



## Legal Certainty Guarantees for Children's Identity Rights from Unregistered Marriages: A Comparative Study in Indonesia and Malaysia

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### ABSTRACT

Unregistered marriage constitutes a legal issue that potentially threatens legal certainty regarding children's identity rights in both Indonesia and Malaysia. This study aims to analyze the role of the state in guaranteeing legal certainty for the identity rights of children born from unregistered marriages, as well as to identify the similarities and differences in the legal regulations of the two countries. This research is a normative legal study employing statutory, conceptual, and comparative approaches. The primary legal materials in Indonesia include Law Number 1 of 1974 concerning Marriage, Law Number 24 of 2013 concerning Population Administration, the Compilation of Islamic Law, and the Constitutional Court Decision Number 46/PUU-VIII/2010. Meanwhile, the primary legal materials in Malaysia include the Islamic Family Law (Federal Territories) Act 1984 and the Births and Deaths Registration Act 1957. The findings indicate that Indonesia adopts a corrective-progressive approach through the mechanism of *isbat nikah* (marriage validation) and Constitutional Court Decision Number 46/PUU-VIII/2010, which allows the recognition of civil relations between a child and the biological father based on scientific evidence. In contrast, Malaysia applies a stricter preventive-institutional approach through the Islamic Family Law Act 1984 under the supervision of the Syariah Court. The similarities between the two countries lie in the obligation of marriage registration, the role of religious courts, and their adherence to the Convention on the Rights of the Child (CRC). The principal differences are found in the recognition of civil relations between children and biological fathers, the marriage registration system (centralized versus decentralized), the existence of criminal sanctions, and the orientation of child protection policies. This study recommends the harmonization of regulations based on the principle of the best interests of the child as the foundation for developing responsive Islamic family law policies oriented toward the protection of children's rights.

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## Introduction

In the concept of a constitutional state (*rechtsstaat*), every state has a fundamental obligation to guarantee legal certainty for all citizens without discrimination, including children born from marriages that do not fulfill administrative registration requirements. Legal certainty is one of the core values of law, ensuring that individuals clearly understand their rights and obligations under prevailing regulations (Bedner & Van Huis, 2010). This principle also serves as the foundation for state protection of human rights, including children's rights as one of the most vulnerable groups in society. The right to identity is a fundamental child right universally recognized through the Convention on the Rights of the Child (CRC) of 1989. Article 7 of the CRC affirms that every child has the right to be registered immediately after birth, to have a name, and to acquire nationality. This right forms the basis for fulfilling other children's rights, such as education, healthcare, and social protection. Indonesia ratified the CRC in 1990 through Presidential Decree No. 36 of 1990, while Malaysia ratified it in 1995 through the Child Act 2001. The commitment of both countries to the CRC obliges them to ensure that every child, regardless of the marital status of their parents, obtains adequate legal identity recognition.

The phenomenon of unregistered marriage—commonly known as *nikah siri* in Indonesia and *perkahwinan tidak berdaftar* in Malaysia—remains a significant socio-legal issue. In Indonesia, this phenomenon is influenced by economic factors, limited legal awareness, complicated administrative procedures, and the perception that a marriage considered valid under religious law is sufficient without administrative registration (Rahmatillah & Bustamam, 2023). In Malaysia, the Islamic family law system administered by the State Islamic Religious Departments imposes stricter supervision; however, unregistered marriages continue to occur, particularly among border communities and certain social groups (Maruan, Fauzi, & Yusof, 2025).

The legal consequences of unregistered marriage on children's identity rights are substantial. Children born without official marriage documents of their parents often face obstacles in obtaining birth certificates, which directly affects their access to public services. Civilly, the unclear lineage relationship between the child and the biological father creates issues concerning inheritance, maintenance, and guardianship rights (Larhizar, 2024). This situation becomes more complex because Indonesia and Malaysia are Muslim-majority countries that apply Islamic law in marriage and family matters, thereby integrating religious legal dimensions into state policies.

A major milestone in the protection of children's identity rights in Indonesia was the Constitutional Court Decision No. 46/PUU-VIII/2010, which affirmed that children born outside registered marriages may establish civil relations with their biological fathers through scientific evidence such as DNA testing or other lawful proof. This decision marked a paradigmatic shift in family law from a formalistic approach toward substantive justice-based protection of rights (Wicaksana & Kambela, 2023). In contrast, Malaysia adopts a different approach through the Islamic Family Law (Federal Territories) Act 1984, which treats marriage registration as a formal requirement and imposes sanctions for violations, with the Syariah Court serving as the central institution for resolving family law disputes (Paizah Hj. Ismail, 2017).

A comparative study between Indonesia and Malaysia in this area holds strong academic relevance. Both countries share similarities in Malay-Islamic cultural backgrounds and legal systems influenced by Islamic law, yet they demonstrate significant differences in policy approaches toward protecting children's identity rights. Studies specifically analyzing the role of the state through a comparative perspective between the two countries remain relatively limited (Kasim, Kamba, & Karim, 2023).

## Method

This study employs normative legal research (doctrinal legal research) using a comparative legal research model. Normative legal research positions law as a set of written norms analyzed through legislation, court decisions, and legal doctrines without empirically examining social

behavior (Marzuki, 2017). Three approaches are applied integratively: (1) the statutory approach to examine regulations concerning marriage registration, children's identity rights, and population administration; (2) the conceptual approach to analyze the concepts of legal certainty, legal protection, and the role of the state; and (3) the comparative approach to compare the legal systems of Indonesia and Malaysia based on predetermined parameters (Zweigert & Kötz, 1998).

The primary legal materials for Indonesia include Law No. 1 of 1974 on Marriage as amended by Law No. 16 of 2019; Law No. 23 of 2006 on Population Administration as amended by Law No. 24 of 2013; Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI); and Constitutional Court Decision No. 46/PUU-VIII/2010. For Malaysia, the primary legal materials consist of the Islamic Family Law (Federal Territories) Act 1984 (Act 303), the Law Reform (Marriage and Divorce) Act 1976, the Births and Deaths Registration Act 1957, and the Islamic Family Law Enactments of each state. Secondary legal materials include family law literature, national and international journals, and relevant court decisions (Ali, 2021). The analysis is conducted through qualitative normative methods using grammatical, systematic, and teleological interpretation.

## Result

### A. Theoretical Framework: Legal Certainty, Legal Protection, and the Role of the State

Legal certainty (*rechtssicherheit*) is a fundamental value in modern legal systems. Lon Fuller formulated the eight principles of the internal morality of law, requiring legal norms to be general, publicized, non-retroactive, clear, consistent, enforceable, stable, and congruent with their implementation. Gustav Radbruch, through his trilogy of legal values, positioned certainty as an essential element alongside justice and utility. In the context of children's identity rights, legal certainty refers to the existence of clear and predictable rules regarding children's legal status and their derivative rights. According to Philipus M. Hadjon, legal protection consists of preventive and repressive protection. Preventive protection aims to prevent disputes through accessible registration procedures, mobile *isbat nikah* services, and public legal education. Repressive protection includes judicial mechanisms to determine a child's legal status and civil relationship with their parents. From the perspective of modern state theory, the state has three principal functions: regulator, protector, and provider. These functions must operate synergistically in guaranteeing children's identity rights arising from unregistered marriages.

From the perspective of *maqāṣid al-syarī'ah*, the protection of children's identity rights is closely related to two primary objectives: *ḥifẓ al-nasl* (protection of lineage), which requires clarity of descent and family relations, and *ḥifẓ al-nafs* (protection of life), which demands the fulfillment of children's basic needs, including legal identity. Amartya Sen's capability approach is also relevant, viewing identity as a basic capability enabling children to access public services, education, healthcare, and social protection. Without official identity, children risk being trapped in cycles of poverty and structural discrimination (Maula & Hidayati, 2024).

### B. Regulation of Unregistered Marriage and Children's Identity Rights in Indonesia

#### 1. Marriage Law System and Registration Mechanism

Indonesia's marriage law system is pluralistic. Article 2 paragraph (1) of Law No. 1 of 1974 states that a marriage is valid if conducted according to the religion and beliefs of the parties involved, while Article 2 paragraph (2) requires marriage registration as an administrative obligation. This dualism creates space for the practice of *nikah siri* (unregistered marriage), which may be religiously valid but lacks legal recognition by the state. For Muslims, marriage registration is conducted at the Office of Religious Affairs (Kantor Urusan Agama/KUA), while for non-Muslims it is conducted at the Population and Civil Registration Office (Dukcapil). Article 5 paragraph (1) of the Compilation of Islamic Law (KHI) emphasizes the obligation of

registration to ensure orderly marriage administration, while Article 6 paragraph (1) states that marriages conducted outside the supervision of a Marriage Registrar have no legal force.

Several factors contribute to the practice of unregistered marriage in Indonesia: (1) economic limitations in meeting administrative costs; (2) the belief that religious validity alone is sufficient without state registration; (3) bureaucratic procedures perceived as complicated; and (4) local cultural traditions recognizing customary marriages. Early-age marriages, polygamous marriages without court permission, and marriages conducted to avoid certain legal requirements also contribute to this phenomenon. The absence of registration means that the marriage lacks an authentic certificate as legal proof, directly affecting the legal status of children born from such unions (Rahmi, Warman, & Effendi, 2025).

## 2. Legalization Mechanisms and Protection of Children's Identity Rights

The Indonesian state provides the mechanism of *isbat nikah* (marriage validation) as a corrective instrument for legitimizing unregistered marriages. Through the Religious Court, couples may apply for legal recognition of marriages that are religiously valid in order to obtain state recognition and official documents in the form of a marriage certificate from the KUA. *Isbat nikah* serves as the legal basis for children to obtain clear legal status, including the inclusion of the father's name on the birth certificate. In addition, the Surat Pernyataan Tanggung Jawab Mutlak (SPTJM) is provided as an administrative mechanism enabling children born from unregistered marriages to obtain birth certificates even without *\*isbat nikah*.

The most significant legal breakthrough was the Constitutional Court Decision No. 46/PUU-VIII/2010, which declared Article 43 paragraph (1) of the Marriage Law unconstitutional insofar as it denied civil relations between a child and their biological father that could be proven through science and technology. This ruling opened the possibility of establishing biological relations through DNA testing, shifting the legal paradigm from formalism toward a child rights-based approach. Law No. 24 of 2013 on Population Administration further strengthened this guarantee by requiring the registration of every child's birth within sixty days and ensuring the issuance of birth certificates without discrimination based on the marital status of the parents (Puspitasari, 2023).

Institutionally, the state's role in guaranteeing children's identity rights in Indonesia involves several bodies: the Religious Court as the adjudicative institution for *isbat nikah* and determination of lineage; the KUA as the official marriage registrar; Dukcapil as the issuer of birth certificates; and the Ministry of Religious Affairs as the regulator of marriage administration. However, coordination among these institutions still faces challenges, particularly in implementing Constitutional Court Decision No. 46/2010, which requires technical procedures and DNA testing costs that remain inaccessible for many citizens (Nasution, Syahnan, & Lubis, 2024).

## C. Regulation of Unregistered Marriage and Children's Identity Rights in Malaysia

### 1. Islamic Family Law System and Registration Mechanism

Malaysia adopts a dual legal system consisting of English common law for civil matters and Islamic law for Muslim family affairs. The Islamic Family Law (Federal Territories) Act 1984 (Act 303), together with the Islamic family law enactments of each state, comprehensively regulates Muslim marriages. Unlike Indonesia's more decentralized religious approach, Malaysia applies a preventive system: Muslim couples must obtain permission to marry from the State Islamic Religious Department before the marriage contract is solemnized. This process includes identity verification, examination of previous marital status, guardian approval, and mandatory pre-marriage courses. In cases of polygamy or inter-state marriages, additional approval from the Syariah Court is required (Nurul Hidayat Ab Rahman & Mohamad Noh, 2023).

After the marriage ceremony, the marriage must immediately be registered before the

Registrar of Marriage, Divorce, and Reconciliation in order to obtain an official marriage certificate as authentic legal evidence. Unregistered marriages are considered violations of the Islamic family law enactments of each state and may result in fines or imprisonment, functioning as a strong deterrent effect. Malaysia also encounters cases of unregistered marriages, particularly marriages conducted in Southern Thailand and later submitted for validation before the Malaysian Syariah Court, illustrating social dynamics that extend beyond formal legal regulations (Zanariah Noor, 2018).

## 2. Legal Status of Children and Identity Protection Mechanisms

The Malaysian Syariah Court has exclusive jurisdiction over Muslim family law matters, including validation of unregistered marriages (application for validation of marriage), determination of lineage (*nasab*), and other family rights. The concept of *\*nasab\** in Malaysian law is conservatively adopted from the Shāfi'ī school of Islamic jurisprudence. The minimum pregnancy period of six lunar months from the date of marriage serves as the principal judicial parameter used by the Syariah Court in determining lineage. A child born less than six months after marriage cannot legally be attributed to the husband under Islamic law, which affects the inclusion of the father's name in official documents, inheritance rights, and guardianship (Paizah Hj. Ismail, 2017).

In the population administration system, the National Registration Department (*\*Jabatan Pendaftaran Negara/JPN\**) is responsible for birth registration and the issuance of birth certificates for every child. The inclusion of the father's name on the birth certificate depends on the validity of the marriage according to the Syariah Court or official confirmation from the State Islamic Religious Department. Children born from unregistered marriages may still have their births registered; however, certain annotations regarding the child's status may affect various civil rights. Coordination among the State Islamic Religious Departments, the Syariah Court, and the JPN reflects an integrated institutional structure combining religious and administrative functions of the state (Ibrahim & Mohd Zin, 2020).

## D. Comparative Analysis: The Role of the State and Legal Certainty

### 1. Similarities Between Indonesia and Malaysia

The comparative analysis identifies four fundamental similarities. First, both countries require marriage registration as the primary instrument for ensuring legal certainty in family relations and recognizing children's legal status. Article 2 paragraph (2) of Indonesia's Marriage Law and the Islamic family law enactments in Malaysia both position registration as an administrative obligation determining the legal validity of marriage. Second, both countries recognize the central role of religious judicial institutions—Religious Courts in Indonesia and Syariah Courts in Malaysia—as the principal adjudicative bodies for marriage validation and determination of children's status.

Third, Indonesia and Malaysia are equally bound by international obligations under the Convention on the Rights of the Child (CRC), which requires the protection of every child's identity rights without discrimination. Fourth, both countries provide mechanisms for validating unregistered marriages: *isbat nikah* through the Religious Courts in Indonesia and marriage validation applications before the Syariah Court in Malaysia. Both also ensure the issuance of birth documents for every child, although the procedures and requirements differ (Mahendra, Izzuddin, & Alfikri, 2024; Azwar & Armi, 2024).

### 2. Differences Between Indonesia and Malaysia

The most substantial difference lies in the approach toward recognizing civil relations between children and their biological fathers. Following Constitutional Court Decision No. 46/PUU-VIII/2010, Indonesia allows recognition of civil relations based on scientific evidence, enabling children born from unregistered marriages to establish legal relations with their biological fathers. This represents a progressive approach prioritizing the best interests of the

child. In contrast, Malaysia firmly maintains the Islamic law principle of *nasab*, which recognizes child-father relations only through a legally valid marriage. Consequently, children from unregistered marriages that cannot be validated risk being categorized as illegitimate children with certain legal consequences.

The second difference concerns the structure of the legal system. Indonesia has a nationally centralized religious court system under the Supreme Court, resulting in relatively consistent legal application across regions. Malaysia, as a federal state, operates a decentralized *Syariah* legal system under state authority, creating variations in handling unregistered marriage cases among states. Third, Malaysia criminalizes unregistered marriages through fines and imprisonment as a preventive measure, whereas Indonesia does not explicitly criminalize such practices but instead provides corrective legalization mechanisms. Fourth, the orientation of legal policy differs: Indonesia emphasizes the best interests of the child, while Malaysia prioritizes the preservation of Islamic lineage (*nasab syar'i*) as the foundation of family law legitimacy.

Comparative Aspect	Indonesia	Malaysia
Main Legal Basis	Law No. 1 of 1974 on Marriage; Compilation of Islamic Law (KHI); Law No. 24 of 2013 on Population Administration; Constitutional Court Decision No. 46/PUU-VIII/2010	<i>Islamic Family Law (Federal Territories) Act 1984 (Act 303); Births and Deaths Registration Act 1957; State Islamic Family Law Enactments</i>
Marriage Registration Institutions	Office of Religious Affairs ( <i>KUA</i> ) for Muslims; Civil Registry Office for non-Muslims	State Islamic Religious Departments; Marriage Registrar Offices
System Approach	Corrective approach – post-marriage legalization through <i>isbat nikah</i>	Preventive approach – mandatory pre-marriage permission ( <i>permission to marry</i> )
Validation Mechanism	<i>Isbat nikah</i> through the Religious Courts	Application for validation before the <i>Syariah</i> Courts
Recognition of Child–Biological Father Relationship	Permitted through scientific evidence (DNA) based on Constitutional Court Decision No. 46/2010	Recognized only through a valid marriage; based on the Islamic lineage ( <i>nasab</i> ) principle and the six-lunar-month rule
Sanctions for Unregistered Marriage	No explicit criminal sanctions	Fines and/or imprisonment under state enactments
Child Birth Certificate	Issued with the mother's name; may be updated through SPTJM or <i>isbat nikah</i>	Depends on marriage validation by the <i>Syariah</i> Court; risk of classification as an “illegitimate child”
Structure of Religious Judiciary	Centralized Religious Court system under the Supreme Court of Indonesia	Decentralized <i>Syariah</i> Court system under each state
Policy Orientation	Progressive – prioritizing the <i>best interests of the child</i>	Conservative – emphasizing the purity of Islamic lineage ( <i>nasab</i> )

Table 1. Comparison of Legal Regulations on Children's Identity Rights from Unregistered Marriages in Indonesia and Malaysia

#### 4. Analysis of the Strengths and Weaknesses of Each System

Indonesia's legal system demonstrates strengths in its inclusiveness and progressive protection of children's rights. Following Constitutional Court Decision No. 46/PUU-VIII/2010, children born from unregistered marriages have legal opportunities to obtain recognition of civil relations with their biological fathers, thereby expanding access to inheritance, maintenance, and guardianship rights. The population administration system, which guarantees the issuance of birth certificates for every child without discrimination, is also a

significant advantage. However, the system's weaknesses lie in weak pre-marital control, allowing the practice of *nikah siri* to persist, as well as the uneven implementation of Constitutional Court Decision No. 46/2010 due to limited public access to DNA testing, judicial mechanisms, and insufficient coordination among relevant institutions.

Malaysia's system has advantages in maintaining legal order through strong institutional supervision from the pre-marital stage, effectively reducing the incidence of unregistered marriages. Criminal sanctions create a stronger deterrent effect, while coordination among the State Islamic Religious Departments, the Syariah Courts, and the National Registration Department (JPN) results in a more structured system. Nevertheless, its weakness lies in the rigidity of lineage recognition, which may disadvantage children born without fault of their own. The application of the label "illegitimate child" in administrative documents may create long-term social stigma, while variations among state enactments generate inconsistencies that potentially undermine the principle of equality before the law for all Malaysian citizens (Anshori & Lubis, 2025).

### **E. Relevance of Human Rights, Maqāṣid al-Syarī'ah, and the Best Interests of the Child Perspective**

From the perspective of international human rights, children's identity rights are considered inalienable rights. The United Nations Committee on the Rights of the Child emphasizes that state parties to the Convention on the Rights of the Child (CRC) must ensure birth registration and identity documentation for every child without discrimination based on the marital status of the parents. The principle of the best interests of the child, as stipulated in Article 3 of the CRC, requires states to prioritize children's interests in every policy and action concerning children. Indonesia's more progressive approach through Constitutional Court Decision No. 46/2010 is more aligned with these international standards than Malaysia's more restrictive approach to lineage recognition.

From the perspective of *maqāṣid al-syarī'ah*, the protection of children's identity rights is directly connected to *ḥifẓ al-nasl* (protection of lineage) and *ḥifẓ al-nafs* (protection of life/self). *Ḥifẓ al-nasl* requires clarity of lineage and family descent, while *ḥifẓ al-nafs* demands fulfillment of children's essential needs, including legal identity necessary for accessing healthcare, education, and social security. Contemporary scholars of Islamic legal theory emphasize that *maqāṣid al-syarī'ah* should be interpreted dynamically according to changing social contexts in order to achieve *maṣlahah* (public welfare), which constitutes the essence of Islamic teachings. A state's failure to provide legal certainty for children born from unregistered marriages represents neglect of the principle of the best interests of the child and contradicts the objectives of Islamic law itself (Dahlan & Nafisah, 2025).

The synthesis between universal human rights perspectives and *maqāṣid al-syarī'ah* demonstrates that protecting children's identity rights is not merely a positive legal obligation, but also a moral and religious imperative requiring proactive and comprehensive state responses. An ideal model would integrate the strengths of Malaysia's preventive system in maintaining administrative order with the progressive aspects of Indonesia's system in recognizing children's rights. The state should act as *parens patriae*, actively protecting children without disregarding the principle of lineage purity in Islamic law, but rather interpreting it contextually to achieve substantive justice for all children born within its jurisdiction.

### **Conclusion**

First, the role of the Indonesian state in guaranteeing legal certainty for children's identity rights arising from unregistered marriages is implemented through a corrective-inclusive model, which includes: the *isbat nikah* mechanism in the Religious Courts as an instrument for marriage validation; the guarantee of birth certificate issuance for every child through the Population Administration Law; and a judicial breakthrough through Constitutional Court Decision No. 46/PUU-VIII/2010, which recognizes civil relations between children and their biological

fathers based on scientific evidence. Malaysia guarantees legal certainty of children's identity through a preventive-institutional model based on the *Islamic Family Law Act 1984*, with strict supervision by the Syariah Court from the pre-marital stage, as well as coordination among the State Islamic Religious Departments, the Syariah Courts, and the National Registration Department in population administration. Second, the similarities between Indonesia and Malaysia include: the obligation of marriage registration as an instrument of legal certainty; the central role of religious judicial institutions; adherence to the obligations of the *Convention on the Rights of the Child (CRC)*; and the availability of birth certificate mechanisms for every child. The principal differences lie in: (a) the system model—Indonesia adopts a corrective approach, while Malaysia applies a preventive approach; (b) recognition of civil relations between children and biological fathers—Indonesia adopts a progressive approach based on scientific evidence, whereas Malaysia maintains a conservative approach based on Islamic lineage (*nasab*) principles; (c) the existence or absence of criminal sanctions; (d) the judicial structure (centralized versus decentralized); and (e) policy orientation (*best interests of the child* versus the preservation of Islamic lineage purity).

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