

## Registration Problems of Illegitimate Children among Muslims in Malaysia

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### Abstract

*Today, the issue of illegitimate child (IC) birth is a pressing matter for the Muslim community in Malaysia. It threatens the community in terms of social relationship aspect as well as the Islamic practice relating to the fatwa on nasab (ruling of lineage). Consequently, this paper intends to explain the problems of IC with a qualitative study which was conducted recently. Archival method and interviews were used in the study. All data was obtained from the official fatwas, the provisions of laws, court cases and interviews with informants, which were then analyzed manually. The study's findings show that there are two fatwas which are in effect in Malaysia. The first is the federal and all of the states' fatwa except Perlis which decrees that all children born after six months from the date of marriage are eligible to be legally associated to their mother's husband. The second is the fatwa of the state of Perlis which allows the nasab or legitimate association of a child who is born less than six months after the date of its mother's marriage to its mother's husband on a condition that the said husband does not deny that the child is his. The study also identifies several legal and registration issues regarding IC which can be referred to by the Muslim community. Finally, the study suggests that the IC should not be discriminated by the community due to the mistakes of its parents. As a matter of fact, the rights of IC in the aspects of religion, social and the law must be preserved based on the Islamic justice and universality.*

**Keywords:** illegitimate child; fatwa; nasab; registration

### 1.0 Introduction

The study regarding the issue of illegitimate child (IC) is necessary to preserve the sanctity of lineage and the family institution in Islam. It is inevitable that the problem of IC occurs in the Muslim community and needs to be well addressed. It is imperative to maintain the purity of lineage as it is one of the objectives of the maqasid al-shariah (purpose of Islamic laws). For this purpose, Allah SWT has commanded the Muslims to enter into marriage as He says "then marry those that please you of [other] women, two or three or four..." (al-Nisa', 3:3).

The foundation of a family in Islam is nasab which refers to a substantiated relationship or blood ties that bonds each member of a family. The nasab relationship is a pure and sanctified relationship that last eternally and the only way acceptable by Islam to establish this relationship is through a formal marriage.

The absence of nasab in a relationship will lead to several legislations consequences such as the rights and responsibilities, nafkah (sustenance), inheritance and many more. Therefore, for the sake of upholding the maqasidsyariah (objective of the Islamic law), the study regarding the fatwa on nasab in Islam as well as analyzing its application in Malaysia, needs to be carried out. This research is important because it concern the lineage sanctity of a Muslim who will assume the role of Allah's caliph. The basic foundation of the Muslim community begins with a family and, the beginning of a family starts with lineage which refers to a substantiated blood ties that bond each member of a family. The nasab relationship is a solid and sacred bond which can never be severed. Marriage is the only means in Islam to establish a nasab relationship, and the implications of the related Islamic laws will be eligible (MdZawawi Abu Bakar, Wan Ab Rahman Khudzri Wan Abdullah & Wan Ibrahim Wan Ahmad, 2011).

Nevertheless, the development that is taken place in the community today, specifically with the increase of illegitimate child cases has crippled the family system. Eventually, if the social issues are not well addressed then social diseases such as free and random sexual relationship, unwed couples, fornication, illegitimate child birth, illegal abortion or baby dumping will be catastrophic and ravaged the community.

### **2.0 Objective**

This paper will explain the issues of IC pertaining to (1) fatwa on nasab in Malaysia, (2) child registration procedures at the National Registration Department (JPN), and (3) arising legal issues.

### **3.0 Literature Review**

The recent development in the society has resulted in crippling the family institution. The effects of social diseases such as random sexual relationships, illegal cohabitation, fornication, illegitimate child birth, illegal abortion or baby dumping will eventually destroy the community if they are not properly addressed. The statistics of Malay IC, as reported by MohdAzisNgah, is 17,303 registered births in Malaysia for the year 2009. According to the Director General of the National Registration Department (JPN) at the time, Datuk Alwi Ibrahim, the number of cases increase to 762 as compared to the previous year. In 2008, 16,541 IC births were registered with JPN, and in 2007 16,100 birth registration. Datuk Alwistated that in the last five years, JPN has registered a total of 74,723 Malay/Muslim IC births. This number does not include baby dumping cases which were reported with the Social Welfare Department (JKM). During this period, 214,033 babies of various races were registered as illegitimate children including 104,834 fatherless children and 109,199 abandoned children under Section 13, Birth and Death Registration Act 1957 (Act 299) (Berita Harian, 22 March 2010).

Based on the statistics above, there are many cases of unwed pregnant women in this country. Many of these women were married to their partners to solve the problem of unwed pregnancy. A research conducted by MdZawawi Abu Bakar (2015) concerning child marriage showed that among the contributing factor is unwed pregnancy. Even though the couples were married but the birth of IC is inevitable, if the child is born less than six months and two *lahzahs* (moment) according to the fatwa (MdZawawi Abu Bakar, 2011). A part from that, many parents believe that early marriage for their young daughters will elude unwed pregnancy, in which will cause a disgrace to the family (Clark, 2004; UNICEF Malaysia, n.d.). Getting married at a young age has become an inclination in Malaysia. Many parents stated that their daughters have become 'wild' and are out of control, and the only viable solution is to marry them off as for their protection.

According to Jamil (2010), the main factor of child marriage in Pahang is due to infatuation. Under this factor there were five subfactors listed according to the percentage which were: accidental pregnancy (54%), mutual affection and prevent immorality (30%), sexually involved with one another but not pregnant (8%), eager to get married early (4%) and sexually involved with partners. Other than the couples themselves, their parents too, opted marriage as the best solution to conceal their shame. The Syariah Justice Department of Malaysia statistics shows that 50% of the underage/child marriage applications are due to involvement in sexual relationship and wish to conceal their shame, and rape cases (4%). According to Muhammad Naim (2013), the rampant involvement of random sexual relations have caused many minors to opt for early marriage.

Even if unwed sexual relation or pregnancy is being covered by a marriage or child marriage, other issue might arise for the couples especially concerning the Islamic legitimacy lineage once the mother gave birth to a child. This is due to the fact that all Muslims' newborns are bound by the fatwa on nasab either as legitimate or illegitimate child. Besides that, all IC children will face registration problems with the JPN as the IC children cannot be legally associated to the husbands. On the contrary, the child will be associated only to its biological mother and this will create a stigma in the community. It is due to this stigma that the unwed couple chooses to abandon their child through abortion in order to escape the shame and many other problems relating to child birth out of wedlock. The increase cases of IC have made the Social Welfare Department (JKM) to redefine the term single mother to include unwed mothers (Muhammad PehimiYusof, 2015).

#### **4.0 Materials and Method**

This study was conducted in Kedah and Perlis using the qualitative research method (Wan Ab Rahman Khudzri Wan Abdullah, MdZawawi Abu Bakar & Wan Ibrahim Wan Ahmad, 2011). The data was gathered through extensive interviews with two main informants who were legal practitioners involved directly with the issue of the research. The two informants were the Director of JPN for the state of Perlis and the Deputy Mufti of the state of Kedah. All the information retrieved from the sources mentioned above has been analyzed based on the qualitative method and the manual qualitative analysis or MQA. The information on the fatwa on nasab was obtained from content analysis on the official fatwas produced by the fatwa authorities from all over the country including legal documents and the related court cases.

#### **5.0 Results and Discussion**

This part discusses the issue regarding IC especially the (1) fatwa on nasab in Malaysia, (2) child registration procedure at JPN, and (3) the related legal issues.

##### **5.1 Fatwa on Nasab**

###### **5.1.1 Legal definition of fatwa**

In the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), the provision regarding the fatwa is clarified under section 34:

1. Fatwa refers to the Mufti's opinion on any unsettled questions or issues that raises dispute regarding the Islamic Law;
2. A fatwa is produced on the direction of the Yang di-PertuanAgong, or on the request of any members of the community through a letter addressed to the Mufti or on the Mufti own initiative;
3. A statement made by the Mufti can only be treated as fatwa if it is published in the Gazette relating to the Islamic Law.
4. A fatwa published in the Gazette binds all Muslim residents in the state with the exception of personal practice which is allowed by the Syariah; and
5. Gazetted fatwa will be part of the Islamic law and recognized by all the Syariah Courts in a particular state.

###### **5.1.2 Status of the National Fatwa**

The decision/opinion on a certain matter of the Fatwa Committee of the National Council for Islamic Affairs (MKI) is not a fatwa based on the Syariah. It is a unanimous decision/opinion made by all the Muftis in Malaysia who are the members of the Committee. The decision however, does not bind any states to enforce any fatwa unless a state decides to put a fatwa into effect in their respective Islamic code. In brief, the MKI's Committee discusses matters that require the jurists' opinion from the Islamic perspectives especially on national issues or questions which involve the Federal's interest.

The main task of the Fatwa Committee of the National Council according to Article 14 of the MKI's Regulations is to evaluate, decide and produce a fatwa on any matters related to Islam which are referred to the council by the Conference of Rulers. The Fatwa Committee will then present its decision to MKI before the council presents their recommendations regarding a matter back to the Conference of Rulers.

### 5.1.3 The Fatwa Regarding Nasab

The result of an interview with one of the research's informant showed that the state's mufti office will produce a fatwa regarding the nasab of an IC if such case is referred to them. Under a usual circumstance, the procedure for nasab determination will involve cooperation from the religious office, mufti department and the National Registration Department (JPN) (Interview). However, in terms of practice and jurisdiction, the research found that the national fatwa is only used for guideline and does not bind any states to enforce it. Due to this fact, the state's mufti office will produce a fatwa on nasab if JPN refers a dubious birth case while conducting the registration (<http://www.e-fatwa.gov.my/>). It is this fatwa that determines the status of the birth whether legit or otherwise.

The list below shows the fatwas regarding nasab passed by the authorities which are the MKI's Fatwa Committee and all the States' Fatwa Council in Malaysia. Referring to Table 1.0 below:

**Table 1.0 The fatwas on nasab of the States of Malaysia**

No	State	Fatwa
1	Wilayah Persekutuan, Kelantan, Negeri Sembilan, Terengganu, Pulau Pinang, Kedah, Melaka, Sarawak, Selangor, National Fatwa.	All children born after six months and two lahzahs from the date of marriage can be nasab to its mother's husband
2	Perlis	Allow a nasab even the birth is less than six months and two lahzahs from the date of marriage on a condition that the father does not deny his association with the child.

(Source: States' Mufti Office and e-fatwa)

The result of the study has explained that each state has its own fatwa regarding nasab. Nevertheless, the state's mufti office will produce a fatwa from time to time if JPN or the religious office refers a doubtful birth case (Interview). Besides that, the informant has also explained the difference between the Perlis's fatwa and other states' as well as the national fatwa. Below are the fatwas of other states regarding the birth of a child born after six months from the date of a marriage. The fatwa of Wilayah Persekutuan in the 54<sup>th</sup> Meeting, Book 5 on 4 April 2000 stated that,

*“if a child is born after six months from the date of its mother's marriage to a man, then the child is considered as legit and can be nasab (legally associated) to the man (mother's husband), even though the child is a result of an illegitimate sexual relationship”*

### 5.1.4 Fatwa for the State of Kelantan

In Kelantan the fatwa to determine the status of a child who is born after 6 months of a marriage was decided on 7 November 1994. The fatwa was based on the following case: “A woman is married while she is 2 months pregnant as a result of illegitimate sexual relationship with another man. She admits that the child does not belong to her current husband and the husband gives the same statement. After 6 months of marriage she gives birth to the child. Do the statements from both the husband and the wife make the child birth as illegitimate?” The Council of Scholars decreed that: “the child cannot be considered as illegitimate about a child of the married couple. The mother's confession of being 2 months pregnant while getting married to her husband cannot be treated as an excuse to deny the child's legitimate status according to the syariah. This is because the confession is not sufficient to be a convincing truth of her pregnancy unless verified by an expert in the field. Moreover, she gives birth after 6 months from her marriage; and the syariah stipulates that a child born after 6 months and a lahzahs (moment) after a wedding is considered as the legitimate child of the married couple”. This matter is based on the explanation in the book of *Bughyat al-Mustasyidin* chapter *al-ila' wa al-zihar wa al-li'an*”.

### 5.1.5 Fatwa for the State of Kedah

In Kedah, a marriage which does not fulfill the conditions of the syariah is nullified. If the couple confessed that the newborn child belongs to them before a marriage then it is unlawful to nasab the child to its father.

However, if the child is born after six months and 2 *lahzahs* (moment) or more from the date the couple got married then the nasab of the child to its father is legitimate (Fatwa on 24 April 2008).

### **5.1.6 Fatwa for the State of Perlis**

According to AsriZainulAbidin (2008), the Syariah Committee of Perlis has decided that the nasab of a child in the duration of its parents' marriage is less than 6 months as the following: "A child born less than six months after its mother's marriage is permitted to be associated to mother's husband unless denied by the husband".

The decision is passed in the Meeting of Perlis Islamic Religious Council and the Malay Affairs that was chaired by His Royal Highness, the Crown Prince of Perlis, Tuanku Syed Faizuddin Putra Ibn Tuanku Syed SirajudinJamalullail on 4 November 2008. This fatwa specifically refers to a woman who got married and bore a child less than 6 months from her marriage date is permitted to nasab her child to her husband except if the husband denies the association. This is due to the fact that, the JPN's refusal to register and accept the nasab of any Muslim's child who is born less than 6 months from the date of its mother's marriage. In other words, the action of the JPN will sealed the fate of such child as illegitimate. The fatwa bythe National Council for the Islamic Affairs (MKI)

According to MKI in its 64<sup>th</sup> Meeting on 27 July 2004, the definitions of IC are:

- i. A child born out of wedlock either a result of illegal sexual relation or rape, and not from *shubhah* (questionable) sexual intercourse or from slavery
- ii. A child born less than 6 months 2 *lahzahs* from the time of *tamkin* (marriage consummation) based on the *qamariahtaqwiw* (lunar calendar);
- iii. A child born after 6 months 2 *lahzahs* (moment) from the time of *tamkin* based on the *qamariahtaqwiw* after a legitimate marriage and accompanied by *iqrar*(confession) from both or either one of the parents that the child is conceived before the marriage or testified by 4 witnesses that fulfill the criteria of the Islamic law.

Hence, the research concluded that almost all of the states' fatwa are identical to the national fatwa. However, the Perlis's JPN branch nasab verification practice seems to be different. This is due to two contradictory fatwas that are in effect; one is the state's fatwa and the other is the national fatwa. In the discussion above, it is apparent that the National fatwa is merely a decision/opinion that does not bind any state to compel to it. This clearly shows that the Perlis's Mufti Office is entitled to overrule the national fatwa in favor of its own fatwa. In fact, the federal constitution dictates that the states in Malaysia have the power to exclusively exercise its religious authority on its Islamic affairs (Table Nine, List 2). Therefore, any dispute regarding birth and nasab related issues at JPN, the agency has an advantage to choose on which authority should they refer to; if it's the National Fatwa, then the Perlis JPN registration practice is similar to other JPN states branches but if it follows the Perlis's fatwa then there is leniency in its practice.

## **5. 2 Child Registration Procedure at Department of National Registration (JPN)**

Based on the interview with the informant, the registration procedure of a birth is the same for all the states in Malaysia. As a federal agency, JPN asserts that all birth must be registered and requires the relevant documents based on the specified standard. Unless, in a doubtful situation in terms of the date of marriage and the date of birth, then JPN will refer to the Mufti Office for the purpose of nasab verification. According to the normal practice of JPN, the Perlis's branch will use the national fatwa as guideline to determine the nasab legitimacy of a doubtful birth as it is a federal agency and not a state agency. Therefore, all rulings that are passed by the Mufti Department with regards to newborn registration will be in effect in their operation.

All IC births will be nasab or associated to "Abdullah" while the father's particulars in the birth certificate will not be filled in. According to the informant, JPN is strict when it comes to birth registration as it will affect the related laws and the syariah in the future. Therefore, any attempt to conceal the birth of IC is prohibited. The 'tabanni' method is frequently used for such attempt; the method refers to combining the IC's name with its paternity father. For example, naming the IC as SitiAishah Rahim binti Abdullah where Rahim is the father's name and the baby will be called as SitiAishah Rahim (Interview). The clarification on this part actually proves that JPN is stringent with the birth registration procedures.

## **5.3 Legal Issues Regarding Illegitimate Child(IC)**

It is apparent that the fatwa allows a nasab on a child if it is born after 6 months and 2 *lahzahs*, and the father does not deny his paternity. Likewise, the normal practice at JPN is to register the nasab of a child based on the fatwa and after the child's status verification has been produced by the mufti office. However, based on the analyzed court cases, it was found that the court can also grant nasab on a child even though the child's status does not conform to the fatwa. This shows that even though the child is born less than 6 months and 2 *lahzahs*, there is still chance that the child birth will be registered as legitimate.

Based on the case of *ZafrinZulhilmiPauzi vs Noor AiniNasron*, the plaintiff (father) married his wife (respondent) through her *wali* on 14 April 2010 in Terengganu. After four months and 24 days, the respondent had given birth to a female baby which preceded the permissible time frame of the fatwa. Regarding that, the plaintiff had requested the court to verify the child's legitimacy status either by the law or the syariah, and requested the court to grant the child's nasab to him. The couple had been staying together and the plaintiff had sexual relationship with the respondent during that period. Since there was no denial from both sides, the court had granted the plaintiff's request and allowed the nasab to the child based on conventional laws and worldly norms. The judge based his verdict according to the opinion of Dr. Abdul Karim Zaidan, "a child who is born 4 months and 24 days after the wedding and the groom did not state that the child is his illegitimate child then it can be nasab to the father based on the conventional laws and worldly norms".

However, the court justified that even though the child was granted the nasab to its father based on the conventional laws and worldly norms but in terms of the syariah, the opinions of the jurists are still in effect. The child is legitimate in all of the worldly affairs except in *wali* representation and property inheritance. This means that the father cannot be the *wali* of the child and neither of them can inherit the property of each. This statement was repeated to both the plaintiff and respondent at the end of the hearing.

In another case, *Wan Azmi vs Nik Salwani*, the plaintiff (PM) and the defendant (PKT) were married on 29.6.1987 and divorced on 21.12.1987. They were divorced in Kadhi Court, JajahanTumpat, Kelantan. The defendant claims alimony from the plaintiff in the Kota Bahru, Kadhi Court as she had given birth to a child on 18. 3. 1988, which was 8 months after their marriage. The plaintiff denied his fatherhood of the child and requested the court to affirm his claim. However, the court rejected the request and decided that the child is his because it was born more than 6 *qamariyah* months from the coitus period and should be treated as a legitimate child. This case shows that a child born after 6 months and 2 *lahzahs* is considered to be as a legitimate child.

In short, there are provisions of the syariah which clearly answer the problem of nasab. The application of these rulings must be thoroughly explained to the community. The nasab cases presented in the above show that the rulings of the courts and the judges' verdicts differ significantly based on the facts of a case. Only the syariah court and legal process can assist couples who are facing the questions of IC.

## **6.0 Conclusion**

The findings of the study concluded that there are two fatwas regarding the nasab of a child's birth and the registration of IC. The first fatwa allows a nasab to a child after the birth is six months and two *lahzahs* from the date of the marriage, and the second fatwa permits the nasab to a child even the birth is less than six months with a condition that the mother's husband does not deny his fatherhood to the child. There seems to be a confusion in the state of Perlis with regards to IC registration, as to which agency should the Perlis's JPN refers to, whether the National Fatwa Council or the state's fatwa even though the informant stated that as a federal agency, Perlis's JPN must abide by the national fatwa.

However, the researchers have concluded that the questions of nasab ruling have already been answered by the fatwas produced by the mufti office. The difference between the fatwas, for as long as it does not deviate from the Al-Quran and Sunnah, is a form of blessing to the *ummah* (community) despite the imperfections among the jurists in fulfilling the needs to meet the objectives of the syariah. Regarding the registration of IC, according to the Terengganu Syariah High Court which had allowed the registration of a child who was born less than six months and two *lahzahs* with JPN and verified its nasab status to the father was based on the conventional law and worldly norms. However the court's verdict will not alter the syariah aspects of inheritance and *wali* representation. As a conclusion, there are several solutions to the issues and questions of IC either in the aspects of the syariah or the law. Therefore, the community is strongly advised to seek the authorized agencies if they face any arising issues or problems relating to IC so that the best possible solutions can be provided.

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