

Does Illegitimacy Status of Children Matter? A Review on Malaysian Perspectives

Meerah Deiwi Raja Gopal

Faculty of Business, Communications and Law, Inti International University, Malaysia

Abstract The “right to identity” is popularly known as the “right to have rights”. Birth registration and the right to a name and nationality is a civil right of every child from the moment of birth. Once the birth is registered, all other rights of a child will naturally flow in and it is the responsibility of States to not only honor these rights, but also to provide the necessary laws and policies so that children have the necessary platforms to practice these rights. Children’s rights in Malaysia have significantly progressed since Malaysia acceded to the United Nations Childs Rights Convention in 1995 and introduced the Child Act 2001. Many initiatives to realize and uphold the rights of children have been advanced by both government and civil society. However, Malaysia reserved Article 7 which demands for birth registration, the right to a name and nationality. As a result of this, birth registration continues to be serious challenge in Malaysia. Hence, this paper intends to highlight the factors, precisely children born as a result of artificial/assisted reproductive technology that may contribute towards the rise of illegitimate births in Malaysia and suggests for judicial development followed by appropriate enforcement.

Keywords Illegitimacy, Child birth rights, child law, Assisted reproductive technology

1. Introduction

CHILDREN’S rights in Malaysia have significantly progressed since Malaysia acceded to the United Nations Childs Rights Convention (hereinafter referred to as UNCRC) in 1995 and introduced the Child Act 2001. Many initiatives to realize and uphold the rights of children have been advanced by both government and civil society. However, human right convention has always been an option to countries around world although it is a form of universal law. Hence, Malaysia opted to be signatory to selected conventions and one of it being the UNCRC 1989 of which Malaysia has reserved five core Articles; precisely Article 2 (regarding non-discrimination); Article 7 (regarding birth registration, the right to a name and nationality); Article 14 (regarding freedom of thought, conscience and religion); Article 28 (1) (a) (regarding compulsory and free primary education for all); and Article 37 (regarding torture or other cruel, inhuman or degrading treatment or punishment and unlawful or arbitrary deprivation of liberty). Due to above mentioned reservations, some key challenges remain for children in Malaysia, precisely children who belong to the “marginalized group” [1]. They can face significant restrictions on their ability to access education, healthcare, birth registration and /or child protection services [1]. The

rise of illegitimate birth in Malaysia in the recent years, has called for a serious attention and action by the government, enforcement agents and NGO’s. The outcry for this attention resulted in the enactment of Legitimacy Act 1961. This study intends to highlight the contributing factors that leads towards illegitimacy status of children in Malaysia. It will not only analyze the importance of children’s right to birth registration and nationality, but also the effectiveness of the laws enacted and actions taken by the government in lieu with this phenomena.

2. Literature Concept Review

2.1. Definitions of a Child

United Nations Child Rights Convention (UNCRC) 1989- Article 1 of the United Convention of the Rights of the Child 1989 states that for the purposes of the convention a child means “every human being below the age of 18 years unless under the law applicable to the child majority is acquired earlier.”

Malaysian Common Law - in Malaysia a child is defined as a person under the age of 18 years old and this is clearly stipulated within the Age of Majority Act 1971 and The Child Act 2001. However, this law is only applicable if there is no definition given in any other written law. This is because the definition of child differs in other laws such as the Adoption Act 1952, The Guardianship of Infants Act 1961 (GIA) and The Domestic Violence Act 1994. The Evidence Act 1950, s 133A used the word “child of tender

* Corresponding author:

mdeiwi.rajagopal@newinti.edu.my (Meerah Deiwi Raja Gopal)

Published online at <http://journal.sapub.org/ijap>

Copyright © 2015 Scientific & Academic Publishing. All Rights Reserved

years” but gives no definition of that word. According to the Law reform (Marriage and Divorce) Act 1976, a child is a person under 18 who is a child of the family and it does not matter whether he or she is adopted or illegitimate or a child of one of the parties to the marriage [3].

Malaysian Islamic Law-since Malaysian legal system is recognized as the dual legal system, The Islamic Laws is applied conjunctively with the Civil law. However, the Islamic Law is only applicable to the Muslim and as such, it is important to look at the definition of “child” under Islamic Law as well. According to the Islamic Law, a child is a person who has not attained baligh (puberty). Baligh for a female is when she starts her menses and for male when he has a “wet dream”. However, this has been subject to criticism and two schools of thought play an important role in determining when a child becomes baligh. The Shafie’s school of thought argued that, if a child has no physical sign that he or she has become baligh, then the acceptable age of baligh is 15. However, the Hanafi School on the other hand argues that a child attains baligh at the age of 18. [3]. Hence, Malaysia when ratifying the UNCRC had reserved Article 1 on the definition of child.

2.2. Rights of Children in Malaysia – The Right to Birth Registration

Under the Common Law, a child is legitimate if both parents are married to each other at the time of birth. A child who is born after his or her parents are divorced is also legitimate as it was conceived within wedlock or if it was conceived out of wedlock but born within the wedlock. A child is illegitimate if it is born out of wedlock and the law is not concerned when the child was conceived.

However, the child may become legitimate if the biological father marries the mother of the child and legitimizes the child by subsequent marriage under **Section 3(1) Legitimacy Act 1961** [2] or by adopting the child under the **Adoption Act 1952** [2], where the adopted children assume all the rights of biological children of the adoptive parents. According to the common law, an illegitimate child is related only to its mother and has no relationship with its biological father.

The Legitimacy Act 1961 Act is focusing on legitimation of children upon a valid marriage of his or her parents and their rights that follows upon such legitimation. Nowhere within its provision has it mentioned any rights pertaining to illegitimate children. It must be noted that this Act has made very minimal contribution towards acting in the best interest of children and it seem to contradict with UNCRC. Particularly Section 3 (1), will only consider legitimation following a marriage which was solemnized and registered. Section 11 states that an illegitimate child can only inherit his/her mother’s property if the mother dies intestate, provided she does not leave any legitimate issues surviving her and vice versa. Section 6 (1) of the Act [2] states that only a legitimated person shall be entitled to take any interest in the estate (of both parents) and any disposition coming

into operation only after the date of legitimation. Section 9 states that only a legitimated person shall have the same rights and be under the same obligations in respect of maintenance and support of himself.

Under Islamic Law, for Muslims, a child is legitimate if the parents are legally married to each other when the child was conceived and born. Legitimacy is an important issue for Muslims as it involves the issue of *nasab* (lineage) which is pertinent to legitimacy matters. If a child is legitimate, his *nasab* is of his father and if illegitimate, of his/her mother only. An illegitimate child has no relationship whatsoever with his/her biological father under the Islamic law. *Nasab* is important as it is the root of legitimacy. If a child is legitimate, it is through such status that its other rights arise such as its right to father, right to a good mother, the right to a name, the right to maintenance, inheritance and guardianship. There are a number of ways to prove *nasab* or lineage but the common method is by calculating the period of pregnancy. Both the Fuqaha and Abu Hanafi Schools of thought, although has different ways of calculating the pregnancy, it can be concluded that the minimum period of pregnancy is 6 months. The maximum period of pregnancy is 2 years based on the view given by Hanafi which was based on the words of Aishah that “a child in a mother’s womb cannot be more than two years” [3]. The above hadith also stated that a pregnant woman who gave birth within the two years of her husband’s death or from the date of her divorce, the child is the legitimate child of the ex-husband. The Islamic perception is that a child is legitimate if it is born 6 months after solemnization of marriage or 2 or 4 years after the husband’s death or divorce.

2.3. Reasons and Consequences of the Rise of Illegitimate Births in Malaysia

According to Noor Aziah in her journal which made reference to Kosmo newspaper on the 15th of June 2006, between the years 1999 to 2003 alone there was a total number of 70,430 illegitimate births [3]. On the other hand, Associate Professor Dr. Fatimah Abdullah in a paper presented at an international conference held at UKM in December 2009 on the “The Life Story of Single Mothers with Illegitimate Child: Case Study in Kuala Lumpur”, said that statistic from the National Registration Department for the period 2000 to July 2008 recorded more than 257,000 birth certificates were issued to babies without their fathers names being recorded. This means an average of 2500 illegitimates were born every month or just over 83 a day [10]. Professor Dr. Fatimah also stated that ethnically the Malays and Sabah and Sarawak Bumiputera recorded the highest with 20,949 babies, Indians 19,581 and Chinese 18,111. Based on religion, the statistics showed 30,978 Muslims, 18,085 Hindus, 17,236 Buddhist and 3,395 Christians. According to Child Rights Coalition Malaysia, in their study done in 2013, there are over 234,000 children who have no information written for in the space for father’s name in their birth certificates. Some 85,000 are Muslims

[10].

Also, in Islam adoption is not acceptable as a solution to the problem of infertility and this sum up to the issue of lineage. However, in Malaysia adoption is possible under the Syariah law and it is governed under Registration of Adoption Act 1952 (the RAA) and it is only applicable in Peninsular Malaysia. However, children adopted under the RAA cannot assume the name or inherit the property of the adoptive parents, although children do get identity documents (including passport) through the adoption certificate.

i. Among Non-Muslims in Malaysia

The obvious reason for the rise is that most of these children are born out of wedlock. Since an illegitimate child can only take its mother's name, it should be registered immediately upon birth. However, many illegitimate children's names were not registered immediately after birth because the mother of the children fear that her child will be discriminated against or stigmatized by society if he or she holds a birth certificate without the father's name. Therefore the child's right to a name, identity and nationality.

As illegitimate children have no ties with their father, they shall be maintained by their mothers. Results of research done on 58 respondents staying in 2 institutions where they were interviewed, revealed that most unwanted pregnancies happened because of consensual sexual intercourse, and almost half of the unwed mothers claimed that they trusted their partners. In the case of *Peter James Binsted v Jevencia Autor Partosa* (2000) 2 AMR 2002, the respondent claimed that appellant was her husband and the father of her child, and applied for maintenance under s.3(1) of the Married Women and Children (Maintenance) Act 1950. However, the appellant denied the claims and the respondent applied to the Magistrate Court for an order that the appellant and the child undergo a DNA test. The appellant appealed against the Magistrate court decision and High Court that a DNA test can only be done if the person concerned consented to it, otherwise such test would violate s.323 of the Penal Code.

In *Yanasha v National Registration Department (NRD) Home Ministry and Government of Malaysia* where the plaintiff was in an identity limbo for 14 years because the mother was a foreigner and the father was a Malaysian. She was issued a birth certificate but was not granted a citizenship and that posed problems for her to be enrolled in a local government school. However, she managed to obtain her citizenship only when her father agreed for a DNA test and it was confirmed that he is her biological father. Furthermore, there are no laws in Malaysia to order a person to undergo a test to ascertain paternity. Hence, an illegitimate child may be without maintenance, and it will become difficult for the mother to maintain the child all by herself, especially if she herself is a child supported by her own parents. This further leads to children given away for adoption or abandoned and will eventually contribute to the rise of illegitimate birth. Other reason for unwed mothers to neglect their illegitimate child is to safeguard family name

and dignity and that their own parents did allow them to take care of their own child. Some claims that giving the child away for adoption, will give the child a better future and that they did not want the child to be stigmatized or belittled by the community.

Besides, dual religion marriages especially if marriages were between a Muslim and a non – Muslim. The compulsion to convert upon marrying a Muslim and the Federal Constitution, article 12 (4) and the interpretation and application of *Teah Eng Huat v Kadhi Pasir Mas and Anor*, *Tan Kong Meng v Zainon bte Md Zain and Anor* and *Sharmala a/p Sathiyaseelan v Dr.jeyaganesh a/l C Mogarajah* which states that a child's religion is determined by his or her parents, is a contributing factor to the rise of illegitimacy. There are numerous cases of Muslims married to non-Muslims in Malaysia. Here the child has to be Muslim. If the parents don't want their child to be Muslim, the identity of the Muslim parent is hidden to prevent this.

Incidence of child marriages which has no legal effect, may also declare a child born for a child as illegitimate. Besides that, children born to couples married in accordance to customs & traditions only, where requirements of documents like parents birth or marriage certificates are conditions either difficult to meet. This problem is rampant amongst those who live in ignorance of law, especially those who are living in rural areas and estates. Many Indian living in the estates were identified as not having a birth certificate as a result of marriage not registered under the LRA 1976. Some children obtained birth certificates, courtesy of some religious institution and school, however their status remain illegitimate due to failure to adduce relevant documents. This is evident in cases such as *Letchumy & 2 others v National Registration Department and Home Ministry and The Malaysian Government*, the case of "Three generations of Statelessness" and the ancestors and parents of the applicants did not register their marriages according to LRA 1976, hence depriving Letchumy and her daughters from obtaining citizenship. They have birth certificates, however their citizenship status is marked as not determined as Letchumy never obtained the proper birth and identity documentations for herself. However, she and her descendants managed to obtain their citizenship and their MyKad by way of judicial review. An individual is a national of a particular country by birth. Nationality is got through inheritance from his parents or it be called a natural phenomenon. On the other hand an individual becomes a citizen of a country only when he is accepted into that country's political framework through legal terms. Therefore, the right to citizenship further extends a child's right such as the right to vote and express his or her views, and right to be heard.

ii. Among the Muslims in Malaysia

An illegitimate child has no relationship whatsoever with his/her biological father under the Islamic law and this is a result of the child born out of wedlock. Marriage is a sacred and important institution among the Muslims. Thus, those

who have not performed the “akad nikah” or children born less than 6 months after the solemnization are considered illegitimate. For such children the National Registration Department of Malaysia (NRD) inserts “bin/binti Abdullah” in place of father’s name and these actions can be far reaching consequences as children are in effect publicly labeled as “illegitimate” by virtue of their surname. A child born for couples of irregular marriage contract shall be considered illegitimate under the Islamic law. Under the Islamic law, a couple must be married to each other in compliance to ‘Hukum Syarak’ and failure to comply with the rules under this Hukum shall render the marriage irregular. Similarly, the divorce proceedings also must be in compliance to the hukum syarak. If a marriage contract is irregular, pregnancy is counted from the time of consumption of marriage and if the child is born between 6 to 9 months of marriage, then the child is considered to be attributed to the woman’s husband, before or after the separation. However, if a child born within 6 months of cohabitation, no paternity can be established regardless of contract.

On the other hand, in the absence of any marriage contract, there can be a semblance of rights; in other words where parties to a marriage are within a prohibited degree of relationship [18] but had no idea of it and a child born out of such a relationship is attributed to the man of such relationship on the strength of his acknowledgement and so long as he did not declare the child to be an issue of adultery which will eventually lead towards declaring that child to be illegitimate. Also a child born after separation or divorce, annulment or death shall be attributed to the husband if the interval between separation, divorce and birth is one lunar year or else that child shall be considered illegitimate.

It must be noted that Islamic laws provides routes to settle disputes over the identity of a child during the continuation of a valid marriage, after separation or divorce and for a father of a child to claim paternity through acknowledgement. The father can expressly or impliedly claim paternity provided the child is not known to be child of another, ages between the parties are suitable to be of father and child, the child is legitimate and if the child is of the age of discretion, then the child can confirm or acquiesce such acknowledgement. Similarly, the mother can declare the child to be hers provided she complies with the required rules within the Islamic laws. However, if the unwed woman fails to comply with above prescriptions and laws, she may decide not to register the birth of her child and eventually she may be prosecuted for fornication or adultery under the Islamic criminal laws of each state and upon conviction may be fined up to MYR5, 000 or imprisonment of up to 3 years or both. Hence, many unwed Muslim woman decided to either give the child away for adoption or postpone the registration of the birth till she gets married to the biological father of the child.

For Muslims, illegitimate children have no right to sue their biological father in the Syariah court, as the syariah court does not recognize such relationship. At present

Muslim unwed mothers can sue in civil High court for maintenance of their illegitimate child under s 3(2) of the Married Women and Children (Maintenance) Act 1950 and applied in the case of Mohd Hanif Fakkirullah v Bushra Caudri and Anor. Hence, an illegitimate child may be able to get some maintenance from its father, but how many of them are willing to come forward through their mother to sue their biological father?

3. Findings: Rights of Children Born as a Result of Assisted Reproductive Technology in Malaysia

Right of a child conceived and born as a result of ART has been through serious debate and scrutiny lately. ART is not mentioned in the primary sources of Sharia. Patients and Muslims doctors alike thought by seeking ART for infertility treatment, they are challenging God’s will. ART has made it possible for the involvement of third party in the process of reproduction whether by providing an egg, a sperm, an embryo or uterus. It has opened the way for several other practices including gender selection, pre-implantation genetic diagnosis, genetic manipulation, cryopreservation of gametes, embryo, cloning...etc. [4]. This is definitely against the primary source of Islamic laws which states that the parents of the child must be the biological parents. Therefore, children born out of surrogacy or through the involvement of any other third party, other than the biological parents (unmarried couples) shall not be recognized and child born out of such technology shall be regarded as illegitimate.

The laws of artificial reproductive rights are still vague in Malaysia. Physicians providing ART are always concerned about legislations of various practices of ART in countries where they are practicing. However, in many countries legalizations do not exist and physicians follow guidelines issued by prestigious concerned bodies and organizations if they exist.

It is for these reasons that a child rights, born as a result of Assisted Reproductive Technology (ART) is currently under heavy debates among the Muslim countries. However, it must be noted that Islam does not totally discourage ART. It is to be practiced upon taking in consideration of the above discussed hadith. ART is widely accepted only after prestigious scientific and religious bodies and organizations issued guidelines which were adopted by Medical Councils or concerned authorities in different Muslim countries and controlled the practices in ART centers.

Today, the basic guidelines for ART in the Muslim World are: ART should be indicated only in a married couple as a necessary line of treatment and it is permitted only during validity of marriage contract with no mixing of genes. If the marriage contract has come to an end because of divorce or death of the husband, then ART should not be performed on the female partner even if the sperm belonged to her husband [4]. If a child is conceived out of this guideline, then eventually the child inherits an illegitimate status.

So far, many infertile couples have been seeking such assistance and have had children produced through such technology. The importance of marriage still stand strong in relation to the children conceived through ART whereby the couples seeking to register these babies has to be married. However, it must be noted that ART can also be a preferred solution to married couples where only either one of them maybe infertile and under such circumstances the issue lies within the fact that the child may only carry the genes of either one particular partner only. Although the law has set restrictions on ART procedures whereby no mixing of genes are allowed, desperate couples would seek healthcare centers that would perform this procedures on them for a high price. In advertently, only those who can afford to pay such price will seek ART eventually.

4. Conclusions

Empowerment of women through awareness and effective laws is the most necessary tool overcome this illegitimacy issue. Children, be it legitimate or illegitimate, must be treated equally as it is not their fault to be born as such. Children are born with rights according to the UNCRC and no one has the right to rip that from them. Some of the conflicting areas of rights between a mother and child must be erased so that they can be given better life such as the right to abortion of a mother which eventually conflicts with the child's right to life. However, many children are accorded the same treatment by the government or at least some attempts have been made. Many core development policies have been focusing on the needs of younger generations, especially with regards to children's best interest. Child focused policy is important in guiding the authority to formulate plans of actions that can serve and accommodate children's best interest alongside the development within the society.

5. Recommendations

The position and status of women all over the world has risen incredibly in the 20th century. However, empowerment of women does not lie within policies and legislation that allows for women to demand for equal treatment only. Empowerment of women simply means recognizing her needs and creating opportunities for her to exercise her rights and protect herself from any form of exploitation.

It is an undeniable fact that more young and unmarried women are becoming pregnant in Malaysia. According to the Malaysian Ministry of Health Statistics: out of the 18,652 cases of pregnant children and teenagers between the ages of 10 to 19 years old recorded in 2011 and 4,222 were unmarried [11]. This is due to lack of awareness of sexual and reproductive health and rights among Malaysian women. Social and cultural norms result in state policies that deny women the right to make decisions about reproduction and sexual abuse leading to unwanted pregnancies. Hence, this

awareness must be cultivated among the younger generations (who are sexually active) and the lower income group.

In Malaysia, contraception is allowed for spacing purposes but not for permanent use for Muslims unless for health and welfare issues, and only made available widely in Ministry of Health services for married couples. Young people selectively are provided with contraception from government services. Contraception Prevalence Rate (CPR) has stagnated for the past 25 years due to low policy and service priority, as well as increasing religious influence. Hence, very little research done on the deeper reasons for this. Services for IUD and ligation require the permission from husbands [11].

Besides Noor Aziah's recommendation in her journal [3] for sexual education for children and parents by trained counselors and facilities for illegitimate children, government should enhance meaningful partnership & collaborations with NGO working on Child Rights for effective and wider reach of programs. Setting up of the maintenance agencies as Federal Institution to maintain illegitimate children such as the ones in New Zealand and Australia will resolve the issue of maintenance.

Government should also enhance the capacity of counselors, law enforcement agencies, child care providers and other stakeholders for effective execution of child protection policies. The focus should now divert to the rights of children born out of Assisted Reproductive Technology (ART), because there have been recent debates on the legitimation and ethical issues of children born out of such technology. ART made it possible for the involvement of the 3rd party in the process, either intentionally or accidentally. Currently there are no laws governing the right of a child born out of such technology, however, it has provoked ethical debate among the Muslims and non-Muslims. Malaysia should consider The Status of Children (Assisted Reproduction Technology) Act 2013, a Singapore legislation relating to the legal status of children conceived and born through assisted reproduction technology and for matters connected therewith.

A well-known writer, Normi Abdul Malek in her journal titled "Efficacy of the Law in Sustaining Family Institution: The Malaysian Position" made reference to Sinnadurai who observed that a new phenomenon has begun amongst the Malaysian and it is called an informal union or domestic partnership and commonly called cohabitation. The trend caught on in Asian countries including Malaysia in a big way from the early 1990's [8]. However, there are no laws legalizing such phenomenon and children born as a result of such relationship and these children born out of such relationship will ultimately be known as illegitimate. The issue here is how is the NRD going to fill the gaps of the father's detail. The NRD is prepared to issue birth certificates and citizenship upon receiving a court order. It will not take long for a larger group of people to demand for it, and when such demands are given consideration, it is important to ponder the ways in which the father's details are to be filled in the birth certificate when it becomes a hassle to

locate the biological father.

REFERENCES

- [1] Child Rights Coalition Malaysia, December 2013. Status Report on Children's Rights in Malaysia.
- [2] Legitimacy Act 1961, Adoption Act 1952.
- [3] Noor Aziah, The Rights of Illegitimate Children in Malaysia: A comparative study between Islamic and Civil laws in Malaysia, 2007-2009.
- [4] Gamali. Serour, 2005, Religious perspectives of ethical issues in ART 1. Islamic perspectives of ethical issues in ART, Middle East Fertility Society Journal, vol 10, no.3.
- [5] Carol S. Bruch, A Non-Marital Cohabitation in the Common Law Countries: A Study in Judicial legislative Interaction. The American Journal of Comparative Law, Vol 29, No.2, cohabitation without marriage (Spring 1981)/ <http://www.jstor.org/stable/>.
- [6] Elaine E. Sutherland, 2012, The Future of Child and Family Law, International Predictions.
- [7] Bill Atkin, Sumner 2003, The Challenge of Unmarried Cohabitation-The New Zealand Response, Family Law Quarterly Vol.37, No:2, (<http://www.jstor.org/stable/>).
- [8] Normi Abdul Malek, 2011, "Efficacy of the Law in Sustaining Family Institution: The Malaysian Position"; No.2, Vol 7, Journal of Islamic Law Review.
- [9] <http://www.dailymail.co.uk/news/article-2360084/Most-babies-born-wedlock->.
- [10] UKM news portal: news@ukm.my.
- [11] FRHAM, RRAAM & SRI; October 2013, Joint stakeholder Submission on Sexual and reproductive Rights in Malaysia for the 17th Session of the Universal Periodic Review.