

THE LEGAL STATUS OF CHILDREN OUTSIDE MARRIAGE: A COMPARATIVE STUDY OF CIVIL LAW IN INDONESIA AND MALAYSIA

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Abstract

*The legal status of children's validity raises conflicts between *das sein* and *das sollen*, especially about religious values, children's interests, and legal developments in Indonesia and Malaysia. This research aims to analyze and compare the Decision of the Constitutional Court of the Republic of Indonesia No. 46/PUU-VIII/2010 and the Decision of the Rayuan Sivil Court of Malaysia No. W-01 (A) - 365-09/2016 regarding the legal status of children out of wedlock so that similarities and differences can be identified in terms of legal substance, legal considerations, and legal implications for the protection of the rights of children out of wedlock in Indonesia and Malaysia. The method used in this research is normative legal research with a comparative legal approach. The result of this research is that the validity of the status of children out of wedlock is legally recognized in Indonesia and Malaysia. The Decision of the Constitutional Court of the Republic of Indonesia No.46/PUU-VIII/2010 explains that children out of wedlock have a civil relationship not only with their mother and mother's family but also with the man who is the father, provided that the relationship can be proven through science and technology or other evidence that is valid according to law. In Malaysia, based on the Rayuan Sivil Court Decision No W-01 (A) - 365-09/2016, children of Muslim couples born out of wedlock can now be attributed to their biological father. Although the two decisions have the same legal substance, the reasons underlying the birth of the two decisions are different. The Constitutional Court of the Republic of Indonesia made social justice, legal certainty, and protection of children's rights as citizens guaranteed by the constitution (UUD 1945) legal considerations. However, the Court of Civil Procedure is oriented towards administrative regulations based on the 1957 BDRA Deed Seksyen 13.*

Keywords: *Illegitimate Child, Legal Status, Comparison, Indonesia, Malaysia.*

Abstrak

Permasalahan status hukum keabsahan anak menimbulkan pertentangan antara *das sein* dan *das sollen*, khususnya berkaitan dengan nilai-nilai agama, kepentingan anak, dan perkembangan hukum di Indonesia dan Malaysia. Penelitian ini bertujuan untuk menganalisis dan membandingkan Putusan Mahkamah Konstitusi Republik Indonesia Nomor 46/PUU-VIII/2010 dan Putusan Mahkamah Rayuan Sivil Malaysia No. W-01 (A) – 365-09/2016 mengenai status hukum anak di luar nikah sehingga dapat diidentifikasi persamaan dan perbedaan dari segi substansi hukum, pertimbangan hukum, dan implikasi hukumnya bagi perlindungan hak anak di luar nikah di negara Indonesia dan Malaysia. Metode yang digunakan dalam penelitian ini adalah penelitian hukum normatif dengan pendekatan perbandingan hukum. Hasil penelitian ini yaitu keabsahan status anak di luar nikah diakui secara hukum di Indonesia dan Malaysia.

Putusan Mahkamah Konstitusi Republik Indonesia No.46/PUU-VIII/2010 menjelaskan bahwa anak di luar nikah memiliki hubungan perdata tidak hanya dengan ibunya dan keluarga ibunya, tetapi juga dengan laki-laki yang merupakan ayahnya, asalkan hubungan tersebut dapat dibuktikan melalui ilmu pengetahuan dan teknologi atau alat bukti lain yang sah menurut hukum. Di Malaysia, berdasarkan Putusan Mahkamah Rayuan Sivil No W-01 (A) – 365-09/2016, anak pasangan beragama Islam yang dilahirkan di luar nikah kini dapat di dinasabkan kepada ayah biologisnya. Meskipun kedua putusan tersebut memiliki substansi hukum yang sama, tetapi alasan yang mendasari lahirnya kedua putusan tersebut berbeda. Mahkamah Konstitusi Republik Indonesia menjadikan keadilan sosial, kepastian hukum, dan perlindungan hak anak sebagai warga negara yang dijamin konstitusi (UUD 1945) sebagai pertimbangan hukum. Namun, Mahkamah Rayuan Sivil berorientasi pada regulasi administratif yang didasarkan pada Akta BDRA 1957 Seksyen 13.

Kata kunci: Anak di Luar Nikah, Status Hukum, Perbandingan, Indonesia, Malaysia.

INTRODUCTION

Indonesia is one of the countries with the largest Muslim populations in the world.¹ Malaysia, as Indonesia's neighboring country, also has a predominantly Muslim population.² In practicing Islamic teachings, the majority of the population in both countries adhere to the Shafi'i school of thought as a guideline.³ However, in reality, Indonesia and Malaysia do not always apply the provisions of the Syafi'i school in every legal matter. One of the striking issues is the legal status of the lineage of children born out of wedlock. In Indonesia, the Constitutional Court, through Decision Number 46/PUU-VIII/2010, ruled that children born out of wedlock have civil relations not only with their biological mother but also with their biological father. Meanwhile, in Malaysia, the Malaysian Civil Appeal Court Decision No. W-01 (A) – 365-09/2016 established the lineage of children born out of wedlock to their biological father.⁴ Both rulings contradict the teachings of the Shafi'i school of jurisprudence, which only recognizes the lineage of illegitimate children with their mothers.⁵ This difference creates a conflict between *das sein* (social reality) and *das sollen* (legal ideality), especially in seeking a balance

¹ Zainul Erfan et al., "Politik Hukum Antar Bangsa (Siyasah Dauliyah Indonesia Dalam Perdamaian Dunia)," *Indonesian Journal of Islamic Jurisprudence, Economic and Legal Theory* 2, no. 2 (2024): 767–87, <https://doi.org/10.62976/ijjel.v2i2.552>; Jumlah penduduk muslim Indonesia mencapai 245.973.915 jiwa, lihat Nabilah Muhamad, "Mayoritas Penduduk Indonesia Beragama Islam Pada Semester I 2024," *databoks*, 2024, <https://databoks.katadata.co.id/demografi/statistik/66b45dd8e5dd0/mayoritas-penduduk-indonesia-beragama-islam-pada-semester-i-2024>.

² Imam Aji Pratomo, Raja Shahril, and Dede Indra Setiabudi, 'Dinamika Penyebaran Islam Di Asia Tenggara', *Triwikrama: Jurnal Ilmu Sosial* 1, no. 2 (2023): 157–67.

³ Firda Noor Safitri, Isma Fury Rachmawati, and Nurul Azizah, 'Titik Temu Dari Sebuah Perbedaan: Analisis Perbedaan Mazhab-Mazhab Fiqh', *Islamic Education* 1, no. 1 (2023): 38–50.

⁴ Putusan Mahkamah Rayuan Sivil Malaysia No. W-01 (A) – 365-09/2016 Tentang Penetapan Nasab Anak Zina.

⁵ Asman Asman, 'Hamil Di Luar Nikah Dan Status Nasab Anaknya', *Shar-E: Jurnal Kajian Ekonomi Hukum Syariah* 6, no. 1 (2020): 1–16.

between religious values, the interests of the child, and the development of modern law in both countries.

Previous research has been conducted by various researchers. There have been several studies on this matter, including research conducted by Dunggio, Suleman, and Sumanto, which found that the status of illegitimate children according to the Civil Code only has a legal relationship with the parent who acknowledges them.⁶ Nelli, in her research, explains the Constitutional Court's ruling on the status of children born out of wedlock and its relevance to the reform of millennial family law in Indonesia.⁷ There is also research that reveals the views of judges from the Religious Court of the Special Region of Yogyakarta on the interpretation of the law regarding children born out of wedlock in the Marriage Law of 1974, written by Mahmud.⁸ Then, research written by Abubakar, Julian, and Hasan discusses the protection of life (*hifz al-nafs*) as the *ratio legis* ('*illat*) for the legal rights of children born out of wedlock from their biological father.⁹ Ali, Wulandari, and Erianti, in their research, explain that the relevance between the Constitutional Court's decision and Ibn Taymiyyah's opinion lies in both recognizing the possibility of establishing lineage without solely considering the circumstances of the child's birth. This recognition can be achieved through DNA tests in the present era and through acknowledgment and assessment of facial resemblance in the time of Ibn Taymiyyah.¹⁰ From all the research that has been conducted, none have compared Islamic law and civil law in Indonesia and Malaysia, thus providing an opportunity for further study.

This research aims to analyze and compare the Constitutional Court Decision of the Republic of Indonesia Number 46/PUU-VIII/2010 and the Malaysian Civil Appeal Court Decision No. W-01 (A) – 365-09/2016 regarding the legal status of children born out of wedlock. The analysis of the two rulings from the two countries, namely Indonesia and Malaysia, is intended to identify the legal considerations or *ratio decidendi* behind the recognition of the legal status of children born out of wedlock. In addition, this research also

⁶ Abdul Hamid Dunggio, Zulkarnain Suleman, and Dedi Sumanto, 'Status Hukum Anak Diluar Nikah Dalam Perspektif Fikih Islam Dan Hukum Positif Indonesia', *As-Syams: Journal Hukum Islam* 2, no. 1 (2021): 12–21.

⁷ Jumni Nelli, 'Putusan Mahkamah Konstitusi Tentang Status Anak Di Luar Perkawinan Dan Relevansinya Pada Pembaharuan Hukum Keluarga Milenial Di Indonesia', *Hukum Islam* 21, no. 1 (2021): 78–94.

⁸ Mahmud Mahmud, 'Interpretasi Hukum "Anak Di Luar Perkawinan" Dalam Undang-Undang Perkawinan 1974 (Studi Pandangan Hakim Pengadilan Agama Provinsi Daerah Istimewa Yogyakarta)', *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 8, no. 1 (2020): 66–88, <https://doi.org/10.14421/sh.v8i1.2048>.

⁹ Ali Abubakar, Juliana Juliana, and Maisyarah Rahmi Hasan, 'The Right of a Child Outside the Legal Marriage of a Biological Father: The Analysis of *Hifz Al-Nafs* as *LawIllat*', *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (2021): 153–73.

¹⁰ Bukhari Ali, Nur Wulandari, and Nahara Erianti, 'Status of Children Born Out of Wedlock: A Study of Constitutional Court Decision and Its Relevance to the View of Ibnu Taimiyah', *El-Usrah: Jurnal Hukum Keluarga* 7, no. 1 (2024): 406–26.

aims to explore the similarities and differences in terms of legal substance, legal reasoning, and its legal implications for the protection of the rights of illegitimate children in Indonesia and Malaysia. The comparison of court rulings from both countries is expected to provide a comprehensive understanding and analysis of the legal status of children born out of wedlock.

METHOD

This research is a normative legal study, which examines law as a norm (law in book) as the main object of the research.¹¹ The approach used in the research is a comparative legal approach. (comparative approach). This approach compares the laws or court decisions of one country with the laws or court decisions of one or several other countries regarding the same issue.¹² The main focus and object of the research are court rulings in Indonesia and Malaysia related to the legal status of the legitimacy of children born out of wedlock. The primary legal sources of this research are the Constitutional Court Decision Number 46/PUU-VIII/2010 and the Malaysian Civil Appeal Court Decision No. W-01 (A) – 365-09/2016. Secondary legal sources for the research include books, documents, journals, and various other references related to the theme to obtain relevant conclusions.¹³ The data collection technique in this research is conducted using the documentation method or document study.¹⁴ The analysis used in this research employs a qualitative analysis model with a legal interpretation method in the form of comparative legal interpretation, which involves comparing legal rules from two or more countries regarding the same issue.¹⁵

RESULTS AND DISCUSSION

Indonesian Constitutional Court and the Status of Children Outside Marriage

The Constitutional Court is a state institution that has the authority to adjudicate at the first and final levels to test laws against the 1945 Constitution of the Republic of Indonesia, with its decisions being final.¹⁶ In 2010, the Constitutional Court received a petition to review Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (Marriage Law) against the 1945 Constitution of the Republic of Indonesia. (UUD

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005), 47.

¹² Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 57.

¹³ Sigit Sapto Nugroho, Anik Tri Haryani, and Farkhani, *Metodologi Riset Hukum* (Karanganyar: Oase Pustaka, 2020), 66.

¹⁴ Bahtiar Bahtiar, *Metode Penelitian Hukum* (Tangerang Selatan: UNPAM Press, 2018), 137.

¹⁵ Muhaimin, *Metode Penelitian Hukum*, 69.

¹⁶ Muhammad Syauqi Bin-Armiya et al., 'From Constitutional-Court To Court Of Cartel: A Comparative Study Of Indonesia And Other Countries', *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 9, no. 2 (2024): 457–79; Rifa Rona Dwi Arifa, Firmansyah Putra, and Muhammad Eriton, 'Kewenangan Mahkamah Konstitusi Dalam Melakukan Pengujian Terhadap Kebijakan Hukum Terbuka', *Limbago: Journal of Constitutional Law* 4, no. 2 (2024): 109–21.

1945). This application was submitted by Hj. Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan bin Moerdiono. The petitioners feel constitutionally aggrieved by the enactment of these articles, namely the right to obtain validation of the marriage (Hj. Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim with Moerdiono) as well as the legal status of the petitioners' child. (Muhammad Iqbal Ramadhan bin Moerdiono).¹⁷

Regarding the legal standing, the constitutional rights of the Applicant that have been violated are the rights guaranteed by Article 28B paragraph (1) and Article 28B paragraph (2) of the 1945 Constitution.¹⁸ Based on the provisions in Article 28B paragraph (1) and (2) as well as Article 28D paragraph (1) of the 1945 Constitution,¹⁹ the Applicant and their child are constitutionally entitled to recognition of their marriage and the legal status of their child. These constitutional rights have been harmed by the legal norms stipulated in the Marriage Law. These legal norms are considered unjust and detrimental because the Applicant's marriage has fulfilled the marriage requirements according to Islamic teachings and is therefore religiously valid.²⁰ However, the legal provision requiring the registration of marriage according to statutory regulations causes a marriage that is valid according to Islamic norms to be legally invalid. As a result, the status of the child born from that marriage is also considered invalid according to the legal norms contained in the Marriage Law.²¹

After undergoing the examination process, the Constitutional Court on February 17 issued the verdict in Decision Number 46/PUU-VIII/2010, which partially granted the petitioners' request. The content of the decision explains that Article 43, paragraph (1), of the Marriage Law, which states, "Children born out of wedlock only have civil relations with their mother and their mother's family," is contrary to the 1945 Constitution as long as it is interpreted as eliminating civil relations with a man who can be proven based on science and technology and/or other legal evidence to have a blood relationship as the father. Furthermore, the decision

¹⁷ Yazid Bustomi, 'Politik Hukum Putusan MK No. 46/PUU-VIII/2010 Sebagai Upaya Pembangunan Hukum Nasional', *Jurnal Ilmiah Hukum Dan Hak Asasi Manusia* 3, no. 1 (2023): 9–20; 'Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010' (n.d.).

¹⁸ Pasal 28B ayat (1) UUD 1945 berbunyi: "Setiap orang berhak membentuk keluarga dan melanjutkan keturunan melalui perkawinan yang sah." Pasal 28B ayat (2) berbunyi: "Setiap anak berhak atas kelangsungan hidup, tumbuh, dan berkembang serta berhak atas perlindungan dari kekerasan dan diskriminasi."

¹⁹ Article 28D paragraph (1) of the 1945 Constitution states: "Everyone has the right to recognition, guarantee, protection, and fair legal certainty as well as equal treatment before the law."

²⁰ Dimas Ginsu, Franky Suleiman, and Nenden Herawaty Suleman, 'Status Anak Luar Nikah Perspektif Hukum Islam Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010', *Spectrum: Journal of Gender and Children Studies* 2, no. 1 (2022): 1–14.

²¹ Mohammad Fattah and Ahmad Syagif Hannany Mustaufiy, 'Judicial Review Undang-Undang Perkawinan: Floating Execution Mahkamah Konstitusi Dan Implikasinya Terhadap Kepastian Hukum', *Hudan Lin Naas: Jurnal Ilmu Sosial Dan Humaniora* 5, no. 2 (2024): 177–94, <https://doi.org/10.28944/hudanlinnaas.v5i2.1904>.

explains that Article 43, paragraph (1), of the Marriage Law does not have binding legal force as long as it is interpreted as eliminating civil relations with a man who can be proven based on science and technology and/or other legal evidence to have a blood relationship as the father, so the article must be read as follows: "Children born out of wedlock have civil relations with their mother and their mother's family and with the man as their father, who can be proven based on science and technology and/or other legal evidence to have a blood relationship, including civil relations with the father's family."²²

The Constitutional Court granted part of the petition regarding the examination of the status of children born out of wedlock based on several considerations. The Court stated that naturally, pregnancy cannot occur without the meeting of the ovum and spermatozoa, either through sexual intercourse (coitus) or through other methods made possible by technological advancements that result in fertilization. Therefore, it is neither appropriate nor fair for the law to only recognize the relationship of a child born from an out-of-wedlock pregnancy with the woman as the mother. Similarly, it is unjust if the law absolves the man who caused the pregnancy from his responsibilities as a father, and denies the child's rights against that man as her father.²³ Moreover, with the current technological advancements, it can be scientifically proven that a child has a biological relationship with a certain man. Legally, the birth resulting from a pregnancy initiated by sexual intercourse between a woman and a man creates a legal relationship with reciprocal rights and obligations between the child, mother, and father as legal subjects.²⁴

Based on these considerations, the Constitutional Court granted the Petitioner's request to provide legal recognition for children born out of wedlock. This decision affirms that the child has a civil relationship not only with their mother and the mother's family but also with the man who is the father, provided that the relationship can be proven through science and technology, such as DNA tests, or other legally valid evidence. In addition, this civil

²² Hazar Kusmayanti et al., 'The Justice for Illegitimate Children of Indonesian Women Workers Through Constitutional Court Decision No. 46/PUU-VIII/2010', *Jurnal IUS Kajian Hukum Dan Keadilan* 11, no. 2 (2023): 253–64; Asep Lukman Daris Salam, 'Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/PUU/VIII/2010', *As-Sakinah: Jurnal Hukum Keluarga Islam* 1, no. 1 (2023): 35–60; Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010.

²³ Rahmad Setyawan, Nur Sholikin, and Al Robin, 'Implikasi Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Terhadap Kedudukan Anak Di Luar Perkawinan', *Ahwaluna: Jurnal Hukum Keluarga Islam* 5, no. 1 (2024): 318–37; Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010.

²⁴ Nelli, 'Putusan Mahkamah Konstitusi Tentang Status Anak Di Luar Perkawinan Dan Relevansinya Pada Pembaharuan Hukum Keluarga Milenial Di Indonesia'; Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010.

relationship also includes ties with the father's family.²⁵ This court decision is an important step in protecting the rights of children born out of wedlock, ensuring justice, and preventing discrimination against children due to a birth status beyond their control. Thus, the child is entitled to comprehensive legal protection, both in family relations and other civil rights.

Malaysian Civil Court and the Legal Status of Children Born Outside Marriage

The discussion about illegitimate children in Malaysia has become an ongoing and frequently debated controversy. Every year, the statistics on cases of illegitimate births revealed by the National Registration Department (JPN) appear alarming. Based on statistics from 2019, 25,567 illegitimate children were registered with the JPN. Furthermore, statistics released by the Ministry of Health Malaysia show that 3,694 unmarried girls under 18 years old were pregnant and gave birth to illegitimate children in 2017. It is recorded that an average of 300 cases occur each month, which is equivalent to 10 cases per day. According to records released by the Department of Social Welfare, the states with the highest ratio of illegitimate births in Malaysia are Selangor, Pahang, Johor, Sabah, and Sarawak.²⁶

The issue of determining a child's lineage is a subcategory of family law issues. All matters related to Muslim family cases in Malaysia must be resolved by the Syariah Court.²⁷ Family law for Muslims in Malaysia, specifically in the state of Johor, is governed by Enactment 17 of 2003, the Islamic Family Law Enactment (Johor) 2003, Part VIII, on the Legitimacy of Children, in Section 111 regarding who is meant by "Father," which is: *"If a woman who is married to a man gives birth to a child more than six lunar months from the date of her marriage or within four lunar years after her 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 the father of the child, but the man can, through li'an or cursing, deny the child as his in front of the Court."* This means that the Enactment 17 of 2003, the Enactment on Islamic Family Law (Johor State) 2003, explains that a child can be attributed to the father if the age of birth is at least 6 (six) lunar months from the date of marriage of the parents. In this enactment, the determination of lineage

²⁵ Syarifah Lisa Andriati, Nabila Marsiadetama Ginting, and Martha Ruth Elena, 'Ketetapan Anak Luar Kawin Dengan Keluarga Ayahnya Pada Hubungan Keperdataan Sebagai Akibat Hukum Dari Putusan MK No. 46 Tahun 2010', *Jurnal Kajian Hukum Dan Pendidikan Kewarganegaraan* 2, no. 5 (2023): 96–103.

²⁶ Muhamad Muizz Abdullah, Abdul Bari Awang, and Mohamad Sabri Zakaria, 'Illegitimate Child Inheritance: An Analysis from Syariah Perspective', *International Journal of Islamic Thought* 24 (2023): 133–44.

²⁷ Agustin Hanafi and Mohamad Hedhayatullah Bin Mohamad, 'Peran Bahagian Sokongan Keluarga Dalam Masalah Pemenuhan Nafkah Isteri Pasca Perceraian (Studi Kasus Di Mahkamah Tinggi Syariah Kedah, Malaysia)', *Media Syari'ah* 20, no. 1 (2020): 57–74, <https://doi.org/10.22373/jms.v20i1.6501>.

for a child born out of wedlock is attributed to the mother and not the father because the child's age at birth is less than 6 lunar months.²⁸

In 2016, the Civil Appeal Court issued a ruling, namely Ruling No. W-01 (A) – 365-09/2016, using the BDRA (Births and Deaths Registration) Act 1957, specifically Sections 13 and 13A(2), which states: "Regardless of any previous provisions of this law, in the case of an illegitimate child, no person who will be the father of the child is required to provide information regarding the child's birth, and the registrar will not enter another person's name as the father of the child in the register, except at the joint request of the mother and the person who acknowledges himself as the father of the child, and that person must sign the register together with the mother." (Article 13). "The surname, if any, that will be entered in relation to the illegitimate child where the mother is the informant and information volunteer will be the mother's surname; provided that where the person who acknowledges himself as the father of the child in accordance with the request of Section 13, then his surname may be that person's surname."

Because Section 13A(2) indeed states that a child born out of wedlock can be acknowledged by the biological father if both the mother and biological father agree and acknowledge it. Due to the above section, the Civil Court of Appeal issued a ruling that established the legitimacy of an illegitimate child to their biological father. Since the ratification of the Civil Appeal Court's ruling on lineage based on decision No W-01 (A) – 365-09/2016, it will impact the Civil Appeal Court's ruling on children of Muslim couples born out of wedlock, who are now legally entitled to bear their father's name.²⁹

The reason for the determination of the lineage of a child born out of wedlock by a Muslim husband and wife being brought to the Civil Court of Appeal, as seen in the Civil Court of Appeal decision No W-01 (A) – 365-09/2016, is due to the dissatisfaction of the husband and wife (M.E.M.K and N.A.W) with the lineage determination made by the National Registration Department (JPN) which attributed their child to Abdullah, not to M.E.M.K as determined by the High Court. The court that based its decision on the BDRA 1957 Act is the Civil Court, where there is a possibility of illegitimate child lineage being attributed to the biological father if the BDRA 1957 rules are applied. The basis of the Civil Court of Appeal in

²⁸ Deniansyah Damanik and Eka Mardianingsih, 'Hukum Keluarga Di Dunia Islam: Eksistensi Nasab Dan Perwalian Di Negara-Negara Muslim', *Jurnal Akademika Kajian Ilmu-Ilmu Sosial, Humaniora Dan Agama* 3, no. 3 (2022): 50–66.

²⁹ Nurulazlina binti Mohd Norazman, "Penetapan Nasab Anak Zina Menurut Hukum Di Malaysia (Studi Kasus Terhadap Putusan Mahkamah Rayuan Sivil No W-01 (A) – 365-09/2016)" (Undergraduate thesis, Universitas Islam Negeri Sumatera Utara, 2019), 80.

deciding case No W-01 (A) –365-09/ 2016 regarding the determination of the lineage of a child born out of wedlock is due to the application of the child's parents and the person who claims to be the child's father, and the determination of the child's lineage from initially according to JPN "bin Abdullah" to "bin M.E.M.K" who is the person claiming to be the child's father (biological father) is Section 13 of the BDRA 1957 Act. Nevertheless, the Civil Court of Appeal's Decision No W-01 (A) – 365-09/ 2016 contradicts the Enactment 17 of 2003, the Islamic Family Law Enactment (Johor State) 2003.³⁰

Comparative Analysis

The decisions of the Constitutional Court of the Republic of Indonesia and the Civil Appeal Court of Malaysia show different approaches in regulating the legal status of children born out of wedlock. Both decisions have different legal backgrounds, methods of proof, and impacts, reflecting the legal systems and social values prevailing in each country. In Indonesia, the Constitutional Court's decision is based on the constitutional review of Article 43 paragraph (1) of the Marriage Law against the 1945 Constitution. The Constitutional Court decided that children born out of wedlock have a civil relationship with their biological father, provided it can be proven through scientific means such as DNA tests or other legal evidence. On the other hand, in Malaysia, the Civil Appeal Court refers to the Births and Deaths Registration Act (BDRA) 1957. This ruling allows an illegitimate child to be recognized as the biological child of the father if there is acknowledgment from both parents, recorded in the official registration.³¹

The substance of the ruling is also significantly different. The Constitutional Court affirmed that children born out of wedlock have civil rights that include relationships with their mother, father, and family from both sides. Meanwhile, in Malaysia, the Civil Appeal Court ruling grants recognition to the biological father, but only if administrative consent between the mother and the biological father is achieved. This creates limitations in the recognition of children's rights if one party is unwilling to give their acknowledgment. The Indonesian legal approach more accommodates aspects of social justice and the protection of human rights. The Constitutional Court views that a child's legal status should not be disadvantaged by the marital status of the parents, especially because the child has no control over their circumstances. On the other hand, the Malaysian legal approach is more administrative and marked by a dualism of law between sharia and civil law, which has the potential to create legal uncertainty.

³⁰ Norazman, 89.

³¹ Norazman; Putusan Mahkamah Rayuan Sivil Malaysia No. W-01 (A) – 365-09/2016 Tentang Penetapan Nasab Anak Zina.

The legal conflict is more pronounced in Malaysia, where the Civil Appellate Court's ruling allowing the child's lineage to be attributed to the biological father contradicts the Johor State Islamic Family Law Enactment 2003. This statute stipulates that a child born less than six lunar months after marriage can only be attributed to the mother. Meanwhile, in Indonesia, the Constitutional Court's decision is final and binding, providing stronger legal clarity and more effective implementation. The method of proof also becomes a striking difference. In Indonesia, proof through technology such as DNA testing becomes the main basis for determining the legal relationship between a child and their biological father. In Malaysia, administrative acknowledgment from both parents is the main prerequisite that must be met.

From a social impact perspective, the Constitutional Court's ruling in Indonesia has a clear objective to reduce the negative stigma against children born out of wedlock. By providing comprehensive legal recognition, this ruling ensures that these children have equal rights, including civil relations with both parents and their families. This approach not only protects children's rights but also helps eliminate the social discrimination they often face due to their birth status. On the other hand, in Malaysia, the dualism of law between the Civil Court of Appeal and the Syariah Court creates confusion that can exacerbate the stigma against these children, especially among Muslims who strictly adhere to Syariah law. The Civil Court of Appeal's ruling, which allows the attribution of paternity to the biological father based on administrative consent, often conflicts with stricter Sharia rules. This can create tension between the need to keep up with modern legal developments and the commitment to religious principles.

The legal philosophy behind both rulings also shows a fundamental difference. The Constitutional Court in Indonesia emphasizes the importance of legal certainty based on social justice and the protection of children's rights as part of citizens guaranteed by the constitution. On the other hand, the Civil Appellate Court's ruling in Malaysia is more oriented towards administrative aspects, prioritizing technical and procedural requirements in the recognition of a child's status.

Both legal systems have their advantages and disadvantages. Indonesia shows a clear commitment to the full protection of children's rights through the Constitutional Court's ruling, while Malaysia still faces challenges in harmonizing civil and sharia law. To provide certainty, Malaysia needs consistent legal harmonization, while Indonesia must ensure the implementation of the Constitutional Court's ruling is carried out effectively through strong

regulations and adequate socialization. This comparison highlights the importance of building an inclusive and fair legal system for children born out of wedlock.

CONCLUSION

The legal validity of the status of children born out of wedlock is recognized in Indonesia and Malaysia. The Constitutional Court of the Republic of Indonesia Decision No.46/PUU-VIII/2010 explains that children born out of wedlock have civil relations not only with their mother and their mother's family but also with the man who is their father, provided that the relationship can be proven through science and technology, such as DNA tests, or other legally valid evidence. In Malaysia, based on the Civil Appeal Court Decision No W-01 (A) – 365-09/2016, children of Muslim couples born out of wedlock can now be recognized as the biological father's child. Although both rulings have the same legal substance, the reasons underlying the emergence of these two rulings are different. The Constitutional Court of the Republic of Indonesia considers social justice, legal certainty, and the protection of children's rights as citizens guaranteed by the constitution (1945 Constitution) as legal considerations. However, the Civil Appeal Court is oriented towards administrative regulations based on the BDRA 1957 Act Section 13.

This research has limitations in terms of the research method, which uses normative legal research, because to understand the application of law from both decisions (Constitutional Court Decision No.46/PUU-VIII/2010 and Civil Appeal Court Decision No W-01 (A) – 365-09/2016), an empirical legal research method is required. Therefore, it is hoped that future researchers will conduct field research related to these two rulings to understand the application of law concerning the legal status of children born out of wedlock in society, thereby creating a more comprehensive understanding.

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