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EVIDENCE AND PROSECUTION OF OUT-OF-WEDLOCK PREGNANCIES: A LEGAL PERSPECTIVE OF SYARIAH CRIMINAL OFFENCES IN MALAYSIA

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ABSTRACT

The issue of illegitimate pregnancies is worrying and births out of wedlock are rampant in Malaysia. These concerns are not exclusive to Malaysia however, as typically, developing countries encounter similar problems. Workable data or statistics on adultery are nearly impossible to obtain as the perpetrator would be unlikely to plead

guilty, unless there are reliable witnesses willing to testify and help the prosecution. However, data on out of wedlock pregnancies and illegitimate births in Malaysia are certainly considered essential indicators of acts of fornication. Apart from from the incidences of rape, acts of voluntary sexual intercourse also contribute to both pregnancies and the birth of illegitimate children. Against this backdrop, the prsent paper aims to analyse the relevant syariah criminal laws related to premarital pregnancies. The areas of interest are issues on the allocation of funds, nature of punishment, extent of prosecution, and incriminating evidence required under the Syariah Criminal Offences (SCO) Enactments of states in Malaysia. This study has adopted a qualitative method by obtaining data through analyses of documents pertaining to the Syariah Criminal Offences (SCO) Enactments of Malaysian states, books, and academic journals. This study finds that not all states have provisions for extramarital affairs. In fact, prosecutions in Syariah Courts for out of wedlock pregnancies are very few compared to the number of illegitimate births. In addition, the existing provisions under the SCO are sufficient to handle cases of out of wedlock pregnancies and illegitimate births. In facing this reality, effective laws are obligatory, on top of the need to refine the existing provisions and develop the Islamic legal and judicial system in Malaysia.

Keywords: Prosecution, evidence, syariah criminal offences, illegitimacy, out-of-wedlock pregnancies.

INTRODUCTION

Out of wedlock pregnancy refers to being pregnant before marriage, which indicates that there has been sexual intercourse between unmarried couples. Teen pregnancy out of wedlock happens among those between 13-18 years old. According to a UNICEF report in 2008, teenagers who are found to be pregnant out of wedlock are from this group of 13-19 years of age range (Alavi et al., 2012). From an Islamic perspective, any deviant sexual behavior can cause distorted lineage, collapse of the family and community institution, increase in the number of stressed individuals, fights and spread of infectious diseases. (Omar et al., 2006).

The spike in the number of illegitimate child births is a clear indication that Malaysia is facing a major moral crisis that requires

urgent attention. The issue of illegitimate children in Malaysia has been a cause of concern among Malaysian citizens. A study done by the Malaysian Registry Department (Jabatan Pendaftaran Negara) has recorded a total of 159,725 births of illegitimate children for the period of three years, which is from 2013 to 2015. It reported that Muslim mothers gave birth to an average of 140 babies daily (Ahmad, 2016). Out of wedlock birth is a grave moral misconduct because it distorts lineage and violates Islamic teachings in relation to offspring and descendant development. Illegitimate births also lead to other criminal offences, such as baby dumping and abortion. This is despite the fact that in practice, awareness about the risk of having sex out of wedlock is preached by all religions; the basic teaching is that having sex when one is not yet married can cause many social problems, such as unwanted pregnancies, illegal abortions and health issues (Sarnon et al., 2012).

The 57th Muzakarah of the Fatwa Committee of the National Council for Islamic Religious Affairs has issued the fatwa that a child born less than six months and two moments (*lahzah*) of lunar calendar (*Qamariah Takwim*) from the date of consummation of the marriage (*tamkin*) will be considered an illegitimate child (JAKIM, 2018). A child is regarded as being born out of wedlock, whether he has been conceived because of adultery or rape, and of vague intercourse status or not of slavery child. As for non-Muslim couples, in most cases, illegitimate children refer to children born before the marriage registration date, or a fatherless child. Therefore, it would be only logical to assume that baby dumping is attributed to three causal factors, namely adulterous act, out of wedlock pregnancy and unwanted pregnancy (Bedu et al., 2008).

The World Health Organization (WHO) has classified teenage pregnancies as those involving individuals between the age of 10 to 19. Further it was reported that 10 percent of female teenagers had experienced their first sexual intercourse before they even reached the age of 15, and they admitted to having been forced to the act (World Health Organization 2005). In Malaysia, research has shown that out of wedlock pregnancies involved teenagers as young as 13 (Alavi et al., 2012) and 14 years old (Abdul Ghani & Abd Aziz, 2013). It is more shocking to hear that a pregnant 11-year-old girl had given birth to a baby boy (Manap, 2015).

Out of wedlock pregnancy is generally referred to as one that is the result of an out of wedlock sexual relationship between two consenting individuals (Alavi et al., 2012). The intercourse may occur due to certain circumstances, for example as a rape incident (Madon & Ahmad, 2004). Out of wedlock pregnancy is also described as an unwanted pregnancy as it has been unexpected and unplanned for (Zolna & Lindberg, 2012).

The term "illegitimate child" is a term that has been confused with the use of labels such as "Child Adultery". This is due to the different contexts of terminology usage. In the context of Islam, whatever term is used, it refers to the same phenomenon, it is only considered as different when it is viewed from different perspectives and environments (Ismail, 2013). Research on moral and virtues under the Syariah Criminal Offences Enactment focus more on the aspects of the offence on proximity (*khalwat*), indecent act, jurisdictional issue, uniformity, and effectiveness of the Enactment. On the other hand, research on out of wedlock issues cover matters on family intervention, protection, religious modules, welfare, and therapeutic recovery of pregnant teenagers. However, problems on the comprehensive legal aspect of a premarital pregnancy offence within the Syariah law framework have rarely been discussed. This research will analyse Syariah criminal laws in relation to the legal provisions, punishment, prosecution, and evidential burden of the said offence under the Syariah Criminal Offence Enactment (and Act) of the Malaysian states.

METHODOLOGY

This study uses a socio-legal research method, which is a research method that unites two main areas of research, namely the social sciences and law. This study adopted a qualitative method by obtaining data through analyses of documents referring to the Syariah Criminal Offences (SCO) Enactments of Malaysian states. Document analysis is sometimes seen as content analysis and is often the use of a systematic examination of records and documents. In the context of the present study, documents either in handwriting or printed form such as books or recorded materials that report or record an event or matter, are among the documents which will be analyzed (Long, 2009). The documentary data collection was also carried out to collect

secondary data from the annual reports and database maintained by the Malaysian government. Content analysis and descriptive analysis were used in analysing the data. The study collected data from libraries by referencing appropriate books, journals and other publications, and from browsing recognized websites that discussed some of the issues related to the evidence and prosecution of out-of-wedlock pregnancies in Malaysia.

PERSPECTIVE OF OUT OF WEDLOCK PREGNANCY IN ISLAM

According to Islam, illegitimate children are those who have been circumscribed in the Fatwa Committee Decision of the National Council, the State Fatwa Council, and the acts and enactments of the Ordinance of Islamic Family Law in Malaysia. They are children born out of wedlock, whether as a result of adultery or rape, and are not from doubtful intercourse (syubhah), or children of slaves and are those born less than 6 months 2 lahzah (seconds) according to the qamariah calendar from the date of tamkin (Othman, 2018).

The provisions that regard out of wedlock pregnancy as *prima facie* evidence or prescribe it as an offence, are indeed in line with *maqasid* Syariah principles and the words of Allah that reminds all women of the His commandments as follows (translation):

> *And say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their husbands' sons, their brothers or their brothers' sons, or their sisters' sons, or their women, or the slaves whom their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments. And O ye Believers! turn ye all together towards Allah, that ye may attain Bliss* (al-Quran, An-Nur 24:31).

The above verse emphasizes the responsibility of women to lower their gaze, preserve their modesty and avoid any acts which may probably tarnish their reputation, or any temptation to commit sin. In other words, every man and woman shall observe his (and her) manners and refrain from committing adultery (*zina*), including any act eliciting such a sin.

Having seen the severity of the problem, it is no wonder that the al-Qardhawi has highlighted the importance and need to strengthen the law so as to inculcate respectable moral values in society. Good conscience and instinct alone may not be enough to safeguard humankind from falling into the pit of sins and vice (Mohamad Zaini, 2012). Undignified conduct these days show that an appreciation of Islamic virtues alone will not suffice to curb the involvement of certain individuals in immoral activities.

Out of wedlock pregnancy is the result of being pregnant prior to a lawful marriage, the consequence of premarital sexual intercourse between two individuals who are not legally married. Such a pregnancy is the outcome of a sexual relationship between a man and a woman who are not legally married in accordance with the religion or law of their country (Jolley, 2001). Thus, the law prescribes that any pregnant lady who has not been legally married according to Syariah law, had by itself committed such an offence. It is noted that rape can also lead to out of wedlock pregnancy. In such a situation, the burden of proof is on the pregnant lady (Ismail, 2017).

The term premarital sex is more related in religious context. For instance, research shows the term is more comprehendible among Muslim and Christian teenagers (Abdessamad, 1998). Nonetheless, all religions underline awareness of the risk of a premarital sexual relationship because such pregnancy can lead to other social problems such as unwanted pregnancy, abortion, and baby dumping.

Out of wedlock pregnancy is the result of adultery or a premarital sexual relationship between a man and a woman. Being pregnant and then having a baby without being legally married is circumstantial evidence (*qarinah*) and is enough to secure a conviction aginst the lady for committing out of wedlock intercourse or adultery (*zina*) (Hashim, 2012).

ISSUES OF PREGNANCY AND BIRTH OF ILLEGITIMATE CHILDREN IN MALAYSIA

The out of wedlock issue is indeed a worrying social problem. Generally, such a pregnancy deviates from the social norm (Bahori & Ismail, 2018). Statistical data obtained from the Department of Social Welfare showed that Sabah, Sarawak, Selangor, Johor, and Pahang were among the states with the highest rate of premarital pregnancy, as compared to the other states in the country (Berita Harian, 2018). In fact, statistics provided by the Malaysian Ministry of Health (MOH) had documented a total of 3, 694 unmarried pregnant teenagers in 2017, an average of 10 cases per day (Sinar Harian, 2019). The World Health Organization (WHO) data in 2018 revealed that Malaysia stood at fourth place among 10 countries with the highest rate of out of wedlock pregnancy involving teenagers (Sahib, 2019).

On top of that, Malaysia also faced a spike in births of illegitimate children and baby dumping cases every year (Sinar Harian, 2019). The National Registration Department (NRD) recorded more than half a million births of illegitimate children and baby dumping between the year 2006 and 30th June 2017, came up to a staggering total of 543,363 cases. The figure included children born out of unregistered marriage, born less than six months of their parents' marriage and babies found without any trace of their actual parents (Malaysiakini, 2017). The statistics thus, revealed that the birth rate of illegitimate children in Malaysia is high and alarming. Though the statistics did not identify the religions of the illegitimate children, the number of unwed pregnant teen girls sent to rehabilitation centres kept on increasing and the majority of them were Malay and Muslims (Ahmad & Md. Dahlan, 2016).

It is rather upsetting to find that illegitimate childbirths also occurred among underage girls when they were supposed to be studying in schools and furthering their studies in higher learning institutions. According to the NRD, in 2017 alone, 4,992 babies were delivered by girls under the age of 18, and 120 cases of baby dumping were reported in that year. The same report revealed that, there were 1,664 babies delivered by underage mothers by June 2018 (Joibi, 2018). The NRD data on out of wedlock pregnancy should serve to illustrate the

severity of the problem and calls for urgent attention from all relevant quarters responsible for addressing the issue. Thus, the present study intends to analyse the Syariah criminal provisions in Malaysia, more specifically to examine the issue of out of wedlock pregnancy under the existing laws and the extent of prosecution initiated under the present legal provisions.

PROVISIONS UNDER THE CRIMINAL OFFENCE ENACTMENTS ON THE OFFENCE OF OUT OF WEDLOCK PREGNANCY

The problem of out of wedlock pregnancies in Malaysia should be urgently addressed to deter immoral actions such as *khalwat*, indecent acts and illicit intercourse. What will happen if these actions are not effectively prevented and those who committed illicit intercourse become guilty of out of wedlock pregnancies? Will they be prosecuted? Islam strictly prohibits sexual intercourse without getting married as it can cause various social problems, namely illegitimate babies, baby dumping and even health issues leading to death. Thus, this article will analyse the existing provisions related to out of wedlock pregnancy under the state Syariah criminal laws in Malaysia. It is found that there are sufficient legal provisions to preserve this *maqasid Syariah,* particularly in the preservation of a woman's dignity.

The status of out of wedlock pregnancy in the Syariah criminal offences enactments can be summarised in Table 1 below.

Table 1

Status of Out of Wedlock Pregnancy in State Syariah Criminal Offences Enactments (SCOE)

States	Legal Provisions on Out of Wedlock Pregnancy
Federal Territories Section 23(3) of Syariah Criminal Offences (Federal Territories) Act 1997	The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.

(continued)

States	Legal Provisions on Out of Wedlock Pregnancy
Selangor Section 25(3) of Syariah Criminal Offences (Selangor) Enactment 1995	The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent and while she is fully conscious of the act shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.
Penang Section 23(3) of Syariah Criminal Offences (State of Penang) Enactment 1996	The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.
Johor Section 23(3) of Syariah Criminal Offences Enactment 1997	The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of an offence under subsection (2) by that woman
Sarawak Section 20(3) of Syariah Criminal Offences Ordinance 2001	The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.
Kedah Section 21(3) of Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014	The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.
Negeri Sembilan Section 75(1) of Syariah Criminal (Negeri Sembilan) Enactment 1992	Any woman who is found pregnant or who gives birth to a child outside wedlock conceived out of an illicit intercourse performed with her consent and consciousness, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
Perak Section 50(1) of Crimes (Syariah) Enactment 1992	A woman who is pregnant or who gives birth to a child out of wedlock as a result of illicit intercourse performed with her consent and awareness, is guilty of an offence and shall, on conviction, be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
Sabah Section 79(1) Syariah Criminal Offences Enacment 1995	Any woman who becomes pregnant or delivers a child out of wedlock shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

(continued)

States	Legal Provisions on Out of Wedlock Pregnancy
Kelantan Seksyen 49 of Syariah Criminal Code (I) Enactment 2019	(1) Any woman who is found to be pregnant or has given birth to a child out of wedlock commits an offence and upon conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof. (2) Any woman who gives birth to a child in less than 175 days and 2 lahzah after her marriage shall be deemed to have pregnancy out of wedlock unless there is evidence to the contrary.
Perlis Section 15(1) of Criminal Offences in the Syarak Enactment 1991	Any woman who is found pregnant or who gives birth to a child outside wedlock not including persetubuhan syubhah shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.
Melaka Section 54 of Syariah Criminal Offences (Negeri Melaka) 1991	Any woman who is found pregnant or who gives birth to a child outside wedlock shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding twenty four months or to both.
Pahang Section 29(3) of Syariah Criminal Offences Enactment 2013	The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed of her own accord and while being aware of her action shall be prima facie evidence of the commission of an offence under subsection (2) by that woman.
Section 31 of Syariah Criminal Offences Enactment 2013	Any woman who is pregnant or gives birth without a valid marriage commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.
Terengganu Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001 Section 36	No provision relating to illegal sexual intercourse and out of wedlock pregnancy, but only watie as follows: Any person who commits watie other than qubul and dubur with any man or woman except between husband and wife shall be guilty of an offence and shall on conviction be liable to a fine of not exceeding three thousand ringgit or to imprisonment not exceeding two years or to both.

Based on the provisions summarized in Table 1, it is clear that most of the state syariah criminal offences enactments contain provisions regarding out of wedlock pregnancy. However, the present analysis of the existing provisions of law embodied in the Syariah criminal offences enactments in Malaysian states has shown that out of wedlock pregnancy can be classified into two main categories. The first category consists of Syariah criminal offences enactments which state that out of wedlock pregnancy of a woman has occurred due to a consented sexual intercourse between a woman and a man, and this is *prima facie* evidence of the commission of the offence of adultery or out of wedlock sexual intercourse. This kind of provision can be seen in Section 23(3) of Syariah Criminal Offences (Federal Territories) Act 1997, Section 23(3) of Syariah Criminal Offences (Selangor) Enactment 1995, Section 23(3) of Syariah Criminal Offences (State of Penang) Enactment 1996, Section 29(3) of Syariah Criminal Offences Enactment 2013, Section 23(3) of Syariah Criminal Offences Enactment 1997, Section 20(3) of Syariah Criminal Offences Ordinance 2001 and Section 21(3) of Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014. In contrast, out of wedlock pregnancy resulting from forceful intercourse cannot be treated as *qarinah* (circumstantial evidence) to substantiate an allegation of *zina* or out of wedlock sexual intercourse.

The second category consists of other Syariah criminal offences enactments which specifically criminalized out of wedlock pregnancy and stipulated the punishment for the commission of such an offence. This kind of offence is stipulated in Section 75(1) of Syariah Criminal (Negeri Sembilan) Enactment 1992, Section 50(1) of Crimes (Syariah) Enactment 1992, Section 15(1) of Criminal Offences in the Syarak Enactment 1991, Section 54 of Syariah Criminal Offences (Negeri Melaka) 1991 and Section of Syariah Criminal Code (I) Enactment 2019. The latest amendment to the Kelantan Syariah Criminal Code pointed out the difference when it stated in the same provision that any woman who gives birth to a child in less than 175 days and 2 lahzah after her marriage shall be deemed to have pregnancy out of wedlock, unless there is evidence to the contrary. The provision also states that 'Any man who makes any woman pregnant out of wedlock, whether or not the woman has given birth to the child, commits an offence and on conviction shall be punished according to the provision of subsection (1)'. This kind of provision is important and should be included in other state enactments as well.

Though the Syariah Criminal Offences Enactment 2013 has upheld that out of wedlock pregnancy is *prima facie* evidence of an out of wedlock offence, and section 31 of the enactment also specifically criminalizes such pregnancy. Unlike other state enactments, in Terengganu, these two provisions are absent from the Syariah Criminal Offences (Takzir) Enactment 2001. The only provision available is on *mewatie*, which refers to committing *watie* other than *qubul* and *dubur* with any man or woman, except between husband and wife.

Since most of the Syariah criminal offences state enactments, except that of Terengganu, have their own provision on either out of wedlock pregnancy as *prima facie* evidence for committing adultery, or is as an offence for pregnancy outside marriage, one can conclude that pregnancy out of marriage is an offence under Syariah Criminal law. Alternatively, it is *prima facie* evidence for adultery, unless there is forceful intercourse. These provisions must be enforced to achieve the objectives of the provisions. However, the extent of enforcement of these provisions would heavily depend on a few factors, including the role of society members in enjoining good and fighting evil (*amar makruf nahi mungkar*), and reporting to the authorities to act and execute the relevant laws. This is evident from the extent of prosecution pursued and rate of arraignment in the courts of law.

The existing provisions which have criminalized pregnancy outside marriage as an offence demonstrate that the state Syariah criminal law is attempting to lay down legal responsibility upon those who got pregnant without being legally married. This situation may lead to another important issue that need to be considered since an abortion is strictly prohibited in Islam and is also considered an offence under the Penal Code (Section 312). Thus, in this situation, the provision which states *the fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be prima facie evidence of the commission of illicit intercourse* should be a better approach in preventing the serious sin of abortion.

PROSECUTION AND ELEMENTS OF THE OFFENCE

Enforcement of any Syariah penal provisions can be effectively carried out once a charge is proffered in the court. The prosecution protocol will commence upon conclusion of the investigation process

by the religious authorities. In the investigation conducted by the religious authority, the investigating officer in charge is responsible for recording all statements from the accused and then handing over the investigation papers (IP) to the prosecution to proceed with the case in court. The essential elements for the prosecution's case are, inter alia statements of the suspect, complainant and persons involved in the arrest, in addition to the proper documentations of the arrest. A completed IP will be forwarded to the prosecution for further instructions. The prosecution, with the power vested on the Chief Syariah Prosecutor (the Chief), shall be responsible for perusing the IP before deciding whether to proceed with or abort the process of charging the accused. Section 78 (2) of the Administration of Islamic Law (Selangor) 2003 confers vast power on the Chief to exercise his discretion whether to commence, conduct or discontinue prosecution of any offence before any Syariah Court. In addition, by virtue of section 181 of the Syariah Criminal Procedure Enactment (Negeri Selangor) 2003. The Chief is also conferred complete power to control and give directions on the prosecution during the ongoing criminal proceedings. As such, the Chief has discretion to decide on whether to proceed with charging a suspect and proceeding with the prosecution, or withdrawing the case. However, a decision to discontinue prosecution shall be handled delicately and backed up with credible justifications to avoid any abuse of power.

In deciding to commence the prosecution of a charge of an out of wedlock offence, it is important to ensure that sufficient evidence is available for every element of the offence. Elements of the offence are questions of fact that the prosecution are required to prove in court. Failure to convince the court of any of the elements will jeopardize the prosecution's case and will simply result in the acquittal of the accused person, i.e., without the need for the accused to enter her defence. Elements of the offence are the following required elements of the facts: that the accused is a Muslim lady, one who has reached puberty (*aqil baligh*), consented to the intercourse and was aware of the act. In addition, the pregnancy must have occurred outside a legally binding marriage, or that she must has given birth to a child not less than six months from the date of her marriage to a man. In *Pendakwa Syarie Negeri Sembilan v. Noor Hazila Mohd Sarpan [Criminal Case No.05500-180-0012-2014]* the court convicted the accused person of a pregnancy out of wedlock offence under Section 75 of the Syariah Criminal Offences Enactment 1992. All elements

of the offence were proven against the accused in the said case. In fact, there was an admission by the accused that her pregnancy was the result of an unlawful intercourse that she had consciously and voluntarily performed.

Information on out of wedlock pregnancy could come from a complaint by an individual or records of childbirth related documents from sources such as the National Registration Department (NRD) or the hospital. Complaints may also come from the State Islamic Religious Departments when they find cases of an unmarried woman who is pregnant before the solemnisation of her marriage (*aqad nikah*). In the case *Pendakwa Syarie Negeri Sembilan v. Norasida binti Abdullah & another [Criminal Case No. 05100-142-0009-2015 & 05100-180-0010-2015],* the accused was charged for out of wedlock pregnancy and performing illicit sexual intercourse with a man named Syed Rizal bin Syed Abu Bakar. The case was filed and prosecuted on the basis of a complaint lodged by a religious officer from the District of Tampin Islamic Religious Department. The said officer had recorded an admission from the accused. The accused was found guilty of both offences and sentenced with a fine of RM 1,500.00 for premarital pregnancy and RM 3,750.00 for performing illicit sexual intercourse. These cases illustrate the point that any competent person (or organization) may lodge a complaint to initiate an investigation of the said offence.

The prosecution is at liberty if upon perusal of the investigation paper, to return the IP to the religious enforcement officer in charge of the case, if it is not convinced of the strength of the evidence gathered. The IP may be returned to enable the enforcement officer to gather more input required to further substantiate the charge. Only upon being satisfied with the IP that the prosecution will prepare the necessary documentation to have the case registered in court.⁻Prosecution of an out of wedlock pregnancy offence in all states does not fall within the list of cases that call for the Syarie Chief Prosecutor's sanction to prosecute. For instance, in section 73 of the Syariah Criminal Procedure Enactment (Selangor) 2003 and the same section under the Syariah Criminal Offences (Federal Territories) Act 1997. Regarding the forum, it is vital to note that the prosecution of an offence must be heard before a court with jurisdiction. This is because there are differences in jurisdiction for hearing cases of an out of wedlock pregnancy offence in the respective states. For instance, in Perlis and Kedah, jurisdictional provisions of the respective enactments (namely

section 183(1) of the Enactment of Syariah Criminal Procedure (Perlis) 2006 and section 184(1) of the Enactment of Syariah Criminal Procedure (Kedah) 2006) imply that an out of wedlock pregnancy offence ought to be conducted by the Syarie Chief Prosecutor, or a syarie prosecutor and prosecuted before a high court.

On the other hand, in states like Negeri Sembilan, Perak, Kelantan dan Sabah, prosecution of such cases falls within the jurisdiction of Syariah subordinate courts. The logic of jurisdiction in those states is apparent based on an understanding of the distribution of jurisdiction between the courts, where the law provides that offences punishable with a fine of not less than RM 3,0000.00, or imprisonment of not more than two years or both, be tried at the subordinate court. In all these states, prosecution may be conducted by the Syarie Chief Prosecutor, or a syarie prosecutor or authorized religious enforcement officers, i.e., those who have been sanctioned to prosecute in accordance with section 187(2) of the Syariah Criminal Procedure (Negeri Sembilan) Enactment 2013, section 183(2) of the Syariah Criminal Procedure (Perak) Enactment 2004, section 183(2) of the Syariah Criminal Procedure (Sabah) Enactment 2004 and section 183(2) of the Syariah Criminal Procedure (Kelantan) Enactment 2002. On that note, it is worth to mention that if a pregnancy offence was coupled with an illicit sexual intercourse offence, the trial can proceed before the Syariah High Court, as illustrated in the case of *Pendakwa Syarie Negeri Sembilan v. Norasida binti Abdullah & another [Criminal Case No. 05100-142-0009-2015 & 05100-180-0010-2015).* The above legal arrangement is possible because an out of wedlock offence can be regarded as *prima facie* evidence to corroborate the charge of an illicit sexual intercourse offence. Based on this explanation, there are differences in the prosecution of an out of wedlock pregnancy offence. These differences in jurisdiction and procedures need to be standardized in order to show uniformity in the administration of syariah laws in the respective states.

BURDEN OF PROOF

According to the general legal theory of evidence, parties involved in a criminal proceeding should bear two burdens of proof in court, namely the legal burden and the evidential burden. Legal burden is the burden required to prove a charge, one that will neither be changed nor shifted to the opponent. In such a situation, it is the law itself

that determines the fact in question whether it has or has not been proven (Mustafa, 1988). Whereas evidential burden is not permanent, the burden may be shifted from one party to another. For example, evidence required from the syarie prosecutor may shift to the accused, once the former has laid down his evidence (Mustafa, 1988). Legal burden of proof is drawn up in section 73 the Syariah Court Evidence (Selangor) Enactment 2003, while the evidential burden can be found in 74 of the same Enactment. It is essential to note that every burden calls for a certain standard of proof. The standard of proof may be defined as the degree or specific level of proof that the prosecution or the accused needs to discharge to evince their respective burdens of proof. Thus, the standard of proof plays a significant role in convicting or acquitting an accused person of the charge levelled against him/her. Based on the jurisdiction of syariah criminal punishment in this country, a syariah criminal offence may classified as a *takzir* offence from the *syarak* perspective. As such, the evidence tendered to secure a conviction must fulfil requirements of *takzir* offences. In the case of *Nooraini Abdul Majid v. Pendakwa Syarie Negeri Melaka* [2004] CLJ (Sya) 487, the accused was charged with an out of wedlock pregnancy offence under section 54 of the Syariah Criminal Offences (Melaka) Enactment 1991. The accused pleaded guilty to the offence and was sentenced to a fine of RM 3000.00 and imprisonment of 24 months. The accused appealed to the High Court. The High Court Judge in his grounds of judgment noted that:

> "The case appealed against is not hudud but of *takzir* only. The syarie prosecutor should not have, in his submission in reply of the accused and the trial judge in his grounds of judgment, referred to Quranic verses and hadith related to hudud. Therefore, I agree with the appellant's grounds of appeal that the court has no jurisdiction to convict and punish him with hudud punishment and that this court has not been seized with jurisdictions on any hudud law"

The prosecution bears the legal burden of proving every question of fact the moment a charge is read and continues to bear the same during the prosecution's case until conclusion of the trial. In a proceeding of out of wedlock pregnancy, the prosecution is responsible to prove every element of the offence at the prosecution stage (Saifuddin, 2021). In a proceeding of out of wedlock pregnancy, the prosecution is responsible to prove every element of the offence at the prosecution stage. The court will only call upon the accused to enter her defence

upon being convinced of the level of *zan al-ghalib* or *prima facie* (Saifuddin et al., 2021).

Consequently, evidential burden will be shifted to the accused once the court call for the defence of the accused. The accused is only obliged to tender evidence creating doubts in the elements of the offence which was presented earlier by the prosecution (Saifuddin, 2021). For instance, by proving the fact that the childbirth occurred more than six months after the solemnisation of her marriage. The accused must tender evidence to convince the court of the degree of *syak* or reasonable doubt and the prosecution can counter argue the accused's case by posing relevant questions during the cross examination. The prosecution bears full responsibility in ensuring that the court becomes convinced of the prosecution's case and their evidence will stand unshaken during the unfolding of the defence's case. The law then calls for proof on evidential burden to dislodge the fact that the child was conceived because of *syubhah* intercourse. The proof that is required of the accused may, for instance, be facts which can confirm that the accused had already been married, or that the child was born within the acceptable term of pregnancy. Such a situation will trigger an exception to the general rule of the application of burden of proof. The exception is applicable when an accused is required to prove a fact, other than the fact in question. Exception for this offence can be found in section 75 of the Syariah Court Evidence (State of Selangor) Enactment 2003, which refers to the responsibility to prove facts, section 77 on general exception and section 78 on the knowledge of a particular fact within the specific knowledge of the accused.

The law defines the excuse of a *syubhah* intercourse as the intercourse performed under the impression of the subsistence of a valid marriage vow when the said vow has been considered invalid (*fasid*), or that the intercourse occurred due to a genuine mistake, including all intercourses that are not punishable with *had* in Islam (Saifuddin et al., 2021).

Section 2 of the Islamic Family Law (State of Selangor) Enactment 2003 defines the excuse of a *syubhah* intercourse as the intercourse performed under the impression of the subsistence of a valid marriage vow when the said vow has been considered invalid (*fasid*), or that the intercourse occurred due to a genuine mistake, including all intercourses that are not punishable with *had* in Islam. A clear example would be the case of a syndicated marriage solemnisation

that the court declares as invalid. Intercourse performed during the subsistence of what would otherwise be a valid marriage according to *syarak* principles, falls within the definition of a *syubhah* intercourse. It follows that the burden to prove her contention that the child is indeed legitimate, lies on the accused. In this situation, the possibility is that a marriage solemnised at cross border areas like those in Thailand, is pending authentication by the Syariah courts in the country.

It is imperative to secure a verification of status of the impugned marriage solemnisation prior to taking any further steps in the criminal prosecution of the offence. Verification of the marriage status ought to have been obtained from the Syariah court of competent jurisdiction. Moving to another excuse, i.e., averment that the child was born within the term recognized by *syarak* principles, the law upon considering the opinion of majority of scholars (*fuqaha*), clearly provides that birth must take place not less than six months after the consummation of a valid marriage (Ibnu Rushd, 1966).Thus, if the accused wishes to argue outside the four corners of this law, she must do so authoritatively. Besides that, the accused may assert that the intercourse was performed under duress or that it was a rape incident. This assertion can be successful through two ways, i.e., by writing a representation to the Syariah Chief Prosecutor, or by putting it up as defence during the court proceedings. In the event the representation is accepted prior to the commencement of the trial, the Chief may instruct for a discontinuance of the proceeding. However, if the trial has begun at the time the representation was accepted, the Chief may decide to withdraw the charge and pray for an order of acquittal in court. The accused must put up solid grounds to strengthen her representation by providing, for instance, the conviction record of her rapist that she has obtained from the civil court. The Syariah court may acquit and discharge the accused of all counts if the court is satisfied with all the evidence tendered which had corroborated the accused's version of the story during the defence stage.

THE SYARIAH CRIMINAL EVIDENCE LAW FOR OUT OF WEDLOCK PREGNANCY: AN ANALYSIS OF THE BURDEN OF PROOF

The issue of out of wedlock pregnancy is one side of the coin, the other is proof of paternity. Islam has proposed a few methods to prove paternity (*nasab*), one of which is through marriage. This first method

finds its root in the words of Rasulullah SAW that read as follows (Al Bukhary & Muhammad, 2001: 153):

> A child is attributed to the man who has *al-firasy* (marriage) but a male adulterer is forbidden from paternity.

There are several pre-conditions to qualify for *nasab*. In order to prove paternity, the marriage must fulfil certain requirements, namely that the marriage must be a valid one under the law, the husband is able to impregnate his wife, and the wife has given birth to a child. Furthermore, there must have been intercourse between them, and that child is born not less than 6 months or 1 *lahzah* of pregnancy term and that the husband had not at any time denied paternity of his child by way of *li'an*. The second method is by way of a husband, or rather the man's confession (*iqrar*). The *iqrar* bonds the husband or man to the child in all aspects of rights and responsibilities provided for by *syarak*, of a father to a child. The third method is by testimony of two tustworthy men, affirming that the child is indeed the child of the alleged fatherhood. The fourth method is using the *qifayah* method, one that was adopted in an earlier Islamic era to prove that Zaid bin Thabit is indeed the father of Usamah bin Zaid (Mutalib & Yahya, 2016).

In short, these methods would render assistance to the court in deciding on the paternity of a child, for instance by looking at the parents' marriage status and scrutinizing whether they are legally married to each other. Once status of the parents' marriage status is verified, the court will then look at the birthdate of the child by consulting the *hijri taqwim* (calendar). For the purpose of determining the child's legitimate status, the child must be born not less than six months and two *lahzah* from the date when the parents took their vows to marry each other.

It is interesting to note that at the same time that a scholar has stated that father and mother to the child may opt for the laboratory analysis report conducted by a medical expert to corroborate their paternity claim (Zaydan, 1993). This is because the court also recognizes the use of *Deoxyribonucleic Acid* (DNA) to determine the paternity of a child when deciding an out of wedlock pregnancy offence. As such, this article also highlights the dicussions on the strength of DNA evidence as *qarinah* (circumstantial evidence) in the Syariah court.

Qarinah is defined as any form of evidence that can prove or disprove the existence of a fact or the allegations made (Ahmad et al., 2018). Bahnasi described the linguistic definition of *qarinah* as sign or a lead on something (Azhar & Hadi, 2017). Zaydan (1997) has also taken the view that *qarinah* is a point or sign that can be adopted as evidence of the presence or absence of something. While al-Zuhayli described *qarinah* as all apparent signs that are connected to something hidden, and that these signs explain the related facts (Fattah, 2014), Sayyid Sabiq defined *qarinah* as a sign that could trigger belief or confidence, one that could stand as evidence and has a legal basis (Azhar & Hadi, 2017).

The application of *qarinah* can be seen in surah Yusuf verse 18. The verse relates to the story of Prophet Yaakob, who had not fallen for the tricks used by Prophet Yusuf's brothers when they soaked Prophet Yusuf's clothes with lamb blood. The animal blood was taken as a sign or *qarinah* that his brothers tried to fabricate Prophet Yusuf's death and conceal the fact that he was alive at that material time. Verse 25 to 29 of the same surah also explain the concept of *qarinah*. These verses describe an incident that involved Zulaikha and Prophet Yusuf. The truth about Prophet Yusuf's attacker was revealed through *qarinah*, i.e., the way his shirt was torn was on his back rather than his front. This clearly indicated that Prophet Yusuf had attempted to free himself from Zuhaikha and wanted to flee the crime scene. The Sunnah of Prophet SAW also recorded application of the *qarinah* as one of the required types of proof. For example, Prophet SAW used the *qiyafah* as a method to prove paternity by comparing the similar characteristics of a father and the son he had not fathered but adopted (Muhammad et al., 2015). Based on these examples, the *qarinah* may be adopted as basis of proof in Islam. In this regard, any form of *qarinah* may be tendered and admissible in the Syariah court.

In the Syariah court, section 3 Syariah Court Evidence (State of Selangor) Enactment 2003 defines the *qarinah* as means to relate one fact to another fact in any way stipulated in the Enactment. By virtue of this provision, it is clear the Syariah court may admit any form of *qarinah* from Syariah cases. A few syarie judges had started to recognize DNA as *qarinah* in ascertaining paternity, which in turn will help to resolve inheritance claims and child custody (*hadhanah*) matters. In fact, several Syariah courts had admitted DNA evidence in Syariah criminal cases, such as adultery or illicit sexual intercourse.

The case of *Pendakwa Syarie Sabah v. Rosli bin Abdul Japar* is one of the earliest decisions that has accepted DNA evidence as *qarinah*.

DNA AS *QARINAH* (CIRCUMSTANTIAL EVIDENCE) OF AN OUT OF WEDLOCK PREGNANCY

This section will discuss the admissibility of DNA as *qarinah* in Syariah criminal cases. DNA can generally be traced in samples of the fingerprint, blood stain, sweat, sperm, skin, fingernails, and hair strands of an individual. DNA traces found in these samples will be used as evidence in a criminal investigation and the subsequent process of prosecution (Muhammad et al., 2015). The DNA samples will be used as corroborative evidence to prove conclusively the commission of the crime. As such, DNA evidence can succinctly be equated as *qarinah*. The court has a duty to weigh the corroborative value of DNA evidence to facilitate the judgment of a case because the probative values of *qarinah* may be strengthened when such evidence provide support for other evidence and *vice versa*. The same opinion was held by Ibn Qayyim when he stated that a strong document must be accepted and the weak one must be rejected (Yahya et al., 2020). On that note, DNA evidence should not be tendered in the absence of any other evidence to support its veracity. Thus, in order to ensure the admissibility of DNA evidence, care and attention must be given to the manner in collecting and tendering of the DNA evidence during the investigation and trial respectively. This is closely connected to the concept of the relevance of evidence, probative value, chain of evidence, and custody of the said evidence (Shariff et al., 2019). If all the above protocols are carefully observed, DNA will be admissible as evidence to form a judgment of the case.

The collection process of DNA evidence during the investigation stage is guided by provisions of the Syariah Court Evidence (State of Selangor) Enactment 2003. In the investigation of an out of wedlock pregnancy, the religious enforcement officer is obliged to gather all the necessary evidence, including DNA samples. The collected samples must be sealed in a container and properly labelled to eliminate doubt and then sent to the chemistry department. Tests and reports on the samples will be carried out by a DNA analyst. During the collection and analysis of the samples, the religious enforcement officer and chemist in charge must ensure that they handle the samples carefully

and ensure that the chain of evidence is always intact (Muhammad et al., 2015). Any failure in securing the tight chain of evidence might cast doubt on the reliability of the samples.

Upon concluding the collection of the samples stage, a syarie prosecutor may, by virtue of section 33 of the Syariah Court Evidence (State of Selangor) Enactment 2003, tender the DNA evidence during the trial through the oral testimony of an expert (medical officer or DNA analyst) and also the religious enforcement officer who was involved in the collection of samples. The oral testimony is corroborated with the documentary evidence in the form of the analysis report of the DNA samples (Shariff et al., 2019). The syarie prosecutor, must ensure that every witness and documentary evidence tendered comply with the rules on relevancy, probative and corroborative value, chain, and custody of the DNA evidence.

It is clear that when securing the relevant and admissible DNA evidence, religious enforcement officers and syarie prosecutors must together work closely to strengthen the DNA evidence by providing the best corroborative evidence. Both quarters must work together to ensure that the process and procedures of evidence collection are adhered to. Adherence to the procedures is closely connected to the principles of evidence relevance, probative and corroborative values, chain, and custody of those evidence. Compliance with the procedures of collection and handling of the DNA evidence will go a long way in support of its admissibility as the basis of a judgment.

FINDINGS

The researcher found that there were lacunaes in the Syariah Court Evidence and the Syariah Criminal Procedure Enactments relating to the application of the *qarinah* principle stated by Ibnu Qayyim, Bahnasi, Zaydan, al-Zuhayli and Sayyid Sabiq. These were problems in terms of the definition of *qarinah* and the use of DNA as irrefutable evidence in the courts.

First, the definition of *qarinah* under section 3 of the Syariah Court Evidence Enactment must be refined. This has been suggested because the definition of *qarinah* should include the definition of *qarinah* as every fact or any evidence that surrounds the circumstances of a

case. The proposed new definition of *qarinah* covers a wider scope, which would include and recognize the use of DNA that exists around circumstances of a case as *qarinah* in Syariah criminal case. This allows the court to consider the corroborative value of the DNA evidence and that it can be used as a basis for giving a judgment. At the same time, the researcher also find that there is no legal provision that clearly underline the basic principles on the admissibility of *qarinah* as explained by the Islamic scholars. The absence of legal provisions related to the method of assessment of *qarinah* based on syariah principles can cause the *qarinah* evidence submitted to be evaluated according to only the method of personal interpretation. The evaluation of *qarinah* should be clearly linked to and based on shariah principles. This is because, tendering evidence of *qarinah* such as the use of DNA, will be more credible and admissible to form the basis of a case judgment if it is corroborated with other evidence. Therefore, it is not only reasonable, but also important that assessment on the admissibility of *qarinah* be promulgated in the enactment so that Syariah legal practitioners are clear on the strength of *qarinah*. The proposed inclusion will simultaneously rebut any objection or remove doubts on the admissibility of *qarinah* in Syariah court.

Secondly, the Syariah Criminal Procedure Enactment had not clearly spelt out the process of collecting DNA evidence during the investigation of a Syariah criminal offence. Such lacunae in the law are apparent when one finds no procedural guidance on how to preserve the sanctity of the evidence, i.e., the chain and custody of the evidence. It is pertinent to note that both aspects must be given attention from the beginning of the investigation process of a criminal case, so as to ensure that the DNA evidence provides an irrefutable basis of the case judgment. It is also note worthy that there is the unavailability of legal provisions that specify the power of the religious enforcement officer to bring a victim to hospital for the purposes of examination and the collection of DNA samples.

Absence of such provisions is obviously a flaw in the process of collecting DNA samples. At the same time, the researcher also found that the non-existence of guidelines on the process of collection of DNA samples had contributed to a severe lacuna in the law. For example, in the Standing Instruction of the Director of the State Islamic Religious Department 2007, there are no guidelines that clearly link the DNA evidence collection process with shariah principles related to relevance, probative value, corroborative value, chain of evidence and

chain of custody. Thus, there is an urgent need for the setting up of a guideline that clearly links the process of gathering DNA evidence with Syariah principles on relevance, probative and corroborative values, chain of evidence and chain of custody. For instance, to preserve the chain of custody, guidelines on storage place and methods of storing such DNA evidence starting from its collection at the crime scene, transmission to the chemistry department and storage in evidence stores must be spelt out. In addition, there should be a guideline to require the recording of all transactions of such evidence, starting from the crime scene to the trial of the case in the Syariah court. This is necessary to maintain the sanctity of the custody of the evidence. The availability of such a guideline will assist religious enforcement officers to ensure all transactions of the DNA samples are carried out in accordance with the correct procedures and the admissibility of DNA evidence remains sturdy.

Finally, the process of examination and tendering of the DNA evidence under the Syariah Court Evidence Enactment is unclear regarding the expert witness. This is because the testimony of an expert giving evidence that supports facts related to the DNA evidence cannot be determined by the court since it is beyond the knowledge of the judge presiding the case. Nevertheless, sections 33 to 30 of the Syariah Court Evidence Enactment does not stipulate the procedures required to evaluate and consider the credibility of the expert witness coming to testify in court. Such ambiguity will in the end, lead to problems in the examination of an expert witness (to establish the expert's qualification), determination of third expert witness and the categorization of expertise.

CONCLUSION

The issue of out of wedlock pregnancy is an ongoing social problem and certainly a clear violation of Allah's commandment to refrain from acts of adultery. It is not only injurious to dignity and self-esteem, but also detrimental to purity of lineage (*nasab*) that forms the core of responsibility to uphold the *maqasid Syariah*. The strict enforcement of the law will reflect society's seriousness in addressing this issue and underscore the importance of preserving the sanctity of the nasab. The existing Syariah criminal law has clear provisions on how to deal with the blight of out of wedlock pregnancy. Though some of

the states' Syariah enactments differ from each other on provisions relating to out of wedlock pregnancy, i.e., with some making it *prima facie* evidence of illicit sexual intercourse and others incriminate such a pregnancy as an offence, existing laws should suffice to curb out of wedlock pregnancy through the rigorous enforcement of these laws. For the purposes of enhancing current legislations, the present paper has suggested that the existing provisions on out-of-wedlock pregnancy be revised and standardised so that Syariah laws are synchronised in the respective states in the country, irrespective of the different geographical locations or diverse groups in society.

This paper holds the view that it is more appropriate for the law to regard out-of-wedlock pregnancy as *prima facie* evidence of an illicit sexual intercourse offence, as has been provided for in the Syariah criminal enactments in the Federal Territories, Selangor, Pulau Pinang, Pahang, Johor, Sarawak, and Kedah. This is because making it an offence would put the offender in a dilemma of whether to proceed with the out-of-wedlock pregnancy or abort the pregnancy. Some states like Sabah clearly make abortion an offence and some others have no such provisions. Nonetheless, the illegal termination of a pregnancy is still an offence under the Penal Code. This consideration is imperative to prevent some offenders from choosing to terminate a pregnancy in their attempts to evade punishment for an out-of-wedlock pregnancy offence. Therefore, to preserve innocent lives and shut out the option of an abortion, this article has proposed that an out-of-wedlock pregnancy be treated as the *qarinah* of an illicit sexual intercourse offence, rather than an offence of itself. Though the child will be born as illegitimate, the child is not a sinner who should be punished prematurely. On the contrary, the deserves to live and the enjoy rights accorded any child.

As for the issue on the use of DNA evidence, it is regarded as providing a strong foundation for a judgment in an out-of-wedlock offence. Therefore, the authors submit that the proposed amendments to the Syariah Court Evidence and the Syariah Criminal Procedure Enactments are crucial to ensure the authenticity, admissibility, and veracity of DNA evidence in Syariah courts. Indeed, the proposed amendments are in line with efforts to enhance the jurisdiction of Syariah courts. At the same time, the proposal will assist in creating a better platform of processing evidence in Syariah courts, which iss flexible and in line with scientific and technological advancements,

especially in cases involving the use of DNA as irrefutable proof. Indirectly, it also indicates that Islamic legal system embodied in the Syariah principles are applicable as they transcend time and cover all spects of human life. Thus, to help the courts to produce better judgments in out-of-wedlock pregnancy cases, the Islamic legal and judicial system in Malaysia should call for more law reforms to enhance the evidential and procedural matters in all the relevant enactments.

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