

# The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)

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**The Legal Position of Children of Incest**  
**(A Study of *Madhhab* Scholars and Compilation of Islamic Law)**

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**2**  
**Abstract:** This study aims to discuss the legal position of children of incest, the opinions of *madhhab* scholars, and the provisions on inheritance rights of children of incest according to Islamic law. This normative legal study used the Islamic law methodological approach (*ushul fiqh*) and the legislation/ statute approach. The data were obtained through a literature review of the laws or legal rules. The results of the study revealed that the legal position of children of incest in Islamic law is in terms of civil matters (i.e., lineage/blood relations) between the children and the parents. The children only establish lineage ties with their mothers and their maternal families. Further, the *madhhab* scholars Imam Malik and Imam Shafi'i argue that adultery does not produce legal descendants, and therefore, the children are not related to the male adulterer but to the female, as they are born from an illegitimate relationship. In addition, Imam Hanafi and Imam Hanbali state that it is forbidden for a man to marry the daughter born of his adultery, as she is equal to his legitimate daughter. This is the view of the majority of *madhhab* scholars. In the case of the inheritance rights of children of incest, the children can only get an inheritance from their mothers and the maternal families, apart from the lineage, guardianship, inheritance, and livelihood rights. However, al-Jaziri, a contemporary scholar, views that children of incest are still legitimate children whose lineage and inheritance are still related to both father and mother.

**Keywords:** *Children of Incest, Madhhab Scholars, Incestuous Marriage, Inheritance Rights, Compilation of Islamic Law*

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**Abstrak:** Kajian ini bertujuan untuk membahas kedudukan hukum anak hasil incest, pendapat ulama mazhab dan ketentuan hak waris anak hasil incest menurut hukum Islam. Kajian tersebut merupakan penelitian hukum normative memakai pendekatan metodologi hukum Islam (ushul fiqh) dan pendekatan perundang-undangan. Teknik pengumpulan data yang digunakan adalah kajian kepustakaan berupa undang-undang atau aturan hukum. Hasil penelitian menjelaskan bahwa kedudukan hukum anak hasil incest dalam hukum Islam adalah adanya hubungan nasab atau hubungan darah antara anak dan orang tua secara keperdataan. Hubungan nasab anak hasil hubungan incest hanya memiliki hubungan nasab dengan ibunya dan keluarga ibunya. Sedangkan menurut ulama mazhab seperti diungkapkan oleh Imam Malik dan Imam Syafi'i bahwa perzinahan itu tidak menyebabkan keturunan yang sah, maka anak tersebut bukanlah dari laki-laki yang menggaulinya, namun ia merupakan anak dari ibunya saja. Sedangkan Imam Hanafi dan Imam Hambali berpendapat, anak perempuan hasil zina haram dinikahi, sebagaimana anak perempuan yang sah, sebab anak perempuan tersebut merupakan darah dagingnya sendiri. Pendapat tersebut merupakan argumentasi yang mayoritas. Sedangkan terkait dengan hak waris anak dari hasil incest, maka ia hanya mendapatkan wasiat dari ibunya dan keluarga ibunya, di samping itu ia juga mendapatkan hak nasab, hak perwalian, hak pewarisan, hak nafkah. Pandangan yang agak berbeda dan kurang populer dari Al-Jazairi, seorang ulama kontemporer yang mengatakan bahwa anak yang lahir dari hasil incest tetap anak sah, nasab dan waris tetap berkaitan dengan bapak dan ibunya.

**Kata Kunci:** Anak Hasil Incest, Ulama Mazhab, Perkawinan Sedarah, Hak Waris, Kompilasi Hukum Islam

## Introduction

Children's rights in Islamic law have become one of the most important concerns, including in the distribution of inheritance. Inheritance divided between each entitled party must have the terms and conditions set out in Islamic law. Children born to parents from a legal marriage will get an inheritance according to their rights, but those born from an illegitimate marriage are legally prevented from getting the inheritance. However, children's inheritance rights are not only influenced and regulated by

normative law but also affected by *fiqh* (Islamic jurisprudence), custom, and socio-culture developed in a society that keeps changing.<sup>1</sup>

A number of problems arise related to the status of children in the inheritance law, for example, milk-children adopted children, stepchildren, children as substitute heirs, children born from adultery, or children born from incestuous marriage.<sup>2</sup> In this case, Islamic law has regulated in detail the terms and conditions of marriage because it will have an impact on the rights of children. Islamic law regulates matters relating to marriage, whether about the person to marry or about the marriage process. If in the future problems emerge related to the matters mentioned above, then a marriage contract can be annulled or stipulated by law. For instance, in addition the legal requirements of marriage that are not met, incestuous relation is also a reason for the dissolution of a marriage bond.

One particular problem that may occur is if the marriage is annulled by law (*fasakh*)<sup>3</sup> because both husband and wife are identified to have blood relations, and yet, the couple already has a child. It is questioned whether the child is the direct descendant of both parents whose marriage has been annulled, or of either parent or even has no lineage rights at all, which means that the child does not have any inheritance rights either. This issue will become another crucial problem in the child's future life, both for the child and other family members. Hence, there must be clarity on this issue so that any possible conflict that might arise can be eliminated.

Incest is one of the reasons a marriage can be annulled. Incestuous marriage refers to any marriage whose couple have a kinship; whether towards those related by blood in an upward or downward the lineage line, or towards

11

<sup>1</sup> Euis Nurlelawati and Stijn Cornelis van Huis, "The Status of Children Born of Wedlock and Adopted Children in Indonesia: Interactions Between Islamic, Adat and Human Right Norms," *Journal of Law and Religion* 34, No. 3 (2019), p 356-382. Mark Cammack, "Islamic Inheritance Law in Indonesia: The Influence of Hazairin's Theory of Bilateral Inheritance," *Studia Islamika* 10, No. 1 (2003), p. 97-122. Miftahul Huda, et al., "Fiqh and Custom Negotiation in Inheritance Dispute Traditional at Mataram Society, East Java," *al-Ihkam: Jurnal Hukum dan Pranata Sosial* 15, No. 2 (2020), pp. 224-250.

<sup>2</sup> Ali Abubakar et al., "The Right of a Child outside the Legal Marriage of a Biological Father: The Analysis of Hifz al-Nafs as Law 'Illat," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, No. 1 (2021), p. 154-173. Sugiri Permana, "Implication of Hazairin and Munawir Sjadzali Thoughts in Establishment of Islamic Inheritance in Indonesia," *Ahkam: Jurnal Ilmu Syariah* 18, No. 2 (2018), pp. 375-395. Zaitun Muzana, et al., "Customary Practice of Sharing Inheritance: An Analysis of Society Practices in Pidie Aceh Darussalam," *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* 11, No. 2 (2016), pp. 275-292.

<sup>3</sup> Derived from Arabic فسخ يفسخ فسخا meaning annulled. Ahmad Warson Munawwir, *Kamus al-Munawwir Arab-Indonesia Terlengkap*, (Surabaya: Pustaka Progresif, 2002), p. 1054.



siblings of the same father or same mother and so on upward, or towards children of full siblings and half-siblings and so on downward.<sup>4</sup>

Incestuous marriage is strongly opposed and is not justified by society as it causes a negative impact on both the couple and the children of the marriage.<sup>5</sup> Incestuous marriage is known to have a high potential to produce offspring that are biologically weak, either physically or mentally (disabled), and even deadly (lethal). However, despite the increasingly advanced world's development and human civilization, incestuous marriage still occurs regardless of many regulations to prohibit such a marriage.<sup>6</sup>

The law weakens the legal consequences of annulment of incestuous marriage; yet, the marriage still bears consequences, including for the spouses, their children, and third parties, until the statement of annulment is made. The consequences of a dissolution of this marriage have been clearly regulated in Law Number 1 of 1974, Article 28 Paragraph (2), and in the Compilation of Islamic Law (*Kompilasi Hukum Islam*) Articles 75 and 76 explaining the annulment of marriage.<sup>7</sup>

In Indonesia, incestuous marriage cases can be found in several regions which had been annulled. For example, in Depok, West Java, a marriage occurred in 2001, which was annulled in 2009 as the couple was legally proven to have blood relations: having the same mother but different fathers. The couple already had three children whose education and health expenses were covered.<sup>8</sup> Another case happened in West Java in which the marriage was carried out in 2003 and then was annulled by the Sumber Religion Court, Cirebon, West Java, in 2011.<sup>9</sup> In Banjarnegara Regency, Central Java, such a marriage took place in 1989 and was then annulled by the Religious Court in 2018, and the couple had three children, aged 28, 23, and

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<sup>4</sup> Hilman Hadikusuma, *Hukum Perkawinan Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama*, (Bandung: Mandar Maju, 1990), pp. 65-66.

<sup>5</sup> Abdul Manan, *Hukum Perdata Islam di Indonesia*, Jakarta: Kencana, 2006, p. 18.

<sup>6</sup> Moh. Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama dan Zakat Menurut Hukum Islam*, Jakarta: Sinar Grafika, 2004, p. 29.

<sup>7</sup> Abdurrahman, *Kompilasi Hukum Islam di Indonesia*. Jakarta: Akademika Pressindo, 1992.

<sup>8</sup> Depok Religious Court Decision Number 1723/Pdt.G/2009/PA.Dpk.

<sup>9</sup> Sumber Court Decision, West Java, 3187/Pdt.G/2011/PA.Sbr

12.<sup>10</sup> Another incestuous marriage also occurred in Lubuklinggau, South Sumatra, in 2005, which was later dissolved by the Religious Court in 2017.<sup>11</sup>

There are various legal issues that will emerge from incestuous marriage, including the marital status of the couple and the rights of the children (e.g., inheritance from the parents and guardianship for daughters). Therefore, Islamic law, either *fiqh* or the Compilation of Islamic Law, puts emphasis on such legal issues so that they do not cause any further legal and social problems in society.

Studies on incestuous marriage with legal consequences have been carried out in a number of aspects. Maimunah (2018) argues that the inheritance rights of children from the incestuous marriage are not regulated in Islamic law since the law regulates those of children from legal and illegal marriages. However, according to the Compilation of Islamic Law, these children only inherit from their mothers.<sup>12</sup>

Bengal (2021) has examined the inheritance rights of children of extramarital relations between female workers and their employers. He concludes that the children have no inheritance rights from the father because they have no kinship with the father, a consequence of the invalid marital status of their parents. His arguments are based on the Compilation of Islamic Law, and therefore, the father has no obligation to provide a living or to act as a guardian in his daughters' marriage.<sup>13</sup>

Here, this present study applied the normative legal research approach, using the Islamic law or *ushul fiqh* (principles of Islamic jurisprudence) and legislation approaches. The Islamic law approach was used to analyze the opinions of *madhhab* (Islamic school of thought) scholars, while the legislation approach was used to analyze the marriage law and Compilation of

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<sup>10</sup>Banyumas Religious Court Decision Number 1160/Pdt.G/2018/PA.Bms. Azhari, Mohamad Badja and Liza Priandini, "Akibat Hukum dari Pembatalan Perkawinan Sedarah (Putusan Pengadilan Agama Banyumas Nomor 1160/Pdt.G/2018/PA.Bms)," *Pakar (Pakuan Law Review)* 8, No. 1 (2022), pp. 212-227.

<sup>11</sup>Lubuklinggau Religious Court Decision Number 80/Pdt.G/2017/PA.Llg. Pricillia Putrid and Wirnyaningsih, "Analisis Akibat Pembatalan Perkawinan Sedarah terhadap Harta Bersama dan kedudukan Anak (Studi Kasus Pengadilan Agama Lubuklinggau Nomor 80/Pdt.G/2017/PA.Llg)," *Indonesian Notary* 4, No. 1 (2022), pp. 843-865.

<sup>12</sup> Maimunah, "Kedudukan Hak Waris Anak Dari Pernikahan Incest dalam Perspektif Fiqh," *Al-Ahkam: Jurnal Hukum, Sosial dan Keagamaan* 14, No. 1 (2018), pp. 20-38.

<sup>13</sup> Rahmat Fijai Bengal, et al., "Tinjauan Yuridis Kompilasi Hukum Islam tentang Hak Warisan Anak Hasil Hubungan di Luar Nikah antara Tenaga Kerja Wanita dengan Majikannya," *Bhirawa Law Journal* 2, No. 1 (2021), pp. 125-129.

Islamic Law.<sup>14</sup> The study collected data by means of literature review, including the laws, government regulations, scientific articles, opinions of legal experts or *madhhab* scholars, and a compilation of Islamic laws related to incestuous marriage.

### The Legal Position of Children of Incestuous Marriage in Islamic Law

The ultimate goal of marriage is to create peace and harmony between a man and a woman. Married couples should therefore have a strong sense of love and affection, and such are the signs of Allah's power (i.e., Surah Ar-Rum (30:21)). In Islamic law, marriage requires certain conditions, one of which is the prohibition of marrying those with blood or marital relations, known as incestuous marriage. Such a prohibition is clearly stated in the Qur'an, in which Allah forbids a Muslim man to marry his mother, daughter, sister, father's sister, mother's sister, milk-sister, mother-in-law, wife's daughter (step-daughter) who is under his care born of his wife with whom he has consummated the marriage, daughter-in-law, and to marry two sisters (Surah An-Nisa (4:23)).

The purposes of marriage in Islamic law are to foster a happy and prosperous family, to have healthy children, and to avoid divorce. Marriage also aims to strengthen social and cultural ties as well as religious and customary dimensions and to establish harmonious physical and spiritual bonds known as *sakinah* (tranquility), *mawaddah* (love), and *rahmah* (mercy).<sup>15</sup> To this end, marriage preparation for both man and woman should consider the religious, physical, health, economic, social, and cultural aspects of their respective partner.<sup>16</sup>

Marriage is not only an event of worship but also a legal event that will yield legal consequences for both the spouses and for the children they will conceive. Hence, in Islamic law, the legal status of marriage is crucial as it will affect the position of the children in relation to their lineage or blood

<sup>14</sup>Munir Fuady, *Metode Riset Hukum: Pendekatan Teori dan Konsep*, Jakarta: Rajawali Press, 2018, p. 121. Amiruddin and Zainal Asikin, Pengantar Metode Penelitian Hukum, Jakarta: Rajawali Press, 2014, pp. 117-120. Juhaya S. Praja, *Teori Hukum dan Aplikasinya*, Bandung: Pustaka Setia, 2014, pp. 69-78.

<sup>15</sup>Hilman Hadikusuma, *Hukum Perkawinan Adat*, Bandung: Alumni, 1977, p. 28. Ridwan Nurdin, et al., The Gayonese Culture of Marriage System: the Islamic Law Perspective, *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, No. 1 (2021), pp. 108-126.

<sup>16</sup>Ahmad Tholabie Kharlie, *Hukum Keluarga Indonesia*, Jakarta: Sinar Grafika, 2013, p. 204. Yukhanid Abadiyah et al., "Usia Dewasa Dalam Menikah: Studi Kritis dalam Ilmu Psikologis dan Kompliasi Hukum Islam," *Al-Maslahah: Jurnal Hukum Islam dan Pranata Sosial Islam* 8, No. 1 (2020), pp. 377-390.



relations between the children and the parents. This relationship is the strongest civil relationship that cannot be contested and limited by anything. Therefore, it is necessary to clarify the lineage of a child because it will bring legal consequences to the child, which also involves the rights and obligations obtained that must be implemented for its legal force. In the Islamic law, according to Wahbah al-Zuhaily, children are generally divided into two categories, as follows:<sup>17</sup>

1. *Shar'i* children are children who have a kinship (legally) with their male parent (father).
2. *Tabi'i* children are children who do not have a kinship with their male parent (father).

More specifically, the Islamic law divides the children's status into six, namely: biological children, adopted children, milk-children, foster children, stepchildren, and illegitimate children.<sup>18</sup> However, the lineage of children of incestuous relations is only established with their mother and their mother's family. The lineage of these children cannot be determined as they are born out of legal wedlock, which is prohibited by religion. Article 39 of the Compilation of Islamic Law has also described the people who are prohibited from marrying. Moreover, it can also be scientifically proven whether or not the children are the result of incestuous relations, such as through DNA testing, in order to obtain absolute certainty.

In the case of children of incest, there is no custodian from their father, nor lineage and kinship with their father and other men from the father's side because their lineage line is only toward their mother and the mother's family. Based on the laws and regulations in Indonesia concerning marriage law, the lineage status of children out of wedlock has a civil relationship with their mother and the maternal family. Such a relationship is commonly referred to as parental power, which is the emergence of rights and obligations between parents and children. The implication is that children born from incestuous mating can only establish a relationship that bears rights and obligations with their mother and the maternal family.

In the marriage legislation in Indonesia, both in Law Number 1 of 1974 on marriage and in the Presidential Instruction Number 1 of 1991 on the dissemination of the Compilation of Islamic Law, there is no clear position on children of incestuous marriage. However, the mention of incestuous marriage prohibited by the Civil Code is affirmed in Article 31: (1) Between brother-

<sup>17</sup> Wahbah Az-Zuhaily, *Fiqh Islam Wa Adillatuhu*. (Transl. Abdul Hayyie al-Kattani), Jakarta: Gema Insani, 2011, p. 698.

<sup>18</sup> Andi Syamsu Alam and Fauzan, *Hukum Pengangkatan Anak Perspektif Islam*, Jakarta: Kencana, 2008, p. 26.



in-law and sister-in-law, whether it is valid or invalid, except if the husband or the wife who establishes the in-law relation has died or on the ground of the absence of the husband or the wife permission has been given by the Judge to the living husband or wife to carry out another marriage; (2) Between uncles and/or parents' uncles and nieces, as well as between aunts or parents' aunts and nephews, legitimate or illegitimate. Here, if there are significant reasons, the President, by granting a dispensation, has the power to remove the prohibitions contained in this article.

Further, Law Number 1 of 1974, Article 43 paragraph 2 on marriage has mentioned that further explanations will be made in the Government Regulation regarding the position of children; however, no Government Regulation has been promulgated yet in this regard. According to Bashar Muhammad, a descendant is a single ancestor, meaning that there is a blood relationship between one person and another and two or more people who are related by blood, so the single ancestor is the descendant of one from the other.<sup>19</sup> The origin of children is the basis to show the existence of a lineage (kinship) relationship with their father. Most Islamic scholars are of the opinion that children born out of *zina* (adultery)/ *li'an* (divorce by curse) only have a kinship with the mothers who gave birth to them.

Therefore, the Civil Code and Law Number 1 of 1974 only concern the position of legitimate and illegitimate children and not the position of other children, as is the reality in the family and household life in society today. However, it can be concluded that the legal position of children of incest in Islamic law refers to the existence of a civil relationship or blood relationship between the children and the parents. Here, these children will only establish a kinship with their mothers and their maternal families.

### The Opinions of *Madhhab* Scholars on Children of Incest

The majority of *madhhab* scholars agree that children born from illegitimate marriage only inherit from their mothers and their maternal relatives. Imam Hanafi and Imam Hanbali are of the opinion that it is forbidden for men to marry their illegitimate daughters, being equal to the legitimate daughters, because the daughters are their own flesh and blood. However, illegitimate children are not recognized as part of lineage by the sharia law in terms of the sharia matters, such as inheritance and livelihood.<sup>20</sup> Imam Hanafi compares intercourse in adultery to intercourse in marriage since

<sup>19</sup> Bushar Muhammad, *Pokok-Pokok Hukum Adat*, Jakarta: Pradnya Paramita, 1991, p. 3.

<sup>20</sup> Muhammad Abu Zahrah, *Al-Ahwal Al-Syakhsyah*, Beirut: Dar al-Fikr al-Arobi, 1957, p. 331.

both can produce children, and therefore, the legal rule is the same.<sup>21</sup> In this case, the status of children of incest in the view of Islam equals that of illegitimate children, which means children of incest can only establish kinship with their mothers while kinship with the fathers is severed.

Imam Malik and Imam Shafi'i argue that adultery will not result in legal descendants, and thus, any child born will not belong to the man committing the intercourse with the woman. The child will only be related to the mother as there is no bloodline established between the man and the child according to the law; thus, the man is not obliged to provide a livelihood for the child, and there is no mutual inheritance relationship between the two.<sup>22</sup> The man may even marry the daughters born from his adultery, as well as the sisters and the daughters of his sons or daughters, because all of these women are not *muhrim* (illegally to be married) for the man in the view of the sharia law.<sup>23</sup>

Several scholars of the Hanbali School, including Ibn Taimiyah, under certain circumstances, still attribute children of adultery to their fathers and inherit their fathers' property. However, further problems arise when the provisions regarding the inheritance of children out of wedlock are stipulated in Indonesia. In general, the inheritance law that applies to Muslims in Indonesia is the Islamic inheritance law, formulated by the majority of Islamic scholars, especially the Shafi'i school.<sup>24</sup>

Nevertheless, according to the contemporary *fiqh*, Al-Jaziri states that if a marriage has been carried out that is **3** valid due to mistake, ignorance, or unintentionality, then once discovered, the marriage must be immediately annulled. If intercourse has occurred, then it is considered as *wathi subhat*, not considered adultery, and the child born in the marriage is a legitimate child whose lineage and inheritance ties are still related to the father and mother.<sup>25</sup> Likewise, when calculating the inheritance, there will be no difference with children from **3** ordinary marriages, both in position and share. The dissolution of parents' marriage is not the cause of the change in the status of the child's inheritance rights. However, if it is known that there is a prohibition on marriage, yet the husband and wife continue to commit intercourse, then such

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<sup>21</sup> Muhammad Yunus, *Hukum Perkawinan Dalam Islam Menurut Empat Madzhab*, Jakarta: Hidakarya Agung, 1996, p. 37.

<sup>22</sup> Muhammad Yunus, *Hukum Perkawinan Dalam Islam Menurut Empat Madzhab*...., p. 36.

<sup>23</sup> Muhammad Abu Zahrah, *Al Ahwal Al Syakhshiyah*..., p. 330.

<sup>24</sup> Ahmad Rofiq, *Pembaharuan Hukum Islam di Indonesia*, Yogyakarta: Gema Media, 2004 p. 117.

<sup>25</sup> Al- Jaziri, *al-Fiqhu 'Ala Madzahibul Arba'ah*, (Beirut: Darul Fikri, 1982), p. 119

a relationship is adultery, and the status of the child born is illegitimate, having only lineage and inheritance ties with the mother.<sup>26</sup>

The impacts of incestuous relationships can be seen from various aspects, as below:

1. Impacts in terms of the Islamic law and legal rules

All *fiqh madhhabs* forbid incestuous marriage, and it cannot be justified even if it is voluntarily, much less by coercion (rape). They equate incestuous marriage with adultery which must be punished. However, there is a difference amongst *madhhabs* regarding the punishment. There are five criteria for punishment for the perpetrators of adultery. First, a *mushrik* (polytheist) man who commits adultery with a Muslim woman shall be killed, even though his status is *mustama'man mu'ahad* (protected in the agreement). Second, a married Muslim man shall be stoned. Third, an unmarried Muslim shall be whipped and exiled. Fourth, a slave shall be sentenced to half of the punishment of a free person. Fifth, an insane person does not get any punishment.<sup>27</sup> Further, the Maliki, Shafi'i, Hanbali, Zahiri, and other schools punish incest perpetrators with *hudud* punishment (Islamic law with fixed forms and levels of punishment, e.g., cutting off hands) or with the punishment for adulterers. On the other hand, Ibn Hanifah punishes voluntary incest with *ta'zir* (severe warning or harsh punishment).<sup>28</sup>

2. Psychological impacts

Various incidents of incestuous relationships have shown the suffering of women as victims of incest. The fear of being threatened by the perpetrators has made women unable to resist being raped by their own fathers, grandfathers, uncles, or siblings. It is intricate for them to get out of the multi-layered violence because they rely on the perpetrators for their life and still think they should not expose the disgrace of the men whom they essentially love and should be their protectors. As a result, these women experience lifelong trauma and mental disorders.

3. Impacts on humanity

Despite having consent and not being a victim, incest has sacrificed the moral sense of the public. With the occurrence of incest, human morality will be lost, and the future will be slumped if future

<sup>26</sup> Abdul Manan, *Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana, 2006), p. 40

<sup>27</sup> Samsul Arifin, *Pendidikan Agama Islam*, (Yogyakarta: Depublish, 2014), p. 32.

<sup>28</sup> Ibnu Rusyd, *Bidayatul Mujtahid Wa Nihayatul Muqtashid, Rujukan Utama Fiqih Perbandingan Mazhab Ahlussunnah Wal Jama'ah*, Jakarta Timur: Akbar Media Eka Sarana, 2017, pp. 104-105.



generations have inhumane morals and do not use the perspective of religion.

#### 4. Social impacts

Incestuous relationships that occur in one family will cause the destruction of the family's reputation within society. The family can be ostracized by the community and become the talk of the town. A crucial issue to consider is the case of a child of incest, in which the father impregnates his daughter. Then, when a baby is born, the status of the father becomes double as both a father and a grandfather. This is one example of the social impacts of incestuous relationships.

#### 5. Impacts on health

From the medical point of view, not every incestuous relationship will produce children with health disorders or abnormalities. There are even a few who gave birth to healthy and normal children. However, there are other major effects that show incest is harmful, such as damage to the reproductive organs and the risk of contracting sexually transmitted diseases. In addition, victims and perpetrators become stressed, which will deteriorate their mental health. Another impact of incest is the possibility of children carrying more homozygous-recessive genes, i.e., individuals whose chromosomes have identical genes from a pair or a series of alleles/genes that have positions on the same chromosome but with varied traits caused by mutations in the original gene; then, the gene is covered by the more dominant gene, so that it is unable to express its attributes. This can cause death in infants, known as fatal anemia, and visual impairments in children aged 4-7 years which can result in blindness, albinism, and so forth.

Additionally, most Islamic scholars do not recommend someone to marry a close family member, let alone those forbidden to marry. Studies on the health risks of marriage with close relatives, especially parallel cousins, are widely found in the Islamic societies in the Middle East, Central Africa, and Central Asia.<sup>29</sup> The same occurs in South Asia, for example, in Bombay, India. There is a Parisy tribal community, known as a closed society, that intermarries among its own tribal members; for example, marriage between milk-siblings in the tribe. As a result, it was found that 50% of women suffered from breast cancer among the tribe. In contrast, the average percentage of

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<sup>29</sup>Millicent R. Ayoub, *Parallel Caousin Marriage and Endogamy: A Study in Sociometry*, *Southwestern Journal of Antropology* 15, No. 3 (1959), pp. 266-275.



Muslim women in Bombay who suffer from cancer is very low compared to that of the Parisy tribal community.<sup>30</sup>

In the context of Indonesia, there are risks of bad health for children born from close family marriages. In Aceh, particularly, it was found that four out of five studied couples who married close relatives gave birth to children with health problems, e.g., mental retardation, speaking difficulties, respiratory disorders, prone to fatigue, and blood disorders (thalassemia), and paralysis.<sup>31</sup> In North Sumatra, close family marriages, i.e., between parallel cousins, have also led to health problems, whereas cross-cousin marriages have not caused any health problems. Although parallel-cousin marriages pose health risks, many still carry out the practice on the grounds of preserving traditions and strengthening social ties between families.<sup>32</sup>

All in all, Islamic law does not recommend any close-relative marriage, much less incestuous marriage, which is completely *haram* (unlawful). The effects of incestuous marriage, in terms of health, psychology, social, and humanity, have led the *madhhab* scholars to forbid such marriage and to avoid any close-relative marriage.

### The Provisions on the Inheritance of Children of Incest in the View of Islamic Law

In the case of inheritance for children of incest, generally, it is subject to the inheritance law that applies to Muslims in Indonesia, which is the Islamic inheritance law, more specifically the Shafi'i school. This is reflected in Article 186 of the Compilation of Islamic Law, which states that children born out of wedlock only have an inherited relationship with their mother and the maternal family.<sup>33</sup>

Children's rights dictate that children without discrimination shall be able to fully develop and have access to education and health care, grow up in a suitable environment, be informed about their rights, and participate actively in society.<sup>34</sup> The Marriage Law and the Compilation of Islamic Law relate the rights of a child based on the position of the child, whether it is based on the

<sup>30</sup> Muhammad Kamil Abdushshamad, *Mukjizat Ilmiah dalam Al-Quran*, Jakarta: Media Grafika, 2004, pp. 222-223.

<sup>31</sup> Syahrizal Abbas, et al., "Persepsi Masyarakat tentang Praktik Pernikahan Keluarga Dekat di Kecamatan Seunagan Kabupaten Nagan Raya," *El-Usrah: Jurnal Hukum Keluarga* 3, No. 2 (2020), pp. 157-158.

<sup>32</sup> Yayuk Yusdiawati, "Penyakit Bawaan: Kajian Resiko Kesehatan pada Perkawinan Sepupu," *Jurnal Antropologi: Isu-Isu Sosial Budaya* 19, No. 2 (2017), pp. 89-99.

<sup>33</sup> Ahmad Rofiq, *Pembaharuan Hukum Islam...*, p. 117.

<sup>34</sup> Mohammad Fackhrudin Fuad, *Masalah Anak dalam Hukum Islam*, (Jakarta: Pedoman Ilmu Jaya, 1991, p. 25.

state law or Islamic law. Therefore, when looking at the inheritance rights of children of incest, these children also have the rights, including lineage rights, guardianship rights, inheritance rights, and livelihood rights.

Article 2 of the Compilation of Islamic Law states that what is meant by marriage is marriage according to Islam, which refers to a powerful bond (*mitsaqah ghalidzan*) to obey Allah's commands and carry it out as worship. Further, Article 3 of the Compilation of Islamic Law describes that marriage aims to realize a *sakinah, mawaddah, and rahmah* household life. The Islamic law allows some and forbids others within marriage, and in this case, the act of incest is one of those prohibited.<sup>35</sup>

Surah an-Nisa (4:23) mentions people whom men are forbidden to marry, such as mothers, grandmothers, daughters, and granddaughters, as explained earlier. Illegal marriages or incestuous relationships are known to have a high potential to produce descendants that are biologically weak, physically and mentally (disabled), or even deadly (lethal).<sup>36</sup>

Any violation of the provisions of the prohibition of marriage<sup>7</sup> or the conditions of marriage, or the terms of marriage in the provisions of the Indonesian Marriage Law is mentioned in Article 39 point (1) letter (a) of the Compilation of Islamic Law, stipulating that it is forbidden to carry out a marriage between a man and a woman due to kinship ties, namely with a woman who gave birth to or who descended him, or his descendants.<sup>37</sup>

Incestuous marriage is known to potentially yield offspring that are biologically weak or even deadly. This phenomenon is well known in the animal and plant world because of the increased kinship coefficient in the offspring. The accumulation of weak trait-carrying genes from both parents occurs in one individual or child whose genotype is expressed in a homozygous condition. Incestuous marriage is undesirable in almost all societies of the world. All major world religions also prohibit incestuous marriage.

In Islamic law, the concept of *mahram* is known to regulate social relations between individuals with kinship. A person is not allowed to have a marital relationship with parents, grandparents, siblings, and step-siblings (not adoptive siblings from parents, nephews, and grandchildren) because of the occurrence of gene abnormalities that can cause physical and mental disabilities.

<sup>35</sup> Abdurrahman, *Kompilasi Hukum Islam...*, p. 74.

<sup>36</sup> Ministry of Religious Affairs of the Republic of Indonesia, *Al-Qur'an dan Tafsirnya (Edisi yang Disempurnakan)*, Jakarta: Departemen Agama RI, 2009, p. 825.

<sup>37</sup> Anshary, *Hukum Perkawinan di Indonesia*, (Yogyakarta: Pustaka Pelajar, 2015), p. 37.

In this regard, Umar ibn Khattab, the second Caliph, once advised that Muslims would be weak. Thus, they should marry those from outside their family line or those not from close relatives.<sup>38</sup> Moreover, incest cases certainly come from close families, both from maternal and paternal relatives, as in the cases of marriages annulled by the Religious Courts in West Java, Central Java, and South Sumatra.

In light of the above discussions, not only is incestuous marriage unlawful, but close-relative marriage is also not encouraged as it can cause negative impacts in terms of social, cultural, psychological, and health aspects. In the case of health, children of incest pose several major health effects such as mental retardation, respiratory problems, paralysis, blood disorders, and language and communication disorders. Therefore, these impacts have caused the majority of Islamic scholars to discourage any marriage carried out among close relatives.

### Conclusion

Incestuous marriage annulled by the Religious Courts has a number of legal consequences. The state law and the Compilation of Islamic Law stipulate that the legal position of children of incest is in terms of civil matters between the children and the parents. The children only establish kinship with their mothers and their maternal families. On the other hand, the *madhhab* scholars, such as Imam Hanafi and Imam Hanbali, state that it is forbidden for a man to marry the daughter born of his adultery, as she is equal to his legitimate daughter. Further, Imam Malik and Imam Shafi'i argue that adultery does not produce legal descendants, and therefore, the children are not related to the male adulterer but to the female, as they are born from an illegitimate relationship. In the case of the inheritance rights of children of incest, the children can only get an inheritance from their mothers and the maternal families, in addition to the lineage, guardianship, inheritance, and livelihood rights. However, al-Jaziri, a contemporary scholar, believes that if incestuous marriage is invalid due to mistake, ignorance, or unintentionality, the marriage must be annulled immediately once revealed. If intercourse has occurred, then it is seen as *wathi subh*, and the child born in the marriage is still a legitimate child whose kinship and inheritance are still related to both father and mother. Likewise, in terms of inheritance, there will be no

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<sup>38</sup> Sayyid Ahmad al-Musayyar, *Fiqh Cinta Kasih: Rahasia Kebahagiaan Rumah Tangga*, Jakarta: Erlangga, 2008, p. 114.



difference between children from the ordinary marriage. The annulment of the parents' marriage is not the cause of the change in the status of the child's inheritance rights. In a further context, the prohibition of incest is highly related to the negative impacts and risks posed to children of incest, including health, psychological, social, customary, and cultural impacts. To this end, Islamic law even discourages any marriage with close relatives, although it is not considered *haram*.

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