

Child Filiation and Its Implications on Maintenance and Inheritance Rights: A Comparative Study of Regulations and Judicial Practices in Indonesia, Malaysia, and Turkey

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Abstract

This article analyses the national laws governing child filiation and their implications on the maintenance and inheritance rights of children in Indonesia, Malaysia, and Turkey. This is prompted by the fact that the determination of child filiation in these three countries not only adopts singular *fiqh* (Islamic jurisprudence) provisions, as some Middle Eastern Muslim countries do but also takes into account cultural values and human rights. Therefore, this article employs a normative-juridical approach by conducting a comparative analysis of the laws in these three countries. The research reveals that the laws in these three countries differentiate child filiation based on the marital status of the parents: maternity, biological paternity, and *nasab* (lineage) paternity. These three typologies of child filiation have implications for their maintenance and inheritance rights. The laws in these three countries stipulate that children born from valid marriages have both maintenance and inheritance rights from both parents, while children born from unregistered or non-marital unions only acquire these rights from their mothers. Although the laws in these three countries grant maintenance and inheritance rights to children born out of wedlock from the maternal lineage, some judicial decisions in Indonesia and Turkey grant these rights from both parents. The differences in judicial practices among these three countries are attributed to variations in legal systems and the Islamic legal schools adopted. Among the three studied nations, this article finds that the legal frameworks and judicial practices in Indonesia and Turkey are more accommodating to children's rights compared to those in Malaysia.

[Artikel ini menganalisis hukum negara yang mengatur ketentuan filiasi anak dan implikasinya terhadap hak pemeliharaan dan waris anak di Indonesia, Malaysia, dan Turki. Hal ini dipicu oleh fakta bahwa penetapan filiasi anak di ketiga negara tersebut tidak hanya mengadopsi ketentuan fikih secara tunggal, seperti beberapa negara Muslim di Timur Tengah, tetapi juga memperhitungkan nilai-nilai budaya dan hak asasi manusia. Oleh karena itu, artikel ini menggunakan pendekatan normatif-yuridis dengan melakukan analisis perbandingan terhadap hukum di ketiga negara tersebut. Penelitian ini menunjukkan bahwa hukum di ketiga negara tersebut membedakan filiasi anak berdasarkan status perkawinan orang tua: maternitas, paternitas biologis, dan paternitas nasab. Ketiga tipologi filiasi anak ini memiliki implikasi terhadap hak pemeliharaan dan waris

anak. Hukum di ketiga negara menetapkan bahwa anak yang lahir dari perkawinan yang sah memiliki hak pemeliharaan dan waris dari kedua orang tua, sedangkan anak yang lahir dari perkawinan yang tidak tercatat atau tanpa ikatan perkawinan hanya memperoleh hak tersebut dari ibunya. Meskipun hukum di ketiga negara memberikan hak pemeliharaan dan waris anak tanpa ikatan perkawinan dari jalur ibu, beberapa keputusan yudisial di Indonesia dan Turki memberikan hak-hak tersebut dari kedua orang tua. Perbedaan dalam praktik peradilan di ketiga negara ini disebabkan oleh perbedaan sistem hukum dan mazhab fikih yang dianut. Dari ketiga negara yang diteliti, artikel ini menemukan bahwa hukum dan praktik peradilan di Indonesia dan Turki lebih akomodatif terhadap hak anak dibandingkan dengan di Malaysia.]

Keywords: Child Filiation, Inheritance Rights, Judicial Practice, Maintenance Rights, State Law.

Introduction

Regulations in Muslim countries establish the legitimacy of children based on the filiation relationship (maternity and paternity) with their parents,¹ which has an impact on the rights obtained by children in the future.² Several Muslim countries in the Middle East use and adopt *fiqh* (Islamic Jurisprudence) as a source for codifying family law.³ *Fiqh* explains the condition or marital status of the parents, which affects the child's legitimacy.⁴ The birth of a child and the parents' marriage are the determining factors in the legitimacy of a child and their filiation with parents.⁵ *Fiqh* exclusively recognises the legitimacy of a child based on the parents' legitimate marital status.⁶ This issue is motivated by Sharia constitutions in Middle Eastern countries that adopt puristic schools of *fiqh* as a source of legal codification, including family law, which becomes a legal product (law).⁷ These schools of *fiqh* are also used as a legal basis for judges in judicial practice in deciding cases relating to the legitimacy and filiation of children.⁸

¹ Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies," *Osgoode Hall Law Journal* 39, no. 4 (October 1, 2001): 39.

² See: Fatkul Hidayat et al., "Legislation on Determining the Parentage of a Born-Out-of-Wedlock Child Based on the Perspectives of the Best Interest of Child and Progressive Fiqh," *Asian Research Journal of Arts & Social Sciences* 16, no. 1 (January 7, 2022): 13; Dörthe Engelcke and Nadjma Yassari, "Child Law in Muslim Jurisdictions: The Role of The State in Establishing Filiation (Nasab) and Protecting Parentless Children," *Journal of Law and Religion* 34, no. 3 (December 20, 2019): 333.

³ Annelies Moors, "Debating Islamic Family Law: Legal Texts and Social Practices," in *Social History of Women and Gender in the Modern Middle East*, ed. Margaret L. Meriwether and Judith E. Tucker, 1st ed. (Oxfordshire: Routledge, 1999), 151.

⁴ See: Nadjma Yassari, "Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law," *American Journal of Comparative Law* 63, no. 4 (December 14, 2015): 927; Engelcke and Yassari, "Child Law in Muslim Jurisdictions," 332.

⁵ Maria Ulfah, "Wanita Hamil di Luar Nikah (Status Anak)," *Jurnal Pembaharuan Hukum* 2, no. 3 (2015): 333.

⁶ Andrea Büchler and Eveline Schneider Kayasseh, "Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates," *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 6 (2018): 33.

⁷ Ahmed Fekry Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," *Islamic Law and Society* 22, no. 3 (May 1, 2015): 164.

⁸ Mashood A. Baderin, "Effective Legal Representation in 'Shari'ah' Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States," *Yearbook of Islamic and Middle Eastern Law Online* 11, no. 1 (2004): 141–42.

Another case pertains to Muslim countries outside the Middle East. These countries adopt *fiqh* to establish the legitimacy of children and employ other legal instruments⁹ that reference the Convention on the Rights of the Child (CRC) by the United Nations (UN).¹⁰ This difference in approach results in various determinations regarding child legitimacy and filiation,¹¹ as observed in countries such as Indonesia, Malaysia, and Turkey.¹² These three nations determine the legal filiation of children based on three conditions regarding the parents' marital status:¹³ legitimate marriage (registered), unregistered marriage, and non-marital unions.¹⁴ Moreover, several of these countries also incorporate biomedicine¹⁵ into determining child filiation laws, which were influenced by the ratification of the CRC.¹⁶ Thus, the disparity between the regulations of these three countries and those of several Muslim countries in the Middle East stems from variations in the adoption of *fiqh* in the codification of family law, ultimately impacting the rights afforded to children.

Several previous studies have examined the issue of child filiation provisions and categorised them into two typologies. First, the division of paternity determination into biological and *nasab* (lineage) paternity.¹⁷ The determination of paternity occurs in judicial practice in cases of children born out of unregistered marriages and non-marital conditions.¹⁸ To prevent potential child neglect, there is support for the application of deoxyribonucleic acid (DNA) testing in determining a child's filiation.¹⁹ Second, the filiation of children has an impact on their civil rights. The civil rights of children born out of unregistered marriages

⁹ See: Delfina Serrano-Ruano, "Redefining Paternal Filiation through DNA Testing: Law and the Children of Unmarried Mothers in the Maghreb," *Journal of Middle East Women's Studies* 14, no. 3 (November 1, 2018): 292–313; Ron Shaham, "Law versus Medical Science: Competition between Legal and Biological Paternity in an Egyptian Civil Court," *Islamic Law and Society* 18, no. 2 (2011): 236–66.

¹⁰ There is an obligation to guarantee the child's rights, which is recognised so that it becomes the responsibility of the parents to care for the child. See: "Convention on the Rights of the Child" (1990), Article 18 paragraph (1).

¹¹ Gary B. Melton, "Beyond Balancing: Toward an Integrated Approach to Children's Rights," *Journal of Social Issues* 64, no. 4 (December 25, 2008): 903.

¹² Zaini Nasohah, "Dynamics of Islamic Family Law in Facing Current Challenges in Southeast Asia," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 8, no. 1 (2024): 16.

¹³ Ahmad Yasa, "The Development of Indonesian Islamic Law: A Historical Overview," *Journal of Indonesian Islam* 9, no. 1 (June 8, 2015): 101.

¹⁴ Anke Iman Bouzenita and Feryad A. Hussain, "Psychological and Societal Impacts of Unknown Descent and the Islamic Objective of Nasab. A Preliminary Study of Chosen Biomedical Technologies," *IIUM Medical Journal Malaysia* 20, no. 1 (January 5, 2021): 171–72.

¹⁵ Shaheen Sardar Ali, "A Step Too Far? The Journey from 'Biological' to 'Societal' Filiation in the Child's Right to Name and Identity in Islamic and International Law," *Journal of Law and Religion* 34, no. 3 (December 24, 2019): 384.

¹⁶ See: Ali, 384; Büchler and Kayasseh, "Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates," 55.

¹⁷ Euis Nurlaelawati and Stijn Cornelis van Huis, "The Status of Children Born Out of Wedlock and Adopted Children in Indonesia: Interactions Between Islamic, Adat, and Human Rights Norms," *Journal of Law and Religion* 34, no. 3 (December 24, 2019): 371.

¹⁸ See: Serrano-Ruano, "Redefining Paternal Filiation through DNA Testing: Law and the Children of Unmarried Mothers in the Maghreb," 292–313; Serrano-Ruano, "Redefining Paternal Filiation through DNA Testing: Law and the Children of Unmarried Mothers in the Maghreb"; Shaham, "Law versus Medical Science: Competition between Legal and Biological Paternity in an Egyptian Civil Court," 236–66.

¹⁹ Amal Fathullah and Muhammad Abduh, "The Relationship of Children and Their Biological Father (Comparative Study of Positive Law of Indonesia, Thailand and Jordan)," *SYARLAH: Jurnal Hukum dan Pemikiran* 22, no. 2 (2022): 228.

and non-marital unions have not been ideally distributed because legal frameworks in several Muslim countries are less accommodating to children's rights in the contemporary era.²⁰ These Muslim countries have not found a suitable formulation, utilising both *fiqh* and human rights instruments, to fulfil children's rights. However, some other Muslim countries have progressively resolved cases related to the civil rights of children born out of unregistered marriages and non-marital unions.²¹

Unlike previous studies, this article compares state law and judicial practices in child filiation cases affecting maintenance and inheritance rights in Indonesia, Malaysia, and Turkey. These three countries were chosen due to their adoption of different legal systems: Indonesia, with its Muslim majority, follows a civil law system; Malaysia employs a Sharia approach; and Turkey has undergone legal secularization.²² This article employs a desk research method with a juridical-normative approach. Primary data consist of regulations and judicial practices related to filiation law and children's rights based on the parents' marital status in the aforementioned countries. Additionally, several fatwas (legal opinions) and international human rights conventions serve as secondary data sources. Literature data is discussed comparatively with a juridical-normative approach²³ and analysed through Ahmed Fekry Ibrahim's theory of Islamic legal episteme. This theory elucidates the proportion of adoption of *fiqh* and other legal instruments that influence changes in legal methodology in the formulation of laws.²⁴

Child Filiation and Its Impact on Children's Rights: A *Fiqh* Perspective

Children's filiation refers to the familial relationship between children and their parents, determined by the marital status of the parents, either singularly with the mother, father, or both.²⁵ Maternity pertains to the relationship between the mother and child, while paternity refers to that between the father and child. These two filiations are assessed through the lenses of two distinct subjects:²⁶ the state, which establishes filiation based on biological ties, and Islamic law, which determines filiation through *nasab*, or lineage. While *nasab*

²⁰ See: Delfina Serrano-Ruano, "The Duration of Pregnancy in Contemporary Islamic Jurisprudence (Fiqh) and Legislation: Tradition, Adaptation to Modern Medicine and (In)Consequences," *The Muslim World* 112, no. 3 (July 26, 2022): 368; Jean-Philippe Dequen, "Filiation and Adoption Among Muslims in India: The Quagmires of a Religious Minority Law," *Journal of Law and Religion* 34, no. 3 (December 17, 2019): 29.

²¹ See: Haniah Ilhami, "Kontribusi Fatwa MUI No. 11 Tahun 2012 tentang Anak Hasil Zina dan Perlakuan terhadapnya dalam Hukum Keluarga Islam di Indonesia," *Mimbar Hukum* 30, no. 1 (February 15, 2018): 14–15; Asep Saepudin Jahar and Shubhan Shodiq, "Social and Religious Dimensions of Children's Inheritance in Turkey, Saudi Arabia and Indonesia," *MIQOT: Jurnal Ilmu-Ilmu Keislaman* 46, no. 1 (August 29, 2022): 48; Kiki Adnan Muzaki, Asep Saepudin Jahar, and Muhammad Amin Suma, "Reform of the Law of Inheritance in Turkey and Tunisia," *AL-'ADALAH* 17, no. 2 (February 19, 2021): 249.

²² See: Rohmawati Rohmawati and Ahmad Rofiq, "Legal Reasonings of Religious Court Judges in Deciding the Origin of Children: A Study on the Protection of Biological Children's Civil Rights," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 21, no. 1 (June 30, 2021): 16; Hikmet Kocamaner, "Regulating the Family through Religion: Secularism, Islam, and the Politics of the Family in Contemporary Turkey," *American Ethnologist* 46, no. 4 (November 10, 2019): 8.

²³ P. Ishwara Bhat, *Idea and Methods of Legal Research*, 1st ed. (New Delhi: Oxford University Press, 2020), 281–93.

²⁴ Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," 158.

²⁵ Mykitiuk, "Beyond Conception," 780.

²⁶ Andi Samsul Bahri, "Comparative Study: The Concept of Legitimate Children in the Perspective of Positive Law and Islamic Law," *Al-Bayyinah* 5, no. 1 (June 28, 2021): 55.

encompasses biological aspects, the reverse is not necessarily true; biological considerations do not inherently constitute *nasab*.²⁷ The perspectives of these two subjects yield divergent interpretations of filiation. Consequently, filiation can be elucidated through various terminologies, serving as a genealogical concept to ascertain human lineage. *Nasab*, as posited by Nurlaelawati and van Huis, denotes the descent determined by Islamic marriage contracts, making it a fundamental concept in Islamic jurisprudence for defining filiation.²⁸

The term ‘filiation’, as conceptualised by Anke Iman Bouzenitaa and Feryad A. Hussain, encompasses three distinct types of relationships.²⁹ Firstly, maternity signifies the inherent bond between mother and child, established unequivocally at birth, regardless of external validation, whether medical, legal, Islamic, or anthropological.³⁰ Maternity represents a fundamental aspect of genealogy, transcending subjective interpretations and embodying a straightforward kinship structure. However, the concept of filiation becomes notably complex when considering paternity, which comprises two primary dimensions: *nasab* paternity and biological paternity. *Nasab* paternity denotes the relationship between the child and the father within the framework of Islamic law, where legitimacy is determined based on marital status as prescribed by Islamic legal principles. Conversely, biological paternity relies on empirical evidence, such as DNA testing, to establish the genetic link between father and child, providing an objective means of verifying paternal lineage distinct from cultural or legal frameworks.

Essentially, the child’s filiation relationship considers the parents’ marital status. In two of these three typologies of filiation, *fiqh* only addresses maternity and *nasab* paternity. These two typologies ideally entail the contract of marriage.³¹ Therefore, without marriage, no *nasab* paternity is established between the child and the father. In *fiqh* studies, the mother’s gestation period determines the filiation relationship. According to Imām Abū Ḥanīfah, the establishment of the child’s filiation by *nasab* is only valid if the minimum time between childbirth and marriage is within six lunar months. Thus, even if sexual intercourse occurs without marriage, resulting in pregnancy, it can be converted into a legitimate marriage to perfect the *nasab* under the minimum timeframe mentioned above.³²

Without the establishment of paternity, the child’s rights,³³ including guardianship, maintenance, and inheritance, are adversely affected. Firstly, guardianship over a child born out of wedlock is typically assigned to the mother. Most classical *fiqh* scholars assert that the right to guardianship for a child in marriage is intertwined with the entitlement to

²⁷ Bouzenita and Hussain, “Psychological and Societal Impacts of Unknown Descent and The Islamic Objective of Nasab,” 172.

²⁸ Nurlaelawati and van Huis, “The Status of Children Born Out of Wedlock and Adopted Children in Indonesia: Interactions Between Islamic, Adat, and Human Rights Norms,” 361.

²⁹ Bouzenita and Hussain, “Psychological and Societal Impacts of Unknown Descent and The Islamic Objective of Nasab,” 172.

³⁰ Muhammad Rasyid et al., “Science and its Role in Changes in Islamic Legal Thought (An Analysis of Changes in the Fatwa of the Indonesian Ulema Council Due to Recent Scientific Findings),” *Syariah: Jurnal Hukum dan Pemikiran* 23, no. 2 (January 24, 2023): 122.

³¹ Ali, “A Step Too Far?,” 384.

³² Wahbah al-Zuhayli, *Fiqh Islam wa Adillatuhu*, Vol. X (Yogyakarta: Gema Insani, 2011), 28.

³³ Ali Abubakar, Juliana, and Maisyarah Rahmi Hasan, “The Right of a Child Outside the Legal Marriage of a Biological Father: The Analysis of Ḥifẓ al-Nafs as Law ‘Illat,” *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, no. 1 (June 30, 2021): 153.

inheritance.³⁴ Secondly, child maintenance is usually the mother's responsibility, as there is no legal filiation between the father and the child. As Wahbah Zuhaylī explains, the obligation to provide maintenance for children arises from the marital bond between both parents.³⁵ Thirdly, children lacking marital do not inherit from their biological fathers due to the conditions set forth by Ibn Rushd, as per the consensus of the majority of scholars (*jumbūr*). This applies particularly to children born under non-ideal circumstances, such as before the marriage contract or outside the prescribed time frame between birth and marriage.³⁶

The study of *fiqh* underscores the significance of the parents' marriage legitimacy as a filiation provision impacting the rights of the child. The establishment of *nasab* establishes rights and obligations between children and parents. Al-Zuhaylī explicates that the child's filiation with the mother constitutes a permanent *nasab* regardless of marital status. However, the child's filiation with the father is contingent upon legitimate marriage, unregistered marriage, or the father's acknowledgment of filiation.³⁷ Additionally, the views of Imām Mālik and Imām Abū Ḥanīfah stress that the acknowledgment of filiation lies solely with the father, granting him the right to determine paternity.³⁸ Consequently, paternity filiation becomes a complex *fiqh* study, necessitating new codification by several Muslim countries to safeguard the rights of non-marital children. These children, referred to as having biological paternity filiation, do not enjoy the same ideal status as those recognised under *fiqh*.³⁹

Child Filiation Based on Parental Marital Status: A National Law Perspective

Several countries' regulations establish the child's filiation relationship based on the parents' marital status.⁴⁰ Filiation status typically encompasses three elements: maternity, biological paternity, and *nasab* paternity. Among these, it is understood that maternity filiation exists in all marital conditions. However, differences arise regarding biological and *nasab* paternity filiation in various marital contexts, typically categorised into three types. First, in a legitimate (registered) marriage, where the child's filiation status inherently encompasses all three elements. In this scenario, the term biological paternity is applied without requiring medical proof, as it is already fulfilled by *nasab* paternity through a legitimate marriage, which is officially recognised by the government.⁴¹

Secondly, unregistered marriages lack the same legal certainty as registered marriages. This type of marriage poses a risk of depriving children of their civil rights since the child

³⁴ Sayyid Sabiq, *Fikih Sunnah*, Vol. III, (Bandung: Al Ma'Arif, 1996), 378.

³⁵ Wahbah al-Zuhaylī, *Fiqh Islam wa Adillatuhu*, Vol. IX (Yogyakarta: Gema Insani, 2011), 97.

³⁶ Ibnu Rusyd, *Bidayatul Mujtabid*, Vol. II, ed. Ahmad Abu al Majd, Takhrij (Jakarta: Pustaka Azzam, 2007), 717.

³⁷ Zuhaili, *Fiqh Islam wa Adillatuhu*, X: 27.

³⁸ Rusyd, *Bidayatul Mujtabid*, II: 713.

³⁹ Dörthe Engelcke, "Establishing Filiation (Nasab) and the Placement of Destitute Children into New Families: What Role Does The State Play?," *Journal of Law and Religion* 34, no. 3 (December 24, 2019): 420.

⁴⁰ Zainal Muttaqin, "Formalization of Islamic Law in Indonesia in the Framework of Social Engineering Theory by Roscoe Pound," *El-Masblahah* 11, no. 2 (December 23, 2021): 112.

⁴¹ Souha Korbatiéh, "Evidence Laws in Sharia and the Impact of Modern Technology and DNA Testing," *Australian Journal of Islamic Studies* 5, no. 3 (December 6, 2020): 15–16.

only has the certainty of filiation with the mother (maternity).⁴² However, to establish legal certainty of paternity filiation, a legal mechanism of recognition and proof in court must affirm the child's status as having paternity filiation. The child is recognised as having both biological and *nasab* paternity filiation simultaneously due to the acknowledgment of the parents' marriage by the government. Therefore, this type of marriage has the potential to be equated with a registered marriage, granting the child similar rights.⁴³

Thirdly, children born out of wedlock have a civil relationship with their mothers. Due to the absence of both legitimate and unregistered marriage ties, paternity filiation is only addressed concerning biological children. In Muslim countries, particularly in the Middle East, the filiation between children and fathers is often not determined in this marital condition.⁴⁴ However, some countries, like Indonesia and Turkey, have legal mechanisms to establish paternity in such cases.⁴⁵ Maternity filiation is solely attributed to the child, whereas biological and *nasab* paternity filiation is not automatically recognised among the three marriage conditions.

Indonesia

Provisions regarding the filiation of children based on the marriage of both parents are outlined in Law No. 1 of 1974 on Marriage (Marriage Law) and Presidential Instruction No. 1 of 1991 on the Dissemination of the Compilation of Islamic Law (KHI). Article 42 of the Marriage Law states that a legitimate child is born within or as a result of a legitimate marriage.⁴⁶ Similarly, Article 99, paragraph (1) of the KHI explains that a legitimate child is born within or as a result of a legitimate marriage.⁴⁷ These regulations elucidate the ideal scenario of the child's filiation relationship within a legitimate marriage, where children have both maternity and biological paternity as well as *nasab* filiation. However, in Indonesia, there are other marital conditions aside from legitimate marriages, such as children born from unregistered marriages, commonly referred to as children from unregistered marriages (Indonesian: *nikah sirri*).

In this type of marriage, the rules above illustrate a polemic regarding the filiation between the father and the child, where no kinship or filiation relationship is established.⁴⁸ However, in the evolution of Indonesian law, the legal principle explaining paternity filiation in unregistered marriages can be validated under Constitutional Court Decision No. 46/PUU-VIII/2010. This decision elucidates the existence of a mechanism to establish paternity filiation in court. Furthermore, there was a response to this decision through the

⁴² Ladan Rahbari, "Marriage, Parentage and Child Registration in Iran: Legal Status of Children of Unmarried Parents," *Social Sciences* 11, no. 3 (March 10, 2022): 5.

⁴³ Tuba Erkoc Baydar, "A Secret Marriage and Denied Rights: A Critique from an Islamic Law Perspective," *Religions* 14, no. 4 (March 30, 2023): 12–13.

⁴⁴ Ainur Nadhrah Roslan, Nik Sarah Adilah Abdul Aziz, and Fathin Izzati Mohd Shahrudin, "Discrimination Against an Illegitimate Child According to Law and Society," *Current Legal Issues* 3 (2021): 20–21.

⁴⁵ Amal Fathullah and Muhammad Abduh, "The Relationship of Children and Their Biological Father (Comparative Study of Positive Law of Indonesia, Thailand and Jordan)," *SYARLAH: Jurnal Hukum dan Pemikiran* 22, no. 2 (2022): 214.

⁴⁶ "Marriage Law No. 1 of 1974," Article 42.

⁴⁷ "Presidential Instruction No. 1 of 1991 on Compilation of Islamic Law," Article 99 paragraph (1).

⁴⁸ See: "Marriage Law No. 1 of 1974," Article 43 paragraph (1); "Presidential Instruction No. 1 of 1991 on Compilation of Islamic Law," Article 186.

enactment of Supreme Court Circular Letter (SEMA) No. 7 of 2012, which specifies that the determination of filiation of children born in unregistered marriages can be brought before the Religious Court. These two legal reforms shed light on the matter of filiation concerning children born in unregistered marriages, categorising them as legitimate children despite the performance of marriages according to Islamic law provisions without state-facilitated registration.⁴⁹

The decision of the Constitutional Court not only provides legal certainty regarding filiation for children born from unregistered marriages but also establishes certainty regarding paternity filiation in cases of non-marital relationships. This decision amended Article 43 of the Marriage Law, ensuring that not only maternity filiation but also children born out of wedlock have a recognised paternity filiation.⁵⁰ However, the Constitutional Court's Decision sparked controversy among Muslims in Indonesia due to concerns that children born out of wedlock would have the same legal status as children born within marriage.⁵¹ This controversy prompted a response from the Indonesian Ulema Council (MUI), which issued Fatwa No. 11 of 2012 on the Status and Treatment of Children Born out of Zina (adultery). This fatwa codifies the legal status of children born out of wedlock, referred to as 'children of adultery', and denies them paternity filiation status.⁵²

Nurlaelawati and van Huis elucidate that within the Religious Courts, a term is used to designate the status of children born out of wedlock, whereby they are recognised as natural children of the mother and biological children of the father.⁵³ This terminology reflects a distinct form of religious and state legal recognition.⁵⁴ The rulings of the Constitutional Court and the MUI Fatwa⁵⁵ have significantly impacted subsequent decisions made by the Religious Courts.⁵⁶ These legal developments are evident in the verdicts of the religious courts, which delineate the distinction between children acknowledged as natural offspring biologically and

⁴⁹ See: A. Mukti Arto, "Gugatan Nafkah Anak Luar Nikah sebagai Ta'zir dan Penyelesaiannya di Pengadilan Agama," Badan Peradilan Agama, 2013, <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/gugatan-nafkah-anak-luar-nikah-sebagai-tazir-dan-penyelesaiannya-di-pengadilan-agama-oleh-a-mukti-arto-152>; Nofaldi et al., "The Ambiguity of Using the Statement of Absolute Responsibility Based on Minister of Home Affairs Regulation Number 109 of 2019: Study in Dharmasraya Regency, West Sumatra Province, Indonesia," *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 23, no. 1 (June 29, 2023): 118.

⁵⁰ Indonesian Constitutional Court Decision No. 46/PUU-VIII/2010.

⁵¹ In a press conference, Member Judge (Ahmad Fadlil Sumadi) explained: "*The Court only focuses on the protection of innocent children who have been stigmatized without their fathers. And it must be understood that protecting children and the issue of adultery are two different legal regimes.*" See: "Putusan MK Semata Lindungi Anak Luar Kawin," Hukumonline, 2012, <https://www.hukumonline.com/berita/a/putusan-mk-semata-lindungi-anak-luar-kawin-lt4f573e2151497/>; Ilhami, "Kontribusi Fatwa MUI No. 11 Tahun 2012 tentang Anak Hasil Zina dan Perlakuan terhadapnya dalam Hukum Keluarga Islam di Indonesia," 3.

⁵² Fatwa of the Ulema Council of Indonesia No. 11 of 2012.

⁵³ South Jakarta Religious Court Verdict No. 96/Pdt.P/2016/PA.JS.

⁵⁴ Nurlaelawati and van Huis, "The Status of Children Born Out of Wedlock and Adopted Children in Indonesia: Interactions Between Islamic, Adat, and Human Rights Norms," 371.

⁵⁵ See: Ibnu Elmi Achmat Slamet Pelu and Jefry Tarantang, "Fatwa Majelis Ulama Indonesia sebagai Solusi Permasalahan Umat Islam di Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 14, no. 2 (December 3, 2020): 315.

⁵⁶ Abubakar, Juliana, and Hasan, "The Right of a Child Outside the Legal Marriage of a Biological Father," 171.

through *nasab*. Moreover, the MUI Fatwa serves as a non-state legal codification, offering an alternative reference for Muslims in Indonesia.⁵⁷

An example of the application of separating biological and *nasab* children can be found in South Jakarta Religious Court Verdict No. 96/Pdt.P/2016/PA.JS. In this case, the court granted the application of a father as applicant I and a mother as applicant II for establishing guardianship. The judge determined that the relationship between the mother and the child was based on *nasab*, while the relationship between the father and the child was considered biological.⁵⁸ This verdict was a direct implementation of the Constitutional Court Decision aimed at safeguarding children's rights to their civil liberties.⁵⁹ The harmonisation of these two legal provisions offers a novel legal interpretation that distinguishes between legitimate and illegitimate children in terms of paternity, thereby addressing the complexity of non-marital children's rights by employing the terms *nasab* and biological children.⁶⁰ Naturally, the procedures to achieve this are formulated to preserve the child's inherent nature, emphasising their need to be cared for, protected, and supported. Thus, this approach provides legal certainty for children regardless of their parents's marital status.

Malaysia

Two laws in Malaysia partially address the filiation of Muslim children. The Islamic Family Law (Federal Territories) 1984 (Act 303) regulates the filiation status of children born from two marital conditions.⁶¹ Firstly, children from legitimate marriages, born more than six months after the marriage, are acknowledged.⁶² Secondly, children from unregistered marriages are also recognised, despite the absence of state registration, as long as the marriage adheres to the *fiqh* conditions.⁶³ Their filiation status is determined similarly to that of children from legitimate marriages. Thirdly, the filiation status of non-marital children remains uncertain. The 2017 Fatwa of the Mufti Wilayah-Wilayah Persekutuan (PMWP) on Illegitimate Children and the Parentage of Illegitimate Children clarifies that such children do not have a filial relationship with their fathers. In Malaysia, this fatwa holds legal certainty under the Administration of Islamic Law (Federal Territories) 1993 (Act 505).⁶⁴ Following the implementation of the fatwa, courts in the Federal Court, Appeal Court, and High Court

⁵⁷ Umarwan Sutopo, "Dialektika Fatwa dan Hukum Positif di Indonesia: Meneguhkan Urgensi dan Posisi Fatwa di Masyarakat Muslim Nusantara," *Justicia Islamica* 15, no. 1 (December 29, 2018): 99.

⁵⁸ Hazar Kusmayanti et al., "Judges' Acceptance of Sharia-Inspired Laws in Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 17, no. 2 (October 27, 2023): 210.

⁵⁹ South Jakarta Religious Court Verdict No. 96/Pdt.P/2016/PA.JS.

⁶⁰ Ilhami, "Kontribusi Fatwa MUI No. 11 Tahun 2012 tentang Anak Hasil Zina dan Perlakuan terhadapnya dalam Hukum Keluarga Islam di Indonesia," 14–15.

⁶¹ Wan Abdul Fattah Wan Ismail et al., "A Comparative Study of the Illegitimate Child Term from Shariah and Malaysia Legal Perspective," *Humanities & Social Sciences Reviews* 8, no. 4 (July 10, 2020): 107.

⁶² See: Laws of Malaysia, "Islamic Family Law (Federal Territories) Act 1984 (Act 303)," Article 110; Meerah Dewi Raja Gopal, "Does Illegitimacy Status of Children Matter? A Review on Malaysian Perspectives," *International Journal of Applied Psychology* 5, no. 4 (2015): 112.

⁶³ Laws of Malaysia, "Islamic Family Law (Federal Territories) Act 1984 (Act 303)" Article 113.

⁶⁴ Laws of Malaysia, "Administration of Islamic Law (Federal Territories) Act 1993 (Act 505)" Article 34.

rejected cases regarding the filiation status of non-marital children. This fatwa has sparked controversy in discussions regarding the legitimacy of paternity for non-marital children.⁶⁵

Another impediment leading to the rejection of civil registration in Malaysia⁶⁶ is the recognition that children's civil rights are only legitimised through marriage under Islamic law.⁶⁷ This constraint underscores the authority of religion and the state to implement *fiqh* in modern legal frameworks,⁶⁸ thereby upholding the integrity of *fiqh* schools in Muslim countries. The Malaysian government acknowledges paternity solely within the context of legal marriage, deeming it as the legal basis for obligating a father's responsibility towards his child, but not for non-marital children. This exemplifies the uncompromising nature of *fiqh* as a legal reference, wherein no other interest can supersede its authority.⁶⁹

Turkey

There is a single regulation addressing child filiation based on each parent's marital status, namely Law No. 4721 of 2001 on the Turkish Civil Code (TCC). This regulation marks a departure from the previous *fiqh*-based codification. Turkey demonstrates a more progressive stance by equally recognising the legitimacy of children in both maternity and paternity filiation.⁷⁰ Three articles within the TCC delineate the filiation of children in three marital conditions. Firstly, it addresses children born during a marriage.⁷¹ Secondly, it pertains to children from unregistered marriages, with their recognition contingent upon registration in the civil registry. Thirdly, the regulation treats non-marital children on par with children born within a marriage.⁷²

Turkey's legal framework reflects marital rules similar to those in European or Western legal cultures. The history of the TCC rules illustrates⁷³ civil marriage as a private matter of subjective legal capacity, rendering Islamic legal norms irrelevant. Turkey prioritises secular marriage rules,⁷⁴ unlike Islamic legal norms, which necessitate objectivity in formulations

⁶⁵ Muhammad Mustaqim Roslan, "Argument Methodology Against Fatwa Conviction of Illegitimate Children's Lineage in Malaysia: Analysis of the Appointment Name to Abdullah," *Journal of Muwafaqat* 6, no. 2 (2023): 31.

⁶⁶ The rejection of the National Registration Department (JPN Malaysia) was based on article 13 of the Birth and Death Registration Act 1957 that a child can only bear the name of the father in a legitimate marriage. See: Kelly Buchanan, "Malaysia: Federal Court Holds that Illegitimate Muslim Child Cannot Use Father's Last Name," Library of Congress, 2020, <https://www.loc.gov/item/global-legal-monitor/2020-03-06/malaysia-federal-court-holds-that-illegitimate-muslim-child-cannot-use-fathers-last-name/>.

⁶⁷ Najwa Fudil, Rafeah Saidon, and Noorul Huda, "Children's Rights in Maintenance Management According to the Perspective of the Islamic Family," *International Journal of Law, Government and Communication* 7, no. 28 (June 22, 2022): 219.

⁶⁸ Moors, "Debating Islamic Family Law," 157.

⁶⁹ Bahiyah Ahmad et al., "Assessing the Rate of Child Maintenance (Financial Support) from a Shariah Perspective: The Case of Malaysia," *Al-Jami'ab: Journal of Islamic Studies* 58, no. 2 (December 7, 2020): 300.

⁷⁰ Binnaz Toprak, "Islam and Democracy in Turkey," *Turkish Studies* 6, no. 2 (January 25, 2005): 167.

⁷¹ "Turkish Code of Civil Law No. 4721 of 2001," Article 282.

⁷² "Turkish Code of Civil Law No. 4721 of 2001," Articles 292–293.

⁷³ Ihsan Yilmaz, "Semi-Official Turkish Muslim Legal Pluralism: Encounters between Secular Official Law and Unofficial Shari'a," in *Boundaries of Religious Freedom: Regulating Religion in Diverse Societies*, ed. Adam Possamai, James T. Richardson, and Bryan S. Turner, 1st ed., vol. 1 (Cham: Springer International Publishing, 2015), 63.

⁷⁴ Ahmet Temel, "Between State Law and Religious Law: Islamic Family Law in Turkey," *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 8, no. 1 (2020): 76.

derived from Islamic law sources and arguments.⁷⁵ The non-marital children are entitled to civil rights and social security. Article 292, referencing Article 185, stipulates that spouses bear responsibility for mandates undertaken.⁷⁶

There are alternative methods for determining the legitimacy of children. Legitimacy is only conferred upon a child through the acknowledgment of both parents on an inter-subjective basis, as outlined in Articles 282, 293, and 292 of the TCC. However, establishing legitimacy for non-marital children requires evidence in a civil court. Article 303 of the TCC delineates the legal mechanism for establishing paternity in court, applicable within one year after the child's birth due to the 'presumption of paternity' initiated by the child's mother.⁷⁷ However, the one-year limitation on filing a paternity determination resulted in potential injustice experienced by both the mother and child. In 2012, the Turkish Constitutional Court invalidated the first paragraph of Article 303 of the TCC.⁷⁸

The regulations concerning child filiation represent a form of legal reform in each respective country. The transition from *fiqh* to normative law introduces flexible legal norms. State-formulated regulations become more humanistic by reassessing rights for the future, particularly those of children.⁷⁹ This trend is evident in Indonesia⁸⁰ and Turkey, where broader opportunities are created to ensure children's rights, including in non-marital conditions. Conversely, Malaysia's legal discourse does not favour the rights of non-marital children. According to Ibrahim, Malaysia's legal landscape fails to offer new opportunities for such children, adhering instead to a puritan-scripturalist approach that eschews Western discourse in modernity.⁸¹

Child Filiation and Its Implications on Child Maintenance and Inheritance Rights

The three terms of a child's filiation significantly influence the fulfilment of the child's right to be cared for. Ideally, children should have both maternity and paternity filiation.⁸² However, variations in marital conditions lead to changes in filiation status. In Islamic law, filiation serves as a foundation for various aspects of legal certainty in the future,⁸³ including family identity, guardianship, maintenance, and inheritance, where filiation determines the continuity of these legal principles.⁸⁴ In cases where a marriage is annulled but pregnancy and

⁷⁵ Meirison, Desmadi Saharuddin, and Husnul Fatarib, "The Dynamics of Islamic Jurisprudence in the Eyes of Contemporary Muslims," *El-Mashlahab* 12, no. 1 (June 30, 2022): 82.

⁷⁶ See: "Turkish Code of Civil Law No. 4721 of 2001," Article 158; Funda Ustek Spilda and Oguz Alyanak, "The Case of Children Born out of Wedlock in Turkey: An 'Empty' Category?," *About Gender* 5, no. 10 (2016): 268.

⁷⁷ "Turkish Code of Civil Law No. 4721 of 2001," Articles 302–303.

⁷⁸ Anayasa Mahkemesinin E: 2011/116, K: 2012/39 Sayılı Kararı, accessed September 10, 2023.

⁷⁹ Moors, "Debating Islamic Family Law," 144.

⁸⁰ Afridawati, "History, Typology, and Implementation of Islamic Law in Indonesia: Combination of Sharia and Fiqh or the Result of Historical Evolution?," *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 21, no. 1 (June 30, 2021): 44.

⁸¹ Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," 167.

⁸² Kelly Oliver, "Conflicted Love," *Hypatia* 15, no. 3 (March 25, 2000): 16.

⁸³ Sakirman, "Telaah Hukum Islam terhadap Nasab Anak," *HUNAF: Jurnal Studia Islamika* 12, no. 2 (January 22, 2016): 364.

⁸⁴ M Jamil, "Nasab dalam Perspektif Tafsir Ahkam," *Ahkam: Jurnal Ilmu Syariah* 16, no. 1 (January 28, 2016): 126–28.

birth occur, only maternity is established for the child. Consequently, paternity is nullified due to the absence of marriage, a prerequisite for Islamic law's genealogical provisions.⁸⁵

Table 1

Maintenance and Inheritance Rights of Children Based on Parental Marital

No.	Countries	Legitimate Marriage (Registered)	Unregistered Marriage	Non-Marital Union
1.	Indonesia	Maintenance and inheritance rights of children from both parents' wealth	Maintenance and inheritance rights of children from both parents' wealth	Maintenance and inheritance rights of children from both parents' wealth through judicial practice
2.	Turkey			Maintenance and inheritance rights of children from mother's wealth
3.	Malaysia			

Source: Analyses from Multi-Sources, 2024.

In Indonesia, children's rights to maintenance and inheritance are fully realised through legitimate (registered) marriages that simultaneously establish maternity and paternity filiation. In unregistered marriages and non-marital unions, the fulfilment of children's rights uses different mechanisms but is based on the same law.⁸⁶ The religious courts legalise children born from unregistered marriages under Supreme Court Circular Letter No. 07 of 2012 and Constitutional Court Decision No. 46/PUU-VIII/2010. These two regulations explain that the determination of a legitimate marriage must first be made by both parents, followed by applying for the status of the child (the origin of the child) born from an unregistered marriage. This mechanism was seen in the Samarinda Religious Court Verdict No. 0282/Pdt.P/2016/PA.Smd, where the applicant, a father, sought a determination of the origin of two children. The verdict revealed evidence of a remarriage performed before a marriage registration officer in 2010, after an unregistered marriage in 1999. The judgment proved that the children were born after the unregistered marriage, in 2000 and 2006. The judge established that both children, with evidence of paternity, were legally recognised as children with paternity filiation.⁸⁷

In the case of a child from a non-marital union, three legal mechanisms were considered in the Kediri Religious Court Verdict No. 5/Pdt.P/2016/PA.Kdr, the Constitutional Court Decision, KHI, and the MUI Fatwa. These determine the child's maintenance and inheritance rights as a biological child, ensuring the protection of their civil rights.⁸⁸ This decision aligns with the Constitutional Court's ruling, which still grants inheritance rights to children based on KHI Article 186 and the MUI Fatwa. This introduces a distinction in the mechanisms governing maintenance and inheritance rights for non-

⁸⁵ Ayman Shabana, "Law and Ethics in Islamic Bioethics: Nonmaleficence in Islamic Paternity Regulations," *Zygon: Journal of Religion and Science* 48, no. 3 (September 23, 2013): 711.

⁸⁶ Nurlaelawati and van Huis, "The Status of Children Born Out of Wedlock and Adopted Children in Indonesia: Interactions Between Islamic, Adat, and Human Rights Norms," 364–65.

⁸⁷ Samarinda Religious Court Verdict No. 0282/Pdt.P/2016/PA.Smd.

⁸⁸ Kediri Religious Court Verdict No. 5/Pdt.P/2016/PA.Kdr.

marital children,⁸⁹ allowing biological children to receive similar rights to maintenance and inheritance through an alternative guarantee known as paternity support and mandatory will (*waṣīat wājibah*). These are determined by the Religious Court to ensure legal certainty of the child's rights.⁹⁰

In Malaysia, a significant difference lies in the rights of non-marital children. Among the three countries compared, the father has no obligation to provide maintenance or inheritance for the biological child. The Malaysian government places the sole responsibility for maintenance and inheritance on the mother. This stance has sparked controversy among Malaysian society and elites,⁹¹ leading to domestic debates.⁹² The lack of paternal responsibility for children with biological paternity filiation status is underscored by the PMWP Fatwa of 2017. Consequently, a child without a father lacks legal certainty in terms of filiation.⁹³ Furthermore, in addition to the disparities in children's rights, legal discrimination against Muslim non-marital children distinguishes them from non-Muslim children with similar circumstances in the country.⁹⁴

With the closed mechanism of determining the paternity of non-marital children, the Fatwa carries binding legal force for the Muslim community in the country. Imposing maintenance and inheritance obligations solely on the child's mother places a heavy burden on her.⁹⁵ This obligation ideally supports the child's maintenance,⁹⁶ yet it represents an inequality in the child's right to receive maintenance from both parents.⁹⁷ An alternative, albeit naive, is to allocate the obligation to the mother's family, given their relationship to the child. However, other considerations to safeguard the child's welfare include assigning

⁸⁹ Ansori Ansori, "Position of Fatwa in Islamic Law: The Effectiveness of MUI, NU, and Muhammadiyah Fatwas," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, no. 1 (July 29, 2022): 68–69.

⁹⁰ See: Fatwa of the Ulema Council of Indonesia No.11 of 2012; Rohmawati and Rofiq, "Legal Reasonings of Religious Court Judges in Deciding the Origin of Children," 2. In the practice of religious courts in Indonesia, mandatory will is also given to non-Muslim relatives. See: Muhammad Lutfi Hakim and Khoiruddin Nasution, "Accommodating Non-Muslim Rights: Legal Arguments and Legal Principles in the Islamic Jurisprudence of the Indonesian Supreme Court in the Post-New Order Era," *Oxford Journal of Law and Religion* 11, no. 2–3 (July 25, 2023): 288–313; Aden Rosadi and Siti Ropiah, "Reconstruction of Different Religion Inheritance through Wajibah Testament," *Jurnal Ilmiah Peuradeun* 8, no. 2 (May 30, 2020): 327–50.

⁹¹ Roslan, Aziz, and Shahrudin, "Discrimination Against an Illegitimate Child According to Law and Society," 16.

⁹² Wan Ismail et al., "A Comparative Study of the Illegitimate Child Term from Shariah and Malaysia Legal Perspective," 105.

⁹³ Non-marital children registered without the father's name were recorded by the Malaysian Child Rights Coalition at 85,000. See: Jason Loh and Juhi Todi, "'Pre-Marital' Children in Malaysia - Addressing the Issue," *Astro AWANI*, 2023, <https://www.astroawani.com/berita-malaysia/columnist-premarital-children-malaysia-addressing-issue-402341?>

⁹⁴ Burhanudin Harahap, I Gusti Ayu Ketut Rachmi Handayani, and Lego Karjoko, "Non-Muslims and Sharia-Based Regional Government: Comparison between Aceh, Indonesia and Selangor, Malaysia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 18, no. 2 (November 19, 2023): 384–85.

⁹⁵ Mardia Mazri, "Siapakah yang Menanggung Nakfah Anak Tak Sah Taraf?," *Pejabat Mufit Wilayah Persekutuan*, 2020, <https://muftiwp.gov.my/ms/artikel/al-kafi-li-al-fatawi/4378-al-kafi-1681-siapakah-yang-menanggung-nakfah-anak-tak-sah-taraf>.

⁹⁶ Andi Sukmawati Assaad et al., "Gender Equity in Inheritance System: The Collaboration of Islamic and Bugis Luwu Customary Law," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 2 (December 31, 2022): 469.

⁹⁷ Busran Qadri and Ihsan Mulia Siregar, "Islamic Renewal in the Field of Family Law: A Historical Analysis of Gender Equality," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 2 (2023): 453.

guardianship rights to other responsible parties for the child's maintenance. Nonetheless, granting the mother's judgment prerogative may be more effective.⁹⁸

In Turkey, there are specific provisions for children in each marital status.⁹⁹ Turkey's Filiation laws exhibit greater dynamism than the other countries in this study. This can be attributed to the secularisation of the Turkish government and its adoption of modern legal approaches influenced by a Western (European and American) perspective.¹⁰⁰ Article 498 of the TCC simplifies the rules regarding paternity filiation by addressing maintenance and inheritance rights within the inheritance law section.¹⁰¹ This provides legal certainty for non-marital children to inherit from their fathers. Additionally, Articles 301-304 of the TCC outline the process for filing paternity cases, allowing mothers to sue fathers suspected of being the biological fathers of their children in the civil courts. Notably, this is without considering the timing of pregnancy and birth, as stipulated in the amendment of Article 303 of the TCC by the Constitutional Court.

Across the three countries, child filiation laws and provisions significantly impact children's maintenance and inheritance rights. Ideally, children born from legitimate marriages enjoy a favourable situation. However, the scenario differs for children born under the other two marital conditions. In Indonesia, there is equality in children's maintenance and inheritance rights, ensuring justice for all children.¹⁰² Likewise, Turkey acknowledges both biological and *nasab* paternity as legally binding, reflecting a 'status quo' established by legal provisions mandated by the Turkish Constitution to safeguard children's rights.¹⁰³ Malaysia takes a more conservative approach, incorporating Islamic law into positive law without substantially altering the traditional *fiqh*.¹⁰⁴

Paternity constitutes a multifaceted domain that can be elucidated through a human rights perspective aimed at ensuring more excellent accommodation of children and their rights.¹⁰⁵ Human rights principles, as outlined in the Convention on the Rights of the Child (CRC)—specifically in articles 7(1), 8(1), 9(3), and 18(3)—emphasize parental obligations that translate into rights for children, ensuring their well-being and sustenance.¹⁰⁶ These obligations resemble the concept of child maintenance and inheritance within Islamic principles, serving as mechanisms for safeguarding children. However, this complexity

⁹⁸ Laws of Malaysia, "Islamic Family Law (Federal Territories) Act 1984 (Act 303)," Article 110.

⁹⁹ Ozcan Gunergok, "Türk Medeni Kanununun Yürürlüğü ve Uygulama Şekli Hakkında Kanunun Mal Rejimleri Bakımından Değerlendirilmesi," *Erzincan Binali Yıldırım Üniversitesi Hukuk Fakültesi Dergisi* VI, no. 1–4 (2002): 333–44.

¹⁰⁰ Jahar and Shodiq, "Social and Religious Dimensions of Children's Inheritance in Turkey, Saudi Arabia and Indonesia," 48.

¹⁰¹ "Turkish Code of Civil Law No. 4721 of 2001," Article 498.

¹⁰² Arbanur Rasyid, "Social Fiqh and its Implications for Community Life in Society 5.0," *Al-Ahkam* 31, no. 2 (October 31, 2021): 141.

¹⁰³ Republic of Türkiye, "Türkiye Cumhuriyeti Anayasası" (1982), Article 41 Paragraph (3).

¹⁰⁴ Sayed Sikandar Shah Haneef, "Women and Malaysian Islamic Family Law: Towards a Women-Affirming Jurisprudential Reform," *Journal of Social Welfare and Family Law* 33, no. 1 (March 17, 2011): 47–49.

¹⁰⁵ Mikhail A. Gushev et al., "Legal Problems of the Paternity Institution: Child's Rights Ensuring Issues," *Rivista Di Studi Sulla Sostenibilità* 1, no. 1 (August 2020): 267.

¹⁰⁶ Convention on the Rights of the Child, Article 7 paragraph 1, Article 8 paragraph 1, Article 9 paragraph 3, Article 18 paragraph 3.

underscores the need for a paradigm shift in fulfilment.¹⁰⁷ The dichotomy between legitimate and illegitimate children delineated by Islamic law creates an imbalance in rights fulfilment, with disparities observed in the rights accorded to children solely by the mother versus those jointly by both parents. Across the three countries examined, variations in children's rights stem from the parents' marital status.

Maintenance and Inheritance Rights of Non-Marital Children: Disparities in Legal Systems and the Adoption of *Fiqh* Schools

The preceding discussion has examined the maintenance and inheritance obligations concerning children born under three marital conditions (see Table 1). It has scrutinised the importance of filiation in determining children's entitlements to maintenance and inheritance. Both parents are responsible for maintenance and inheritance in legitimate and unregistered marriages. However, for children born out of wedlock, their rights hinge upon judicial proceedings, influenced by their filiation to the paternal lineage—biological or *nasab*—based.¹⁰⁸ Upon scrutiny of Indonesia, Turkey, and Malaysia, courts in Indonesia and Turkey tend to recognise and enforce complete maintenance and inheritance rights from both parents. Conversely, in Malaysia, non-marital children are typically under the sole care of the mother, highlighting disparities in regulations and judicial practices regarding children's rights from both parents.

The disparities in child maintenance regulations and judicial practices stem from the divergent legal systems among the three countries, encompassing common law and civil law systems intertwined with an Islamic law approach.¹⁰⁹ Nations following civil law systems, such as Indonesia and Turkey, have formulated legal codifications that cater to children's rights. This reform extends beyond *fiqh* to incorporate elements of children's human rights outlined in the Convention on the Rights of the Child, enriching the legal framework.¹¹⁰ Such legal reforms are imperative for safeguarding the rights and welfare of children post-divorce.¹¹¹ Ibrahim characterises this legal evolution in Muslim nations as neo-*ijtihad* (legal reasoning).¹¹² In contrast, Malaysia's common law system results in partial regulation, particularly for Muslims, who integrate classical *fiqh* (*turāth*) into positive legal frameworks.¹¹³ These discrepancies in legal systems contribute to the development of family law codifications across the three countries.¹¹⁴

¹⁰⁷ Ahmad Rajafi, Ressi Susanti, and Ahmad Elmawan M. Alhanif, "Humanist Fiqh Developed by KH. Ahmad Rifa'i Arief Banten, Indonesia," *JURIS (Jurnal Ilmiah Syariah)* 22, no. 1 (June 13, 2023): 34.

¹⁰⁸ Björn Bentlage, "Legislating for the Benefit of Children Born Out of Wedlock," *Die Welt Des Islams* 55, no. 3–4 (November 26, 2015): 397.

¹⁰⁹ Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (New York: Syracuse University Press, 2015), 31.

¹¹⁰ Ali, "A Step Too Far?," 384.

¹¹¹ Ismail Rumadan and Ummu Salamah, "Settlement of Divorce Dispute through the Forum of Mediation in Judicial Institutions as an Effort of Legal Protection for the Rights and Interests of the Child of Post-Divorce," *Syariah: Jurnal Hukum dan Pemikiran* 21, no. 2 (September 22, 2021): 213–26.

¹¹² Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History*, 281.

¹¹³ Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," 201.

¹¹⁴ Roxana Banu, "Conflicting Justice in Conflict of Laws," *Vanderbilt Journal of Transnational Law* 53, no. 2 (2020): 501.

Maternity filiation, biological paternity, and *nasab* paternity are delineated within each marital status in Indonesia. The implementation of the Constitutional Court's Decision is deemed dynamic in reassessing the certainty of children's filiation and their civil rights in the context of unregistered marriages and non-marital unions.¹¹⁵ Legal reasoning for non-marital children transcends the realms of marriage and *nasab* concepts, constituting a crucial component of Islamic genealogical law. Despite judicial practices and scholars' perspectives not rejecting the notion of biological children employing *fiqh* reasoning, particularly with the *istidlāl* method (legal inference) of the Shāfi'īyah school of thought, biological fathers remain obligated to provide care for their children as per the rulings of the Constitutional Court and the MUI fatwa.¹¹⁶ Consequently, the filiation of biological paternity and *nasab* is distinguished in the decisions of the Religious Court. The child only attains legal certainty as the biological offspring of the father, implying that biological paternity filiation represents a promising alternative within Indonesia's legal framework.¹¹⁷

In Malaysia, the determination of a child's paternity adheres to the Ḥanafīyyah school of thought, which stipulates a minimum birth interval of 180 days following a legitimate or unregistered marriage.¹¹⁸ This provision is enshrined in positive law, specifically the Islamic Family Law 1984 (Act 303). Essentially, this regulation does not alter the essence of the *ijtihad* of jurists.¹¹⁹ However, Malaysia has expressed reservations regarding Article 2, paragraph (1) of the Convention on the Rights of the Child, thereby withholding ratification to ensure the rights of non-marital children.¹²⁰ Consequently, there is no substantive or formal legal provision guaranteeing the rights of Muslim non-marital children in matters of paternity filiation. This stance is further solidified by the PMWP fatwa, which holds binding authority under the Administration of Islamic Law 1993 (Act 505) and the Malaysian constitution.¹²¹

Secularisation in Turkey has led to the formulation of marriage and child filiation laws that integrate a reinterpretation of *fiqh* texts with modern legal principles.¹²² The rights of non-marital children are addressed through the obligation of each parent to ensure the child's entitlement to maintenance and inheritance,¹²³ as outlined in the TCC. This regulatory

¹¹⁵ Rohmawati and Rofiq, "Legal Reasonings of Religious Court Judges in Deciding the Origin of Children," 5.

¹¹⁶ See: Nurlaelawati and van Huis, "The Status of Children Born Out of Wedlock and Adopted Children in Indonesia: Interactions Between Islamic, Adat, and Human Rights Norms," 382; Taufiqurohman and Nelli Fauziah, "The Evaluation of Maqāsid Asy-Syarī'ah on Discourses of the Islamic Family Law," *El-Ushab: Jurnal Hukum Keluarga* 6, no. 1 (September 26, 2023): 75.

¹¹⁷ Kamarusdiana et al., "Pre-Marital Education: Concepts and Regulations in Indonesia and Malaysia," *Al-Ahkam* 32, no. 1 (April 28, 2022): 49.

¹¹⁸ This implementation is a crystallised law by adopting the universal principles of *fiqh*. See: Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," 201.

¹¹⁹ Haneef, "Women and Malaysian Islamic Family Law: Towards a Women-Affirming Jurisprudential Reform," 47–49.

¹²⁰ Malaysia's decision to recognise Islam as national religion. See: Shaheen Sardar Ali and Sajila Sohail Khan, "Evolving Conceptions of Children's Rights: Some Reflections on Muslim States' Engagement with the UN Convention on the Rights of the Child," in *Parental Care and the Best Interests of the Child in Muslim Countries*, ed. Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt (The Hague: T.M.C. Asser Press, 2017), 301.

¹²¹ Wan Ismail et al., "A Comparative Study of the Illegitimate Child Term from Shariah and Malaysia Legal Perspective," 106.

¹²² Ibrahim, *Pragmatism in Islamic Law*, 281.

¹²³ Yilmaz, "Semi-Official Turkish Muslim Legal Pluralism," 57.

framework reflects a more inclusive and dynamic approach influenced by the *ijtihād* of Imām Abū Ḥanīfah.¹²⁴ The determination of paternity filiation in the Civil Court aims to safeguard the child's rights, in line with the constitutional mandate that guarantees all children human rights to be upheld by both parents.¹²⁵ This development contributes to legal stability and underscores Turkey's nuanced perspective on the legal paradigm, transitioning from the evolution of *fiqh* schools to interpreting child protection as a fundamental aspect of human rights fulfilment.¹²⁶

The comparison of child maintenance and inheritance rights underscores the complexities inherent in different legal systems. Indonesia and Turkey, which predominantly adhere to a civil law framework, have enacted legal codifications that integrate a human rights approach while incorporating principles from *fiqh* schools of thought. The inclusion of *fiqh* is seen as a progressive step, as it seeks to interpret the obligation to provide care for the child as a form of punishment (*ta'zīr*) for the biological father.¹²⁷ Conversely, Malaysia, primarily operating within the common law system but heavily influenced by *fiqh*, establishes maternity filiation (albeit not absolute) based on Sharia provisions.¹²⁸ Meanwhile, in Turkey, the determination of paternity by civil courts encompasses both *nasab* and biological paternity, aiming to uphold the constitutional mandate that guarantees all children's human rights by both parents. This achievement reflects an embrace of legal pluralism, with its attendant benefits evident in promoting legal stability.¹²⁹ Consequently, Indonesia and Turkey offer nuanced perspectives on the legal paradigm, transitioning from the evolution of *fiqh* schools to interpreting child protection as a pivotal aspect of human rights fulfilment.¹³⁰

Conclusion

National laws in Indonesia, Malaysia, and Turkey regulate the filiation status of children based on three marital conditions: legitimate (registered) marriage, unregistered marriage, and non-marital union. These conditions give rise to differences in the child's filiation (maternity, biological paternity, and *nasab* paternity), which in turn have implications for the maintenance and inheritance rights acquired by the child from both parents. The laws of these countries specify that children born from a legitimate marriage are entitled to maintenance and inheritance rights from both parents. In contrast, children born from an unregistered marriage or a non-marital union only receive these rights from their mother. Mechanisms exist in the latter two marital conditions for the child to obtain maintenance and inheritance rights from the father through legal proceedings. In all three countries, children from unregistered marriages can secure their maintenance and inheritance rights from both parents

¹²⁴ Murteza Bedir, "Fikih to Law: Secularization Through Curriculum," *Islamic Law and Society* 11, no. 3 (2004): 399.

¹²⁵ Ibrahim, *Pragmatism in Islamic Law*, 31.

¹²⁶ Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," 161–62.

¹²⁷ Khoiruddin Nasution, "Philosophy of Islamic Marriage: Multidisciplinary Islamic Studies," *Istinbath: Jurnal Hukum dan Ekonomi Islam* 16, no. 1 (2017): 213.

¹²⁸ Haneef, "Women and Malaysian Islamic Family Law," 47–49.

¹²⁹ Ibrahim, *Pragmatism in Islamic Law*, 31.

¹³⁰ Ibrahim, "The Codification Episteme in Islamic Juristic Discourse between Inertia and Change," 161–62.

through a court verdict. However, there are significant disparities in non-marital children's maintenance and inheritance rights. In Indonesia and Turkey, both parents are adjudicated by the court to ensure the child's rights, whereas Malaysia solely assigns maintenance and inheritance responsibilities to the mother. This discrepancy arises from the diverse judicial practices in these countries, which adhere to distinct legal systems and *fiqh* schools, influencing the determination of children's maintenance and inheritance rights.

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