

Discrimination against an Illegitimate Child According to Law and Society

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ABSTRACT

The status on the legitimacy of a child has been an on-going issue in Malaysia for a long time whereby an illegitimate child is considered as filius nullius or the son of nobody under the law. Their status are also different compare to a legitimate child whereby an illegitimate child is only left with their mother's wealth and none of their father's. The impact of illegitimacy on a child born out of wedlock does not only concern the society's view on them but also their rights to inherit paternal wealth or in some cases it might affect the child's right to a name, identity and nationality. The objective of this writing is to understand the rights of an illegitimate child in Malaysia and the discrimination faced by them from the society. In order to find out more, a historical approach is done in order to understand the history and to analyse the situation of an illegitimate child before this. This discussion looks into the status, rights, impacts and relief of status of an illegitimate child in Malaysia. In achieving the objective mentioned, this discussion referred to primary and secondary sources e.g. books, articles and cases. Then, based on the materials, it is analysed critically which resulted to the findings on the issue of an illegitimate child, their statuses, impacts and relief of status under the law.

Keywords: discrimination; children; illegitimate child; family law; society.

INTRODUCTION

Legitimacy of a child has been an ongoing issue in Malaysia for a long time and the question that rises from the topic is: what rights do these children have according to the law? Before diving into the topic, the definition of legitimate child must be understood first. According to Section 112, a child is considered to be a legitimate child if he is born or conceived during subsistence of a valid marriage where a husband of a married woman is determined as the legal father of the child. If the parents are divorced, then the child must be born within 280 days after the marriage dissolved with the condition that the mother have not remarried within the period of time. On the other hand, an illegitimate child means those whom did not falls under section 112 as mentioned before. This means an illegitimate child

are those who were born outside of marriage or they were born 280 days after the marriage dissolved. The marriage can be dissolved through a divorce, death of the father or separation by court that have the authority in deciding.

THE STATUS OF ILLEGITIMATE AND LEGITIMATE CHILD

According to common law, if the parents are married when the child was born, the child is considered as legitimate. If the child was born when the mother gives birth to him or her prior to a valid marriage or during a valid marriage but later both parents got divorced, the child is still considered as legitimate. Legitimacy was laid down in section 112 of the Evidence Act 1950. An illegitimate child is a person who was born out of wedlock. The child is

considered as *filius nullius* or the son of nobody (Nuraisyah Chua 2010).

Illegitimate and legitimate child does not share the same privilege. Illegitimate child is left with nothing other than his or her mother's wealth but not father's. From section 112 of Evidence Act 1950, a legitimate child was born during the subsistence of a marriage and the marriage must be a valid marriage. Both parents have the rights to take care of the child according to their capacity if they got divorced afterwards. There are three kinds of marriages that are solemnized which are accordance to Law Reform (Marriage & Divorce) Act 1976, all valid marriages outside Malaysia stated in section 72 of LRA and all marriages that have been registered under section 4 of LRA. If the parties failed to get the validation of marriage or did not even married, the child that was born was born out of wedlock. Therefore, only mother has the right on the child.

Besides, if the child was born after divorce, it must be within 280 days after the divorce and the mother remained unmarried. But the presumption was rebuttable as in the case of *Ng Chian Perng (Sued by Her Mother and Next Friend Wong Nyet Yoon) v Ng Ho Peng* [1998] 2 MLJ 686 where it was held that on appeal, the onus to prove the legitimacy of a child lays on the appellant by proving that the respondent is the father of a child. The respondent does not hold the responsibility to subject himself to the DNA test. In this case, the appellant claimed for maintenance of her infant daughter who was born because of her intimate relationship with the respondent. It was mentioned that the child was registered with the respondent's name as her father but at the time of claimant was made, appellant was married to Phang Mow Yew. It was argued by the respondent that the child was not his and that the name was registered without his consent. DNA test had been brought as an issue besides the urge made by the Council

for the respondent to be observed by court within his physical appearance as there is a similarity between the respondent and child. Therefore, to rebut the presumption, it is crucial for the appellant to bring forth on the issue of being separable between each other when the child should have been gotten. Besides, it needs to be proven that the husband is impotent or incapacitated when the child was conceived. If the rebuttable presumption failed to be presumed, therefore, the claimant will fail even though the physical appearance has said the similarities between the father and child.

Besides, in the case of *Ah Chuck v Needham* [1931] NZLR 559, father of the child denies that he is the guardian as there was a conflict between his wife and him about the gardener who works for the family named Ah Chuck. The accusation was made because the child was having a Mongoloid features instead of Caucasians (a child born to Hedges couple). Ah Chuck who was the market gardener often visited their house while Mr Hedges was absent. It was held that the claimant failed as when the child was conceived or about to be conceived, both Mr and Mrs Hedges were staying together and there is no limitation between them. There is also sexual interaction between the husband and wife therefore Herdman J in his decision upheld that the child is a legitimate child and the father is her real father and no one else is. Therefore, if it is proven that there is a valid marriage with sexual interaction when the child was conceived or about to, therefore it is a strong evidence to show that child is legitimate according to common law.

According to common law, in the case of *Dredge v Dredge* [1947] 1 All ER 29, the child is a legitimate child until the decree of nullity is ordered by the Court. In this case, the wife was pregnant by the husband when the parties went through their marriage ceremony on 6th March 1929 and the child was born on 30th September 1929. The husband was a

servicing marine who put a lot of effort to consummate the marriage even though he was away from his wife but the wife did not want to consummate and refused to permit intercourse with her husband. Therefore, the marriage was never consummated and therefore decree of nullity was awarded. The child became illegitimate when the annulment has been declared by the Court. In Malaysia, according to section 75(1) of the LRA¹ provides that a child who was born from a voidable marriage shall be presumed to be born as legitimate. Besides, in pursuance of section 75(2) of LRA², a child of a void marriage shall be presumed as legitimate if by the time of his or her birth, both or either parties reasonably believed that the marriage was valid, if the father is domiciled in Malaysia. As decided in the case of *Yeoh v Chew* [2001] 4 CLJ 631, invalidity of marriage does not hinder a child to be legitimate as the couples reasonably believe that there was valid marriage. In this case, the marriage was solemnized according to the Chinese customary marriage after coming into force of the LRA. It was held that according to LRA, the marriage was invalid as the couple failed to prove that there is a solemnization according to section 24 of the LRA³ and no certificate of marriage was filed. But accordingly to section 75 (2), the child is still considered as legitimate as the couple believed that the marriage was valid which could be seen that this provision is a safeguard towards the legitimacy of a child.

In pursuance of illegitimate child who was neither born in void nor voidable marriages, he will be ascribed to the mother as stated in the case of *Koh Lai Kiow v Low Nam Hui* [2005] 3 CLJ 139. The application made by the plaintiff for his two illegitimate child under the Guardianship of Infants Act 1961 had failed as there is no provision or portion prescribed for illegitimate children in our statute. In this case, the plaintiff and the defendant are the biological parents of the

two children, married in 1983 according to Chinese customary rights but the marriage had never been registered under the LRA, therefore the marriage was held to be void ab initio.

An issue had arisen in accordance to section 112 of Evidence Act 1950 which is whether the Act is applicable to the Muslims. In the case of *Ainan bin Mahamud v Syed Abu Bakar* [1939] MLJ Vol. 8, 163, the Evidence Act 1950 was held to be generally applicable to Muslims and non-Muslims. The case was related to the execution of a deed of settlement for the benefit of six children. However the sixth to be his child was denied by the settlor. The issue brought was whether the child is a legitimate child even though he was born within six months of the marriage. According to the Court, section 112 of the Evidence Act 1950 in question of legitimacy in the case of Muhammadan, there is an exclusion of the rules. But there are many criticizes on this matter. Therefore, according to Norliah Ibrahim et al (2014), after the amendment of Article 121 of the Federal Constitution, section 112 of the Evidence Act 1950 is no longer applicable as the status of the Syariah Court has been upgraded and therefore, the Court has the right to hear for that matter which regarded as Muslims matter without any interference.

In *Re CT (An Infant)* was decided according to English common law where a mother has rights and obligations towards her illegitimate child. Besides, she was given the guardianship for her children. Under the LRA, illegitimate child is still referred as 'child' when section 88 is read with section 87. Therefore, this section gives the rights for the mother to have her child. Illegitimate child is always a mother's child so it is well aware that according to the law, mother has a solid rights to take care of her own child even though he or she is an illegitimate by law.

THE IMPACT OF ILLEGITIMACY ON SOCIAL STATUS

It is common for any illegitimate child to be questioned on their social status whether a child born out of wedlock can claim his rights towards family name, inheritance and religion given that our community is very diverse in culture and religion. 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 or by adopting the child under the Adoption Act 1952 where the adopted children assume all the rights of biological children of the adoptive parents. The most obvious impact is according to the common law, an illegitimate child is related only to its mother and has no relationship with its biological father. Hence, rights to claim family name and inheritance is one of the biggest issues (Meera Deiwi Raja Gopal 2020).

In terms of inheritance, the law provides for limited circumstances in which an illegitimate child can inherit from his parents' estate. An "illegitimate child" is entitled to inherit from his/her mother's estate only if she dies without leaving a will and does not have any legitimate children. The law suggests that an illegitimate child loses his/her rights of inheritance in the event the mother dies without leaving a will but leaves legitimate children, presumably from an earlier or later marriage.⁴ In the *Tan Ying* case, legal suits were filed by the lawful wife of the deceased to seek, amongst others, a declaration that the child fathered by the deceased with another woman is an illegitimate child and hence, will not have the right to claim an interest in the deceased's estate. Sadly but quite rightly, based on the present law of this country,

the High Court granted the unfortunate declaration.⁵

The impact of illegitimacy on a child born out of wedlock does not only concern the rights to inherit paternal wealth but in some cases it might affect the child's right to a name, identity and nationality. This can happen when the 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. Fear of shame and judgments would jeopardise the future of the poor child. Illegitimate children are claimed to always be bastardized and labelled with ill names and some are not accepted into the family. In the case of *Yanessa v National Registration Department (NRD) Home Ministry and Government of Malaysia*, the plaintiff was denied to be enrolled into a local university as she has not been granted citizenship. Her mother is a foreigner who married a local man. She was issued a birth certificate but not citizenship until her father agreed to do a DNA test (Meera Deiwi Raja Gopal 2020).

An illegitimate child's right to cultural and religious status is defined by the mother and once the child reaches 18, he is allowed to choose his religion of choice and exercise his rights according to the Federal Constitution. When a non-Muslim woman marries a Muslim man, she has to convert into Islamic faith to legalize the marriage. Problems usually arise when the conversion did not happen and a child is born from an illegal marriage so leading issues like birth rights, citizenship and denial of rights to public services and privileges are common due to the illegitimacy. Acceptance among community members has improved as more people are woken in terms of social justice and judgment however basic rights on rights to education and public health care will still be denied.

RELIEF FOR STATUS

Under the Common Law, a legitimate child are those who had parents that were married to each other at the time he is born and those who were conceived within wedlock or if they were conceived out of wedlock but born within the wedlock. An illegitimate child are those who were born out of wedlock which means they are only related to their mother and they have no relationship with their biological father.

A child may become legitimate if the:

- (i) Biological father marries the mother of the child

This is in accordance with section 3(1) of Legitimacy Act 1961 which requires the marriage to be solemnized and registered. The legitimacy of a child will begin on the date stated by the statute or on the date of the marriage. By doing this, the status of the children will change from being an illegitimate child to a legitimate child. In the case of *Chan Tai Ern Bermillo & Anor v Ketua Pengarah Pendaftaran Negara & Ors* [2019] 7 MLJ 113, the first plaintiff was born and his biological father is a Malaysian meanwhile his mother is a citizen of Republic of Philippines. At the time he was born, the first plaintiff's parents were not married which means he was an illegitimate child. After 5 months, the biological father and the mother legally registered their marriage which changes the status of the first plaintiff as a legitimate child by law.

- (ii) Child is adopted

According to the Adoption Act 1952, the adopted children will assume the rights of biological children of the adoptive parents. The reason is, section 6(1) stated that only a legitimate person has the right to take any interest in the estate of both parents into operation after the date of his legitimation. Meanwhile section 9 stated

that in respect of maintenance and support of himself, only a legitimate person shall have the same rights. In the case of *Re E (P) (an Infant)* 1 All. ER. 323 at p.323 , the Court of Appeal decided that:

the advantages for an illegitimate child of being adopted, and thereby ceasing to be a bastard, outweighed the loss of his connection with his real father.

This shows that by adopting a child, it will protect the children from the harmful consequences due to their status even if it means that their relationship with their biological family is severed. The effects of legitimation towards the children is mentioned in section 6(1) whereby the children will have the right to receive any benefit from the property of the deceased person without any will. Other than that, legitimation allows the children to have the same right as a legitimate child in terms of maintenance, damages, allowances, benefits etc. which is also mentioned in the case of *Re Lowe* [1929]. All in all, section 7, 8 and 9 provides that a person who is legitimize will be considered as person who were born that way.

CONCLUSION

In conclusion, illegitimate child are discriminated in terms of their rights, society's view on them and their relationship with their biological father. Their discrimination against their biological father based on the facts that their biological father has no ties with them unless they are married to the mother of the child. An illegitimate child is also not allowed to claim family name and inherit from their biological father which means they are usually maintained by their mother only.

Other than that, most of the time when an illegitimate child is born, they are not registered straight away by their mother because of the fear of being judged

by society or stigmatized when the child holds a birth certificate without the father's name. The stigma against an illegitimate child is too strong especially in Malaysia that some of the parents agree to give their child up for adoption to avoid being stigmatized and belittled by society. All in all, even though Malaysia has come a long way in terms of providing the rights for an illegitimate child, it still has a long way to go in order to educate the society regarding an illegitimate child and their rights.

NOTES

¹ Section 75(1) of Law Reform (Marriage and Divorce) Act 1976 (Act 164).

² Section 75 (2) of Law Reform (Marriage and Divorce) Act 1976 (Act 164).

³ Section 24 Law Reform (Marriage and Divorce) Act 1976 (Act 164).

⁴ Thomas Phillip Advocates and Solicitors, *Illegitimacy and Inheritance in Malaysia: Two Cautionary Tales*, (2019), <https://www.thomasphilip.com.my/articles/illegitimacy-and-inheritance-in-malaysia-two-cautionary- Tales/> (20 June 2020).

⁵ *Tan Ying v Tan Kah Fatt & Anor and another appeal* [2018] MLJU 1070] (the “Tan Ying case”).

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