



Legal Protection of the Rights Children Born Out of Wedlock: A Comparative Study in Indonesia and Malaysia

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ABSTRACT: Children born out of wedlock have the same human rights as those born within a legitimate marriage. This research aims to discuss how the law can play a crucial role in providing strong protection for the rights of children born out of wedlock, comparing legal regulations in family law between Indonesia and Malaysia. The research utilizes normative method of comparative legal analysis to examine regulations related to the legal status of children born out of wedlock within the legal systems of Indonesia and Malaysia. The results of this research indicate that in Indonesia, the protection of children born out of wedlock in terms of their rights can be fulfilled by both parents, and a child born out of wedlock can be acknowledged by the father as long as it can be substantiated through scientific knowledge or concrete legal evidence. Conversely, in Malaysia, the decision regarding the lineage of a child born out of wedlock lies entirely with the mother and her family, following the Shafi'i school of thought, and this has not changed to date. As a consequence, children born out of wedlock in Malaysia may lose their civil rights, including financial rights, custody, inheritance, and other rights from their biological father. Malaysian law also regulates penalties for individuals engaged in relationships outside of marriage to protect their lineage and prevent mixed-race offspring.

1. INTRODUCTION

In contemporary society, many children are born without the bond of marriage due to prevalent extramarital sexual relations. This occurrence is attributed to the perception that sexual matters are private and not subject to interference. The increase in extramarital relationships has led to a rise in the number of children born without the knowledge of their biological fathers. These children often face negative stigma from society due to the forbidden relationship between their parents. Legally, the guardianship of a child born out of wedlock is solely tied to the mother, unlike children born within a legal marriage, who can be acknowledged by both parents (Abraham, 2017).

The importance of protecting the rights of children born out of wedlock within the context of family law transcends mere legal issues. It reflects the values of humanity and social justice within a community. According to Kofi Annan, a prominent figure in human rights, and former Secretary-General of the United Nations, "The protection of the rights of children born out of wedlock is a reflection of how a society respects the human rights of children, regardless of their birth status. Children born outside of legal marriages should not be disregarded in family law systems, as their fundamental rights must be recognized and protected, in accordance with universal human rights principles (Freedman, 2015)".

In Islam, premarital relations are considered forbidden and a major sin. Islam views adultery as intolerable because it can lead to the breakdown of the societal order (Asso, 2017). Islam safeguards the rights of women and children by prohibiting adultery, thereby reducing the abandonment of responsibilities by men. Additionally, Islam recognizes the numerous negative impacts of adultery, and perpetrators may face severe punishments such as flogging or stoning.

Regarding the legal protection of the civil rights of a child born out of wedlock, there remains ambiguity. Children born out of wedlock often lack binding legal certainty. Provisions in civil law appear discriminatory, leaving these children without proper juridical protection. However, following Constitutional Court Regulation No. 46/PUU-VIII/2010, substantial changes have occurred. The court, by approving biological paternity through technological evidence, allows children born out of wedlock to establish lineage with their biological fathers, integrating them into the biological father's family (Ramadhita & Farahi, 2016)

The Constitutional Court Decision No. 46/PUU-VIII/2010 asserts that children born out of wedlock have a legal foundation for the mother and her family, and the father is recognized as the biological father, proven through scientific knowledge, technology, or other evidence. This decision sparked societal conflicts as it was deemed to legitimize extramarital relations. For instance, the Indonesian Ulema Council (MUI) responded by issuing Fatwa MUI No. 11 of 2012, stating that children born out of wedlock only



have lineage, inheritance, and sustenance rights with the mother and her family. Meanwhile, Mahfud MD emphasized that the Constitutional Court's decision does not address lineage but focuses on civil matters between illegitimate children and their biological fathers (MD, 2010)

In Malaysia, the definition of illegitimate children (*anak tak sah taraf*) is found in the Islamic Family Law of Kelantan State No. 6 of 2002. It states that "Not valid in terms of a child means born out of wedlock and not the child of lawful intercourse." This implies that the understanding of children born out of wedlock in Malaysian Islamic Family Law is consistent and in line with the views of Islamic jurists found in old and new *fiqh* books. In this context, all laws applicable in the Malaysian states stipulate that children born out of wedlock cannot be attributed to their fathers (Sugiarto & Wildan, 2023).

Therefore, inheritance, sustenance, and guardianship responsibilities do not fall under the father but only establish civil relations with the mother and her family. This provision aims to preserve lineage and prevent the mixing of lineages. Based on the above elaboration, the central issue to be examined in this paper is the comparison of family rights in Indonesia and Malaysia regarding the protection of the custody rights of children born out of wedlock (Kholish & Ulumuddin, 2022).

2. RESEARCH METHODS

The method used in this writing is the normative legal research method, specifically researching the protection of the rights of children born out of wedlock with a comparative legal approach to the legislation applicable in Indonesia and Malaysia. This type of research analyzes written laws and legal norms that apply in society. The data collection technique involves a literature review, which is an examination of laws related to the object needed in normative legal research, reviewing both primary and secondary data sources such as legislation, books, scholarly works, or tertiary legal materials like newspapers and articles.

3. RESULTS AND DISCUSSION

A. Comparison Protection of Children Born Out of Wedlock in Indonesia And Malaysia

3.1 Protection of Children Born Out of Wedlock in Indonesia

This study examines the formal juridical implementation of marriage laws in Indonesia and the ongoing legal reforms, starting with Law No. 1 of 1974 on marriage, Government Regulation No. 9 of 1975, Law No. 7 of 1989 on religious courts, and the Islamic law compilation based on Presidential Decree No. 1 of 1991. National family law reforms continue to be implemented. The paper explores various regulations in Indonesia related to the rights of extramarital children (Arso et al., 2022).

The definition of a child resulting from marriage, according to Law No. 1 of 1974 on marriage, is found in Article 42: "A legitimate child is a child born from a legitimate marriage." Additionally, Article 43(1) states that a child born out of wedlock has civil relations only with the mother and her family. Article 43 of the Marriage Law is reinforced by Article 44, which states: a. A husband can contest the legitimacy of a child born to his wife if he can prove that his wife committed adultery, resulting in the child. b. The court decides on the legitimacy of the child upon the request of the interested party (Darmawan, 2022).

The Marriage Law primarily defines the position of children resulting from marriage and the status of those born out of wedlock, with the concept of marriage not explicitly regulated. However, clarity is provided through the definition of extramarital children in Article 42, indicating that such children are those not born within or as a result of a legitimate marriage. The proof of a child's origin is emphasized in Article 55 of Law No. 1 of 1974 on marriage: A child's origin can only be proven with an authentic birth certificate issued by an authorized official, If the birth certificate is absent per Article 55(1), the court may issue a determination of a child's origin after a thorough examination based on eligible evidence, Pursuant to the provisions of this lawsuit, the Birth Registration agency in the jurisdiction of the respective court issues a birth certificate for the concerned child. Extramarital children can be broadly and narrowly categorized. Broadly, they include:

1. Illegitimate children born out of adultery - offspring resulting from the relationship between a man and a woman outside a legal marriage, where one or both are married to others (Sugiarto & Wildan, 2023).
2. Illegitimate children born out of wedlock - born from the union of a man and a woman outside a legal marriage, where they are not allowed to marry. According to Article 283 of the Civil Code, an illegitimate child cannot be acknowledged. If the parents are granted marriage dispensation (by the court), the child can be recognized when the parents marry. Through the parents' marriage, the illegitimate child becomes legitimate. The Civil Code explains that a sinner and an illegitimate child cannot be acknowledged by their biological parents. The life of a sinner's child and an illegitimate child is granted only



according to their needs and is done within the capabilities of their parents. c. In a narrow sense, extramarital children are born from the relationship between a man and a woman outside of marriage, where neither is married to others, and their marriage is not prohibited. These children can be legally acknowledged by their father. In other words, extramarital children in the narrow sense are illegitimate children who are not the result of adultery or incest (Polutu et al., 2023).

3. Compilation of Islamic Law Regarding Children Born Out of Wedlock

Article 186 of the Compilation of Islamic Law (KHI) explains that a child born out of wedlock is a child born outside of a legitimate marriage or as a result of a relationship without legal status. Islamic law recognizes children born outside of wedlock, as stated in Article 100 of the KHI, which asserts that "children born out of wedlock only have lineage ties with the mother and her family." According to Article 53 of the Civil Code, a man who commits adultery with a woman may lead to another man becoming the legal husband of the woman if she becomes pregnant due to adultery. Similarly, Article 75 of the KHI addresses the annulment of marriage, stating, "The annulment decision does not retroactively affect a child born out of wedlock." Based on these provisions, a child born out of wedlock does not have legal lineage ties with the father's family. If there is no family connection with the father, the child does not possess legal rights related to custody or inheritance (Hasbullah, 2022).

There are variations in calculating the birth interval. According to the Hanafi school, it is calculated from the commencement of the marriage. Meanwhile, most researchers calculate it from the likely time of their intimate relationship. Consequently, a child born less than six months after marriage is not considered the legitimate child of a pregnant woman. Such a child is deemed illegitimate, lacking parental ties, and consequently, does not enjoy the rights that a child would typically derive from their biological parents. A child under six months is not considered to have a kinship relationship with their father under Islamic law but rather with their mother (Idris et al., 2021)

4. Constitutional Court Decision Regarding Illegitimate Children

Constitutional Court Decision 46/PUU-VIII/2010 has altered the provisions concerning illegitimate children in Indonesian regulations. A request for the judicial review of Article 1 of Law Number 43 of 1974 resulted in a change in the status of illegitimate children, initiated by Aisyah Mochtar. The decision stipulates that a child born out of wedlock has a civil relationship with the mother and her family and also has lineage ties with the man as the father, provided it can be proven through science, technology, and/or other valid evidence, i.e., civil law with the father's family. This decision implies that a child's rights automatically derive from their natural connection to the biological father (Kuspaningrum, 2017)

Since the Constitutional Court Decision Number 46/PUU-VII/2010, both the mother and a child born out of wedlock can assert the child's rights regarding the biological father. If the child is proven to have a civil relationship with the man as the biological father, not only the mother and her family but also the biological father and his family have a valid civil relationship with the child. According to the law, a child has the right to custody, protection, care, and inheritance from their father. This ensures justice for children born out of wedlock by fulfilling equal living rights among children. It also does not negate the responsibility of the biological father (Putusan Mahkamah Agung RI No. 102 K/Sip/1973 tanggal 24 April 1975., n.d.).

The Constitutional Court decision is a new resolution in the material review of Law No. 1 of 1974 concerning marriage regarding the legal status of illegitimate children. Through the Constitutional Court Decision Number 46/PUU-VIII/2010, Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage received an addition. "A child born out of wedlock has a civil relationship with the mother and her family and also with the man as the father, which can be proven based on science, technology, and/or other legal evidence of blood relations, including a civil relationship with the father's family (Anisa, 2022)."

The Constitutional Court's decision on the status of illegitimate children has sparked controversy. Islamic organizations such as the Indonesian Ulema Council (MUI) opposed this decision. MUI argued that adultery was legalized because of this decision, indicating that the term "invalid" not only refers to unregistered Muslim marriages but also adultery. MUI also stated that the Constitutional Court exceeded Sharia provisions and what the decision decided went beyond what the petitioner actually sought. Consequently, on March 10, 2012, MUI issued Fatwa Number 11 of 2012 in response to the decision.



According to the fatwa, children born out of wedlock are not entitled to family relationships, marriage guardianship, inheritance, and maintenance from their biological father. Despite facing opposition, the Constitutional Court's decision is considered in line with the principles of justice. This decision does not rely on legal texts but has priority. According to Thufi, if there is a conflict of interest with the texts of the Qur'an or Hadith, then the interest must take precedence. Based on the 2012 Supreme Court Circular Letter, the Supreme Court instructed Sharia court judges that a child born out of wedlock can be declared legitimate based on a court decision because the child's parents are considered married under Islamic law. Children born from a secret marriage can request the enforcement of maintenance and inheritance rights from their biological father (Idris et al., 2021).

3.2 Protection of Children Born Out of Wedlock in Malaysia

The family law systems employed in both Indonesia and Malaysia share many similarities but also exhibit some differences. While Indonesia has a fatwa council called the Indonesian Ulema Council (MUI), Malaysia has a fatwa council known as the State Fatwa Council. Both of these councils function to discuss issues within Islam that may also be considered by legislation. (Kholish & Galib, 2023) Abraham, H. (2017).

Indonesia has Islamic Family Law known as the Marriage Law of 1974, while Malaysia also has Islamic Family Law regulated within Enactment Acts and Ordinance Acts. The difference lies in the fact that the Enactment Acts are discussed in the State Legislative Assembly in the states of Peninsular Malaysia and Sabah, ratified after Malaysia's independence. On the other hand, the Ordinance Acts are discussed by the State Legislative Assembly of Sarawak and Sabah before independence and approved by the parliament between 1948-1959 during the state of emergency.

1. Illegitimate Children According to Malaysian Islamic Family Law Enactment Acts and Ordinance Acts/

Illegitimate or non-legitimate children are regulated in each enactment across all states in Section 2, as stipulated in the Sarawak Ordinance and Federal Territory Acts that a "non-legitimate" child is a child born outside of a legitimate marriage and not through a doubtful marriage. Then, in Section 110 of the Islamic Family Law Act for the Federal Territory, it regulates who can be linked to the paternal lineage. In Section 111 for the Islamic Family Law Enactment for the States of Selangor, Kelantan, Pahang, Perak, Kedah, Penang, Perlis, Negeri Sembilan, Malacca, Johor, and Sabah. And Section 114 of the Sarawak Laws Ordinance states:

"If a woman married to a man gives birth to a child more than six qamariah months from the date of their marriage or within four qamariah years after their marriage is dissolved either by the death of the man or by divorce, and the woman does not remarry, then the man shall be deemed as the father of that child, but the man may, by li'an or curse, deny the child as his in front of the court."

The above provisions can be understood that if a child is born within less than 6 months from the period of pregnancy, the child cannot be attributed to the biological father. There is a maximum period of 4 years when a husband and wife have separated, allowing the husband to perform li'an or deny the child in front of the court. This provision is found in the Islamic Family Law for other states, such as the Islamic Family Law of Selangor 2003, Malacca 2002, Perak 2004, Penang 2004, Federal Territory 1984, and Sarawak 2001 (Mubarak, 2022).

2. Children Born Out of Wedlock According to the National Registration Department of Malaysia

Every child must be registered to ensure that the child obtains their citizenship rights. In Malaysia, every birth is recorded and registered with the National Registration Department (JPN) based on the Births and Deaths Registration Act 1957 (Act 299). The act stipulates that every child born in Malaysia must be registered, but certain requirements must be met. The person providing information must be the father of the child, the mother of the child, a resident of the house where the child was born, to the knowledge of the residents, anyone present at the time of birth, and anyone who has custody of the child (Petani, n.d.)

However, for children born out of wedlock, referred to as "illegitimate children," it is explained in Section 13. Section 13 outlines that the biological father of an illegitimate child cannot register the child with the National Registration Department:



"Despite anything to the contrary contained in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall be required to give information as to the birth of the child, and the Registrar shall not enter in the register the name of any person as the father of the child unless at the joint request of the mother and the person acknowledging himself to be the father of the child, and such person shall in such case sign the register together with the mother." (Jamal & Al Ahmadi, 2023)

This provision implies that the biological father of an illegitimate child cannot register the child with the National Registration Department because the child was born outside of a valid marriage. Consequently, according to the practice of the National Registration Department, for Muslim children adhering to the rules of Section 13, they will still be registered without attaching the father's name until the required documents are completed, as discussed in the Fatwa Committee meeting of the National Council for Islamic Religious Affairs Malaysia on January 28-29, 1981. The outcome of the meeting was that a child born out of wedlock with Abdullah is not considered the biological father's child (Noor, 2015).

The civil rights obtained by a child born out of wedlock include the right to inherit from the mother or the mother's family. Illegitimate children cannot inherit from their biological fathers, but the biological father can make a will for the child, even though the inheritance from a will may not be as substantial as a regular inheritance distribution. For the protection of the guardian's rights for illegitimate daughters, the rightful guardian is the legal guardian (awali raja) and not the biological father. (Rohmah et al., 2022)

B. Comparative Analysis

In examining the legal protection for children born out of wedlock in Indonesia and Malaysia, a comparative analysis reveals differences and similarities in the approaches of both countries to this situation. Although both nations share common aspects in safeguarding children's rights, there are significant differences in the legal status of children born out of wedlock, registration processes, paternal lineage rights, and inheritance rights in Indonesia and Malaysia.

In Indonesia, children born out of wedlock are recognized to have civil relations with their mother and maternal family, as well as paternal lineage rights. Meanwhile, in Malaysia, children born out of wedlock are often referred to as "illegitimate," and their paternal lineage rights may vary in each state. The registration process also differs, where the biological father in Indonesia can be directly involved, whereas in Malaysia, registration requires joint approval from the mother and father, and proving lineage relations may involve legal procedures such as li'an or curses before the court.

Furthermore, inheritance rights for children born out of wedlock are more rooted in Indonesia, while in Malaysia, these rights are more limited and may require a will from the biological father. The Islamic legal approach also plays a significant role in providing a legal foundation for the protection of children born out of wedlock in both countries.

4. CONCLUSIONS

Based on the research and discussion that the author has presented, it can be concluded that the protection of illegitimate children in Indonesia is explained that through the decision of the Constitutional Court, children born out of wedlock can be assigned to their biological father as long as it can be proven by science or technology and other legal evidence. concrete ones. The impact of the Constitutional Court Decision Number 46/PUU-VIII/2010 on illegitimate children will be to obtain legal certainty and the right to be cared for, protected and looked after like other legitimate children. On the other hand, in Malaysia there is no legal umbrella to protect the rights of illegitimate children, this is because according to the legal provisions in Malaysia, an illegitimate child cannot be assigned to his biological father, which is in line with the provisions of the Syafi'i school of thought.

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