

The Position of Nafkah for Children Born out of Wedlock in MUI Fatwa No. 11/2012 and Child Protection

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ABSTRACT: The article "The Obligation of Male Adulterer's Expenditure on the Child of Zina: Analysis of Qawa'id Fiqhiyyah in MUI Fatwa No. 11/2012" discusses the legal obligations for men who cause the birth of adulterated children. The Indonesian Ulema Council (MUI) has issued Fatwa No. 11/2012 to respond to the anxiety of the Indonesian Muslim community after the decision of the Constitutional Court No. 46/2010. In the fatwa, MUI stipulates that adulterated children have no relationship of nasab, guardianship, or inheritance with the man who caused their birth. However, MUI sanctions male adulterers in the form of ta'zir through the government to provide for the children of adultery and requires them to make a mandatory will so that the inheritance can be distributed to the children after they die. The analysis of this article uses qawa'id fiqhiyyah to understand the legal obligations imposed on male adulterers. Therefore, this article emphasizes the importance of legal protection for adulterated children and protecting the interests of children, not to legalize the nasab relationship between children and gene fathers. This policy is also in line with the policy of the Republic of Indonesia in the Child Protection Law which regulates the interests of children. Thus, this article provides an in-depth insight into the legal obligation for adulterous men to provide for adulterated children based on MUI fatwa No. 11/2012, as well as its legal implications in the context of child protection.

KEYWORDS: MUI fatwa No 11 of 2012; Qawaidh fiqhiyyah; Child Protection Law

INTRODUCTION

Adulterated children are a complex phenomenon in modern society, especially in the context of Islamic law. This issue often involves the question of legal obligations for the man who caused the birth of the child. The Indonesian Ulema Council (MUI) has issued Fatwa No. 11/2012 to respond to the unrest in Indonesian Muslim society following the Constitutional Court's decision No. 46/2010. In the decision, the Constitutional Court stated that the child of adultery has a civil relationship with the man who caused

his birth (his gene father). (Uddin, 2022) This decision was then responded by MUI by giving a decision that the child has no relationship with the gene father, either from nasab, guardianship, or inheritance. However, MUI did not stop there. They also give sanction to the gene father in the form of ta'zir through the authorized government, which is to provide for the child of adultery so that his life needs are fulfilled.

In addition, MUI also sanctioned the gene father to make a mandatory will so that his property can be distributed to the

child after he dies. The policy of MUI's decision is none other than to protect the child's interest, not to legalize the nasab relationship between the child and the gene father.

In this article, we will analyze the qawa'id fihiyyah in MUI Fatwa No. 11/2012 to understand the legal obligation of adulterous men to provide for the children of adultery. This analysis aims to deeply understand the legal obligations imposed on male adulterers and their legal implications in the context of child protection. Thus, this article hopes to provide an in-depth insight into the legal obligations for adulterous men in providing for adulterated children based on MUI fatwa No. 11/2012.

METHODS

In writing this article, it uses a type of library research, which is a series of activities related to library data collection methods. (Mahmud, 2011, 31). In addition, this type of research is documentary research using the sources of official documents of MUI, Constitutional Court decision number 46 of 2010 and the Child Protection Law with normative analysis or an analytical approach to the principles of Islamic law that are relevant to the obligations of male adulterers, such as the principle of protecting the interests of children and the principle of not legalizing the relationship between adulterated children and gene fathers.

The systematic writing of this article is preceded by an introduction that discusses the background, objectives and theoretical framework. Then proceed with the research method, which discusses the research methods used. Furthermore, the findings and discussion are related to the results of the analysis and conclusions obtained. Finally, there is a conclusion which is the final conclusion and recommendations for further research.

RESULT AND DISCUSSION

The Concept of Maintenance

The word nafkah is an absorption from the Arabic language, namely nafaqat, which is rooted in the word infaq, meaning that it is issued. According to Wahbah Zuhaili, the word is not used except in terms of goodness, meaning something that is issued by someone for his family. (Zuhaili, 2011, 94).. Meanwhile, according to Shara', nafkah is the sufficiency given by someone in terms of food, clothing and shelter. (Zuhaili, 2011, p. 94)..

According to Abdul Majid nafkah is everything that is needed by humans such as food, clothing, shelter, assistance and all their needs according to local traditions. (Mathlub, 2005, p. 616). while Aal-Jazairy (2014, p. 863) mentions nafkah briefly, namely food, clothing, shelter that must be given to people who are obliged to receive all of that. From this definition, it can be seen that nafkah is in the form of material, namely spending on food, clothing and shelter. The relationship with this research is that nafkah is defined as the fulfillment of shopping needs from a father to his child.

The legal basis for the obligation of maintenance is found in the word of Allah Qur'an letter al-Baqarah verse 233 as follows. Translation: "Mothers should nurse their children for two full years, that is, for those who wish to complete breastfeeding; and it is the duty of the father to feed and clothe the mothers in a manner acceptable to him. no one is burdened except according to his ability. let not a mother suffer hardship on account of her child, nor a father on account of his child, and neither should an inheritor. If they wish to wean (before two years) by mutual consent and agreement, there is no sin on either of them; and if you wish your children to be nursed by others, there is no sin on you if you pay them according to what is proper. fear Allah and know that Allah sees what you do."

The verse explains the issue of the father's obligation to provide for the mother during the breastfeeding period, but also as a father's obligation to his child.

The hadiths that explain the obligation of maintenance also include. Translation: 'Ā'ishah Radliyallaahu 'anhu said: Hindun bint Utbah, the wife of Abu Sufyan, came to the Messenger of Allah (peace be upon him) and said: O Messenger of Allah, Abu Sufyan is a stingy man. He does not give me enough for me and my children unless I take from his wealth without his knowledge. Is it a sin for me to do so? He said: "Take from his wealth what is sufficient for you and your children well." *Muttafaq Alaihi*.

The Hadith indicates that the father is responsible for the maintenance of his wife and children. The children who must be provided for according to the view of the majority of scholars are children directly from the father, then grandchildren and so on down. This means that a grandfather is obliged to provide for his grandchildren either from any party or path require maintenance, namely birth kinship or kinship between *usul* (main / father upwards) and *furu'* (branch / child downwards). Then non-birth kinship, which is forbidden to marry such as brothers, uncles, aunts and their descendants. (Al-Barry, n.d., p. 91). Regarding this requirement, the scholars of the four madhhabs have provided several conditions, among others:

1. Imam Malik is of the opinion that maintenance is obligatory from the father to the child and then the child to his parents and is limited to that. (Al-Barry, n.d., p. 91).
2. Imam Shafi'i is of the opinion that maintenance must be given to all family members who have a vertical relationship up and down, without limiting certain members (Al-Barry, n.d., p. 91)
3. Imam Hanafi, argues that the obligation of maintenance applies to all muhrim family members. Thus, the scope of the family is. even wider. The father is obliged to provide for his children and grandchildren, and the child is obliged to provide for his parents as a vertical relationship and also to brothers,

uncles, father's brothers, and mother's brothers. (Al-Barry, n.d., p. 91).

However, according to the opinion of Imam Malik, as explained by Wahbah Zuhaili, that children's maintenance is only obligatory for direct children, while children or grandchildren are not included in the *zahir* meaning of the verse above (QS al-baqarah: 233). Still in the same view states that *nafkah* is obligatory because of the mere relationship of inheritance, not because of one family (Zuhaili, 2011, p. 137).

In Islamic law, it is stipulated that there are two types of kinship relationships that even wider. The father is obliged to provide for his children and grandchildren, and the child is obliged to provide for his parents as a vertical relationship and also to brothers, uncles, father's brothers, and mother's brothers (Al-Barry, n.d.).

4. Imam Hanbali, believes that maintenance is obligatory for family members who still inherit from each other, if one of them dies. So that the scope is broader, both family members who are muhrim or not with him. (Al-Barry, n.d., p. 91)..

Based on these four views, it indicates that the obligation of maintenance must be caused by the attachment of *nasab* / kinship. So it can be seen that the attachment of *nasab* or descent is the initial cause of the obligation of maintenance for relatives. This means that if there is no *nasab* or disconnection of a person's *nasab* then he does not get *nafkah* in it.

The Concept of Zina's Child and Its Position in Islamic Law

Children of adultery or children out of wedlock is a term used for children who are born out of an invalid marriage, both according to Islamic law and according to positive law. This term refers to one of the Law Number 1 of 1974 concerning Marriage. Article 42 and Article 43 paragraph (1) state "A legitimate child is a

child born in or as a result of a legal marriage. Children born outside marriage only have a civil relationship with their mother and their mother's family." (Department of Religious Affairs, 2004).

According to Abdul Manan (2006, pp. 80- 81) According to Abdul Manan (2006, pp. 80- 81), a child out of wedlock is a child born to a woman while she is not in a legal marriage with the man who has intercourse with her. The meaning of the word outside marriage is the relationship between a man and a woman who can give birth to offspring, while their relationship is not in a legal marriage according to positive law or the religion they follow. According to Amir Syarifuddin, children born of adultery are children born of adultery, namely sex between a man and a woman who are not bound in a legal marriage (except in the form of syubhat) even though he was born in a legal marriage with a man who committed adultery or another man. (Syarifuddin, 2008, 148).

Sayyid Sabiq defines an adulterous child as a child born out of a non-shari'i marriage. (Sabiq, n.d., p. 697).. In legal substance, these definitions basically have the same principle. So it can be concluded that a child of adultery is a child born from an adulterous relationship. Even though the child is born within the framework of a legal marriage, the child is still included as an extramarital child, where the laws on him still apply, such as the severance of nasab between him and his father (male adulterer).

Regarding the legal position of the child of adultery, scholars agree that he does not have kinship / nasab with the father and his father's family. A child's nasab to his mother can still be recognized from the point of birth whether it is shar'i or not. However, the nasab of a child to his father can only be recognized by the existence of a valid or invalid marriage, or

wati' syubhat (intercourse whose law is unclear), or the recognition of nasab itself in Islam is known as the term *haq* (recognition of a child). (Zuhaili, 2011, p. 25). The disruption of the child's nasab from adultery with his father means that his rights to his father's obligations such as inheritance rights, maintenance and guardianship are also cut off. Likewise, if an adult child of adultery does not get a father does not get the right to the child he produced.

MUI Fatwa No. 11/2012 on the Position of Zina's Children and Their Treatment

The Indonesian Ulema Council (hereinafter written MUI) is a non-governmental organization that accommodates ulama, *zu'uma'*, and Islamic scholars in Indonesia. The purpose of the establishment of MUI is to guide, foster and protect the Muslims throughout Indonesia. The beginning of the establishment of MUI is 17 Rajab 1395 Hijri, coinciding with July 26, 1975 AD in Jakarta, Indonesia. (Afronyati, 2014, p. 44). MUI has a very strategic role in building the country. Because in addition to accommodating the Muslim community including guidance, coaching, and providing some legal products through its fatwa, MUI also acts as the adhesive of the nation, which is used as a forum to unite the perspectives of ulama and umara. The goal is to uphold *amar ma'ruf nahi munkar* or to create religious harmony, and to create national unity.

As stated earlier, one of the duties and functions of MUI is to answer problems that arise in society by issuing legal products through fatwas or answers to legal problems. So is the case related to MUI's fatwa No. 11/2012 on the Position of Children from Zina and the Treatment of Them which is the focal point of this research.

The background to the issuance of this fatwa is to answer public unrest about the growing reality in society about the discriminatory treatment of children resulting from adultery, both sociologically and even juridically. In addition, it is also related to the issuance of a Constitutional Court decision that has conducted a judicial review of Article 43 of Law Number 1 of 1974 concerning Marriage which is considered by the applicant to be contrary to the 1945 Constitution. The provisions in Article 43 are also related to the position of children outside of marriage in general (both children outside of marriage due to adultery or *nikah sirri*). Initially, the case decided by the Constitutional Court was related to the application and legal recognition of the child born to Machicha Muchtar and Moerdiono, who was born from a *nikah sirri* (unregistered marriage).

In relation to this case, the Constitutional Court issued Decision Number 46/PUU- VIII/2010. Based on its consideration in the decision, the Constitutional Court actually provides protection to children and punishes men who cause their birth to be responsible. Because if the man is not responsible, there will be discrimination against children's rights. In essence, children out of wedlock according to the Constitutional Court are considered to have a civil relationship with their mother and their mother's family as well as with the man as their father who can be proven based on science and technology and or other evidence according to the law to have a blood relationship, including a civil relationship with their father.

The issuance of this Constitutional Court decision has caused unrest in the community, especially the followers of Islam, with the emergence of questions about the position of adulterated children, especially related to the relationship of *nasab*, inheritance, *bafkah* and marriage

guardian with the man who caused their birth. Therefore, to answer people's questions related to the issue, MUI considers it necessary to establish a fatwa on the position of adulterated children and the treatment of them to be used as guidelines. (MUI Fatwa No. 11/2012 on the Position of Children of Zina and the Treatment of Them, n.d.).

On the issue of the position of children out of wedlock because of adultery, MUI issued a fatwa with 6 (six) main legal contents that became the result of MUI's decision. The results (contents) of MUI's fatwa no. 11/2012 on the Position of Zina's Hazil Children and the Treatment of them are as follows:

1. The child of adultery does not have a relationship of *nasab*, *wali nikah*, inheritance, and maintenance with the man who caused his birth;
2. The child of adultery only has a relationship of *nazab*, inheritance, *nafaqah* with his mother and his mother's family;
3. The child of adultery does not bear the sin of adultery committed by the person who caused its birth;
4. Adulterers are subject to *hadd* punishment by the authorities in the interest of preserving legitimate offspring (*hifz al-nasl*);
5. The government is authorized to impose a *ta'zir* punishment on the male adulterer who causes the birth of a child by obliging him to:
 - a. Provide for the needs of the child;
 - b. Giving away assets after his death through a mandatory will;
6. The punishment referred to in No. 5 is intended to protect the child, not to legalize the relationship between the child and the man who gave birth to him.

In addition, MUI also gave 5 (five) points of legal recommendations, as follows:

1. The House of Representatives and the Government are requested to immediately draft the governing legislation:
 - a. Severe punishments for committing adultery that can serve as a deterrent and mawani' (making the perpetrator deterred and those who have not yet committed it afraid to do so).
 - b. include adultery as a general offense, not a complaint offense because adultery is a crime that desecrates the noble dignity of man..;
2. The government is obliged to prevent the occurrence of adultery accompanied by strict and firm law enforcement;
3. The government is obliged to protect adulterated children and prevent neglect, especially by punishing the man who caused their birth to provide for their needs;
4. The government was asked to provide easy birth certificate services to adulterated children, but not to attribute the man who caused their birth;
5. The government is obliged to educate the public not to discriminate against adulterated children by treating them like other children. The determination of the nasab of adulterated children to the mother is intended to protect the child's nasab and other related religious provisions, not as a form of discrimination. (MUI Fatwa No. 11/2012 on the Position of Adulterated Children and Their Treatment, n.d.)

Based on the six MUI fatwa results and the five legal recommendations given by MUI to the government, it is indirectly seen that MUI rejects the Constitutional Court's decision which states that children out of wedlock (especially because of adultery) have a civil relationship with their father and his family (biological

father). In the first point of the fatwa, it is clearly stated that adulterous the Treatment of them, there are at least 7 (seven) fiqhiyyah rules used. But specifically, in relation to the determination of the government's authority to require adulterous men to meet the needs of children, MUI uses 2 (two) general rules, while for the rest, MUI uses fiqhiyyah rules that specify the prohibition of damage (including adultery).

The 2 (two) general rules that are related to the provisions of the decision point 5 letter (a) are as follows: Children only have nasab, inheritance, and nafkah with their mother and mother's family, not with their father or father's family who caused the child to be born.(RAhman, 1971, p. 594). This provision is the same as Article 43 of the Marriage Law before the judicial review by the Constitutional Court.

In addition, MUI's fatwa also refutes the Constitutional Court's reasoning that states the absence of biological father's responsibility as a form of discriminatory treatment, which is explained in point 5 that the determination of the nasab of adulterated children to the mother is intended to protect the child's nasab and other related religious provisions, not as a form of discrimination. Therefore, MUI legally determines that adulterated children do not have a nasab relationship with the father and his (biological) father's family.

However, to answer the problems caused as a form of children's rights, there are provisions in point 5 letter (a) which states that the government is authorized to impose ta'zir punishment on adulterous men who cause the birth of adulterated children by obliging them to meet the needs of the child's life. Whereas in Islamic law the obligation of maintenance does not apply to people who do not have a nasab relationship. For this reason, point number

5 letter (a) will be a study that will be examined in the next discussion.

Analysis of Qawaidh Fiqhiyyah Used as Legal Principles in Underlying MUI Decision No. 11/2012 on the Position of Zina's Children and Their Treatment

"All mudharat (harm) should be avoided wherever possible" Related to the authority of the judge in imposing ta'zir punishment on adulterers to meet the needs of children based on the following rules:

"The policy of the imam (government) towards his people is based on the benefit" In inferring the law here, MUI uses maslahah mursalah approach, which means to provide a benefit and benefit for mankind, or an activity carried out to achieve good or benefit either for the community or individual. (Muzarie, 2010, p. 37).

Based on these two rules, MUI obliges adulterous men to fulfill the needs of adulterated children. The purpose is clear in point 6 which states that the punishment that obliges the man to fulfill the needs of the child is aimed at protecting the child, not to legalize the nasab relationship of the adulterated child with the man who caused his birth. Child protection in a broad sense includes the first fiqhiyyah rule, namely all mudharat (for) children must be eliminated as far as possible, one of which is by providing ta'zir law for adulterous men to meet the needs of adulterated children.

Based on all the legal arguments used by MUI in determining the law on the position of adulterated children and the treatment of them, it can be seen that MUI is trying to reaffirm about maintaining nasab. Furthermore, the child of adultery is determined to only have nasab from the mother and the mother's family, including the things that affect it such as inheritance, nafkah, and guardianship. Meanwhile, his

relationship with the adulterous man who caused his birth is cut off. Furthermore, through the maslahah method, it is determined that for the benefit of the child, the adulterous man who caused the birth of the adulterated child is punished with the obligation to fulfill the child's needs. Although in Islam, the adulterated child and the adulterer who caused the birth of the adulterated child are completely different people, and each of them is not burdened with the same responsibilities as a child with a legal father.

Conformity of MUI Decision Policy with Child Protection Law

MUI's Fatwa No. 11/2012 on the Status of Zina's Children and Their Treatment is in line with the Law on Child Protection, but there are also some differences that need to be considered.

Among the suitability of MUI's Fatwa No. 11/2012 with the child protection law, among others:

1. Both aim to provide protection for children, in the fatwa stipulating that children of adultery must be protected from all forms of harm and loss. It is explained in the fatwa that the government is authorized to impose ta'zir law on adulterous men by obliging them to fulfill the needs of adulterated children and provide mandatory wills to adulterated children after the perpetrator dies. (Ilhami, n.d.). Meanwhile, the Child Protection Law also emphasizes the protection of the basic rights of children, including newborn children from illegitimate relationships. (Ilhami, n.d.).
2. The existence of parental obligations towards their children; in MUI fatwa no 11 of 2013 stipulates that adulterous men have an obligation to provide for the needs of the child of adultery and provide a mandatory will after he dies

which aims to protect the child from loss and harm. The child protection law also emphasizes the obligation of parents to care for children and educate their children as best as possible until the child is independent. Although it does not directly explain adulterated children, the law focuses on providing fair treatment and protecting children's rights. (Ilhami, n.d.).

Then there are also differences between MUI Fatwa no 11 of 2012 and the Child Protection Law including:

1. The legal status of adulterated children; in MUI fatwa no. 11 of 2012 explicitly states that adulterated children do not have a relationship of nasab, wali nikah, inheritance and nafaqah with the man who caused their birth, but they only have this relationship with their mother and their mother's family. In contrast, the Law on the Protection of Children specifically does not mention the status of adulterated children, but focuses on providing fair treatment and protecting the rights of children regardless of birth status or family relationships. (Ilhami, n.d.).
2. Ta'zir punishment; Fatwa No. 11/2012 authorizes the government to impose ta'zir punishment on male adulterers in order to protect children, not to legalize the nasab relationship between male adulterers and the children of adultery. However, the Child Protection Law does not specifically mention the existence of ta'zir punishment for male adulterers, but this law focuses on fair law enforcement and protecting the rights of children. (Ilhami, n.d.).

Thus, it can be seen that MUI Fatwa No. 11/2012 and the Child Protection Law are compatible in emphasizing the protection of children's rights and parents' obligations. However, the main difference lies in the legal status of adulterated children and the ta'zir punishment given in the MUI fatwa. Based

on the analysis, it can be seen that MUI through its fatwa directly emphasizes the protection of adulterated children, whose nasab is clearly cut off from their biological father. The effort made by MUI is to maintain and protect the rights of children so that they are not harmed in line with the Child Protection Law. However, Ta'zir punishment is still applied in

CONCLUSION

MUI Fatwa No. 11/2012 on the obligation of nafaqah (maintenance) of adulterous men towards children born of adultery is an important step in protecting the interests of children and preventing harm to them. In the analysis of qawa'id fiqhiyyah, this fatwa stipulates that adulterated children do not have a relationship of nasab, wali nikah, inheritance, and nafaqah with the man who caused their birth. However, the government has the authority to impose a ta'zir punishment on the adulterous man who caused the birth of the adulterated child by obliging him to provide for the child's needs and give him property through a mandatory will after he dies.

Basically, MUI's Fatwa No. 11/2012 on the obligation of an adulterous man to provide alimony for the child of adultery has significant compatibility with the Child Protection Law in emphasizing the protection of children's basic rights. Although there are differences in implementation and specific objectives, both focus on protecting children's interests and providing fair treatment. As such, this fatwa is a clear example of prevention and legal protection for children of adultery, which is in line with the policies of the Republic of Indonesia in the Child Protection Law.

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