

NAVIGATING PRETEXT AND LEGAL CONSEQUENCES ON STATELESS INDONESIAN CHILDREN IN MALAYSIA

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Abstract

Due to lack of job opportunity, low-skilled Indonesian workers opted to work in Malaysia in hope for a better opportunity. As migrant workers in a foreign country, Indonesian are obligated to follow a string of policies reserved for foreign worker. Legal problems started to arise when those workers started a family in Malaysia. According to our interviews with fifty Indonesian Worker in Kuala Lumpur and Indonesian Government Officials in the Embassy, they admitted their ignorance of the ramification of their actions, the risk of statelessness of their children. Indonesian workers are (1) marrying fellow Indonesian workers, (2) marrying foreign workers, (3) marrying Malaysian nationality. As the family grew, their children born in Malaysia may (1) be an Indonesian, provided that their parents marriage are registered, (2) be Malaysian, provided that their parents marriage is legitimate under Malaysian Marriage Law, (3) stateless. The purpose of this paper is to set out the legal ramifications following an Indonesian Workers' marriage to eradicate statelessness of their children and provide solution for them to obtain Indonesian citizenship by combining normative and empirical method to achieve the result. This paper is a conclusion of STIH Adhyaksa's community services in collaboration with Indonesian Embassy in Kuala Lumpur, Malaysia.

Keywords: Family law, choice of law, stateless, immigration, citizenship

Introduction

One's nationality is the foremost aspect to guarantee state's protection and has been recognized as one of the human rights (Bedner & Van Huis, 2010). The regulation of the principle of citizenship is necessary to regulate a person's citizenship status ensuring legal protection from the state, and receive their rights and obligations. Indonesian migrant workers worked and stayed in Malaysia for a long period of time as Malaysia job opportunities offers better pay. As they have stayed for a substantial amount of time, they were bound to create families, either among themselves or other workers with varied nationalities. Many among them are blue collar workers which have limited educational background and resources on administrative obligations (Hori & Wirastri, 2022). In addition to the above issues, some workers have no legal documentation and/or even authentic national identification resulting in more challenging and complex legal issue. Indonesian migrant workers children in Malaysia undergo complex procedures to obtain birth certificates as a result of restrictive laws and a range of practical barriers of which will result in children at particular risk of statelessness (Nisa, 2018). Being undocumented does not equal to being stateless; however, they are closely connected. Lack of birth registration can complicate citizenship claims since no proof or documentations are available to support their claims (Msall et al., 2024; Van Loo, 2022).

Stateless children exist, according to our interview with officials at Indonesian Embassy in Kuala Lumpur, due to unregistered marriages under Indonesian and/or Malaysian Law, born out of wedlock along with insufficient parents documentation or the combination of those three (Allagan, 2019; May et al., 2013).

The purpose of this paper is to set out the legal ramifications following an Indonesian migrant workers' marriage to eradicate statelessness of their offspring and provide solution for them to obtain Indonesian citizenship. This paper will (1) Examine Indonesian Marriage Law and their implications toward citizenship and civil rights; and (2) Explore solutions to address risk of statelessness among Indonesian children. However, this paper will limit the discussion on Indonesian migrant workers with proper documentation.

Research Methods

The rights to marry is protected by the Universal Declaration of Human Rights and the ICCPR, which are ratified and reaffirmed under the Indonesian Constitution. Considered as private affairs, private international law determine rules to govern a marriage depends on several point of contact: nationality, domicile, or habitual residence. Indonesia, under article 16 of *Algemene Bepalingen*, adopts a nationality principles on personal private affairs (Stone, 2014). Thus marriage between Indonesians wherever they may be should governed by Indonesian marriage law. According to Indonesian Embassy in Kuala Lumpur the main cause of stateless Indonesian children are as follow (1) children born out of migrant worker couples wed religiously, (2) children born out of unregistered mixed marriage couple, (3) children born out migrant worker of couples with limited documentations due to illegal work. However, in this paper we will only examines conditions stipulated under (1) and (2).

Results and Discussion

The rights to marry is protected by the Universal Declaration of Human Rights and the ICCPR, which are ratified and reaffirmed under the Indonesian Constitution. Considered as private affairs, private international law determine rules to govern a marriage depends on several point of contact: nationality, domicile, or habitual residence. Indonesia, under article 16 of *Algemene Bepalingen*, adopts a nationality principles on personal private affairs. Thus marriage between Indonesians wherever they may be should governed by Indonesian marriage law (Aisyah & Parker, 2017). According to Indonesian Embassy in Kuala Lumpur the main cause of stateless Indonesian children are as follow (1) children born out of migrant worker couples wed religiously, (2) children born out of unregistered mixed marriage couple, (3) children born out migrant worker of couples with limited documentations due to illegal work. However, in this paper we will only examines conditions stipulated under (1) and (2).

Stateless Children due to Unregistered Marriages

Referring to Indonesian Marriage Law, a couple is considered legally wed provided that they have conducted their wedding in accordance to their religion and registered with civil registration office. An act of marriage will alter their responsibility as husband and wife and later as parents. Although, Indonesia adopts nationality principles as point of contact to determine validity of a marriage, it is important to make sure that their marriage is also lawful in the country where the marriage is taking place. Under article 56 of Marriage Law, the validity of Indonesian marriage abroad will be determined by compliance with local laws and Indonesian marriage law. In addition, the couple is obligated to notify Indonesian consulate and return to Indonesia to register their marriage in the civil registry office according to their domicile (Khairunnisa, 2018).

Neglecting to register the marriage does not mean marriages are not happening among Indonesian migrant workers. Most of them choose to marry in accordance with their religion, thus satisfying one aspect of the marriage law which is valid according to article 2 of the Marriage Law. Some scholars believe although it is considered a valid marriage and not a ground for nullification, the legal status of such marriage would be in a limp footing. Furthermore, referring to article 34 of the Administration Law of 2006, a marriage can only be considered as valid and lawful if properly registered. Proper registration is crucial to ensure legal certainty of a marriage in order to protect all party, as it will affect the status of the child, matrimonial property, qualification of the dissolution of marriage and its implication of the male's obligation to give alimentionation (nafkah), and the protection of women and children from arbitrary divorce (talak).

Not so different treatment regarding the validity of marriages applies to mixed marriage as Indonesian Marriage Law under article 57 defines as a marriage between two people governed by two different laws as consequences to the distinct nationalities which one of them is an Indonesian. Indonesian marriage law will be applicable to Indonesians, however the *principle of lex loci celebrationis* or the law where the marriage is celebrated shall also be applied to determine the formal validity of an international mixed-marriage, in this instance, Malaysian law is the law determining the formal validity of an international mixed-marriage. As soon as the marriage is celebrated, the couple should first report to the Indonesian Embassy before coming back to Indonesia within 60 days to registered their marriage to ensure the validity and lawfulness of the marriage (Havrysiuk, 2019).

Malaysia has similar views regarding validity of the marriage; the marriage must in accordance with one's religion and registered to the religious affair office or a local government body. In the event of the marriage was only celebrated religiously, sharia court can uphold a validity of religious wedding if documentations are available and can be legally proven. With both countries required religious attribute as a factor to consider the validity of the marriages, having different religion complicates the issue even further. For couples with different religious convictions, finding a proper forum to be married is hard on top of registering the marriage to ensure its validity.

The problem for Indonesian migrant workers mixed marriages with other nationalities in Malaysia is the restriction under Malaysian Labor Law, prohibiting migrant workers of marriage with consequences for expulsion and even deportation if violated (Bulan, 2021). According to Malaysia Immigration Act 1154/2002 migrant workers are prohibited to create and/or bring families to Malaysia during their employment contract (Sopyan, 2021). Therefore, since they are currently under a working visa it is illegal for them to create families. As a result, many prefers neglecting registering their marriage in order to avoid sanction or even deportation since Malaysia offers better life prospects compared to Indonesia.

Furthermore, celebrating the marriage will invalidate the marriage since it violates Malaysian labor law which is the governing law.

The validity of a marriage is pivotal to determine their children's nationality and the benefit which entails. Under article 4 of Citizenship law, Indonesia recognizes thirteen approach to establishes one's citizenship:

- a. All persons whom by law and/or based on agreements between the Government of the Republic of Indonesia and other countries prior to the application of this Decree have already become Citizens of the Rep. of Indonesia;
- b. Children born through legal wedlock from an Indonesian father and mother;
- c. Children born through legal wedlock from an Indonesian father and an alien mother;
- d. Children born through legal wedlock from an alien father and an Indonesian mother;
- e. Children born through legal wedlock from an Indonesian mother and a stateless father or whose country does not provide automatic citizenship to their offspring;
- f. Children born within 300 (three hundred) days after the father has passed away, under legal wedlock, and whose father is an Indonesian citizen;
- g. Children born out of legal wedlock from an Indonesian mother;

- h. Children born out of legal wedlock from an alien mother who is claimed by the Indonesian father as his natural child and such claim is declared before the child reaches the age of 18 (eighteen) or before the child has married;
- i. Children born in Indonesian territory whose parents are of undetermined citizenship at the time of the child's birth;
- j. Children newly born and found in Indonesian territory and whose parent's are undetermined;
- k. Children born in Indonesian territory whom at the time of birth both parents were stateless or whose whereabouts are undetermined;
- l. Children born outside the Rep. of Indonesia from an Indonesian father and mother whom due to law prevailing in the country of birth automatically provides citizenship to the child;
- m. Children born from a father and mother who was granted citizenship and died before the parents had sworn their allegiance.

In line with Nationality Law, Marriage Law also stipulates that any children born through legal wedlock will be having the wife as the mother and and the husband as the father, thus guaranteeing the child's family rights such as maintenance and inheritance. Again, referring to the prohibition to bring their family while working, presenting Indonesian migrant workers with dilemmatic situation (Subchi et al., 2022). Both options whether it is to comply with Indonesian marriage law or Malaysian immigration act offers grim solution invoking discouragement to register their important event to government officials. Their reluctance regarding complying with administrative procedures such as registering their marriages and obtaining birth certificate is understandable since it does not carry much social and cultural significance, although it is critical to guarantee the child's right as well as their protection. As much as Nationality Law guarantees that any children born through legal wedlock from an Indonesian father and mother will automatically acquire Indonesian nationality or Marriage Law affirming the legal status of the child, the absence of marriage certificate between the parents will result in the child's inability to obtain birth certificate.

Stateless Children due to being borne out of wedlock in Malaysia

The definition of children born outside wedlock is when they are born when the marriage has not been registered or has not been verified in Indonesia. Consequently, the child will not be considered a legitimate child and instead considered as illegitimate or *Anak Luar Kawin*. This status came with both legal and social consequences. Illegitimate children will only have legal relations to his/her mother and his relationship with his father will only be available through court decisions upholding the biological connection between the child and the father. Certain conditions such as being raped by their employers, having consensual sex outside of marriage or entering into polygamous religious marriage may cause children being born out of wedlock. According to Indonesian Embassy in Kuala Lumpur officials, female migrant workers are prone to sexual harassment which sometimes lead to rape. Such migrant workers then become pregnant and give birth to a child. Being in a close knit community, Indonesian migrant workers also having casual consensual sex with each other and which some of them bound to get pregnant and have a child out of wedlock. Another common reason is getting religiously married with someone who already in a legitimate marriage back in Indonesia, complicating the registering process.

As a consequence to wed religiously ergo not having a marriage certificate, any children born to such marriage will be considered out of wedlock. Eventhough Citizenship law guarantees nationality for children born out of legal wedlock from an Indonesian mother and/or an alien mother who is claimed by the Indonesian father as his natural child, the parents are still reluctant to register the birth of the child. It was mainly due to social stigma of having a single birth certificate on top of the risk of being an illegal migrant worker for having family on a working visa.

Eradicating Statelessness in Migrant Workers Children

The definition of stateless according to Convention relating to the Status of Stateless Persons is a person who is not considered a national by any State under the operation of its Law. According Statelessness Encyclopedia Asia Pacific, there are 8 key treaties on the subject of statelessness eradication : 1)International Covenant on Civil and Political Rights (ICCPR), (2) International Covenant on Economic, Social and Cultural Rights (ICESCR), (3) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), (4) Convention on the Rights of the Child (CRC), (5) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), (6) Convention relating to the Status of Stateless Persons 1954, (7) Convention relating to the Status of Stateless Persons 1967, (8) Refugee Convention and Protocol. Table 1 shows treaties and its relevant articles regarding assurance to abolish statelessness specifically related to issue on this paper.

Table 1. Articles Regarding Assurance To Abolish Statelessness

No	Law	Relevant Article
1	ICCPR	Article 24(2) & (3) Every child shall be registered immediately after birth and shall have a name along with their right to acquire a nationality
2	ICERD	Article 5(d)(iii) States Parties commits to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, spesifically to enjoy their civil rights; nationality
3	CEDAW	Article 9 (1)&(2) Women and Men shall have equal rights to acquire, change or retain their nationality. Having an alien as a spouse or having their spouse turned into an alien should not change the nationality of the wife, render her stateless or force upon her the nationality of the husband automatically. In terms of children, women and men have equal rights with respect to the nationality of their children.
4	CRC	Article 7 A child shall be named and registered immediately after birth. Accordingly, he or she will acquire a nationality and has the right to know and be cared for by his or her parents. The convention prompt state parties to ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Statelessness Encyclopedia Asia Pacific mentioned that according to UNHCR the main cause for statelessness among Indonesian is administrative barriers to birth registration with migrant workers children contributes plenty to the risk of being stateless. Approximately 50 million Indonesian children are at risk of statelessness due to low birth registration rates and barriers to birth registration especially among children of migrant workers and communities living in poverty. Reluctance or inability of Indonesian migrant workers to obtain birth certificate are due to barriers to registration such as costly, complicated procedures, strenuous requirements, and absence of parent’s legal document.

If they are unable to obtain identity documentation, such as a birth certificate, and/or cannot prove their connection to a country through ancestry such children may be at risk of statelessness (Aisyah & Parker, 2017). Thus, unregistered children are de facto stateless, the absence of birth certificate confirming their legal identity may denied them access to any public services and rights under the national legal system (Horii & Wirastri, 2022). Until today, Indonesia has ratified ICCPR, ICESCR, ICERD, CRC and CEDAW. Therefore, it recognizes extensive amount of citizenship acquisition method. Birth registration can help to prevent statelessness as it provides a legal record of a child's birthplace, parentage, and other key elements which determine citizenship (Gordon, Hannah et al., 2024). Indonesia recognizes having a birth certificate as a citizenship certifying document before passport is issued.

Malaysia, on the other hand, take a more restrictive approach on statelessness convention and method of acquiring citizenship. Ratifying only CRC and CEDAW with reservations, Malaysia has the third largest reported stateless population in the Southeast Asia sub-region, reporting 115,169 stateless persons to UNHCR in 2022 (Gordon, Hannah et al., 2024). Gender discrimination law on citizenship is applied in Malaysia where Malaysian mothers may not be able to transfer their citizenship to their Children. Especially, children born in Malaysia out of wedlock (or when the marriage is not yet legitimate) will not automatically acquire parents' citizenship eventhough having Malaysian citizens as their father. Malaysia Federal Constitution under schedule 2, Part I, s1(1) provides citizenship to any child who is born in Malaysia and do not not gain citizenship of another country within one year of birth. However, this provision is lacking in administrative procedures therefore the government is reluctant to implement them in practice. Therefore, often obtaining citizenship according to the above policy should resort through courts, which will obviously be costly and strenuous.

The legal consequence of not having a marriage certificate (as a proof of marriage registration) is dire for both the respective spouses and future children. As mentioned by officials at Indonesian Embassy in Kuala Lumpur main causes to stateless children are unregistered marriages, born out of wedlock and insufficient parent's legal documentation. The child of Indonesian Migrant Workers however, are at risk of being stateless due to administrative and policy barriers. Administrative being the birth of the children cannot be registered since the parents' marriage certificate are nonexistent. Setting aside Malaysian Labor Policy, couples are also not registering their marriage due to inter-religion marriage or entering a polygamous relationship (one of the spouses already has a lawful spouse back home). Children being born from an illegitimate marriage will produce illegitimate children. Illegitimate children are children born out of wedlock. In addition of having unregistered marriage, illegitimate children also exist due to unplanned pregnancy (either by consensual casual sex or being raped by employee). The legal consequence of being an illegitimate child is they only have relationship with the mother. Thus, the father is not obligated to pay for alimonies or inherit his wealth to the child.

Having a birth certificate allows children to uphold his legal status as citizens. The required document for obtaining birth certificate is parent's marriage certificate. Without marriage certificate, civil registry office may issue a single birth certificate showing only the mother as a parent bearing the status of being illegitimate. Article 50 of Law No. 24 of 2013 on Amendment to Civil Administration rectifies this situation if both parents married had been deemed lawful, civil registry official may issued Child Legitimacy Certificate by putting the father's name on the back of the single birth certificate. This provision address the legal issue regarding inheritance and alimonies from the father side of the family.

However, the problem for migrant workers stateless children in Malaysia is far more complicated than administrative issue. The solution for providing migrant workers stateless children with the rights guarantee by the constitution requires hard work from much higher-ranking government official and diplomats. If remained unsolved, this may become a generational problem as creating families will pave the way toward illegality for further generations.

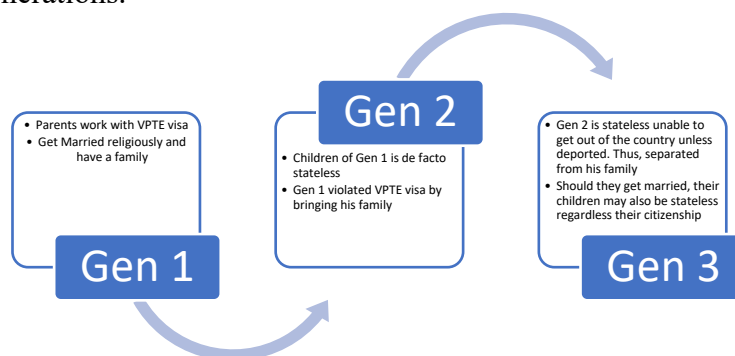


Figure 1. Cross-Generational Citizenship Issues

Due to the absence of the legal basis, officials at Indonesian Embassy are using ad-hoc solution based on discretion when providing services to the citizens. In order to fulfill migrant workers children’s right to education, Indonesian Embassy has established numerous Sanggar Bimbingan or Community Learning Center/CLC). However, the quality of the education offered are minimum due to lack of resources. Indonesian Embassy also establish circuit court or *istbat nikah* to legitimize the marriage between migrant workers and provide them with marriage certificate. Officials also issued Certificate of Citizenship as the basis to create legitimate travel documents while also upholding their legal status as Indonesian and currently the draft of on the Procedures for Confirming the Citizenship Status of the Republic of Indonesia for Indonesian Citizens Without Documents and Proof of Citizenship Outside the Territory of the Republic of Indonesia is being drafted by the Ministry of Law and Human Rights (Prabowo et al., 2024). Historically, in 2006 until 2012 under previous leadership Directorate General of Legal Administration collaborated with the Ministry of Foreign Affairs, the Directorate General of Immigration, the Labor Section of the Indonesian Embassy in Malaysia and the Malaysian Immigration Department to provide and issue clarifications for Migrant Workers to obtain citizenship. Ad-hoc solutions however practical are short term fix, engaging bilateral diplomatic relationship is crucial to address the issue diminishing the chain of generational problem while promoting point eight of Sustainable Development Goals to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.

Conclusion

According to Indonesian Marriage Law, ensuring legitimacy of the parent’s marriage is pivotal to guarantee the legal status of their children. To summarize, a marriage is considered legitimate if celebrated in accordance to one’s religion and be registered to the civil office or office of religious affairs in order to obtain marriage certificate. In the event of the marriage is celebrated outside Indonesia, the couple needs to take into account the relevant law in the country of their choice as the governing law for the act. Afterwards, they will be required to notify the Indonesian Embassy in the

country before coming back to Indonesia to registered to the civil office or office of religious affairs to obtain marriage certificate no longer than 60 days after the wedding. The main obstacle to comply with the provision to register the marriage is the existence of Malaysian Labor Law. Most of Indonesian migrant workers work in 6p sectors : manufacturing, construction, plantation, agriculture, services and services for island resort. 6p sectors migrant workers requires Visit Pass Temporary Employment (VPTE) which valid for three years. VPTE holders are prohibited to bring family members to Malaysia or get married to local or foreign citizen. For Indonesian migrant workers, the administrative aspect to legitimize the marriage present them with two big problems: 1)Cost since coming back to Indonesia means not working and requires quite generous amount of money and 2)Violation of Malaysian Labor Law, if both of them comes back to Malaysia to continue working as husband and wife.

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