



Misconception Regarding Pregnancy Duration in Determining *Nasab* and Children's Legal Status in Indonesia

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Abstract. Pregnancy duration has become one of the criteria formulated by *ulama* in determining *nasab* between father and child. The issue arises when some researchers from Indonesia misunderstand the role of pregnancy duration in determining the status of children in Indonesia. This study aims to uncover this misunderstanding, by formulating two questions: what is the role of pregnancy duration in determining *nasab* in Islam, and what are the misconceptions about pregnancy duration and the causes of researchers' misunderstanding of this concept. This research is qualitative, using a literature review approach. The study found that pregnancy duration serves as one of the criteria in proving *nasab* through *al-firasy*, and this criterion does not stand alone but is interrelated with other criteria. The mistake made by Indonesian researchers is considering pregnancy duration as the sole criterion in determining *nasab* and ignoring other concepts of *nasab*, i.e. *asbab al-nasab* and *tsubut al-nasab*. This misunderstanding is likely caused by a mixture of paradigms regarding the status of children according to Islam and Indonesian national law. The national law only considers the timing of a child's birth as the primary criterion in determining the status of the child. In cases of marriages preceded by pregnancies resulting from zina, it is emphasized that honesty is demanded from the husband and wife to acknowledge that their child indeed does not have *nasab* to his father. At the very least, this acknowledgment should be made to the concerned child or to the legal guardian if the child is a girl who intends to marry in the future, to avoid violating shari'ah provisions in important aspects such as wilayah and others.

Keywords: Misconception, *nasab*, pregnancy duration

1. Introduction

Al-Qur'an tells us about the stages of the creation of man, which can be found in surah al-Mu'minun (23): 12-14. *Ayah* 12 tells us that God created man from a choicest selection (*sulalah*) of clay. Then, *ayah* 13 says that from this extract, God made a germ of male animal life or sperm, and lodged it in the womb uniting it with the female germ. After that, *ayah* 14 goes on to say that from this fusion God created a new individual organism, and from this organism He created an embryo, and from the embryo He created a foetus. Then, from this final foetal stage, God originated another creature, refers to the introduction of the spirit (*al-ruh*) into that being (Al-Attas, 2023). Based on those facts, we can use the duration of pregnancy as one of the criteria to determine the lineage relationship between a child and their father, specifically to answer the question of whether the child indeed originates from intercourse that implies *nasab* or not. Generally, *ulama* establish that the duration of pregnancy/*muddah al-haml*, from conception to birth, lasts a minimum of six months. (al-Zuhayli, 1985)

However, misconception arises in understanding the concept of pregnancy duration, especially in some Indonesian studies. This misconception is highly consequential as it results in a change in the status of the child from one who should be considered without *nasab* to one considered to have *nasab*. For example, Prianter Jaya Hairi stated in his article that if two unmarried individuals engage in intercourse resulting in pregnancy, and later they marry, with the child being born six months after their marriage, then the child still possesses *nasab* with his father. He stated that this is the view of Abu Hanifah. (Hairi, 2012). This mistaken view can be ironically be downloaded from the website of the Legislative Body of the People's Representative Council (DPR) of the Republic of Indonesia. There are still some writings that express this misconception, but they will not all be mentioned here. In short, we can find many Indonesian studies stating that children resulting from extramarital intercourse can be attributed to their father, as long as the child is born after six months since their marriage. This concept is not only puzzling but also fundamentally incorrect. Therefore, this research aims to uncover the causes of this misunderstanding and explain the true function of the pregnancy duration in Islamic law (Marni et al., 2023).

Several researchers have previously investigated research related to this theme. For instance, studies on the concepts of lineage and pregnancy duration: Muhammad Taufiki (2012), Asman (2020), Mara Sutan Rambe (2017), dan Solihul Aminal Ma'mun (2021). Furthermore, there are also studies on the status of children in Indonesia: Hamid Pongoliu (2013), Moh. Anwar (2023), dan Prianter Hairi (2012). The studies mentioned generally have not revealed this misconceptions; in fact, some of them even support the misconception mentioned above.

This research formulates two problem statements. First, what is the position of the pregnancy duration in various fiqh literature. Second, what are the causes of the previous researchers's misunderstanding in associating the pregnancy duration with the legal status of children in Indonesia. These two questions will guide the author to identify the necessary sources and gather research data (Liza et al., 2023).

2. Methods

This is a qualitative research, that employing a library research method. It aims to explore and present studies on the concept of minimum pregnancy duration and its relation to the legal status of children born from marriages preceded by pregnancy, based on secondary data, including books, articles, or other documents. Data collection involves gathering written literature and documentation related to the issue. Subsequently, these materials are classified and synthesized based on structured and systematic discussion points. The data will then be analyzed using a mixed approach of inductive and deductive reasoning (Hizbullah et al., 2023).

There are several main references in this research. First is the book authored by Wahbah al-Zuhaili, titled "*al-Fiqh al-Islami wa Adillatuh*". Second is the fiqh encyclopedia compiled by a group of *ulama* in Kuwait, titled "*al-Mawsu'ah al-Fiqhiyyah*". These two references are mentioned not only as scholarly obligation but also because some of the research material related to the concept of *nasab* is an elaboration of the content from these primary sources. The author will analyze and provide additional descriptions regarding the material presented in the mentioned sources. Therefore, the description in this research is descriptive-informative in nature (Hizbullah et al., 2023).

3. Results and Discussion

3.1. Function of Pregnancy Duration in Establishing Nasab

It should be noted that the determination and termination of *nasab* in Islam are highly complex and not determined by a single criterion. Each requirement is interconnected and interrelated. The complexity of these rules indicates that Islam views *nasab* as highly urgent matters. *Nasab* directly relates to various other legal statuses, both rights and obligations, such as kinship relations, guardianship, and others. Therefore, in establishing the presence or absence of *nasab* relations, careful attention must be paid to all of these provisions to avoid misinterpretation of the law (Wahyudi et al., 2023).

Firstly, we need to understand how Islam regulates the provisions related to the establishment of *nasab* between a father and his child. In this regard, we encounter two types of provisions concerning *nasab*, namely *asbab al-nasab* and *adillah tsubut al-nasab*. Firstly, *asbab al-nasab* contains explanations regarding the types of sexual relations that result in *nasab*. Here, we find the types of sexual relations that lead to *nasab*, allowing us to distinguish them from sexual relations that do not result in *nasab* and even incur the punishment of hadd, i.e. *zina*. Secondly, *adillah tsubut al-nasab* explains how to prove that a descendant originates from a sexual relation falling under the category of *asbab al-nasab*. Thus, *adillah tsubut al-nasab* entails efforts to prove the existence of *sabab al-nasab* (Fitria, 2023).

Now, we shall elaborate on what falls under the category of *asbab al-nasab*. The sexual intercourse falling into this category includes intercourse within the context of *al-nikah al-shahih*, *al-nikah al-fasid*, and *al-wath'u bi syubhah*. First, *al-nikah al-shahih* represents a legally valid marital bond, fulfilling all its necessary conditions and requirements. Offspring born from such a relationship have *nasab* with the father. Second, *al-nikah al-fasid* refers to a marriage contract that is legally invalid, either due to not meeting the requirements or being inherently prohibited, but yet certain circumstances exist such that, in the judge's consideration, their relationship cannot be categorized as *zina*. Thirdly, *al-watha' bi syubhah* denotes intercourse occurring without a contract, not within *al-nikah al-shahih* or *al-nikah al-fasid*, yet specific *syubhah* exist such that, according to judicial discretion, their relationship cannot be classified as *zina* (Dafizki et al., 2023).

About *al-nikah al-shahih*, it is clear that offspring born from a this legally valid marriage – fulfilling all its necessary conditions and requirements – have *nasab* with both the parents, the father and the mother. There is no doubt about this, as all *ulama* agree upon it. Sexual intercourse within this marriage is *halal*, constitutes a part of *nafaqah*, and considered as a virtue. Children born from such intercourse have full legal rights and obligations towards both parents (Wandri et al., 2023).

As for *al-nikah al-fasid*, the offspring born from such a marriage still have *nasab* with both parents (father and mother). Despite the invalidity of this marriage, due to the judge's discretion, their sexual intercourse cannot be categorized as *zina*. Legally, the intercourse is *haram/prohibited*, considered *ma'shiyah/sinful*, and their marriage is deemed void and must be dissolved. However, they are not subjected to the *hadd* punishment for *zina* by the judge. An example of such *al-nikah al-fasid* is a marriage between two individuals unaware of their prohibited kinship (*mahram* relationship). The *mahram* relationship acts as an impediment to marriage (*mani' al-nikah*), rendering their marriage invalid (*fasid*). However, the couples are initially unaware and only realize their situation after engaging in sexual intercourse. They mistakenly believe their intercourse to be lawful, whereas it is not. In cases of such *fasid* marriage, the judge cannot pronounce them guilty of *zina* due to their unintentional actions. This serves as a reason for not subjecting them to the *hadd*, thus, the offspring born from this intercourse have *nasab* with their father. But conversely, if the *fasid* marriage is entered into intentionally, with full awareness from the parties involved, they may be subjected to the *hadd* for adultery, and the offspring born will not have *nasab* with the father. In such cases,

the judge's investigation is still required to determine whether the invalid marriage is categorized as *zina* or not (Sundari et al., 2023).

Thirdly, *al-watha' bi syubhah* refers to sexual intercourse that is not associated with any form of marital contract, whether *shahih* or *fasid*, but yet cannot be categorized as *zina* due to certain *shubhah*. An example of this is intercourse conducted by a man with a woman whom he mistakenly believes to be his wife, but later he discovers otherwise. If a child is born from such intercourse, the child is still has *nasab* with the father and mother. This intercourse cannot be classified as *zina*, due to certain *shubhah*.

Apart from the three types of sexual intercourse mentioned above, there was another form of *asbab al-nasab* that existed in the past, namely sexual intercourse between a man and a female slave under his ownership, known as *milk al-yamin*. However, since slavery no longer exists in this times, further information about it will not be explained here.

Next, we will transition to discuss the *adillah tsubut al-nasab*, which pertains to the methods used to establish the *nasab* resulting from the occurrence of sexual relations falling under the category of *asbab al-nasab*. This proof is crucial because not everyone knows the *nasab* of an individual, whether they are attributed to their father or not, whether they are born from a lawful union or not, thus, this proof is needed to address such inquiries. Generally, there are four methods of proving *nasab*, with the first three being agreed upon by *ulama*, i.e. *al-firasy*, *iqrar*, and *bayyinah*. While the fourth method involves disagreement, i.e. *qiyafah* (Jayusman et al., 2024).

The first method of proof is called *al-firasy*. Etymologically, *al-firasy* means bed or, and it also signifies *watha'* or sexual intercourse. In this context, *firasy* refers to the wife, as she is metaphorically referred to in this manner during sexual intercourse. The Prophet Muhammad peace be upon him said, that can be found in *subul al-salam* (Al-Shan'ani, 2000):

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: "أَلَوْلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الْحَجَرُ". متفق عليه

Artinya: "From Abu Hurairah, may Allah be pleased with him, that the Prophet, peace be upon him, said: "A child is attributed to (the owner of) *al-firasy*, while for the perpetrator of *zina*, there is stone." (HR. Muttafaq 'Alaih)

Therefore, one of the proof of a child's *nasab* with their father is the existence of the marriage of the child's parents. By knowing the marriage of both parents, the birth of the child most likely originates from lawful sexual intercourse, i.e., *halal* intercourse which occurs after the marriage contract. Of course, this is subject to the observance of applicable conditions and requirements. Among the conditions to be fulfilled are that (a) the father is logically capable of impregnating his wife, (b) the child is born after the minimum pregnancy duration, which is six months calculated from the time of the marriage contract or the possibility of sexual intercourse. This provision also applies to *al-nikah al-fasid* and *al-watha' bi syubhah*. The difference lies in that the six-month *pregnancy duration* is calculated only from the occurrence of sexual intercourse.

The proof mentioned above can be established when a marriage is known, or their pregnancy is known, and their birth is also known. However, sometimes a marriage, pregnancy, and birth are not clearly known. This can occur due to events in distant past eras or in remote regions due to migratory lifestyles, or other reasons. Consequently, individuals may lack clear lineage, known as *majhul al-nasab*, meaning their *nasab* is not clearly known. The method to prove *nasab* of someone who is *majhul al-nasab* is through *iqrar* (acknowledgment from one of the parties involved: either the father or the individual themselves), and *bayyinah* (evidence based on the testimony of witnesses). Since this discussion is not directly related to the concept of the pregnancy duration, it will not be elaborated further.

After understanding several concepts above, we will find that the pregnancy duration is not the sole and most determining criterion in establishing *nasab*. However, the pregnancy duration is one of the sub-indicators of proving *nasab* through *al-firasy*. Suppose the pregnancy duration is fulfilled, but the pregnancy does not result from sexual intercourse falling under the category of *al-firasy*, then *nasab* cannot be established, even if the pregnancy has surpassed six months. Similarly, suppose the pregnancy duration requirement is met, and the pregnancy falls within the scope of *al-firasy*, but if other criteria for *nasab* are not met, then it cannot be attributed to the father. For example, the birth of a child after six months following a valid marriage contract, but logically, the husband should not be able to impregnate (not of legal age, or other reasons), then in this case, *nasab* cannot be established, even if the pregnancy duration criteria are met. In conclusion, the concept of the pregnancy duration is one criterion inseparable from other criteria used in proving *nasab* through *al-firasy*.

3.2. Misconception about Pregnancy Duration in Determining Nasab

Prianter Jaya Hairi stated in his article that if two unmarried individuals engage in intercourse resulting in pregnancy, and later they marry, with the child being born six months after their marriage, then the child still possesses *nasab* with his father. He stated that this is the view of Abu Hanifah. (Hairi, 2012). This mistaken view can be ironically be downloaded from the website of the Legislative Body of the People's Representative Council (DPR) of the Republic of Indonesia.

Similar misconception is also found in the book by M. Ali Hasan, which has subsequently been cited by several researchers. In his work, he mentions three *qaul*/judgement of *ulama* regarding the status of children born as a result of *zina*: (a) According to Imam Malik and Shafi'i, if a child born after six months of the marriage of his parents, so that child has *nasab* with his father. (b) If the child is born before six months, then he only has *nasab* with his mother. (c) According to Imam Abu Hanifah, a child born as a result of *zina* still has *nasab* with his father without considering the duration of pregnancy. (Hasan, 2008)

Another misconception can be found in the article by Susanto and his colleagues. They stated that:

"The study of Islamic Law distinguishes "anak luar kawin" (the child born out of wedlock) into two categories. First, a child conceived outside of a valid marriage but born within a valid marriage. Imam Shafi'i and Imam Malik argue that a child born after six months of the marriage of its parents has nasab with the father. However, if the child is born before six months, it can only be attributed to the mother. Imam Abu Hanifah, on the other hand, maintains a different perspective, suggesting that illegitimate children are still has nasab with their father as legitimate offspring. Second, a child conceived and born outside of a valid marriage. Such a child is referred to as "anak zina" (the child born as a result of zina) and "anak li'an (the child who receives the consequences of li'an." (Susanto et al., 2021)

They are not only mistaken in understanding the relationship between the pregnancy duration and the determination of *nasab*, but also in linking it to the concept of illegitimate children as applied in Indonesia, which is not equivalent to the concepts of children born as a result of *zina* and children of *li'an*.

The mistake made by some Indonesian researchers is to consider the duration of pregnancy as the sole primary criterion in determining *nasab*. They argue that if a child is born six months after marriage, even if the pregnancy resulted from *zina*, the child still has *nasab* with the father. This is clearly a misconception. They overlook the fact that the criterion

of pregnancy duration is closely related to other criteria, all of which are also linked to the concept of "*al-firasy*," as a recognized form of intercourse that implies *nasab* according to Islamic law.

Ironically, they claim that their opinion is based on the *ijtihad* of the Imams of the Madhhab such as Abu Hanifah. However, primary references in the writings and jurisprudential texts of the Hanafi scholars that affirm this assertion are not found (Al-Kasani, 2003). The writings that propose such a concept often only refer to secondary sources, which are also interconnected with other incorrect sources. However, upon investigation, the *ijtihad* of scholars stating that a child born from adultery can have lineage to the father as long as the child is born six months after the parents' marriage is entirely unfounded. All *ulama* agree that *zina* does not establish *nasab*, and the presence of pregnancy duration is irrelevant here, as a woman who commits *zina* does not fall under the category of *al-firasy*. (*Al-Mawsu'ah Al-Fiqhiyyah*, 1983; al-Zuhayli, 1985)

Furthermore, there is an interesting quote from Wahbah al-Zuhaili regarding the marriage of adulterers:

يحل بالاتفاق للزاني أن يتزوج بالزانية التي زنى بها، فإن جاءت بولد بعد مضي ستة أشهر من وقت العقد عليها، ثبت نسبه منه، وإن جاءت به لأقل من ستة أشهر من وقت العقد لا يثبت نسبه منه، إلا إذا قال: إن الولد منه، ولم يصرح بأنه من الزنا. إن هذا الإقرار بالولد يثبت به نسبه منه لاحتمال عقد سابق أو دخول بشبهة

"All Ulama agree on the permissibility of marriage between perpetrators of zina. If a child is born six months after the marriage contract, the child is attributed to him; however, if the child is born before six months from the time of the contract, then the child is not attributed to him. Except if he confesses: indeed, this child is from me, without specifying that it is from adultery, then this confession establishes the lineage because there is a possibility that the child is from a previous contract or due to doubtful circumstances." (al-Zuhayli, 1985)

The question is whether the child born after such marriage has *nasab* to his father. In answering this question, we consider Wahbah al-Zuhaili's response based on evidence from a public perspective, assuming that the act of *zina* is not known for certain by the general public. There is an important rule in determining legal issues, namely "*nahnu naqumu bi al-zhawahir*," which means that establishing the law regarding something must be based on evidence found. The apparent evidence from a public perspective is that the couples are married, the child is born six months after the marriage, and the husband is logically capable of impregnating his wife. Therefore, based on this apparent evidence, the child has *nasab* to his father. However, if the child is born before six months, there is no *nasab* between the father and the child unless they present other evidence such as *iqrar*, then the child can have *nasab* with him assuming that the child is a result of a *al-nikah al-fasid* or *al-watha' bi syubhah*.

In this case, ordinary people cannot simply accuse someone of *zina*, or accuse a child born as a result of *zina*, due to the absence of strong evidence (four eyewitnesses or the confession of the perpetrator). However, if *zina* has been proven, then the child born does not have *nasab* to his father. Even if he is born six months after the marriage, or even if the father has confessed to the *nasab* or *iqrar al-nasab*, both are futile and invalid for establishing *nasab* with the child because the nature of *zina* is "*qathi' al-nasab*," meaning lineage severance.

Therefore, in the case where a husband realizes that the child conceived by his wife is from *zina* that happened before their marriage, or they both already knew about the pregnancy before marriage, the six-month pregnancy criterion post-marriage becomes irrelevant for establishing *nasab*. Even if the child is born eight months after marriage, the child still does not have *nasab* to his father. In this case, honesty is demanded from the husband and wife to acknowledge that their child indeed does not have *nasab* to his father. At the very least, this acknowledgment should be made to the concerned child or to the *wali al-*

hakim if the child is a girl who intends to marry in the future, to avoid violating shari'ah provisions in important aspects such as *wilayah* and others.

This misunderstanding seems to stem from how the Indonesian legal system regulates the status of children. In Law Number 1 of 1974, Article 42 states that: "*a legitimate child is a child born within or as a result of a legitimate marriage.*"

Rules like this, according to M. Nurul Irfan, are not in line with the concept of a child's status in Islam. This article would legalize premarital intercourse or children born from marriages by accident, as the child's status is determined based on the timing of birth. Moreover, there is no provision stating the minimum duration of pregnancy for a child to have lineage with his father. With this provision, a girl who is already in her ninth month of pregnancy can be married, and if the baby is born a few days later from her marriage, it is still considered legitimate since it was born "within" the bounds of marriage. This clearly contradicts the fundamental principles of Sharia.(Irfan, 2012)

Based on the approach of Indonesian legislation, which only considers the timing of a child's birth as the main and sole standard, it can be predicted that the misconception regarding the use of pregnancy duration arises from the mixing of paradigms between Sharia principles and national legal principles. Sharia regulates the status of a child based on the circumstances of the conception resulting in the birth, with various criteria. Meanwhile, national law regulates the status of a child based solely on the timing of their birth, without any additional criteria. These two concepts of a child's status cannot be conflated because they have different standards. Therefore, sometimes a child may be recognized as legitimate under national law but not under Sharia. In cases of marriages preceded by pregnancies resulting from *zina*, it is emphasized that honesty is demanded from the husband and wife to acknowledge that their child indeed does not have *nasab* to his father. At the very least, this acknowledgment should be made to the concerned child or to the legal guardian if the child is a girl who intends to marry in the future, to avoid violating shari'ah provisions in important aspects such as *wilayah* and others. Indeed, the status of children in Islam is fundamentally different from children's status in national law.

4. Conclusions

The pregnancy duration is not the sole and most determining criterion in establishing *nasab*. However, the concept of the pregnancy duration is one criterion inseparable from other criteria used in proving *nasab* through *al-firasy*. The mistake made by some Indonesian researchers is to consider the duration of pregnancy as the sole primary criterion in determining *nasab*. They argue that if a child is born six months after marriage, even if the pregnancy resulted from *zina*, the child still has *nasab* with the father. This is clearly a misconception. They overlook the fact that the criterion of pregnancy duration is closely related to other criteria, all of which are also linked to the concept of "*al-firasy*," as a recognized form of intercourse that implies *nasab* according to shari'ah. Therefore, in the case where a husband realizes that the child conceived by his wife is from *zina* that happened before their marriage, or they both already knew about the pregnancy before marriage, the six-month pregnancy criterion post-marriage becomes irrelevant for establishing *nasab*. Even if the child is born eight months after marriage, the child still does not have *nasab* to his father. But, based on the approach of Indonesian legislation, the child is recognized as legitimate. This is due to the national legal paradigm, which determines the timing of birth as the sole standard for the status of a child, without any other criteria. These two concepts of a child's status (between Indonesian national law and shari'ah) cannot be conflated because they have different standards. Therefore, sometimes a child may be recognized as legitimate

under national law but, not under Sharia. In this case it is emphasized that honesty is demanded from the husband and wife to acknowledge that their child indeed does not have *nasab* to his father, even national law recognizes their children's status as legitimate. At the very least, this acknowledgment should be made to the concerned child or to the legal guardian if the child is a girl who intends to marry in the future, to avoid violating shari'ah provisions in important aspects such as *wilayah* and others. Indeed, the status of children in Islam is fundamentally different from children's status in national law.

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