

CHAPTER 3: CONTEXTUALISATION OF THE *MAQĀṢID* APPROACH IN THE CASE OF ILLEGITIMATE CHILD

3.0 Introduction

This chapter discusses issues on illegitimate child from the Islamic family law perspective. The study also refers to a relevant fatwa issued by state fatwa authorities as well as cases law. These are essential in order to understand and appreciate the inherent issues on the illegitimate child in the Malaysian context. The study mainly refers to Selangor Enactment as it has not many significant differences with the enactments of other States and Federal as well. Finally, this chapter analyses and contextualise the *nasab* status of an illegitimate child from the Islamic jurisprudence perspective in light of *Maqāṣid* approach. Accordingly, the objective is to crystallize the idea of *Maqāṣid* approach in exploring the familial issues, precisely the *nasab* status.

3.1 Illegitimate Child from Islamic Family Law Perspective

There are two types of family laws operating in Malaysia, one for the Muslim and the other one for the non-Muslim. Muslims are governed by Islamic family law system. On the other hand, The Law Reform (Marriage and Divorce) Act 1976, which was

enforced throughout Malaysia from 1 March 1982, governs the Chinese as well as Hindus and other religions.²⁵⁵

However, the recent amendments to the law that came into force on 15 December 2018 also affect the act. Accordingly, in the context of one of a spouse that has converted to Islam, Section 51 of the Principal Act has been amended to allow either party or both parties, to a marriage to petition for a divorce in the civil court.²⁵⁶ Previously, the right to petition for divorce would only be available to the non-Muslim spouse.

Moreover, if a converted spouse dies before the non-Muslim marriage is dissolved, the new section 51A of the Act allows the surviving spouse, the surviving children of a marriage and the parents of the deceased converted spouse to be entitled to participate in the distribution of the matrimonial assets of the deceased.²⁵⁷ The non-converted spouse and other non-Muslim family members formerly did not have the right to inherit from the converted unless the converted spouse had specifically bequeathed some of his assets to the non-Muslim family members.

As a Federation consisting of eleven States and three Federal Territories, Malaysia has federal authorities and States authorities. Generally, States have legislative and executive authority over matters relating to Islamic Law, including Syariah Courts.²⁵⁸

²⁵⁵ Raihana, "A Study of Islamic Family Law in Malaysia: A Select Bibliography."

²⁵⁶ Law Reform (Marriage & Divorce) (Amendment) Act (2017).

²⁵⁷ Section 51A of Law Reform (Marriage & Divorce) (Amendment) Act (2017).

²⁵⁸ Federal Constitution Ninth Schedule State List (II).

However, the Federation has legislative and executive authority concerning matters relating to Islamic law, including Syariah Courts.²⁵⁹

Basically, in Malaysia, there are three court systems -the civil court system, the Syariah court system and the native court system. The word civil is used here in contradistinction with Islam. The civil court system could be regarded as the general court system that applies laws of general application. The Syariah Court system is to apply Islamic law for Muslims, and the native court system is to apply native law for non-Muslim natives in Sabah and Sarawak.²⁶⁰

In civil matters, the Federal Constitution provides that Syariah courts have jurisdiction over Muslims in respect of the matters in the State List in the 9th Schedule to the Federal Constitution. Examples are personal and family law of Muslims relating to succession, betrothal, marriage, divorce, maintenance, guardianship, adoption, legitimacy, charitable and religious trusts, *zakat fitrah*, *baitul-mal* and similar religious revenue, mosques to name a few. Accordingly, *nasab* issue or the issue of a child's legitimacy for Muslim will be heard in the Syariah court.

Sections 2, 81, 86, 111, and 112 in the States enactments of Islamic Family Laws provide several provisions relating to the status of an illegitimate child. For instance, referring to the Islamic Family Law (State of Selangor) Enactment 2003, the sections are presented in the following table.

²⁵⁹ Federal Constitution Ninth Schedule State List (I).

²⁶⁰ Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia*. p. 50.

Table 2.0: Relevant Provisions on Illegitimate Child under the Islamic Family (State of Selangor) Enactment 2003

Section	Provision
2. Interpretation.	“illegitimate” in relation to a child, means born out of wedlock but not as a result of <i>syubhah</i> intercourse.
81. Duty to maintain illegitimate children.	(1) If a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the Court, upon proof thereof, may order the woman to make such monthly allowance as the Court thinks reasonable. (2) A monthly allowance under this section shall be payable from the date of commencement of the neglect or refusal to maintain or from such later date as may be specified in the order.
86. Custody of illegitimate children	The custody of illegitimate children appertains exclusively to the mother and her relations.
111. Ascription of paternity.	Where a child is born to a woman who is married to a man more than six <i>qamariah</i> months from the date of the marriage or within four <i>qamariah</i> years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the <i>nasab</i> or paternity of the child is established in the man, but the man may, by way of <i>li‘ān</i> or imprecation, disavow or disclaim the child before the Court.
112. Birth more than four years after dissolution of marriage.	Where the child is born more than four <i>qamariah</i> years after the dissolution of the marriage either by the death of the man or by divorce, the paternity of the child shall not be established in the man unless he or any of his heirs asserts that the child is his issue.

Generally, there are similarities in provisions between the provisions in the Islamic family law enactment of other states and the federal territories, with slight differences in certain numbers of sections. Accordingly, while section 2 concerning interpretation is similar, the other sections are only different in numbers. For instances, instead of

sections 81, 86, 111, and 112, the Islamic Family Law (Federal Territory) acts are 80, 85, 110, and 111.²⁶¹

Meanwhile, as a general rule, all procedures of registration of birth is under the portfolio of The National Registration Department (NRD) as mentioned in Section 3 (1) and 3 (1A) of Act 299, the Birth and Registration Act 1957, saying that:

"The Yang di-Pertuan Agong may appoint a public officer to be Registrar-General of Births and Deaths for Malaysia, who shall be responsible for carrying out the provisions of this Act and shall have general charge and supervision of all registers and all indices and of all matters done or performed under this Act.

The Yang di-Pertuan Agong may appoint a public officer to be Deputy Registrar-General of Births and Deaths for Malaysia, who may, subject to any general or special directions of the Registrar-General, exercise any of the powers of the Registrar-General under this Act, and who shall, in the absence of the Registrar-General or if so directed by him, perform the duties and functions of the Registrar-General thereunder."²⁶²

Nevertheless, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child. The Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of

²⁶¹ Act 303 Islamic Family Law (Federal Territory) (1984).

²⁶² Section 3 (1) and 3 (1A) of The Birth And Registration Act (1957).

the child. That person shall, in that case, sign the register together with the mother, as stated in Section 13.²⁶³

Furthermore, the act explains further, stressing that the surname, if any, to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.²⁶⁴ The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with section 13 requests so, the surname may be the surname of that person.²⁶⁵

However, the situation is different for Muslims, as the Islamic Family Law system governs them. In this respect, in the case of an illegitimate child, the Syariah High Court has the power to hear it as stated in the Federal Constitution Ninth Schedule State List (I) and (II),²⁶⁶ and shown in the cases of *Zafrin Zulhilmi bin Pauzi v Noor Aini binti Nasron* and *Raisha binti Anuar* that are discussed shortly. Therefore, any application must be made at the States' Syariah High Court. Regarding the application for the illegitimate child, Syariah Court Civil Procedure Enactment provides the procedure of it. Any Muslim person can apply for a declaration of the status or nasab of the illegitimate child in the Syariah High Court.²⁶⁷

²⁶³ Section 13 of The Birth And Registration Act (1957).

²⁶⁴ Section 13A. (1) of The Birth And Registration Act (1957).

²⁶⁵ Section 13A. (2) of The Birth And Registration Act (1957).

²⁶⁶ Federal Constitution Ninth Schedule State List (I), Federal Constitution Ninth Schedule State List (II).

²⁶⁷ Hasan, "An Analysis On The Illegitimate Child Cases In The Syariah Court."

Moreover, the recent case of *Jabatan Pendaftaran Negara & 2 Ors. v. A Child & 2 Ors.* (Civil Appeal No.: 01(f)- 43-09/2017(W)) in The Federal Court ruled that a Muslim child conceived out of wedlock cannot bear his father's name. Court of Appeal President, Datuk Rohana Yusuf, delivered the majority Federal Court decision, saying that Section 13A of the Births and Deaths Registration Act 1957 (BDRA) does not apply to the registration of births of Malay Muslim children as Malays do not carry any surnames.

Rohana also issued a consequential order for the NRD director-general to remove 'bin Abdullah' from the birth certificate of the child in the case, as she held that the NRD director-general could not impose the fatwa (religious edict) of the National Fatwa Committee on the child since there was no fatwa on how to name an illegitimate child was gazetted in Johor.²⁶⁸

The grounds of judgment spotlight that in the case of Malay Muslim children, they must refer to the Syariah court. In addition, the judgment also stressed that any decision taken by the High Court of Syariah must refer to the gazetted fatwa of the State in which the case has taken place. A gazetted fatwa is not only binding on every Muslim resident in the State, but also on the Syariah courts, as it should be recognised as authoritative.²⁶⁹ On the other hand, a fatwa issued by the National Fatwa Committee has no force in states or Federal, unless accepted, adopted and gazetted by the states.²⁷⁰ Accordingly, it is clear that in the Malaysian context, gazetted fatwas,

²⁶⁸ *Jabatan Pendaftaran Negara & 2 Ors. v. A Child & 2 Ors.*, Civil Appeal No.: 01(f)- 43-09/2017(W).

²⁶⁹ Section 34(4) of Administration of Islamic Law (Federal Territories) Act (1993); Section 49(2) of Islamic Family law (State of Selangor) Enactment (2003).

²⁷⁰ Federal Constitution Ninth Schedule State List (I).

including on the *nasab* of an illegitimate child, influence the Islamic Family Law practised here, primarily through the Syariah High Court.

3.2 Illegitimate Children Cases in Syariah Courts

There are four categories of applications in respect of the cases for the declaration of the status of the illegitimate children in the Syariah High Courts, namely:

- i) Application in the event NRD refuses to allow the child to bear his/her biology father's name;
- ii) Application for the Wali Hakim;
- iii) Application for the allotment of inheritance; and
- iv) Application for declaration of the status of *nasab*.²⁷¹

Most of the applications brought before the courts are from the (i) and (ii) of the types. The reason is that the NRD never accepts any registration to bear a child his/her biology father's name, in case of the needed document brought by the applicant is incomplete, or the child is born before six months from the date of marriage.²⁷²

With regard to the decisions of the Syariah High Courts on the subject, there are two situations in which either the applications for a declaration of the status of *nasab* are accepted or rejected. Five cases are exemplified herein for both situations.

²⁷¹ Hasan, "An Analysis On The Illegitimate Child Cases In The Syariah Court."

²⁷² Ibid.

Table 3.0: Summary of the Cases

No.	Case	Result	Reason
1.	<i>Hj Ghazali vs Asmah</i>	Legitimate	Born more than six months.
2.	<i>Wan Azmi vs Nik Salwani</i>	Legitimate	Born more than six months.
3.	<i>Raisha binti Annuar</i>	Illegitimate	Born less than six months.
4.	<i>Zafrin Zulhilmi bin Pauzi v Noor Aini binti Nasron</i>	Legitimate (for worldly matters)	Born less than six months.
5.	<i>Faizal bin Rabion v Nurul Fazila bt Nawi</i>	Legitimate (for worldly matters)	Born less than six months.

In the case of *Hj Ghazali vs Asmah* where parties were married in Nov 1974 and divorced in August 1975, the wife claimed maintenance for a child born on 11 August 1975, but the husband disclaimed his paternity of it. The Kadi held that the child was legitimate and ordered the husband's responsibility to maintain the child. Despite the husband's appeal, the Kadi disappaled as there was no evidence showing that the wife was pregnant when she was married.²⁷³

In the case of *Wan Azmi vs Nik Salwani*, the plaintiff and the defendant were married in June 1987 and divorced in December of the year. The plaintiff disclaimed paternity of a child born by the defendant and requested the court to affirm his claim. Thus he argued that he did not have to pay maintenance for it. However, the court held that as it was born more than six months from the time of marriage, the child should be attributed to him and thus, he was responsible for maintaining the child.²⁷⁴

Obviously that in both cases, the children were born more than six months after the marriage. Thus, they were considered as legitimate.

²⁷³ *Haji Ghazali v. Asmah*, 2 JH (1980-81).

²⁷⁴ *Wan Azmi v Nik Salwani*, 9 JH 192.

In another case, *Raisha binti Annuar* case no: 05100-006-0447-2009 took place in Syariah High Court, Seremban, ruled on 4 September 2009. The applicant, Raisha, requested the court to give a ruling for her status of *nasab*, as it was doubted by the Office of Religious Affairs, Port Dickson district after she sent a permission document for marriage therein. The office found out that she was born less than six months after her parents' marriage, referring to the parents' certificate of marriage, dated 5 April 1985, whereas she was born on 1 October 1985.

After considering and analysing the document and other evidence, the court verified that the period between the marriage and birth is less than six months, hence ruled that she could not bear her father's name. As a consequence, she needed Wali Hakim for her marriage.²⁷⁵ Although the judgment differed from the cases referred to above, the explanation is the same as the court held that less than six months of her parents' marriage had taken place.

Meanwhile, in the case of *Zafrin Zulhilmi bin Pauzi v Noor Aini binti Nasron*, Case No. 11300-006-0033-2012, in Kuala Terengganu Syariah High Court, ruled on 7 August 2009 took a different approach. The applicant (father) married his wife (respondent) through her *wali* on 14 April 2010 in Terengganu. After four months and 24 days, the respondent had given birth to a female baby, which was considered less than six months. Then, the applicant had requested the court to verify his child's legitimacy status and requested the court to allow the baby to bear his name. The respondent did not deny the statement given by her husband, even supported his request for the legitimation.

²⁷⁵ Raisha binti Annuar, Case file of the Syariah High Court no. 05100-006-0447-2009.

Finally, after investigating all the statements and facts, the court had granted the applicant's request. The judgment was based on an opinion of Dr. Abdul Karim Zaidan, saying that "a child who is born 4 months and 24 days after the wedding and the groom did not state that the child is his illegitimate child then it can be attributed to the father based on the conventional laws and worldly norms". The phrase 'conventional laws and worldly norms' means that the father cannot be the wali for his daughter, and neither of them can inherit the property of each.²⁷⁶

In this respect, the case of *Zafrin Zulhilmi bin Pauzi v Noor Aini binti Nasron* has a resemblance with the case of *Faizal bin Rabion v Nurul Fazila bt Nawi* [2014] 1 ShLR 137. The defendant and the plaintiff were married, and after five months and five days of their marriage, the defendant gave birth to a child. The plaintiff claimed the child to be ascribed to him, purely for administrative and legal reasons. The court held the child's paternity could not be given to the plaintiff even though he was the biological father of it. Nevertheless, the paternity should be given for matters unrelated to the administration of Syariah laws, such as schooling registration. The court also referred to the opinion of Dr. Abdul Karim Zaidan as mentioned in the previous case. Therefore, the child still cannot inherit the plaintiff's property and cannot be the wali for the child.²⁷⁷ This could be occurred because in principle any rule by a court can be referred by other courts in different states despite the latter is not bound by the former.²⁷⁸

²⁷⁶ *Zafrin Zulhilmi bin Pauzi v Noor Aini binti Nasron*, 2 ShLR 42.

²⁷⁷ *Faizal bin Rabion v Nurul Fazila bt Nawi*, 1 ShLR 137.

²⁷⁸ Mr Zulfikri bin Yasoa'. Online interview with Marwan Bukhari A Hamid. August 1, 2021.

3.3 Fatwa on *Nasab* of Illegitimate Child in Malaysia

Basically, the fatwas on *nasab* of illegitimate children by the States and Federal in Malaysia, for instances, Sarawak,²⁷⁹ Selangor,²⁸⁰ Negeri Sembilan²⁸¹, Pulau Pinang,²⁸² and Wilayah Persekutuan²⁸³ are similar, with the exception of Perlis²⁸⁴.

The dominant fatwas of the states state that all children born before six months and two lahzahs (seconds) from the date of marriage cannot be attributed to their biological father. That is also the fatwa issued by the National Fatwa Committee.²⁸⁵ Nevertheless, the fatwa from Perlis permits the attribution, with the condition that the father does not deny his association with the child.

It is noticeable that, generally, the arguments of the majority states' fatwas share almost the same viewpoint. Nevertheless, there are developments among certain muftis regarding the fatwa. For example, despite Pulau Pinang's gazetted fatwa is similar to the majority, the current Mufti, Datuk Dr. Wan Salim Wan Mohd Noor, however, was to have told that it was possibly a time to revise an old fatwa prohibiting Muslim children born out of wedlock from carrying the name of their father. He added that, in his opinion, this fatwa should be revised and changed if the need arises, after

²⁷⁹ "Anak Tak Sah Taraf."

²⁸⁰ "Fatwa Tentang Garis Panduan Mengenai Anak Tak Sah Taraf Menurut Hukum Syarak."

²⁸¹ "Anak Luar Nikah."

²⁸² "Fatwa Mengenai Anak Tak Sah Taraf."

²⁸³ *Himpunan Fatwa Wilayah Persekutuan*.

²⁸⁴ "Masalah Nasab Anak Kurang Daripada Enam Bulan Perkahwinan."

²⁸⁵ "Kompilasi Pandangan Hukum Muzakarah Jawatan Kuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia." p. 206-207

all, Islamic teachings are based on justice, wisdom, honour, and goodwill.²⁸⁶

Notwithstanding, the fatwa has not yet been revised, as found out yet by this research.

Besides, unlike other fatwas that are briefly presented, apparently, Federal Territories fatwa has elaborated further the position; hence the general argument of the dominant fatwa as outlined in the *Himpunan Fatwa Wilayah Persekutuan* may be represented by it herein.²⁸⁷ Meanwhile, Perlis's fatwa is explained further by its Mufti, Dato Arif Perkasa Dr Mohd Asri bin Zainul Abidin through his answer of a question by an individual, as shown in the mufti's official website.²⁸⁸ Both are the references for the basic arguments from both fatwas that are presented shortly. To better understand the variance between two different arguments, both fatwas are generally demonstrated and divided into three basic arguments.

(1) Quran, Hadith, Practices of the Companions and Views of Majority Jurists

Firstly, despite acknowledging that the issue is disputable, the fatwa of Federal Territories supports the majority's legal opinion, referring to substantial proofs of the Quran and Hadith, practices of the companions, and the majority of jurists. Therefore, the condition of six months and two lahzahs from the date of marriage is strengthened; hence illegitimate children cannot bear their biology fathers' name. On the contrary, Perlis allows the attribution for a birth that is less than six months and two lahzahs from the date of marriage, on a condition that the father does not deny his association with the child.

²⁸⁶ Nambiar, "Fatwa On Bin Abdullah Should Be Revised Says Penang Mufti."

²⁸⁷ *Himpunan Fatwa Wilayah Persekutuan*. p. 196-201.

²⁸⁸ "Masalah Nasab Anak Kurang Daripada Enam Bulan Perkahwinan."

(2) Understanding of Hadith on Illegitimate Child

Secondly, Federal fatwa argues that the true understanding of a renowned hadith on the topic, "a child belongs to the household (where he was born), and the adulterer is stoned," is that a child belongs to a father who is legally married. Nevertheless, Perlis offers a different interpretation of the hadith, exemplified by the opinion of Abu Hanifah, reportedly saying that it is unobjectionable for an adulterer to get married to her partner while she is pregnant, and hide her wrongdoing, and the child is attributed to him. The Perlis fatwa also provides other sources to support the interpretation.

(3) *Maṣlaḥah* and *Mafsadah*

Thirdly, both fatwas also argue on the *maṣlaḥah* and *mafsadah* or interest and harm that may arise from the prohibition or permission. For instance, the Federal fatwa mentions on the probability of increasing of adultery among people. In contrast, Perlis' fatwa argues that the number has been increasing for many years of the prohibition. Besides, Perlis fatwa also draws attention to the harm of shameful feeling that may occur to the child, while the Federal fatwa insists that the feeling is only particular harm, hence should not be prioritized over the public interest, the implication of the increasing number of adulteries.

In general, those are the basic arguments from both opposing fatwas, as can be founded from their official sources, as cited previously. The arguments are only demonstrated to understand better the Malaysian context, especially regarding the

discussion of fatwa over the issue. The analysis of the claims is further illustrated, directly or indirectly, by analysing the issue from the perspective of the *Maqāṣid* approach.

Nevertheless, it is worth noting that both Islamic Family Law and conflicting fatwa on *nasab* in the Malaysian context, as succinctly visualized, prove that the issue of *nasab* is still relevant to be revisited, and open to be re-examined as well. Thus, this study further focuses on contextualising *nasab* of an illegitimate child in contemporary *fiqh* of family within the context of *Maqāṣid* approach

3.4 *Nasab* of The Illegitimate Child in Islamic Jurisprudence

Nasab, or lineal identity, is deemed highly essential in the eyes of *Shari'ah* due to its impacts for the humankind life, as already explained in the previous chapter. Consequently, there are rulings relating to the *nasab* status; one of them is the question of the legitimacy of a child born out of wedlock. Although this issue has long been discussed in the works of Islamic jurisprudence, there are disputable arguments among the scholars since the very early history of the Islamic jurisprudence as shown later.

Basically, there are two opinions that are held by jurists regarding the issue. The prevailing opinion says that it is legally impermissible for an illegitimate child to bear his biology father name. However, the second opinion insisted that it is allowed to do

so if the biology father avows of paternity for the child. Other details deserve to be mentioned amid the discussion of the opinions later.

Before entering into the discussing of the arguments, it is better to apprehend that both acknowledge several principles. Firstly, adultery is categorically forbidden by the Lawgiver, and there are no disputes on that,²⁸⁹ hence neither issue of the permissibility of adultery, nor blaming individual opinion as encouraging to it, relate to this study. Secondly, indisputably that the spousal relationship between man and woman is through legal marriage, as well as other accepted medium such as slave-concubinage, and considered as a legal reason to produce a child. Instead, any relationship out of that is forbidden.²⁹⁰ Thirdly, it is not disputed among jurists that any child born in a legitimate marriage must bear his/her father name as long as he does not deny the lineage by using *li'ān*. Hence in this situation, nobody can claim the child as his before the denying of the legitimate husband.²⁹¹

3.4.1 Primary Argument

There are several proofs or evidence used by the predominant or opponents to legitimize the nasab of an illegitimate child. Some of the arguments are from hadiths, while the rest are rational arguments. Nevertheless, principally, the proof that has widely been utilized by both, is a sound and well-known hadith over the issue, as follows:

²⁸⁹ Al-Qurtubi, *al-Jāmi' li Ahkām al-Qur'ān*. p. 10/165.

²⁹⁰ Ibid., p. 13/42.

²⁹¹ Al-Bar, *Al Tamhīd li Mā fī al-Muwaṭṭa' min al-Asānid*. p. 8/183.

"Yahya said from Malik from Ibn Shihab from Urwa ibn az-Zubayr that A'isha, the wife of the Prophet, may Allah bless him and grant him peace, said, "Utba ibn Abi Waqqas disclosed to his brother, Sa'ad ibn Abi Waqqas, that he was the father of the son of the slave-girl of Zam'a, and made him promise to look after him (after his death). In the year of the conquest of Mecca, Sa'ad took him and said, "He is the son of my brother. He covenanted with me about him." Abd ibn Zam'a stood up and said, "He is my brother and the son of my father's slave-girl. He was born on his bed." They went to the Messenger of Allah, may Allah bless him and grant him peace. Sa'ad said, "Messenger of Allah, he is the son of my brother; he made a covenant with me about him." Abd ibn Zama said, "He is my brother and the son of my father's slave-girl and was born on my father's bed." The Messenger of Allah, may Allah bless him and grant him peace, said, "He is yours, Abd ibn Zam'a." Then the Messenger of Allah, may Allah bless him and grant him peace, said, "A child belongs to the matrimonial bed, and for the adulterer is futility." Then he told Sawda bint Zam'a, "Veil yourself from him," since he saw in him a resemblance to Utba ibn Abi Waqqas." A'isha added, "He did not see her until he met Allah, the Mighty, and the Majestic."²⁹²

This hadith is a sound and credible reference on this matter. Moreover, the hadith had been reported by numerous transmitters, hence considered as among the successive hadiths, *mutawatir*, the highest classification of a hadith in hadith studies.²⁹³

The primary argument of the hadith 's opponents is what the Prophet had said when he gave a solution to both the assertion that "a child belongs to the matrimonial bed, and

²⁹² Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*. p. 8/154, 3/81, 3/54 and 8/165; Hajjaj, *Ṣaḥīḥ Muslim*. p. 2/108 and 2/1081.

²⁹³ Al-Kattāni, *Naẓm al-Mutanāthir min al-Ḥadīth Al Mutawātir*. p. 162-163.

for the adulterer is futility." This hadith literally indicates that a child only can be attributed to his/her father of a legal marriage. Therefore, in the prevailing opinion on that issue, children born out of wedlock cannot bear their biology fathers name.

For examples, in the Shafi'i *madhhab*, one of the conditions applied before claiming someone as his son/daughter is that the claimed must not be born out of wedlock.²⁹⁴

The condition also applied in the other *madhhab*, including *zāhirī*.

As a result, in Hanafi *madhhab*, the hadith is clearly understood, as represented by al-Kasani, that people who do not have a matrimonial bed cannot claim that an illegitimate child is his, as well as there is no stoning for those who do not commit adultery.²⁹⁵ Consequently, Ibn Rushd, the Maliki jurist, invokes the consensus of the majority insisting that lineage cannot be affirmed by adultery.²⁹⁶ The same goes with the Hanbali jurist, Ibn Qudāmah, insists that in the opinion of the predominant, a child born of adultery cannot be attributed to his/her biological father.²⁹⁷

Besides the four *madhhabs*, *zāhirī madhhab* is also in line with the predominant, as Ibn Ḥazm argues that based on the hadith, punishment is for the adulterer. Therefore, a child cannot be attributed to him. Instead, the child is entitled to his/her mother.²⁹⁸ Similarly, in the Imamite Shia since there is the same hadith too in their tradition,²⁹⁹ hence the result is a resemblance with the predominant Sunni.

Generally, these are the opinions of the majority jurists, despite inarguably that there are differences in detail among the predominant themselves. For instance, they differ

²⁹⁴ Al-Shirbīnī, *Mughnī al-Muḥtāj*. p. 3/260.

²⁹⁵ Al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 1982. p. 6/243.

²⁹⁶ Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*. p. 3/63 and 4/217.

²⁹⁷ Ibn Qudāmah, *al-Mughnī*, 1997. p. 9/123.

²⁹⁸ Ibn Ḥazm, *al-Muḥallā*. p. 10/322-323.

²⁹⁹ Ḥubbullah, *Dirāsāt fī al-Fiqh al-Islāmī al-Mu'āṣir*. p. 5/317.

on the meaning of *al-firāsh* and *al-ḥajar*, which are two critical terms within the hadith. Regarding the latter, some interpret it as stoning, while some others stress that the meaning is failure or futility.³⁰⁰ The same goes with their difference in the meaning of the former, as some stress that it means sexual intercourse, assigning wife to give birth to her sole husband, and solemnization.³⁰¹

Nevertheless, the proponents of legitimation insist that the hadith is not ample to indicate a clear and cut decision. Therefore, they offer a partly different interpretation of the hadith. They concur with the majority that any child born in a legitimate marriage must bear his/her father name as long as he does not deny the lineage by using *li'ān*, as earlier stressed in the three mentioned principles. However, it does not necessarily mean that the interpretation also applies to a situation where there is no matrimonial bed, and this is the focal point of difference between the proponents and opponents.³⁰²

Accordingly, Ibn Taymiyya contends that the hadith applied in case of a married couple. Otherwise, in case of an adulterer that has no husband, the issue is disputable.³⁰³

Evidently, Ishaq bin Rahuya, was reported to opine that if a child was born out of matrimonial bed, and his biology father claims his paternity, then he belongs to him. In this regard, he interpreted the aforementioned hadith of matrimonial bed as applying to the context of the dispute.³⁰⁴ This understanding is also consistent with the opinion of several other jurists after the era of the Prophet 's companions, such as al-

³⁰⁰ Al-'Asqalāni, *Fatḥ al-Bārī bi Sharḥ Saḥīḥ al-Bukhārī*. p. 5/8211.

³⁰¹ *Al-Mawsū'at al-Fiqhiyyah al-Kuwaytiyyah*. p. 32/80.

³⁰² Ibn Qudāmah, *al-Mughnī*, 1997. p. 9/123.

³⁰³ Ibn Taymiyya, *Majmū' Fatāwā*. p. 32/139.

³⁰⁴ Ibn al-Qayyim, *Zād al-Ma'ād*. p. 5/381.

Hasan al-Basri, Urwah bin Zubayr, and Sulaiman bin Yasar. After presenting the opinions, Ibn al-Qayyim obviously evaluates the position as strong and clear and supports them with other arguments.³⁰⁵ That is also the opinion of Ibn Taymiyya as outlined earlier.

Meanwhile, the highlight of the context is helpful to understand better and interpret the hadith. Moreover, the position has a base in al-Shāfi'i's perspective of the hadith, as he said that it conveys two meanings. Firstly, the child belongs to the matrimonial bed as long as his father does not deny his paternity. Secondly, when a husband and an adulterer fight for the paternity of the child, then the child belongs to the husband as he is the partner of the matrimonial bed.³⁰⁶ While al-Shāfi'i was among the predominants, his second meaning suggests that the nature of the hadith is a controversy, and that is what the jurists of the proponents have posed, as exemplified by Ishaq bin Rahuya's article.

Interestingly, several jurists in the Imamite Shia also interpret the hadith differently from the majority amid the school. In this respect, al-Khu'i argues that the hadith is applied explicitly to the context of the dispute. Hence it is not applied to every situation. Moreover, he insists that the issue of lineage is based on the nature of it. Thus divine proof should not be the reference here. Therefore, in this case, he differentiates between legitimization of *nasab* and the inheritance of the illegitimate child, as it is only unlawful for the child to inherit for a definite proof exists in their tradition.³⁰⁷ This interpretation was supported by several Imamite contemporary

³⁰⁵ Ibid., 5/381-382.

³⁰⁶ Al-Shāfi'i, *al-Umm*, p. 10/254.

³⁰⁷ Al-Khu'i, "Mawsū'at al-Imām al-Khū'ī." p. 24/143-144

jurists, for instance, Ḥusain Fadlullah,³⁰⁸ and Ḥaydar Ḥubbullah.³⁰⁹

Consequently, despite both parties concurring with the soundness of the hadith, they dispute on the apt interpretation of hadith, especially regarding the principle given by the prophet. In this regard, the hadith is not strongly ample to contend sole opinion of which the impermissibility of attributing an illegitimate child to his biological father, instead the alternative interpretation given by the proponents is also clear and strong as previously shown.

3.4.2 Other Narrations Over the Issue

Other than the primary argument, there are several other narrations provided by the opponents and the proponents alike. One of the hadith is what was narrated by Ibn 'Abbas, the Prophet said:

"There is no prostitution of slave-girls in Islam. And whoever engaged in prostitution in Jahiliyyah (and a child was born), then it will be ascribed to his owners (the owners of the slave-girl). And whoever claims a child outside of marriage, he will not inherit from him, nor will the child inherit from him."³¹⁰

Nevertheless, there was an anonymous person in the narration. Thus it cannot be a proof over the issue.³¹¹

³⁰⁸ Fadlullah, *Fiqh al-Mawārīth wa al-Farā'id*. p. 2/330-331.

³⁰⁹ Ḥubbullah, *Dirāsāt fī al-Fiqh al-Islāmī al-Mu'Āṣir*. p. 5/319.

³¹⁰ Dawud, *Sunan Abū Dāwud*, 2009. p. 3/576.

³¹¹ Ibn al-Qayyim, *Zād al-Ma'Ād*. 5/382.

The other hadith is what was reported by 'Amr bin Shu'aib that the Prophet ruled regarding those who wished to be considered as inheritors after their father's death - meaning those whom they ascribed themselves to. He ruled that any child born to a slave owned by her owner, when the master engages in intercourse with her, the child would be considered to be part of the person who considered him (as a son). However, he will not be given any inheritance that had already been distributed before him. He will, however, be given his portion of the inheritance that has not yet been distributed. Moreover, such (a child) will not be considered a son if his father denied him. Therefore, if the child belonged to a slave whom he had not owned, or to a free woman with whom he had committed fornication, then the child would not be considered his own, nor would the child inherit from him, even if he who is called his father admits that he is the parent, and that is because the child is the product of fornication, whether of a free woman or a slave girl.³¹²

In another chain, he added:

"And he was a child of adultery, then it belongs to his mother's people, whether she was free or a slave. And that is reigning of Islam, as for what was distributed from wealth before Islam, then it has passed."³¹³

In the beginning, Ibn al-Qayyim had expressed reservations about one of the transmitter's reliability, al-Makhoul. However, after explaining the meaning of the narration, he eventually ends up by providing two probabilities. Firstly, in case of the authenticity of the narration, then all the related consequences as argued by the predominant, including the unlawful of legitimation, applied. Secondly, if the

³¹² Dawud, *Sunan Abū Dāwud*, 2009. p. 3/577.

³¹³ Ibid., Hadith no. 2266, p. 3/578.

narration is not authentic, then the correct argument is the opinion of Ishaq bin Rahuya and those who agree with him.³¹⁴

On the contrary, the proponents stay firm on their position by strengthening their arguments with another sound hadiths. The first is a story of a pious man a long time ago before Islam, named Juraij.

"There was an Israeli man called Juraij, while he was offering prayer, his mother came and called him, but he did not respond to her call. He said (to himself) whether he should continue the prayer or reply to his mother. She came to him the second time and called him and said. "O Allah! Do not let him die until he sees the faces of prostitutes." Juraij used to live in a hermitage. A woman said that she would entice Juraij, so she went to him and presented herself (for an evil act), but he refused. She then went to a shepherd and allowed him to commit illegal sexual intercourse with her, and later she gave birth to a boy. She alleged that the baby was from Juraij. The people went to Juraij and broke down his hermitage, pulled him out of it and abused him. He performed ablution, and he prayed, then he went to the male (baby) and asked him: "O boy! Who is your father?" The baby replied that his father was the shepherd. The people said that they would build for him a hermitage of gold but Juraij asked them to make it of mud only."³¹⁵

The focal point of the hadith, according to the proponents, is what the baby replied to Juraij that his biological father was the shepherd. Throughout his exegesis, al-Qurtubi demonstrates his bias towards the view of the proponents by drawing from the hadith the validity of the descent of a child born out of wedlock, as well as all the

³¹⁴ Ibn al-Qayyim, *Zād al-Ma'ād*. p. 5/384.

³¹⁵ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*. p. 3/137

implications of legitimization, except for decisions considered to be consensual among jurists.³¹⁶

Moreover, Ibn al-Qayyim also uses this hadith when he supports the view of the proponents over the issue. He contends his argument by saying that Allah made the baby speak. Hence there is no probability of lying.³¹⁷

Another hadith refers to the story of *li'ān* happened in the age of the Prophet. The Prophet was reportedly said as follows:

Ibn 'Abbas narrated: Hilal bin Umaiyya accused his wife of committing illegal sexual intercourse with Sharik bin Sahma' and filed the case before the Prophet. The Prophet said (to Hilal), "Either you bring forth a proof (four witnesses) or you will receive the legal punishment (lashes) on your back." Hilal said, "O Allah's Messenger! If anyone of us saw a man over his wife, would he go to seek after witnesses?" The Prophet kept on saying, "Either you bring forth the witnesses or you will receive the legal punishment (lashes) on your back." Hilal then said, "By Him Who sent you with the Truth, I am telling the truth and Allah will reveal to you what will save my back from legal punishment." Then Jibril (Gabriel) came down and revealed to him:

"And for those who accuse their wives..." (5: 24:6-9)

The Prophet recited it till he reached: '... (her husband) speaks the truth?' Then the Prophet left and sent for the woman, and Hilal went (and brought) her and then took the oaths (confirming the claim). The Prophet was saying, "Allah knows that one of you is a liar, so, will any of you repent?" Then the woman got up and took the oaths

³¹⁶ Al-Qurtubi, *al-Jāmi' li Ahkām al-Qur'ān*. p. 5/85.

³¹⁷ Ibn al-Qayyim, *Zād al-Ma'ād*. p. 5/382.

and when she was going to take the fifth one, the people stopped her and said, "It (the fifth oath) will definitely bring Allah's Curse on you (if you are guilty) ." So, she hesitated and recoiled (from taking the oath) so much so that we thought that she would withdraw her denial. However, she then said, "I will not dishonour my family all through these days," and carried on (the process of taking oaths). The Prophet then said, "Watch her; if she delivers a black-eyed child with big hips and fat shins then it is Sharik bin Sahma's child." Later, she delivered a child of that description. So the Prophet, said, "If the case was not settled by Allah's Law, I would punish her severely."³¹⁸

The proponents use the last words of the Prophet in the hadith to support their argument, since the Prophet ascribed the son to Sharik bin Sahma', despite undeniably it was born out of wedlock.³¹⁹

The third narration provided by the proponents reported that Umar al-Khattab ascribed illegitimate children born in the pre-Islamic era to their biology fathers as widely reported.³²⁰ Nevertheless, the opponents might say that it was applied for people who had committed illicit sexual intercourse in the pre-Islamic era, and then their children ascribed to them when they embraced Islam. This argument could be seen in numerous references, including in Ibn Rushd's.³²¹ However, the proponents refute the argument, saying that the reason for ascribing is not because of the intercourse

³¹⁸ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*. p. 6/100.

³¹⁹ Al-Khādīmī, "Nasab al-Mawlūd Khārij Rābiṭat al-Zawāj."

³²⁰ Al-Kandahlawī, *Awjāz al-Masālik Ilā Muwaṭṭa' Mālik*. p. 12/239-240.

³²¹ Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*. p. 4/217.

committed in the pre-Islamic age, or the era of Islam, but the underlying reason is to ascribe or not is based on the reality of nature.³²²

It is worth noting that between the proponents and opponents, there is a middle opinion contending that illegitimate children can be ascribed to their biology father with a condition of marriage. Abu Hanifah was well known for this position, as he opines that it is unobjectionable for an adulterer to get married to her partner while she is pregnant, hide her wrongdoing, and the child is attributed to him.³²³ Several narrations indicate that this is also the opinion of some companions, such as Abu Bakr,³²⁴ Ibn 'Abbas,³²⁵ and Jabir bin Abdillah.³²⁶

Nevertheless, this middle position seems to may be included among the opponents, as they did not allow the attributing without marriage. However, they may also be related to the proponents as they principally allowed the attributing with a condition of marriage before the woman gives birth.

3.5 *Nasab* Of Illegitimate Children in Contemporary *Fiqh* of Family

In term of its name, *fiqh* of family has a novel dimension, as it used to be known in different terms in the writings of Islamic jurisprudence. Nevertheless, in term of its substance, *fiqh* of family has been examined from the earliest days of Islam until now.

In this regard, al-Qaraḍāwī, one of the scholars who use the term *fiqh* of family

³²² Burqa'ah, al-*Nasab wa Madā Ta'thīr al-Mustajiddāt al-'Ilmiyyah fī Ithbātih*. p. 237.

³²³ Ibn Qudāmah, al-*Mughnī*, 1997. p. 9/123.

³²⁴ Al-Ṣan'ani, al-*Muṣannaf*. p. 7/204.

³²⁵ Ibid., p. 7/202.

³²⁶ Ibid., p. 7/202.

justifies that the name is more preferred as it is appropriate and indicative of the objective of his work.³²⁷ In modern and contemporary days, this *fiqh* has been widely called *al-ahwal al-shaksiyya*, and both share the same topic covering all issue concerning familial matters.

Before mentioning several examples of the development of the contemporary *fiqh* of family, it is better to realize that in general, discussion on this *fiqh* stemmed from the ultimate sources of Islam, al-Quran, and the Sunnah. Both contain many verses and prophetic traditions relating to the family. The instances of verses relating to the family are 2:221-242 and many others as having been stated in the previous chapter. On the other hand, the Sunnah also consists of a lot of prophetic traditions concerning family, for instance, in the book of *Sahih* by al-Bukhari and Muslim, there are hundreds of *hadiths* encompassing rulings of marriage and divorce, the interaction between spouses, maintenance, and others.³²⁸

Therefore, in the books concerning Islamic jurisprudence, there are several chapters related to the family matters and issues. For instances, in *Mughni al-Muhtaj* of which deemed as one of the references for Shafi'i's school, the familial matters and issues mentioned in the books of *laqīṭ* (abandoned child of unknown parents),³²⁹ *farā'id* (inheritance),³³⁰ *waṣāyā* (bequest),³³¹ *nikāḥ* (marriage),³³² *ṣadāq* (dowry),³³³ *khulu'*

³²⁷ Al-Qaradāwī, *Fiqh al-Ushrah wa Qadāyā al-Mar'ah*. p. 15.

³²⁸ Al-Shāmi, *al-Jāmi' bayn al-Ṣaḥīḥayn*. p. 1/567-628.

³²⁹ Al-Shirbīnī, *Mughnī al-Muhtāj*. p. 1/567-628.

³³⁰ Ibid., p. 4/5-63.

³³¹ Ibid., p. 4/64-130.

³³² Ibid., p. 4/207-360.

³³³ Ibid., 4/361-410.

(divorce at the instance of the wife who pays a compensation),³³⁴ and *ṭalāq* (divorce).³³⁵

Apparently, none of the above has specifically been dedicated to comprehensively study on *nasab* and all related rulings, despite its significance and its thorough principles. The same goes for references from other schools too. Regarding this, Ibn 'Āshūr draws attention to the matter, describing that Hanafi, Maliki, and Shafi'i had been discussing the issues related to *nasab* in the chapters of accusations (*di'āwā*), testimonies (*bayyināt*), and recognitions (*iqrārāt*).³³⁶

Besides that, based on Ibn 'Āshūr, perhaps there is also no specific book that comprehensively covers the topic, even though there are books that have specifically been written for certain topics, for instance, *Tuḥfat al-Mawdūd bi Ahkām al-Mawlūd*, by Ibn al-Qayyim. According to the author, his objective of writing this book is explaining on the rulings related to a child. However, the study finds that it does not discuss and touch comprehensively or in-depth the issue on the illegitimate child.³³⁷

3.5.1 Two Features of Contemporary *Fiqh* of Family

Meanwhile, modern and contemporary days witness several significant features of the *fiqh* of family. Two of the features are, firstly, the openness of references, or

³³⁴ Ibid., 4/429-453.

³³⁵ Ibid., p. 4/454-540.

³³⁶ Ibn 'Āshūr, *Jamharat al-Maqālāt wa Rasā'il al-Shaykh al-Imam Muhammad al-Ṭāhir Ibn 'Āshūr*. p. 2/846-847.

³³⁷ Ibn al-Qayyim, *Tuḥfat al-Mawdūd bi Ahkām al-Mawlūd*. p. 6.

madhhab, and secondly, the rise of writing on the field separately from any typical comprehensive book of *fiqh*.

(1) The Openness of References

Regarding the first, it can be exemplified by the Islamic family law that followed in the footsteps of The Mejlle, which considered a complete code of Islamic Civil law of the Ottoman Caliphate (1877-1926), based on the Hanafi *madhhab*. The Mejlle had not been including Islamic Family Law, as well as worship (*'ibādāt*) and criminal law.³³⁸

Therefore, the family law had been separately created in 1917, specifically on the rulings of marriage and divorce.³³⁹ It is worth noting that the law, despite its limited focus, demonstrated an openness of references, as it is not only based on the Hanafi *madhhab* as clearly featured in the Mejlle, since the judicial divorce (*al-tafrīq al-qaḍā'ī*), in the family law, benefited of opinion from Maliki *madhhab*.³⁴⁰

However, Abu Zahra made it clear, as he wrote, that there was a committee set up in 1926 to reform Islamic family law in Egypt, which advocated the use of other opinions that are more valid in family matters, including direct deductions from the Quran and the Sunnah, and not only restricted to the four *madhhabs*.³⁴¹ The committee came out with several proposals of reform such as restraint of polygamy, the illegality of divorces of the coerced and so on, rights of the wife to provide certain conditions

³³⁸ The Mejlle. p. 3.

³³⁹ Al-Zarqā', al-Madkhal al-Fiqhī al-Ām. p.1/240

³⁴⁰ Ibid., p.1/240

³⁴¹ Abu Zahrah, al-Aḥwāl al-Shakhṣiyyah. p. 13.

before marriage, and they must be legally considered, and other proposals. There were also certain issues of *nasab* raised in the proposals; for instance, the claim of *nasab* must be ignored if it is proved that there was no sexual intercourse happened since the solemnization.³⁴²

Nevertheless, the proposal caused a critical reaction by the representatives of *Dar al-Niyabah*, which made the proposals had been unsettled until the legislation of the act in 1929. However, the act refused to accept the idea of benefiting all other opinions encompassing the four *madhhabs*, hence insisted to just refer to four *madhhabs*. Thus, the proposals were accepted with several modifications.³⁴³ Undeniably, Egypt's experience of the act supports the feature of openness of references, as earlier outlined.

(2) The Rise of Writing on *Nasab*

Furthermore, the experience also paved the way for the second feature of the contemporary *fiqh* of family as mentioned before. In this regard, *nasab* issues have been considered one of the topics that continuously given the attention of researching. Besides the earlier cited of what had been stressed by Ibn 'Āshūr regarding the specification of study on the *nasab*, there are numerous other books separately examine different issues relating to *nasab*, some of them already mentioned in the first chapter of this research.

³⁴² Ibid., p. 13-14.

³⁴³ Ibid., p.15

Therefore, it is clear that *nasab* has long been recorded in the classical books of Islamic jurisprudence, and still be examined in the contemporary *fiqh* of family. There have been numerous issues relating to *nasab*. However, as repeatedly mentioned herein, this research emphasized the *nasab* of the illegitimate child, as one of the issues in the contemporary *fiqh* of family.

3.6 Contextualization of *Maqāṣid* Approach on The *Nasab* Discourse

In light of the *Maqāṣid* approach, as demonstrated explicitly in the previous chapter, the Islamic jurisprudence discourse over the *nasab* of an illegitimate child is examined here. Thus, roles, features and principles of the approach are recalled to study the issue. As explained earlier, there is a clear relationship between *Maqāṣid al-Sharī'ah* and other Islamic disciplines, including Islamic jurisprudence and its principles. Therefore, it is preferred by this research as an independent discipline given the integration of Islamic knowledge.

3.6.1 Principles Related to *Nasab* In The Quran

Some principles can be extracted from the verses of the Quranic concept for the term *nasab*. The significance of the Quranic concept as one of the facets of the *Maqāṣid* approach has been discussed in the previous chapter.

- (1) *Nasab* Signifies Relationship, Relation, Kindred and Consanguinity

In the context of this study, the first principle refers to *nasab* can simply signify relationship, relation, kindred and consanguinity. In this respect, there are two verses in the Quran that convey the meanings. The first verse is 25:54, and the second is 37:158. Both verses, especially the former, signify the fundamental of lineage in the humankind life. God says in the 25:54:

"And He it is Who hath created man from water, and hath appointed for him kindred by blood and kindred by marriage; for thy Lord is ever Powerful."

Consequently, it is firmly established in the Islamic Law that the Lawgiver intends to attribute people to their lineage.³⁴⁴ This first principle is in line with the natural law as shown in the 25:54, and the Islamic Law alike. Therefore, as proved in the previous chapter, the preservation of lineage is deemed as among the purposes of *Shari'ah* concerning familial matters.

(2) Consideration of the Reality and Substance of a Thing

The second principle that can be extracted by looking into the Quranic concept of the *nasab* is the consideration of the reality and substance of a thing. Therefore, there is no place for whimsical speculations in the issue.³⁴⁵ Even though this principle is very core in the Islamic Study in general, but in the issue of *nasab*, it is mentioned explicitly in verses 33:4-5 as follows:

"Allah has not made for any man two hearts in his (one) body: nor has He made your wives whom ye divorce by Zihar your mothers: nor has He made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But Allah tells

³⁴⁴ Ibn 'Āshūr, *Jamharat al-Maqālāt wa Rasā'il al-Shaykh al-Imam Muhammad al-Ṭāhir Ibn 'Āshūr*. p. 2/849.

³⁴⁵ Ibn 'Āshūr, *al-Taḥrīr wa al-Tanwīr*. p. 21/254.

(you) the Truth, and He shows the (right) Way. Call them by (the names of) their fathers: that is juster in the sight of Allah. But if ye know not their father's (names, call them) your Brothers in faith, or your maulas. But there is no blame on you if ye make a mistake therein: (what counts is) the intention of your hearts: and Allah is Oft-Returning, Most Merciful."

In light of the concept and principles, it is clear that the discussed hadith on the issue, specifically the hadith on 'matrimonial bed', illustrates the mentioned Quranic principles. The opponents and proponents only differ on the legitimation of a child who born out of matrimonial bed, as demonstrated before. To better understand the hadith of which the main proof used in this issue, this research continued by recalling the principle of purposefulness in interpreting the Islamic scriptures.

3.6.2 *Maqāṣid* Principles In Approaching the Hadith on Nasab

The main proofs of the issue, hadith of matrimonial bed, has been interpreted differently by the proponents and opponents of legitimation, as outlined earlier. Obviously, one of the thoughts stressed in the discussion is the context of the hadith that is a dispute. According to al-Shāfi'i, investigating the context is helpful to clarify the meaning of the Islamic scriptures.³⁴⁶

In this regard, Ibn 'Āshūr spotlights that an essential skill for the seeker of *Maqāṣid al-Sharī'ah* is to distinguish the different intents of the words and actions of the

³⁴⁶ Al-Shāfi'i, *al-Risālah*, p. 144-145.

Prophet.³⁴⁷ Otherwise, overlooking the context or reasons for the mentioning of hadith results in many perplexities in understanding religion and causes difficulties for Muslims.³⁴⁸

In the case of the hadith, the context of a dispute is distinct. The context indicates that the Prophet exercised his position and conduct as a judge. The capacity of judgeship refers to what emanates from the Prophet when settling disputes between people.³⁴⁹

The Prophet settled the dispute by giving the right of the son to Abd Ibn Zam'a, after hearing from both. Moreover, the judgment significantly hints that the Prophet compared between two arguments, between the claims of Sa'd and Abd. Finally, the argument of Abd was accepted because of the evidence of the relationship between the Zam'a, the master and his slave-girl. In contrast, the claim of Sa'd was considered weak despite the resemblance between 'Utba and the son, as it was merely a claim without strong evidence. Moreover, compared to other evidence, the matrimonial bed is the strongest.³⁵⁰ Therefore, in such case of existence of matrimonial bed, it is attributed to the legitimate couple, unless the husband denies it by using *li'ān*.³⁵¹

Accordingly, it is comprehensible why the response of the proponents that the judgment by the Prophet is only in the presence of matrimonial bed, thus the case of absence of it is not included.³⁵² Consequently, by looking into the context and the capacity of judgeship hold by the Prophet in the hadith, it shows that the result could be different if there is no dispute, for instance when a biology father affirms his paternity for an illegitimate child.

³⁴⁷ Ibn 'Āshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah*. p. 211

³⁴⁸ Al-Raysūni, *Maqāṣid al-Maqāṣid*. p. 62.

³⁴⁹ Ibn 'Āshūr, op. cit., p. 213.

³⁵⁰ Burqa'ah, *al-Nasab wa Madā Ta'thīr al-Mustajiddāt al-'Ilmiyyah fī Ithbātih*. p. 259.

³⁵¹ Al-Shāshi, *Maḥāsīn al-Sharī'ah*. p. 308.

³⁵² Ibn Taymiyya, *Majmū' Fatāwā*. p. 32/110.

Furthermore, the result is in line with one of the essential *Maqāṣid* principles, namely the rationale behind the ruling. This principle is recalled here because it is essential to differentiate between what is considered as merely religious (*ta'abbudī*) and what may be conceived its rationale.³⁵³ In this regard, it must be clear that the ruling concerning *nasab* is related to the latter. To prove this statement, this research asserted that *nasab* is part of the family law which is also a part of *mu'āmalāt* discourse. Unlike religious matter (*'ibadat*), it is generally based on reasoning. Moreover, the followed hadith on *qā'if* (one who is expert in noticing the resemblance between persons belonging to the same lineage) is more obvious to prove the application of this principle in this matter.

A'ishah narrated, Allah's Messenger once entered upon me in a very happy mood, with his features glittering with joy, and said, "O 'Aishah! Don't you see that Mujazziz looked just now at Zaid bin Haritha and Usama bin Zaid and said, 'These feet (or Usama and his father) belong to each other.'³⁵⁴

The explicit statement over the resemblance between Zaid and Usama significantly indicates the consideration of blood relationship as a reason for paternity.³⁵⁵ Seemingly, the reason of resemblance is part of the Quranic principle cited before, consideration of the reality and substance of a thing. For that reason, Ibn al-Qayyim supports the position of proponents by using the analogy of the maternity of biology mother that was concurred upon it by scholars, then why they differ on the paternity of biology father for illegitimate children.³⁵⁶

³⁵³ Al-Shāṭibi, *al-Muwāfaqāt*. p. 2/581.

³⁵⁴ Al-Shāmi, *al-Jāmi' bayn al-Ṣaḥīḥayn*. p. 1/612-613.

³⁵⁵ Al-Khādimi, "Nasab al-Mawlūd Khārij Rābiṭat al-Zawāj."

³⁵⁶ Ibn al-Qayyim, *Zād al-Ma'ād*. p. 5/382.

3.6.3 Rational and *Maṣlaḥah*-Based Arguments

It is worth noting that the proofs, especially the main proof, are disputable among the jurists. Moreover, some other proofs related to the issue also considered weak and not reliable for this essential discourse. As a result, both the opponents and proponents also support their positions with rational arguments, including *maṣlaḥah*-based justifications.

Firstly, the opponents argue that the semen of adultery is not sacred based on the proof of the absence of all consequences from the *nasab*, like inheritance and others.³⁵⁷ However, the proponents refute the argument, stressing that child born out of wedlock is sacred too, despite the adultery is undeniably categorically prohibited in the Islamic Law. Moreover, some consequences resulted from the born, as concurred by the proponents themselves, like the forbiddance of relationship by marriage and suckling.³⁵⁸

In fact, in *madhhab* Shafi'i, there is a minority opinion stressing on the forbiddance of relationship by marriage, if an illegitimate child is really from the semen of the adulterer. The opinion chosen by several Shafi'i jurists, including al-Ruyani, despite the dominant position in the *madhhab* is the legitimacy of marriage between the adulterer and his daughter.³⁵⁹ The argument that partly refuted by the opinion, and the opinion itself, are mentioned in the same book.

³⁵⁷ Al-Shirbīnī, *Mughnī al-Muhtāj*. p. 4/290.

³⁵⁸ Burqa'ah, *al-Nasab wa Madā Ta'thīr al-Mustajiddāt al-'Ilmiyyah fī Ithbātih*. p. 224-225.

³⁵⁹ Al-Shirbīnī, *op. cit.*, p. 290.

Secondly, the opponents argue that permissibility of the ascribing could open the means for adultery, for instance.³⁶⁰ Nevertheless, the proponents answered them, stressing that there is no correlation between the permissibility and increasing of adultery since adultery is always considered a prohibition and there is no calling for committing it as well.³⁶¹

In this regard, the position of the middle opinion, as cited earlier, also can be used to refute this argument, as they allow the marriage, not to promote adultery, instead, among other things the reason is to give her opportunity to hide her wrongdoing, as quoted from Abu Hanifah.³⁶² Consequently, denying the misconduct is considered to be one of the rules of recognizing the validity of children born after five years of pregnancy or six months of birth. However, five years is usually due to adultery, and six months of marriage is very rarely considered to be linked to premarital sex.³⁶³

Moreover, in Malaysia that disallows the legitimation, the number of children born out of wedlock increases every year. Evidently, NRD statistics show that a total of 159,725 children were born out of wedlock to Muslim mothers since 2013. Of this number, 53,492 were born in 2013, 54,614 in 2014 and 51,169 in 2015.³⁶⁴ The statistics significantly demonstrate the weakness of the argument.

Apparently, Abu Hanifah's argument spotlights a significant dimension of *maṣlaḥah*, namely *maṣlaḥah* of hiding wrongdoing. This *maṣlaḥah* was inductively derived from numerous proofs from the Quran and Sunnah, the life of the Prophet and history, as

³⁶⁰ Al-Ghaznawī, *al-Ghurrah al-Munīfah*. p. 154.

³⁶¹ Burqa'ah, *al-Nasab wa Madā Ta'thīr al-Mustajiddāt al-'Ilmiyyah fī Ithbātih*. p. 226.

³⁶² Ibn Qudāmah, *al-Mughnī*, 1997. p. 9/123.

³⁶³ Al-Qarāfī, *al-Furūq*. p. 4/200-201.

³⁶⁴ Ahmad, "159,725 Anak Tak Sah Taraf Didaster Sejak 2013."

well as many other proofs.³⁶⁵ Due to the importance of this *maṣlahah*, it may pave the way for the emergence of another *maṣlahah*, such as encouraging adulterers to remorse and be responsible for the outcomes of their wrongdoings.

On the other hand, the second argument might be meant to restrict adultery of which the third argument of them. Nevertheless, the proponents may debunk it by insisting that the permissibility will realize many forms of the restriction because once the child attributed to his biological father, then the father must bear many responsibilities, such as maintenance, hospitality, education, and many others.³⁶⁶

Moreover, the argument of opponents may also cause other harms after the harm of adultery. For instances, the harms of baby dumping, depression of mothers, negligence of fundamental rights of the illegitimate children, and many others. Such multiple expected harms must be avoided at any cost. In this respect, one of the governing principles of *Shari'ah* urges that the basest of *mafsadah* is prevented by committing the base one. If the various type of *maṣlahah* and *mafsadah* are equal, preference will be based on numerical superiority.³⁶⁷

Instead, the responsibilities of biology fathers, as the outcome of the legitimation may prevent the harms, even possibly can realize many important *maṣlahah* like pleasuring children with the lineage of which will result in their rights including the custody and maintenance. Besides the material interests, there are also psychological interests that

³⁶⁵ Al-Khādīmī, “Nasab al-Mawlūd Khārij Rābiṭat al-Zawāj.”

³⁶⁶ Ibn Qudāmāh, op cit., p. 225.

³⁶⁷ Ibn Abd al-Salam, *Qawā'id al-Aḥkām fī Iṣlāḥ al-Anām*. p. 1/246.

may be achieved by the legitimation.³⁶⁸ The *maṣlahah* related to the rights of children is one of the purposes of *Shari'ah*, as explained in the second chapter.

Meanwhile, the proponents also come out with several rational arguments. Among them is the analogy of allowing to ascribe an illegitimate child to his mother, with the attribution to his biological father.³⁶⁹ Despite the apparent rationality of this argument, it may be refuted by the opponents, as the issue raised by them is the legitimacy from the Islamic perspective. Hence they based their position mainly by the hadith of matrimonial bed.

Nevertheless, the proponents offer another argument, saying that the opponents themselves affirm that adultery disallows the relationship of marriage. Accordingly, it is impermissible for an adulterer to get married to the mother or daughter of his partner. If this consequence of *nasab* is applied to the adulterer, hence the legitimation should be allowed, since it is also a consequence of *nasab*.³⁷⁰

In this respect, seemingly the position taken by the proponents is generally in resemblance to the principles of the Quran relating to *nasab*, as highlighted before. Regarding the Quranic principle saying that the Lawgiver intends to attribute people to their lineage, one of the proponents, al-Raysūni, offers a compelling argument to realize the principle. According to him, since the preservation of progeny is deemed as among the necessities (*darūriyyāt*), and the concern with lineage, its legitimacy and authenticity, serves the necessity. When contradiction occurs between the concerned, which is a need (*hājiyyāt*), and the necessity, then the preservation of the necessity

³⁶⁸ Al-Raysūni, *Nazariyyat al-Taqrīb wa al-Taghlīb*. p. 373.

³⁶⁹ Ibn al-Qayyim, *Zād al-Ma'ād*. p. 5/381-382.

³⁷⁰ Al-Hilālī, *al-Baṣmat al-Wirāthiyyah*. p. 367.

must be prioritized over the preservation of the need, as the latter is just a complement for the former.³⁷¹

3.6.4 *Maqāṣid* Approach in Favour of the Permissibility of Ascribing Illegitimate Child to Biological Father with Certain Parameters

Based on all the arguments presented, it is clear that in the first place, there is no consensus among scholars over the issue. Consequently, they differ on the permissibility or impermissibility of ascribing illegitimate children to their biological father. The differences are not only on rational arguments. Instead, it is primarily on the interpretation of the main proof or the hadith of matrimonial bed. However, after demonstrating the arguments of the opponents and proponents, this research tends to prefer the latter over the former. The reasons are as follows:

3.6.4 (a) Revisiting the interpretation of Hadith on Matrimonial Bed

As far as the hadith of the matrimonial bed is concerned, the fundamental proof of this is the existence of a relationship, either between the master and the slave-girl, as in the case, or between the husband and the wife. Therefore, in the case of absence, the hadith is not necessarily applied.

Apart from the sense of the hadith that is useful to infer, it is also based on a linguistic approach, as the *alif lam* letters of the term *al-walad* (child) in the hadith is considered by many scholars, including Ibn al-'Arabi, to be *alif lam al-'ahd*, so it does not mean

³⁷¹ Al-Raysūni, *Naẓariyyat al-Taqrīb wa al-Taghlīb*. p. 375.

all the constituents of the word, but some constituents. Thus, it means individual children in case of the presence of matrimonial bed.³⁷²

3.6.4 (b) Hadith of Juraij Ascribing Illegitimate Child to Biological Father

The proponents also supported by other hadiths, for instances the hadiths of Juraij, *li'ān*, the policy of Umar that ascribed illegitimate children born in the pre-Islamic era to their biology fathers as widely reported, and using the analogy of ascribing illegitimate child to the birth mother.

3.6.4 (c) Principle of Consideration of Reality Relationship

The arguments of the proponents on the legitimation are closer to the Quranic principles on the *nasab*. By ascribing them to their biology father, not only their lineage is preserved, but also the consequences of the lineage such as maintenance and inheritance. Moreover, the ascribing is based on the reality of the relationship, just like the real relationship between the child and his/her mother. Therefore, in respect of the principle of consideration of real relationship, Riḍā supports the position of the proponents, as can be seen within his exegesis of the 4:23.³⁷³ This is also the essence of the position of the proponents, as discussed earlier.

3.6.4 (d) Maṣlaḥah Supersedes Maḥṣadah

There are many *maṣlaḥah* to be achieved, and *maḥṣadah* to be avoided behind this legitimation as outlined before. Despite the opponents coming out with the argument of *maḥṣadah* that could emerge of this legitimation, but according to this research, it is

³⁷² Al-Zurqānī, *Sharḥ al-Zurqānī 'ala al- Muwaṭṭa'.* p. 4/25.

³⁷³ Riḍā, *Tafsīr al-Manār.* p. 4/381.

not sufficient to contravene the expected *maṣlaḥah*. Even, one of the relevant expected *mafsadah* stated by them, that this legitimization could be a means for the increasing of adulteries, is disputed by the statistics of the illegitimate children among Muslim in Malaysia.

In this respect, al-'Izz reminds, if it is impossible to prevent all *mafsadah* or to secure all *maṣlaḥah*, then, if their rank is the same, one has a choice, and if their degree is different, then the one with a higher degree will be given precedence. If this is not known, then one will desist.³⁷⁴ Besides, the principle of consideration of implications before deciding a position, as stressed by al-Shāṭibi, is also reminded here.³⁷⁵ As a result, this research tends to prefer the *maṣlaḥah*-based arguments of the proponents as by doing so, the purposes of familial matters may be realized, and achieving the better consequences as well.

3.6.4 (e) Upholding Several *Shari'ah* Principles on *Nasab*

The position is also endorsed by many principles of *Shari'ah*, including the principles of the possible reasoning behind *nasab*'s ruling, the concealment of wrongdoing, the intention of the Lawgiver to assign people to their origin, consideration of the truth and nature of the matter, and consideration of the consequences. All the principles have been mentioned in the discussion before.

3.6.4 (f) Concept of *Taqwā*

As asserted in earlier, family is considered as one of the crucial fields that insist on the fundamental of *taqwā* as its eminent guidance. The messages of *taqwā* present in the

³⁷⁴ Ibn Abd al-Salam, *Qawā'id al-Aḥkām fī Iṣlāḥ al-Anām*. p. 1/8.

³⁷⁵ Al-Shāṭibi, *al-Muwāfaqāt*. p. 4/517-518.

verses related to marriage and divorce, as well as other matters concerning familial relations. Considering it as an essential concept of Islamic law as extensively discussed in chapter two, this study deems it as the basis for the specific purposes of family in Islamic law.

Therefore, it is worth to recall one of the meanings of the concept here. It is fear of the consequences of one's actions –whether in this world or the next. In other words, it is the fear that comes from an acute sense of responsibility, here and in the hereafter, and not the fear of a wolf or an uncanny tyrant, for the God of the Qur’ān has unbounded mercy. However, He also wields dire punishment, both in this world and in the hereafter.³⁷⁶ Accordingly, this research opined that legitimation could lead to better consequences for the illegitimate children and safeguard their interests.

3.7 Conclusion

In conclusion, this chapter examines the Malaysian context for Islamic Family Law, specifically on the issue of *nasab*. To better understand the context, five cases regarding the issue of illegitimate children in Syariah High Courts were exemplified. Besides that, *fatwas* from States and the Federal, over the issue also presented with a particular focus on the arguments of the proponents and opponents.

After briefly exploring the Malaysian context, this research studied *nasab* related issue in the contemporary *fiqh* of family, followed by an illustration of the arguments of the opponents and proponents. Finally, the *Maqāṣid* approach, as stated in the

³⁷⁶ Rahman, *Major Themes Of The Quran*. p. 29.

previous chapter, was employed to analyse the arguments, and eventually gave its preference over the issue and the reasons for it.

Although this position contravenes the position of the official *madhhab* in Malaysia, but for the reason of common good and public interest, it may be applied in Malaysia. Evidently, in section 54 of the Enactment No. 1 of 2003, Administration of The Religion of Islam (State of Selangor) Enactment 2003, regarding the authorities that must be followed. It is mentioned in articles 1, 2 and 3 in the section that:

(1) In issuing any *Fatwa* under section 48, or certifying an opinion under section 53, the *Fatwa* Committee shall ordinarily follow *qaul muktamad* (the accepted views) of the *Mazhab* *Syafie*.

(2) If the *Fatwa* Committee is of the opinion that following the *qaul muktamad* of the *Mazhab Syafie* will lead to a situation which is repugnant to public interest, the *Fatwa* Committee may follow the *qaul muktamad* of the *Mazhab Hanafi*, *Maliki* or *Hanbali*.

(3) If the *Fatwa* Committee is of the opinion that none of the *qaul muktamad* of the four *Mazhabs* may be followed without leading to a situation which is repugnant to public interest, the *Fatwa* Committee may make the *Fatwa* according to *ijtihad* without being bound by the *qaul muktamad* of any of the four *Mazhabs*.³⁷⁷

In addition, there is a principle within the *madhhab* itself, which states that whoever is afflicted with suffering will obey the judgment that requires, even in contrast to the

³⁷⁷ Section 54 of the enactment no. 1, Administration Of The Religion of Islam (State of Selangor) Enactment (1993).

accepted views of the *madhhab*.³⁷⁸ If this principle is stated in the author's commentary on the decision to use gold and silver vessels in connection with the suffering of individuals, then it is logically more important to apply it in the light of our debate on the common goods of the Muslim communities, the rights of children and single mothers.

³⁷⁸ Al-Bājuri, *Ḥashiyat Ibrāhīm al-Bājūrī ‘alā Sharḥ al-‘Allāmah Ibn al-Qāsim al-Ghazzī*.