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The Law of *Nasab* in Islam

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ABSTRACT

Nasab (lineage) is emphasized heavily in the Islamic Law since it determines the purity of genealogy. Preserving the sanctity of family lineage is one of the objectives of the Islamic Law. Children that are brought into this world and the formation of family must follow the rules ascribed by the Syariah. This paper intends to explore the discussions of Islamic *fiqh* (jurisprudence) and the recent views on the law of lineage that are adhered to by the Muslims community in Malaysia. In order to achieve the objectives, two principal informants were interviewed. Data was gathered using unstructured interviews and was analyzed quantitatively. The results showed that even though there are specific *fatwas* and several views from eminent scholars regarding the law of *nasab*, Muslim Malays strongly adhere to National *Fatwa Council* which stated that every child that is born after six months from the date of a marriage can be lineaged (*nasab)* to his or her mother's husband. Other *fatwa*s and views which allow the *nasab* on the biological father of a child that is born after six month after it was conceived are rejected by the majority of Malays Muslim Scholars. Next, this paper will then focus on the status of illegitimate child according to the provisions under the law of *nasab*. The writings of this paper also will be based on the reference of several writings of the Islamic *fiqh* which eventually concluded the selected views adhered by the Muslim community in Malaysia.

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INTRODUCTION

Nasab is the Arabic word meaning family ties or blood ties that relates one member of a family to another. Steadfastly upholding the purity of family lineage is one of the objectives of the Islamic Law (*maqasid al-syariah*). In order to fulfill this objective, Allah enjoins marrriage when He states "Marry women of your choice, two, or three, or four;" (al-Nisa', 3). Consequently, this paper intends to discuss the law of *nasab* that has been the source of reference and adhered to by the Muslim community in Malaysia.

Nasab has been an important element in family. Family is a social institution that units individuals into cooperative groups that oversee the bearing and raising of children (Macionis, 1999). In Islam, the formation and development of family must be through marriage, while marriage, an official bond between a man and a woman is strongly upheld by Islam as the Prophet said marriage is my way (sunnah): whoever loves my conduct should follow my way, and whoever strays from my way is not of me (Aminah Annette Ferrar, 2006). Family is the basic foundation in the formation of a society and nation. The formation of a good society or nation depends entirely on how good and well a family is formed. Clearly, it is imperative to carefully preserve the formation of family in the best possible manner. Among the basic foundations in the formation of a family is *nasab*, the integrity of lineage and genuine blood ties that relates or bonds every family members in Islam. This form of relationship is ultimate and pure; it can never be broken and should last forever. Marriage is the only permissible way to establish the *nasab* relationship and it also determines certain legal issues of rights and responsibilities, maintenance (*nafkah*), inheritence and so on. This means that living without marriage amongst couples is strongly prohibited by Islam and should be avoided as its bring chaos to society as a whole.

The following data demonstrate how living together prior to formal marriage resulted with divorce. According to reports by Researchers from Yale University, Columbia University and the Institute for Resource Development at Westinghouse, the divorce rates of women who cohabit are nearly 80 percent higher than the rates of those who do not (Neil Bennett, et al. 1988) The University of Wisconsin at Madison researchers report

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that cohabiters perceived greater likelihood of divorce than couples who did not cohabit before marriage and the longer couples live together outside of marriage, the higher likelihood of divorce (Thomson and Colella, 1992). This scenario also have a relation with children born as a result of that relationship which in many ways more likely to be abused and become victims of the situation. Popenoe and Whitehead, researchers from the National Marriage Project, found that children living with cohabiting biological parents who are unmarried are 20 times more likely to be abused and children whose mother lives with a boyfriend who is not the biological father are 33 times more likely to be abused than children with married biological parents (Popenoe and Whitehead, 1999) Compared to children in intact families, children in cohabiting households had more behavioral problems and poorer academic scores (Popenoe and Whitehead, 1999) The scenario suggest that marriage and living together legitimately has so many benefits not only for the couple but the children born as a result of the legitimate marriage. This paper therefore aims to analyze the law of nasab in Islam with particularly reference to Malaysia. To analyze this issue, the paper is organized into four sections. The first section presents the introduction to the topic of discussion. In the second section will be a brief discussion on materials and method employed in this study, while the third section provides results and discussion.

MATERIALS AND METHOD

This present paper presents a result of a qualitative study regarding the law of nasab in Malaysia. All information in this paper is obtained from that qualitative research which was conducted in the states of Perlis and Kedah, (Wan Ab Rahman Khudzri Wan Abdullah Md Zawawi Abu Bakar and Wan Ibrahim Wan Ahmad, 2011). Data were collected through unstructered interviews with two informants whom directly involved with the issue being studied. The two informants were the Perlis State Director of the National Registry Department, and the Deputy *Mufti* for the state of Kedah. The interview, containing both closed-ended and open-ended questions, made available a wide range of data that have been collected.

While searching a literature review from books and journals to gather information on nasab and religious decree on that matter, we have collected a wide range of information regarding the law of nasab in Islam. We felt that it should be highlighted before some other issues related to nasab in Islam as analyzed in our research highlighted later. Information regarding the law of nasab was also obtained from secondary analysis conducted on the official *fatwa* (religious decree) by the country's *fatwa* authority, as well as all related legal documents.

RESULTS AND DISCUSSION

Definition of Nasab:

As stated above, *nasab* is the Arabic word meaning family ties or blood ties that relates one member of a family to another. Not every member of a family has a blood ties, and thus through this we can determine which member of a fimily has been considered as nasab. Nasab can be traced from two sides, from mother, and from father. Every child that is born has an undoubted relationship with his or her birth mother whereas the relationship with his/her father can only be determined once certain conditions are fulfilled. This is because not all mother's husband at the time the birth happened is the man who responsible for the pregnancy of the mother. Steadfastly upholding the purity of family lineage is one of the objectives of the Islamic Law. Nasab originates from the Arabic word meaning family ties or blood ties (Ibrahim Mustafa, Ahmad Hassan al Zayyat et al, 1989). Whereas *nasab* in the Islamic Family Law (Federal Territories) 1984 (Act 303) is defined as descent based on lawful blood relationship. A father holds the *nasab* to a child based on Section 110 of Act 303:

"Where a child is born to a woman who is married to a man more than six qamariah months from the date of the marriage or within four qamariah years after dissolution of the marriage either by the death of the man or by divorce, the woman not having remarried, the nasab or paternity of the child is established in the man, but the man may, by way of li'an or imprecation, disavow or disclaim the child before the court."

Type of Nasab:

Nasab can be derived into three ways; *firash* (copulation with the wife or female slave), *ikrar* (confession) and *bayyinah* (profess). According to the Islamic jurists, there are three ways to determine the *nasab* of a father to a child. However there are differences of opinions among the scholars from the school of thoughts of Maliki, Hanafi, Syafie and Hambali regarding the related conditions, among them are:

a. The husband is able to impregnate the wife (*akil baligh*)
b. The married couple must possibly consummate the marriage after *aqad nikah (contract in verbal form)*
c. The child is born after six month from the date of the *aqad* (marriage).

The minimum duration for a child who is still in the woman's womb to have a blood ties to her husband is six *Qamariah* (lunar) months and two *lahzah*. This conclusion is made based on two Quranic verses: (1) "We have enjoined on man kindness to his parents: In pain did his mother bear him, and in pain did she give him birth. The carrying of the (child) to his weaning is (a period of) thirty months" (al-Ahqaf: 15), and (2) "The

mothers shall give suck to their offspring for two whole years, if the father desires to complete the term". (Al-Baqarah: 233). Islamic jurists referred to the two verses above and determined the minimum period of pregnancy is six lunar months and two *lahzah* starting from the fertilization of the ovum right until the event of childbirth. The union of sperm and ovum is called *al-dukhul al-haqiqi* or *imkan al-dukhul*. There were several discussions among the Islamic jurists regarding *imkan al-dukhul*. According to Imam Abu Hanifah, *nasab* take place within merely lawful *aqad nikah* even though the husband and wife do not meet each other completely (*dukhul*). If the husband is in the West while the wife is in the East, they got married and got a child; the child then is lineaged (*nasab*) to the husband even if the meeting between the husband and the wife is inadequate (*dukhul*) after the *aqad* (al-Sarakhsi: al-Mabsut 17/156, al-Kasani: al-Bada'i' 3/212, ibn `Abidin: al-Hasyiyah 3/547).

Juristic Point of Views on Nasab:

According to the school of thoughts of Imam Syafie, Imam Malik and one of the branches of Imam Ahmad *nasab* take place within lawful *aqad nikah* together with both *imkan al-dukhul* and *al-talaaqi* (al-Syirazi: al-Tanbih ms 190, al-Syirazi: al-Muhazzab 2/120, al-Bahuti: Kashf al-Qinaa` 5/406). Meanwhile, other branches of school of thoughts of Imam Ahmad have a view that *nasab* take place within lawful *aqad nikah* with *dukhul haqiqiyy* (al-Mardaawi: al-Ansaf 9/258). A man can deny the *nasab* with an unborn child in the womb of his wife. According to Imam Malik, Syafie dan Ahmad, a man may deny the *nasab* with a child his wife is carrying within her pregnancy period. The only way to do this is through imprecation (*li'an) in Court*. Imam Malik also viewed that if the man is with his wife during her pregnancy then the period to deny the *nasab* with the child starts at the beginning of her pregnancy right until childbirth. After which he can no longer deny the *nasab*. However, if the husband travels or disappear during his wife pregnancy and childbirth, he then can deny the *nasab* with the child once he is aware about it.

All jurists are in accord and agree that should a man denies the *nasab* with his child; he is obligated to perform imprecation between him and his wife. The jurists were also in accord that if a husband accepted the child as his own lineage before denying a *nasab* whether the acceptance is with *sarih* (clear utterance) or *majaz* (action that indicates acceptance as in receiving praises, providing education or giving affection to the child as a father would give to his child) then he can no longer has the right to deny the *nasab* with the child. If he still wishes to deny the *nasab* with of child, he will be punished with *Qazaf* (false accusation).

Conclusion:

Nasab has been an important element in family, while in Islam, the formation of family must be through marriage. Marriage is strongly upheld by Islam. Nasab is heavily emphasized in the Islamic Law. It determines the purity of genealogy or blood ties that relates one member of a family to another. If the children that are brought into this world were to be approved by nasab, the formation of family must follow the rules ascribed by the Syariah. Thus, nasab is greatly emphasized in Islam because it is closely related to more important matters such as inheritance, marriage and so on. Moreover, in this modern times there are cases that raise the questions of authenticity of nasab in the society which in turn requires complete attentions of many parties concerned. The classical jurists have different view in regard to a way to determine nasab which at the end to ensure that marriage, and children born result of the marriage are legitimate in the Islamic laws. This paper have discussed the questions of nasab and the recent views on the law of lineage that are adhered to by the Muslims community in Malaysia. Two principal informants were interviewed to get their opinion on this matter. The writings of this paper is also based on the reference of several writings of the Islamic *fiqh* which eventually concluded the selected views adhered by the Muslim community in Malaysia. Regarding the law of nasab in Malaysia, Muslim Malays strongly adhere to National *Fatwa Council* which stated that every child that is born after six months from the date of a marriage can be lineaged (*nasab)* to his or her mother's husband.

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