with the mother and the mother's family,*" does not have any legal force insofar as it implies excluding a civil relationship with the biological father who can be the father through scientific and technological means and/or other evidence according to applicable laws to have a blood relationship as a father; and thus, its wording must be changed to, "*A child born outside of marriage has a civil relationship with the mother and the mother's family, as well as with the man as the father that can be proven through science and technology and/or other evidence according to law, to indicate blood relations, including civil relations with the father's family.*"

²³Constitutional Court Decision Number 46/PUU-VIII/2010, p. 35.

²⁴Al Yasa' Abubakar, *Metode Istislahiah: Pemanfaatan Ilmu Pengetahuan dalam Usul Fiqh*, (Jakarta: Kencana Prenada Media Group, 2016), p. 371.

²⁵Imanuddin, *Metode Penetapan Nasab Melalui Al-Qafah Perspektif Maqasid Syari'ah*, (Banda Aceh: Pascasarjana UIN Ar-Raniry, 2021), p. 5.

²⁶Constitutional Court Decision Number 46/PUU-VIII/2010, p. 37.

The decision of the Constitutional Court bears legal consequences for children born out of wedlock, whether born from *siri* marriage or from *zina*, to have civil relations with their fathers. This legal conclusion arises due to no specific mention of the Constitutional Court's statement for "children born out of wedlock" as being children from *siri* marriage or not. As long as the child's paternity can be proven, the child can become the responsibility of the father. This also applies to children born out of wedlock, whether from *zina* or *siri* marriage, that they still have *nasab* ties with the consequences of being in a civil relationship with the man as their biological father.

The View of Ibn Taymiyyah on the *Nasab* of Children Born Out of Wedlock

1. Biography of Ibn Taymiyyah

The full name of Ibn Taymiyyah is Shaykh al-Islam Taqiyyuddin Abu al-Abbas Ahmad bin Abdul Halim bin Abd al-Salam bin Abdullah bin Abi al-Qasim al-Khidhr bin Muhammad bin al-Khidhr bin Ali bin Abdullah Ibn Taymiyyah al-Harrani al-Dimashqi al-Hanbali. Ibn Taymiyyah was named after his great grandfather, Muhammad bin al-Khidhr, whose famous for his Hajj journey from Taimaa'. When his grandfather came back from Hajj, his wife bore a daughter to whom he named as Taymiyyah. Since then, her descendants have been named Ibn Taymiyyah as a commemoration of their great grandfather's Hajj journey.²⁷

Ibn Taymiyyah was born in Harran, for which reason at the end of his name he is also often attributed the name of the city of his birth with the designation "Al-Harrani". He was born on the 10th of Rabi'ul Awwal 661 H/1263 M and died in the prison of Damascus on the 20th of Zulqaidah 728 H which corresponded to 1328 CE.²⁸

Ibn Taymiyyah came from a family of scholars and imams of great renown. His father and grandfather were renowned scholars in the Hanbali school of thought and were very close to the Shafi'i school. He was known as an ascetic scholar. As a result, many people sought to study with him, both directly and through his works.

Ibn Taymiyyah was a *wara'* (pious) scholar, a *muttaqi* (devoted) student, and a man of *zuhud* (asceticism). He was known as a *muhadith* (hadith scholar), a *mufasssir* (exegete of the Qur'an), a *faqih* (jurist), a theologian, and a philosopher with a vast knowledge. By the age of 10, Ibn Taymiyyah had memorized the Qur'an and mastered *Musnad Imam Ahmad* as well as the books *Kutub al-Sittah* and *Mu'jam al-Tabrani*. He also mastered various disciplines of knowledge, including *tafsir* (exegesis), philosophy, *tasawwuf* (sufism), Arabic language, and *khat* (Arabic calligraphy).

As a prominent scholar, Ibn Taymiyyah acquired knowledge from renowned *ulema*, including Qasim bin Abu Bakr bin Al-Qasim bin Ghunaimah Al-Irbili,

²⁷Ardiansyah, "Pengaruh Mazhab Hanbali dan Pemikiran Ibnu Taimiyah dalam Paham Salafi". *Jurnal Analytica Islamica* 2, No. 2 (2013), p. 249- 251.

²⁸Akhmad Satori and Sulaiman Kurdi, *Sketsa Pemikiran Politik Islam*, (Yogyakarta: Budi Utama Deepublish, 2016), p. 103.

Ibrahim bin Ismail bin Ibrahim Al-Dairji Al-Qurayshi Al-Hanafī, Imam Ahmad bin Hanbal, Zainuddin Abu al-Abbas Ahmad bin Abdurdaim, Taqiyuddin Abu Muhammad Ismail bin Ibrahim bin Abi Al-Shur al-Tanukhi, and Ibn Qudamah al-Maqdisi. Further, among his distinguished students are Sharifuddin Abu Abdullah Muhammad al-Maghili, Jamaluddin Abu al-Hajjaj Yusuf bin al-Zaikki, Shamsuddin Abu Abdullah Muhammad bin Ahmad bin Abdul Hadi, Shamsuddin Abdullah Muhammad bin Ahmad bin Usman Al-Zahibi, Ibn Qayyim Al-Jawziyyah, and Salahuddin Abu Said Khalil bin Al-Amir Saifuddin Kaykaylaidi.²⁹

Ibn Taymiyyah adhered to the Hanbali *madhhab*. Throughout history, he was considered one of the most influential Salafī *ulema*, both before and after his time. He was associated with other prominent Salafī *ulema* such as Abdullah ibn Abbas, Abdullah ibn Umar, Umar ibn Abdul Aziz, al-Zuhri, Ja'far al-Sadiq, and the four *imams* (i.e., Imam Hanafī, Maliki, Shafī'i, and Ahmad ibn Hanbal) and their followers. Ibn Taymiyyah himself was also included among these prominent Salafī *ulema*.

Ibn Taymiyyah's thoughts and contributions in the fields of Islamic law, theology, and other disciplines have had a profound impact on the Islamic world, both during his time and to this day. However, due to the influential nature of his ideas, he also faced opposition and controversy, leading to his imprisonment in Cairo in 1306 CE. Ibn Taymiyyah remained incarcerated until his death.

As a prominent *ulema*, Ibn Taymiyyah engaged in various intellectual pursuits throughout his life, including:³⁰

- a. Book: *Majmu' Fatawa* (Collection of Legal Opinions), delving into Islamic jurisprudence (*fiqh*)
- b. Book: *Al-Radd 'ala al-Mantiqiyyin* (Refutation of the Logicians)
- c. Book: *Muqaddimah fi Usul al-Tafsir* (Introduction to the Principles of Qur'anic Interpretation), providing a foundation for understanding Qur'anic exegesis
- d. Book: *Al-Tibyan fi Nuzul al-Qur'an* (Explanation of the Revelation of the Qur'an), contributing to the field of Qur'anic exegesis
- e. Book: *Al-Faraq bayna Awliya' al-Rahman wa Awliya' al-Shaytan* (The Distinction Between the Friends of the Merciful [God] and the Friends of Satan), addressing the topic of Islamic mysticism (*tasawwuf*)
- f. Book: *Siyāsah al-Shar'iyyah* (Governance According to Islamic Law), exploring Islamic political thoughts.
- g. Book: *Al-Aqida al-Wasitiyyah* (The Middlemost Creed), delving into Islamic theology (*aqidah*)
- h. Book: *Rasa'il fi Usul al-Din* (Epistles on the Principles of Religion), contributing to the field of Islamic theology (*usul al-din*)

²⁹Syaikh Ahmad Farid, *60 Biografi Ulama Salaf*, Translation by Masturi Irham and Asmu'i Taman), (Jakarta: Pustaka al-Kautsar, 2019), p. 807-808.

³⁰Ardiansyah, *Pengaruh Mazhab...*, p. 249- 251.

- i. Book: *Al-Hisba fi al-Islam* (The Role of the Market Inspector in Islam), addressing Islamic ethics (*akhlaq*).
- j. Book: *Minhaj al-Sunnah al-Nabawiyah* (The Method of the Prophetic Tradition), focusing on the study of Hadith.³¹

2. Ibn Taymiyyah's Opinions on the *Nasab* Status of Children Born outside of Marriage

The majority of *ulema* agree that the *nasab* status of children born outside of marriage is primarily linked to their maternal side. However, there are differing opinions among the *ulema* regarding the status of the child in relation to the father who acknowledges paternity through the process of *istilhaq* (recognition of the child). The *nasab* status of children born from *zina* or out of wedlock remains a subject of debate among the *ulema*. The discussion revolves around whether or not the *nasab* of a child born out of wedlock is attributed to the male adulterer who causes the birth of the child.

In this context, Saiyyid Al-Saqa, a legal expert from Sudan, mentions that there are two different views on the *nasab* status of the child born from *zina*. *Jumhur ulema* argue that the *nasab* of the child cannot be attributed to any man, including to the male adulterer who causes the birth of the child. Others view that the child's *nasab* can be linked to the male adulterer provided that he acknowledges paternity. The latter opinion is held by a minority of *ulema*, including Urwah bin Zubair, Sulaiman bin Ya'ishar, Abu Hanifah, Ibn Ashim, Hasan Al-Basri, Ibn Sirin, Al-Nakh'i, Ishaq Ibn Rawahah, Ibn Taymiyyah, and Ibn Qayyim.³²

Saiyyid Al-Saiqai's explanation indicates that the opinion that the *nasab* of children born from *zina* can be attributed to the biological father is not exclusive to the view of Ibn Taimiyyah. Some *salafi ulema*, such as Ibn Qayyim Al-Jauziyyah who was a loyal student of Ibn Taimiyyah, also hold a similar view. According to Ibn Taymiyyah, the *nasab* of a child born from *zina* or born out of wedlock can be attributed to the male adulterer who causes the birth of the child only if two methods are applied:

1) Acknowledgement (*istilhāq*)

Istilhāq refers to the voluntary acknowledgment by a man of paternity over a child born out of wedlock. The acknowledgment establishes a legal relationship between the father and the child, granting the child inheritance rights and other legal protections. If the man does not acknowledge paternity, the *nasab* of the child does not exist, and the child is not entitled to inherit from the man, along with other entitlements.

Ibn Taymiyyah has also discussed the status of a man who has sexual intercourse with a woman who was previously a slave and later freed without marriage. He states that the intercourse is a *zina* act, and thus, *haram*. The child's

³¹Syaikh Ahmad Farid, *60 Biografi...*, p. 809.

³²Saiyyid Saqa, *Walad Al-Zina*, (London: E-Kutub Ltd, 2022), p. 62.

born is that of *zina* and the child is not entitled to inherit from the father or any other relatives.³³

Ibn Taimiyyah argues that a person cannot claim the *nasab* of a child to himself if the child is not from his own. This can be understood from the following points: A person cannot acknowledge (*istilhāq*) the *nasab* of a child if the child is not from his seed. Likewise, if the womb is not cleansed, there is a possibility that semen from a fornicator may have adhered. In addition, there are two opinions regarding the claim of *nasab* of a child by a fornicator from a pregnant woman while she does not belong to *firasy*. The Prophet said: “*The child is for the firasy (bed) and the fornicator gets nothing.*” Therefore, the child is linked to the owner of the bed, not to the male fornicator. If the woman has no *firasy*, then this hadith does not apply.³⁴

The recognition of *nasab* of a child is not granted to someone whose child is not from his seed (sperm). This means that an individual who has no marital or blood relationship with the child cannot have any *nasab* ties with the child of *zina*, even if the man acknowledges paternity through *istilhāq*, unless the *istilhāq* is performed by the male fornicator himself for the child of *zina* he fathered. This opinion is supported by the teachings of Ibn Taymiyyah in his book *Majmu’ Fatawa*:

أن ولد الزنا يلحق بأبيه الزاني إذا استلحقه.³⁵

“*A child born from zina is bound to the adulterous father if he acknowledges the child as his.*”

In addition, Ibn Taymiyyah also has an opinion regarding the status of a child born from *zina* that is recognized by the male fornicator. This recognition results in the child’s *nasab* being established, as explained by Ibn Taymiyyah in the following statement:

إن كان الولد استلحقه في حياته، وقال: "هذا ابني" لحقه النسب.³⁶

“*If the adulterer acknowledges the child (of zina) during his lifetime, and says, ‘This is my son,’ the nasab is established for him.*”

According to Ibn Taimiyyah, an unmarried woman who gives birth outside of marriage can establish her child’s paternity to the man she claims is the father through *istilhaq*. This means that the man acknowledges that the child born outside of wedlock is his own. This is an important aspect that has consequences for the ruling of *zina*. If the man does not recognize the child through *istilhaq*, the *zina* act cannot be the basis of establishing *nasab*. Therefore, what determines the legitimacy of a child’s *nasab* in this case is not the act of *zina* itself, but rather the man’s

³³Ibn Taimiyah, *Al-Fatawa Al-Kubra*, Juz 4, (Beirut: Dar Al-Kutb, 2010), p. 405.

³⁴Ibn Taimiyah, *Majmu’ah Al-Fatawa: Kumpulan Fatwa Ibn Taimiyah*, Translation by Misbahm Jilid 26, (Jakarta: Pustaka Azzam, 2014), p. 781-782.

³⁵Ibn Taimiyah, *Majmu’ Fatawa*, Juz 32, (Riyadh: Mamlakah Arabiyyah Al-Su’udiyah, 2004), p. 139.

³⁶Ibn Taimiyah, *Majmu’ Fatawa*, Juz 31, p. 215.

acknowledgment of paternity. The process of *istilhaq* is voluntary effort (*ikhtiyar*), and thus, the male fornicator is free to choose whether or not to carry it out.

2) Similarity test (*al-qafah*)

Al-qafah is a similarity test that compares the physical resemblance of a child to the alleged father who has filed a claim of paternity for a child born from *zina*.³⁷ This method is only used when there are more than one man claiming paternity for the same child through *istilhāq*. The *al-qafah* method is only to support a paternity claim through *istilhāq*. It positions as a secondary method when there are two or more claims, each recognizing paternity. This method cannot be used solely or independently to establish *nasab* children outside of marriage because its nature is dependent to the main method (*istilhāq*).

Ibn Taimiyyah only acknowledges *istilhāq* to establish the *nasab* of a child born out of wedlock to a man as the biological father. However, this is different if the man who committed *zina* refuses to acknowledge the child, born by a woman with whom he had *zina*, as his own. For example, a man and a woman are proven to have committed *zina* through four witnesses, and the woman is also known to be pregnant. In this case, if the child is later born, the child's *nasab* status cannot be linked to the man solely based on the evidence of *zina* they have committed, before the acknowledgment (*istilhāq*) from the man voluntarily and without any coercion. Thus, it is clear that Ibn Taimiyyah considers the *nasab* status of a child born out of wedlock or from *zina* can be linked/established to the man who committed *zina* and caused the child to be born only through the process of child acknowledgment (*istilhāq*).

The consequences of establishing *nasab* under Islamic law can lead to the establishment of other legal status, such as *mahram* relations, inheritance rights, civil rights, and maintenance obligations. In this context, Ibn Taymiyyah argues that the fornicator's recognition (*istilhāq*) of a child born out of wedlock may also result in other legal status, e.g., *mahram* relations, inheritance rights, maintenance obligations, and guardianship. In terms of kinship relations, the child becomes related to the father's side of the family, including paternal uncles, aunts, and cousins. The child also inherits from the father's estate and is entitled to maintenance from the father. The father also has the right to guardianship of the child.

Based on the explanation above, Ibn Taimiyah has in fact viewed that *nasab* can only be established through legitimate marriage. Sexual relations that result in the birth of children outside of marriage actually sever the *nasab* ties of the child with the male lineage. However, the *nasab* of the child from *zina* (i.e., child born outside of marriage) can be determined through *istilhāq* by the male fornicator, which caused the child to be born, as he acknowledges that the child is his. In this context, *nasab* ties based on recognition by the father thus lead to other legal consequences, including inheritance rights, maintenance obligations, guardianship, and *mahram* relationships.

³⁷ Ibn Taimiyah, *Majmu' Fatawa...*, p. 139.

The Relevance of Ibn Taimiyah's View on the Constitutional Court Decision Regarding Children Born Out of Wedlock

Extramarital children often cause a lot of controversy in society, especially regarding the *nasab* status of the children and their relationship with their biological fathers. The controversy surrounding the *nasab* status of an extramarital child (i.e., born out of wedlock) with the biological father arises from two dichotomous aspects. On the one hand, social reality demands legal protection for extramarital children from various forms of violence, including the threat of being abandoned by their mothers or biological fathers, which can lead to uncertainty, anxiety, and negative stigma in their surroundings, as well as discriminatory treatment. On the other hand, Islamic legal norms negate (i.e., reject, deny, and invalidate) the *nasab* relationship between an extramarital child and the fornicator father; thus, legally, the child does not have a father in the sense of Islamic law. To obtain a legal *nasab* relationship, it can only be established through a valid marriage according to Islamic religious values, not through fornication.

Drawing upon the views of Ibn Taymiyyah and the previous rulings of the Constitutional Court, it can be understood that there are aspects of similarity and essential differences between their positions. In terms of similarity, both Ibn Taymiyyah and the Constitutional Court recognize the possibility of a *nasab* connection between a child born out of wedlock and the male involved in *zina* as the biological father. The recognition of this kinship tie needs not be contingent and conditional upon determining the cause of the child's birth, whether it is the result of *zina* or legitimate marriage.

In terms of the differences, Ibn Taymiyyah's opinion and the Constitutional Court decision differ in two aspects:

1) The Aspect of *Nasab* Determination Process

Ibn Taymiyyah acknowledges only one method to determine the *nasab* of a child born outside of wedlock with the alleged father, i.e., *istilhaq*. The *istilhaq* method can be applied simply by recognizing *walad al zina* (the child of *zina*) as one's own, by saying, "*Hadza ibni*" or "*This is my son*". If there are claims from two or more individuals regarding the paternity of the child, the acknowledgment process remains the same. However, to determine which of the claimants has a stronger claim, Ibn Taymiyyah proposes another method, i.e., *al-qafah* or *al-qiyafah*, identifying physical resemblance between the child and the claimant.³⁸ The second method, *al-qafah*, is only used to strengthen the acknowledgment (i.e., *istilhaq*) and serves as a supplementary method when there are multiple claimants. *Al-qiyafah* cannot be used independently to establish *nasab* for extramarital children as it is dependent and rather supplementary. This is in contrast to the *istilhaq* method, which serves as the primary or main method.

³⁸Ibn Taimiyah, *Majmu' Fatawa...*, p. 139.

On the other hand, according to the Constitutional Court judges, the process of determining the *nasab* (blood ties) and the civil relations of a child with the biological father can be carried out through scientific and technological means, and in this case is the DNA testing. In the material of the Constitutional Court decision, there is no explanation regarding the use of DNA testing as a means of proving *nasab* ties; however, modern science and technology that serves to determine the identity of a person's lineage with another can only be performed through DNA testing. Therefore, the use of science and technology means may refer to the DNA testing, or other evidence that can ensure the blood relationship and connection of the child and the father.

Nevertheless, blood ties based on DNA test evidence are fundamentally different from *nasab* ties. This distinction is proposed by Imanuddin, who differentiates between blood ties (*rawabith al-dam*) and kinship in the context of *nasab* (Islamic lineage). Using the term "blood ties" to refer to *nasab* is generally inaccurate as *nasab* itself is a legal term in Islam with specific implications. Individuals with a *nasab* relationship have reciprocal rights and obligations, while not all individuals with blood ties have the same consequences as those in *nasab*. This is the reason for the distinction between the meaning of *nasab* as kinship and the meaning of blood ties (*rawabith al-dam*). *Nasab* should be differentiated from blood ties, or at the very least, it can be stated that blood ties are a subset of *nasab*. However, not all individuals with blood ties have *nasab*. For instance, a child born out of wedlock has a blood tie to the biological father, but according to Islamic law, the child does not have a *nasab* relationship with the man causing its birth.³⁹

Referring to the previous explanations, it can be concluded that Ibn Taimiyah considers the process of *istilhaq* as a legitimate way under certain conditions, such as child of *zina*, while the Constitutional Court judges that *nasab* and blood ties can be determined through the utilization of science and technology, e.g., DNA testing. Ibn Taimiyah concludes that a child born out of wedlock cannot be established as the child of any man unless there is an acknowledgment from the man. However, in the case of the Constitutional Court ruling, if there is no acknowledgment from the man, the *nasab* and blood relationship between the child and the man as his father can still be determined if science and technology (e.g., DNA testing) has taken place.

2) The Aspect of Thinking Foundation

The foundation of the thinking of the Constitutional Court judges tends to be based on the aspect of the cause and effect relationship (causality) between the fertilization of two cells (sperm from the man and ovum from the woman) and childbirth. Childbirth will not occur without the contact of sperm and ovum cells. By this logic, a child must have a father regardless the legitimacy of fertilization itself, whether it is through a valid marriage or not. In this aspect, the marriage process that is legally valid is only a technical matter, and the most important aspect is the contact

³⁹Imanuddin, *Metode Penetapan Nasab...*, p. 35-36.

of cells that results in fertilization. The role of men in the fertilization and birth of a child is also important, so a child should have blood ties from the male line. For that reason, the proof process can be designed through the utilization of scientific and technological means. This aspect becomes the thinking basis for the Constitutional Court judges in assessing the possibility of determining blood ties of extramarital children and their alleged fathers.

On the other hand, Ibn Taymiyyah's basis of thought is based on the guidance of legal norms. The determination of the *nasab* of extramarital children through *istilhaq* is reflected in the hadith of the Prophet Muhammad SAW narrated by Imam al-Bukhari, which deals with the case of the claim of a child born from *zina* between Sa'd bin Abi Waqqas and 'Abd bin Zam'a, which reads as follows:

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا قَالَتْ كَانَ عُنْبَةُ عَهْدٌ إِلَى أَخِيهِ سَعْدٍ أَنَّ ابْنَ وَليدَةَ زَمْعَةَ مِنِّي فَأَقْبَضَهُ إِلَيْكَ فَلَمَّا كَانَ عَامَ الْفَتْحِ أَخَذَهُ سَعْدٌ فَقَالَ ابْنُ أُخِي عَهْدٌ إِلَيَّ فِيهِ فَقَامَ عَبْدُ بِنُ زَمْعَةَ فَقَالَ أُخِي وَأَبْنُ وَليدَةَ أَبِي وُلِدَ عَلَيَّ فَرَأَيْتَهُ فَتَسَاوَقَا إِلَيَّ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَ سَعْدُ يَا رَسُولَ اللَّهِ ابْنُ أُخِي قَدْ كَانَ عَهْدٌ إِلَيَّ فِيهِ فَقَالَ عَبْدُ بِنُ زَمْعَةَ أُخِي وَأَبْنُ وَليدَةَ أَبِي وُلِدَ عَلَيَّ فَرَأَيْتَهُ فَقَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ هُوَ لَكَ يَا عَبْدُ بِنُ زَمْعَةَ الْوَلَدُ لِلْفِرَاشِ وَاللِّعَاطِرِ الْحَجَرُ ثُمَّ قَالَ لِسُودَةَ بِنْتِ زَمْعَةَ اخْتَجِبِي مِنْهُ لِمَا رَأَى مِنْ شَبْهِهِ بِعُنْبَةَ فَمَا رَأَاهَا حَتَّى لَقِيَ اللَّهَ.⁴⁰ (رواه البخاري).

Narrated by Aishah (may Allah be pleased with her): Utba entrusted (his son) to his brother Sa'd bin Abi Waqqas saying, "The son of the slave-girl of Zam'a is my (illegitimate) son, take him into your custody." So during the year of the Conquest (of Mecca) Sa'd took the boy and said, "This is my brother's son whom my brother entrusted to me." "Abu bin Zam'a got up and said, "He is my brother and the son of the slave girl of my father and was born on my father's bed." Then both of them came to Allah's Apostle and Sa'd said, "O Allah's Apostle! This is my brother's son whom my brother entrusted to me." Then 'Abu bin Zam'a got up and said, "This is my brother and the son of the slave-girl of my father." Allah's Apostle said, "O Abu bin Zam'a! This boy is for you as the boy belongs to the bed (where he was born), and for the adulterer is the stone (i.e. deprivation)." Then the Prophet said to his wife Sauda bint Zam'a, "Screen yourself from this boy," when he saw the boy's resemblance to 'Utba. Since then the boy did not see Sauda till he died. [Sahih al-Bukhari]

The hadith discusses the dispute over the lineage of a child born out of wedlock between Sa'd bin Abi Waqqas and 'Abd bin Zam'a. Ibn Taymiyyah uses this hadith to establish the *nasab* relationships of children born outside legal marriage. The Prophet Muhammad SAW ruled in favor of maintaining the *mahram* ties between the child and Sa'd bin Abi Waqqas, while establishing a *nasab* tie with 'Abd bin Zam'a. This hadith narrates a legal case between 'Abd bin Zam'a and Sa'd bin Abi Waqqas, both of whom claimed kinship with a child born from a slave woman owned by Zam'a. 'Abd bin Zam'a argued that the child was his kin as he

⁴⁰ Abu Abdillah Al-Bukhari Al-Ju'fi, *Al-Jami' Al-Musnad A-Shahib Al-Muktashar Min Umuri Rasulallah*, (Beirut : Dar Tuq An-Najah, 1442 H), p, 674

was born from his father's slave woman. On the other hand, Sa'd ibn Abi Waqqas claimed that the son raised by Zam'a was actually the kin of Utba bin Abi Waqqas, and supported this claim by pointing out the resemblance between the child and Utba. However, the Prophet Muhammad SAW ruled in favor of maintaining the *nasab* tie between the child and Zam'a, as he was born on Zam'a's bed.

Through hadith evidence, three forms of *nasab* establishment are present, namely *firasy* (bed) which is identifiable through legitimate marriage or slave ownership, *istilhaq* (child acknowledgement), and *syabah/al-qafah* (resemblance). Regarding *istilhaq*, Ibn Taymiyyah considers the correlation between child acknowledgement and *nasab* establishment, including *nasab* for a child born outside of marriage. However, in the case of claims from two individuals, such claims must be supported by strong evidence. Ibn Taymiyyah explains that the Prophet Muhammad SAW established *nasab* to 'Abd bin Zam'a, not to Sa'd bin Abi Waqqas, because 'Abd bin Zam'ah's claim was stronger, supported by *firasy*, while Sa'd bin Abi Waqqas' claim was only supported by resemblance or *syabah (al-qafah)*.⁴¹

The two aspects in determining the validity of a child's *nasab* and the concept of thinking from Ibn Taymiyyah and the Constitutional Court have different bases. It is known that Ibn Taymiyyah assesses the *nasab* of a child born outside of marriage to the alleged father by means of *istilhāq*. This is contrary to the content of the Constitutional Court decision. The *nasab* or blood ties determination, according to the Constitutional Court, should be carried out by DNA examination of the child and the alleged father, regardless of the marital status and the child acknowledgment.

Conclusion

The decision of the Constitutional Court Number 46/PUU-VIII/2010, which reviewed the material test of Article 43 of the Marriage Law, has significantly changed the wording of Article 43 the Marriage Law. Initially, the Article 43 stated that, "*a child born out of wedlock only has a civil relationship with the mother and the mother's family*". However, after the Constitutional Court decision, the Article 43 now reads, "*a child born out of wedlock has a civil relationship with the mother and the mother's family, as well as with the man as the father that can be proven through science and technology or other evidence according to law, to indicate a blood relationship, including a civil relationship with the father's family.*" The ruling of the Constitutional Court does not explicitly clarify the status of children born out of wedlock, whether the referred child is the result of an underhand marriage as in the applicant's case or a child of *zina*. Consequently, both children born from underhand marriage and born out of *zina* can become the responsibility of the biological fathers as long as their paternity can be proven through DNA testing. According to Ibn Taimiyah, in his book *Majmu' Fatawa*, a child born from *zina* can link the *nasab* to the man, who committed *zina* with the mother of the child, by using the *istilhaq* method. This method involves the man acknowledging the child as his

⁴¹Ibn Taimiyah, *Al-Iman*, (Beirut: Al-Maktab Al-Islami, 1996), p. 328.

without any coercion or force. However, if there are more than one male adulterer claiming the child as theirs, Ibn Taimiyah suggests using the *qiyafah* method, which involves comparing the child's physical features to those of the claimants. Yet, this method should not be applied without prior *istilhaq*, as it is merely complementary. The relevance of Ibn Taimiyah's view to the Constitutional Court ruling is that both recognize the possibility of linking the *nasab* of a child born out of wedlock to the alleged father, regardless of the cause of the child's birth, whether a valid marriage or fornication. The child's *nasab* can be proven using *istilhaq* and *qiyafah* according to Ibn Taimiyah, or using technology (e.g., DNA testing) in the modern era.

References

Journal and Books

- Abubakar, Al Yasa', *Metode Istislahiah: Pemanfaatan Ilmu Pengetahuan dalam Usul Fiqh*, Jakarta: Kencana Prenada Media Group, 2016.
- Abubakar, Ali et al., "The Right of a Child outside the Legal Marriage of a Biological Father: The Analysis of Hifz Al-Nafs as Law 'Illat," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, No. 1 (2021). DOI: <http://dx.doi.org/10.22373/sjkh.v5i1.9256>.
- Arifin, Muhammad, *Kedudukan Anak Luar Kawin: Analisis Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 tentang Uji Materi terhadap pasal 43 ayat 1 UU nomor 1 tahun 1974 tentang Perkawinan*," *Ahkam* 5, No. 1 (2017).
- Ali, Zainuddin, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, 2015.
- Al-Jauziyah, Ibn Qayyim, *Panduan Hukum Islam*, Translation by Asep Saefullah and Kamaluddin Sa'adiyatulharamain, Jakarta: Pustaka Azzam, 2007.
- Al-Jauziyah, Ibnu Qayyim, *Zadul Ma'ad*, Translation by Amiruddin Djalil, Jilid 7 Jakarta: Griya Ilmu, 2006.
- Al-Ju'fi, Abu Abdillah Al-Bukhari, *Al-Jami' Al-Musnad A-Shahib Al-Muktashar Min Umuri Rasulullah*, Beirut : Dar Tuq An-Najah, 1442 H.
- Ardiansyah, "Pengaruh Mazhab Hanbali dan Pemikiran Ibnu Taimiyah dalam Paham Salafi," *Jurnal Analytica Islamica* 2, No. 2 (2013).
- Aziz, Nasaiy Aziz and Muksal Mina, "Nasab Anak yang Lahir diluar Nikah: Analisis Fatwa MPU Aceh Nomor 18 Tahun 2015 dan Keputusan MK Nomor 46/PUU/VIII/2010", *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 1, No. 1 (2017).
- Farid, Syaikh Ahmad, *60 Biografi Ulama Salaf*, Translation by Masturi Irham and Asmu'i Taman), Jakarta: Pustaka al-Kautsar, 2019.
- Hanbal, Imam Ahmad Bin, *Musnad Al-Imam Ahmad Bin Hanbal*, Translation by Adil Al-Mursyid, Beirut: Muassasah Ar-Risalah, 2001.
- Hasanuddin, Ahmad Fariz "Anak Luar Nikah Dalam Undang-Undang Perkawinan No 1 Tahun 1974 (Analisis Putusan MK Tentang Anak Luar Nikah)" [Bachelor's thesis], Universitas Islam Negri Jakarta, 2014
- Ibn Taimiyah, *Al-Fatawa Al-Kubra*, Juz 4, Beirut: Dar Al-Kutb, 2010.

- Imanuddin, *Metode Penetapan Nasab Melalui Al-Qafah Perspektif Maqasid Syari'ah*, Banda Aceh: Pascasarjana UIN Ar-Raniry, 2021.
- Kementerian Agama, *Al-Qur'an dan Terjemahan*, (Bandung: Sygma, 2009).
- Megawati, "Analisis Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Mengenai Anak Luar Kawin Perspektif Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan anak Dan Hukum Islam," *Jurnal QIYAS* 2, No. 2 (2017).
- Nurbaeti, Siti, "Hadis Tentang Nasab Anak Zina Dalam Perspektif Ibnu Qayyim Al-Jauziyyah", *Jurnal Holistic al-hadis* 4, No. 2 (2018).
- Perpustakaan Nasional RI, *Ensiklopedia Hukum Islam*, Ed. Abdul Aziz Dahlan, Jilid 4, Cet 6, (Jakarta: Ichtiarbaru van Hoeve, 2003), p. 1304
- Rokhmadi, "Status Anak Di Luar Perkawinan Pasca Putusan Mahkamah Konstitusi No. 46/PUU -VIII/2010," *Jurnal-SAWWA* 11, No. 1 (2015).
- Saqa, Sayyid, *Walad Al-Zina*, (London: E-Kutub Ltd, 2022).
- Satori, Akhmad, and Sulaiman Kurdi, *Sketsa Pemikiran Politik Islam*, Yogyakarta: Budi Utama Deepublish, 2016.
- Taimiyah, Ibn, *Al-Iman*, Beirut: Al-Maktab Al-Islami, 1996.
- Taimiyah, Ibn, *Majmu' Fatawa*, Juz 32, Riyadh: Mamlakah Arabiyyah Al-Su'udiyah, 2004.
- Taimiyah, Ibn, *Majmu'ah Al-Fatawa: Kumpulan Fatwa Ibn Taimiyah*, translation by Misbahm Jilid 26, Jakarta: Pustaka Azzam, 2014.
- Taymiyah, Ibn, *Majmu' al-Fatawa*, Juz XXXII, Madinah: Majma' Malik Fahd, 1995.

Laws and Rules

Constitutional Court Decision Number 46/PUU-VIII/2010.