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ILLEGITIMATE CHILD; AN ANALYSIS :

A COMPARATIVE STUDY BETWEEN CIVIL AND MUSLIM LAW

AZIZAH MOHD (G 9410064)

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KULLIYAH OF LAWS  
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AZIZAH MOHD  
KULLIYAH OF LAWS  
INTERNATIONAL ISLAMIC UNIVERSITY.  
PETALING JAYA, SELANGOR.

## **PREFACE**

It might be a well known fact that, children nowadays may be devided into three categories;

- i - Legitimate child
- ii - Illegitimate child
- iii - Legitimated child

In fact, among these three, illegitimate child is the most unfortunate. He is degraded by his own status and is denied of his rights because of such status. He becomes a subject to disabilities unless he is legitimated. But only certain Law which will give him such a way. Islamic Law strictly disallows legitimation. As a result, he remains illegitimate, a child of a low status and of no value in the eyes of the society. The question arises as to whom to be blamed? How is his position nowadays, what is his rights and whether the law affords any protection for his sake.

With this study, we try to give a clear and exact picture on the above matters in the light of Civil and Islamic Perception, especially with regard to his position in Malaysia.



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# CHAPTER ONE

## INTRODUCTION

### THE LAW OF PARENTAGE

#### 1.1 - WHAT IS PARENTAGE

Parentage is a term used for the status of a born child. A child who is born is deemed to have a mother and a father who shall establish his parentage.

Parentage can be broadly defined as a legal relationship between children and parents created by their birth in consequence of a legal marriage contract entered into between the parents.<sup>1</sup> It seems that a marriage contract has been made a 'necessary condition' to legalize parentage of a child. It follows that, once a child's parentage is legal, he is a

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<sup>1</sup> Dr. Tanzil Ur Rahman, *A Code Of Muslim Personal Law*, Vol. 1, 689 (1978).

legitimate child.

At Common Law, a child is presumed legitimate if his mother was married either at the time of conception or at the time of birth.<sup>2</sup> This presumption may prove difficult to displace.<sup>3</sup>

Under Islamic Law, marriage shall legalize parentage of a child if he is born after six months pregnancy within a subsisting marriage or in accordance with Hukum Syara'.<sup>4</sup> Islam really concerns about the legality of parentage to preserve the dignity of human kind. In the Quran, it was provided to the effect that;

وهو الذي خلق من الماء بشرا فجعله نسبا وصهرا

"It is He who has created man from water then has He established Relationship of Lineage and Marriage..."<sup>5</sup>

The word 'nasb' in the ayat is an Arabic term stands for parentage which was defined by the ayat as 'relationship of

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<sup>2</sup> *Cocks V Juncken* (1947) C.L.R. 74 at 277 & 294, quoted in Anthony Dickey, *Family Law*, First Edition, 235 (1985). Also see *Knowles V Knowles* [1962] All ER 659 at 660. The words of Wrangham J. in *Knowles V Knowles*, "There is undoubtedly a presumption (strong but capable of being rebutted by satisfactory evidence) that a child born in wedlock to a married woman is the child of her husband. That presumption applies not only to a child clearly conceived during wedlock".

<sup>3</sup> Christina M. Lyon, *The Law Relating To Children*, 40 (1993).

<sup>4</sup> Dr. Tanzil Ur Rahman, *Op. Cit.* at 693-694.

<sup>5</sup> The Quran, Surah al Furqan 25:54. Also see Abdullah Yusuf Ali, *The Meaning Of The Holy Quran*, New Edition With Revised Translation And Commentary, 902 (1992).



'lineage'. The ayat further indicates that, in Islam, marriage and parentage are related to each other. Thus, once marriage exists, parentage shall be established on the fulfillment of certain conditions.

## 1.2 - KINDS OF PARENTAGE

There are two kinds of parentage.

A - Maternal Lineage (Maternity)

B - Paternal Lineage (Paternity)

A - Maternal Lineage (Maternity)

Maternal Lineage or Maternity is established by the mother of the child. Generally, it does not raise any doubt as to the mother of the child. The doubt may arise on the identity of the father of the child. It is sometimes said that, maternity is a matter of fact whereas paternity is a matter of opinion. A Latin Maxim '*Mater Semper Certa Est Pater Incertus Est*' express that, once's mother is certain but one's father is not.<sup>6</sup>

At Common Law, previously, a woman who gave birth to a child

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<sup>6</sup> Anthony Dickey, *Op. Cit.* at 250.

was deemed to be the mother of the child.<sup>7</sup> The same situation applied to Muslims. Islamic Law recognized a woman to be the mother of a child if she gives birth to the child irrespective of whether the child is born within or without a contract of marriage.<sup>8</sup>

However, as a result of scientific advances made, a woman nowadays is able to give birth to a child who is not genetically related to her.<sup>9</sup> In line with this development progress, a legal definition of a child's mother was provided in a statutory form under The Human Fertilization And Embryology Act 1990. This act provides that ;

" The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman is to be treated as the mother of the child".<sup>10</sup>

For this purpose, it seems that, a woman who has given birth to a child shall be the mother of the child.

Islamic Law however is strict in this case. Placing an embryo in a mother's womb is allowed only if it is from her husband's sperms and her eggs, provided that, she has no other

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<sup>7</sup> C. M. Lyon, *Op. Cit.* at 46.

<sup>8</sup> Dr. Tanzil Ur Rahman, *Op. Cit.* at 691 - 692.

<sup>9</sup> e.g. where an embryo or eggs semen have been placed in the mother's body.

<sup>10</sup> *Human fertilization And Embryology Act 1990*, s. 27(1). See also C.M. Lyon *Op. Cit.* at 46-47.

way to gain children. If the sperms do not belong to the husband, the effect is just like a child who is born as a result of adultery. She is still the mother to a child of no father. On the other hand, if the embryo is from other persons' sperms and eggs, she has no relationship at all with the child.<sup>11</sup> Thus, the status of the child is not differed with those of foundlings.

## B - Paternal Lineage (Paternity)

Paternal Lineage or paternity is established by a father of a child. It is a relationship between a father and a child which is only legally established through marriage as discussed earlier.

## I - Importance Of Paternity

Paternity can be said to be a matter of a great concern. It is very importance since it establishes legitimacy of a child. With no paternity, a child is deemed to be illegitimate. Thus, once a child is born, it is necessary that his legitimacy is ascertained, so that his other rights can be established such as right to custody, maintenance and inheritance.

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<sup>11</sup> Abdullah Al Bassam, "Atfaal Al Anaanib", *Majallah Mujma' Al Fiqhi Al Islami*, 257-260 & 266 (1986). Also see, Zakariyya Ahmad Al Barry, *Hukum Anak - anak Dalam Islam* (tr.), Chadijah Nasution, 15-16 (1977).

## II - Ways of Establishing Paternity

Paternity of a child may be established through a few ways. Civil Law and Islamic Law make marriage as the key point to establish paternity of a child. However, subjective conditions seem to be different. Civil Law is very lenient in this matter while Islamic Law is quite strict.

### 1.3 - ESTABLISHING PATERNITY UNDER CIVIL LAW

English Law recognizes a few ways of establishing paternity of a child; among others are;

#### A - Paternity Through Marriage

As earlier discussed, a marriage automatically presumed paternity of a child if he is born during the subsistence of such marriage or at least conceived in the contract of marriage. The presumption is that, the wife's husband is the father of the child.<sup>12</sup>

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<sup>12</sup> Mimi Kamariah Majid, "Equal Status Of Children", in *Journal Of Malaysian And Comparative Law (Jernal Undang-undang)*, Vol. 5, 76 (1978).

The Civil Law maxim '*pater est quem nuptiae demonstrant*' which means that, the presumption that if a child is born to a married woman, her husband is to be deemed to be his father until the contrary is proved.<sup>13</sup>

The words of Wrangham J. in the case of *Knowles V Knowles*,<sup>14</sup> describe the basic rule and its exception, where he stated that;

"It seems to me that, the basis of the presumption is that, the law contemplates spouses as fulfilling their marital duties to each other unless there has been an actual order of the court dispensing for the performance of such duties. So long as the law contemplates the spouses as performing their marital duties to each other, so long will it contemplate that a married woman if she bears a child will be bearing it as a result of intercourse with her husband only".

However the presumption does not apply if at the time of conception the parties were married but subject to either a decree of judicial separation or a separation order.<sup>15</sup>

Nevertheless, the presumption seems a very strong one because so long as it could be proved that the parties to the marriage had access to each other at any time when the child could have been conceived, the child is the child of the man. This presumption

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<sup>13</sup> P.M. Bromley & N. V. Lowe, *Bromley's Family Law*, Seventh Edition, 241 (1987).

<sup>14</sup> [1962] ALL ER 659 at 660-661.

<sup>15</sup> *Ettenfield V Ettenfield* [1940] ALL ER 96 at 110.

has excluded any scientific evidence which may be adduced to rebut the presumption.<sup>16</sup>

This strong presumption is illustrated by the New Zealand's case of *Ah Chuck V Needham*,<sup>17</sup> where in this case, a child was born to European parents exhibiting strong signs of being racially a half-caste. There was evidence that the wife had an intimate relationship with a Chinese man but at the same time no evidence that the husband and the wife had not had intercourse at or about the time of conception. The Court held that, it was indisputable that at the time of conception, the husband and the wife had opportunities of access they were living together as man and wife in the years 1928 and 1929. It follows that the child having been born during the continuance of the marriage is prima facie legitimate.

Herdman J. stated that;

" The presumption of legitimacy which arises when a child is born in wedlock can be met only by some kind of definitive proof that sexual intercourse between husband and wife did not or could not take place at the time the woman conceived".<sup>18</sup>

The presumption seems hard to displace. However, it was rebuttable previously beyond reasonable doubt. At present the law

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<sup>16</sup> Mimi Kamariah, *Op. Cit.* at 78.

<sup>17</sup> [1931] N.Z.L.R. 559.

<sup>18</sup> *Ibid.*

becomes more lenient and provides that, it can be rebutted on the balance of probabilities.<sup>19</sup> Proof of non access by the husband to his wife on that the couple were staying far away from each other or the husband is impotent can be good grounds for this purpose.<sup>20</sup>

Meanwhile, the law has expanded the provision to allow children of void and voidable marriages to be treated as legitimate. It also allows legitimation by subsequent marriage of the mother or the child's parents. However, this will depend on the domicile of the father where the father must be domiciled in England or Wales at the time of the birth or if he died before the birth was so domiciled immediately before the death.<sup>21</sup>

In Malaysia, the position is similar. Section 112 of Evidence Act 1950<sup>22</sup> has given the status of legitimacy to any person born during the continuance of a valid marriage between his mother and any man or born within two hundred and eighty days after its dissolutions the mother remaining unmarried. It follows that the marriage shall be the conclusive proof unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

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<sup>19</sup> P.M. Bromley, *Op. Cit.* at 242-243.

<sup>20</sup> Mimi Kamariah, *Op. Cit.* at 76.

<sup>21</sup> *Legitimacy Act 1976* s. 1(1)(2), as amended by *Family Law Reform Act 1987* s.28. S.E. 1987. See, Halsbury's Statutes, Fourth Edition, Children, Vol. 6, 212 (1992).

<sup>22</sup> Act 56.

In the case of *Ainan Bin Mahamud V Syed Abu Bakar*,<sup>23</sup> the Evidence Act 1950 was held to be of general application and applicable to Muslims and non Muslims.

The fact of this case among others related to the execution of a deed of settlement for the benefit of six children. The settlor however denied the sixth to be his child. It was contended that the child (Mat Sah) had been conceived prior to the marriage and born within six months of the subsisting marriage. The question arose as to whether Mat Sah is a legitimate son of the settlor.

It was held inter alia that, in questions of legitimacy in the case of Muhammadans, section 112 of Evidence Act 1950 applies to the exclusion of the rule of Muhammadan Law.

This case has been criticized on a few grounds;

i - That section 112 should not be included into the Evidence Act 1950 since it is a substantive law and should not be passed as a law which deals only with procedure and evidence. Since it was included it must not be applicable to Muslims.

ii - That the matter of legitimacy among Muslims fell under jurisdiction of State Laws, so that Evidence Act is impossibly applicable.<sup>24</sup>

In our opinion, the above criticism is fair and should be

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<sup>23</sup> (1939) MLJ Vol.8, 209

<sup>24</sup> Mimi Kamariah Majid, *Undang-undang Keluarga Di Malaysia*, 110 (1992).