

Questioning Government Public Policies toward Indonesian Stateless Children in Malaysia

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ABSTRAK

Jutaan penduduk dengan status tanpa kewarganegaraan (stateless) berada di seluruh dunia dan setengah dari jumlah tersebut menetap di Asia dan tersebar di beberapa wilayah. Status dan situasi masyarakat Indonesia berstatus tanpa kewarganegaraan di Malaysia begitu kompleks sehingga pemerintah harus memperkuat kebijakan yang telah ada dalam melindungi hak-hak mereka. Tujuan artikel ini adalah untuk melihat implementasi kebijakan Indonesia selama ini dalam melindungi anak-anak Indonesia tanpa kewarganegaraan tersebut. Penelitian dilakukan dengan pendekatan kualitatif dengan cara melihat ketentuan hukum dan hak asasi manusia disertai wawancara lapangan, pengumpulan data dan observasi. Topik penelitian ini penting bagi Pemerintah Malaysia dan Indonesia dimana kondisi dan masalah yang ada begitu kompleks, sehingga penyelesaian secara hukum dan upaya politik untuk menghilangkan hambatan ekonomi dan sosial politik terus dilakukan. Hasil penelitian menunjukkan bahwa implikasi lebih lanjut terhadap perlindungan hak anak tanpa kewarganegaraan perlu terus diperkuat berdasarkan berbagai konvensi internasional dan peraturan pemerintah yang ada. Upaya diplomasi dalam menyelesaikan masalah sosial ekonomi dan politik di Indonesia dan Malaysia membuat solusi alternatif sesuai kebutuhan negara masing-masing memang tidak mudah dicapai.

ABSTRACT

Millions of stateless statuses existed around the world, half of them are scattered in Asia expanding across several regions. The status and situation of the Indonesian stateless are so complex and to construe this situation causing the government to strengthen policies in protecting their rights is questioned. The purpose of this article is to observe how effective the implementation of Indonesian policies in protecting Indonesian stateless children who currently spread in several regions of Malaysia. The research was conducted in qualitative method approach on several legal and human rights provision added with field interviews, data collections and observations. As the issue is considered essentially for both Malaysian and Indonesia Governments and conditions surrounding the topic have complex multifaceted problems, struggles of law and political effort in line with economy and social hindrances that continually hinge around should be enforced. The result shows that more implications on the protection of rights for stateless children need to be persistently strengthened by using existing various conventions and governmental regulations. Also, social economic and political conditions in Indonesia and Malaysia are different making soluble alternative that fit countries needs is not tranquil to have.

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INTRODUCTION

Sofie, a flight attendant who is in search of personal identity due to domestic intervention of her parents and family, experiences sexual harassment from her spiritual mentor while she is detained in an immigration detention center, located in a barren desert region of Australia.

Apart from Sofie's experience, an Afghan immigrant (Fayssal Bazzi) who is detained altogether with his wife and two daughters, an Australian man (Jai Courtney) who serves as security staff at the detention center, and the head of detention (Asher Keddie) were cast in a film called *Stateless* (produced in 2014). The movie directed by E Freeman and J. Moorhouse shows a real picture of the implication of citizenship and the rights to own one as a means of freedom for life in the future (*Stateless*, 2020). Those who are detained in this immigration detention center do not possess official documents making them considered 'stateless'. The movie also shows painful experiences and the value of freedom as a dream reality. Even if there is an opportunity to escape, they will instead eventually face other negative actions such as fraud, extortion, or practices being the object of human trafficking.

As the movie shows problems often occurred in immigration institutions all over the world, it is important to pay attention to certain crucial issues, especially in the matter of human rights, by all stakeholders. The protection of citizens' rights is absolute, and has to be protected accordingly. In interpreting such freedom and the matter of human rights within the term of stateless, millions of people around the world currently are having the status of stateless under various conditions (Fullerton, 2014). About 50 percent of the 10 million stateless people live in Asia scattered in several regions, especially in Myanmar of the Rohingya Muslims (Bloom et al., 2017; Rahmawati et al., 2018; *Stateless People – UNHCR Indonesia*, 2023; Tendayi Bloom, Katherine Tonkiss, 2018). The status and situation of the stateless people are mostly resulted from the effect of global migrations or non-migration activities. Indonesian workers (TKI) who legally visited Malaysia was 283.640 workers in 2018 who work formally and non-formal areas. This number is excluding those illegal workers who visited Malaysia and became '*pendatang haram*' that later considered as stateless. In Sabah, around 500.000 workers who lived without official documentsⁱ and based on Indonesian Embassy Data in Tawau, around 21.627 children don't have access to formal education (Hartati & Rofi'atul, 2020). More stateless children scattered in Malaysia without being recorded significantly who need to paid attention.

Having this condition, the author has taken a series of trips and academic community servicesⁱⁱ to ascertain the fulfilment of rights to education, health, work on Indonesian 'Stateless' children in Malaysiaⁱⁱⁱ. The fulfilment of those rights are crucial to government policies to be reinforced. Hence, how strong the tension and complexities of Indonesian Government efforts to protect those Indonesia-descendant stateless children is discussed while considering released problem of Indonesia-Malaysia within stateless issue.

Literature Review

As millions of people are having the status of stateless, practices occur within a complex situations resulting missing of the citizenship (the 1954 Convention) has been noted. The Art. 1 of the Convention relating to the Status of Stateless Persons itself states and explains "... the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law". Normally, the stateless status is named as a form of document-unaccompanied migrant or children (IOM, 2020). Based on the definition, if any opportunities those people or children cross the border to another country for some reason, they are still considered stateless. By this, a child who is born and abandoned without any birth documents is identified as a stateless (Acer & Byrne, 2017; Bloom et al., n.d., 2017; Clark, 2012; Mountz, 2009; Selvakumaran et al., 2022; Singh, 2014). Also, a child who is born to parents of stateless, due to certain problems in

law or other citizenship provisions, will follow the status of their parents (Bloom et al., 2017). A revised Citizenship Law enacted in 2006 has removed previously a gender bias which is now allowing a female parent pass her nationality to the child (*Stateless People – UNHCR Indonesia*, 2023). Therefore, it is clear that the status of stateless is given to a person who is not considered a citizen by any country under the implementation of its law.

The condition of stateless is an important issue as it is frequently misjudged by the public (Kerwin & Warren, 2022). A miserable consequence of the status is that whoever resides in any country with this status will not receive any protection from the state. In Malaysia, there are around 300.000 Indonesian children's are stateless or at risk of being stateless (Kompas, 2022). It is estimated between 30.000 - 52.000 of them are in Sabah region (The Conversation, 2018). This number could be the impact due to several reasons. Among them are caused by the lack or absence of birth certificates or any documents describing children's status. This could also because their parents being unable to produce valid marriage certificates. It is well known that any children who were born as undocumented persons are illegal and considered as irregular migrants or refugees and they will be displaced or even abandoned. They all face the risk of statelessness (Rodziana Mohamed Razali et al., 2015).

Until now, although the issue of stateless children in Malaysia has been raised in several research articles particularly in the definition of the stateless children (Rodziana Mohamed Razali et al., 2015) and the issue of human rights violation arisen behind the status, Malaysian law in fact does not define specific policy or law in providing legal definition for the stateless status (Selvakumaran et al., 2022). As the attention of cases and humanity problems related to stateless children becomes awareness to all, the presence of the stateless children issue has attracted attentions and been recognized and recorded internationally. To this, an official report issued by the Malaysian Parliament (<http://www.parlimen.gov.my>) consequently paid attention to the problem and both Malaysian and Indonesian authorities supported by NGOs and civil society have to keep alert to the issue. Having this as well as a respect to the context of international law and human rights law, critics and reminding discussion, as this article, have to be continually conducted.

RESEARCH METHODS

The article is written the aftermath authors field trips in the scheme of academic report of a non-governmental budgeted 'International Joint Cooperation Community Service' carried out by multi discipline lecturers of the Makassar State University and Hasanuddin University that supported by the Indonesian Embassy in Kuala Lumpur - National University of Malaysia, and the Malaysian Ministry of Health. The preliminary activity was held on January 24-28, 2023 continued in July 17-22, 2023. The writing is started with of collecting qualitative data for the purpose of the article. The data research is collected from primary and secondary qualitatively include surveys, interviews, and observation to be analysed theoretically for the practical use.

The Research purpose to ascertain the fulfilment of rights to education, health, or work opportunities on Indonesian 'Stateless' children in Malaysia based on legal International and local regulations, as well as Indonesian and Malaysian Government policies within the the fulfilment of those rights.

RESULTS AND DISCUSSIONS

In 2014, as statelessness was firmly re-installed on the international human rights agenda and in its campaign was launched 60 years after the 1954 UN adopted the Convention Relating to the Status of Stateless Persons has drawn attention to statelessness protection (UNHCR, 2014a). The campaign 'through minor changes in existing laws', emphasizes measures take to reduce the numbers of stateless people.^{iv} In fact, In Malaysia, a *jus sanguinis* principle of citizenship was applied there are clear legal provisions to protect the status of otherwise stateless children (R. M. Razali et al., 2015). Although the federal constitution allows for a child born in Malaysia who is not born as citizen of another country, and who cannot acquire citizenship of another country by registration within one year of birth, to become a citizen of Malaysia, in reality, this citizenship has never been granted. This has been shown in a 2015, when a Malaysian father's applied citizenship for his 5- year-old son was rejected, because the parents were not married at the time of the boy's birth (R. M. Razali et al., 2015).

In point of facts, children with stateless status face various challenges and obstacles in fulfilling their rights. Some of their problems are in the forms of limited legal access, insignificant education and health, exploitation and human trafficking threats, or a tendency to unwillingly engage in criminal acts (Nations, 2023; *Statelessness - United States Department of State*, 2023). In the matter of law enforcement, stateless children are frequently disrespected (Herberholz, 2022) as they might not have official identification documents such as birth certificates, ID's, or passports. The conditions produce vulnerable matter to discrimination and the denial of their basic rights. Those who do not have adequate legal protection or security guarantees from the state could be detained, deported, or even separated from their families. One of frequent crimes usually occur within the matter of stateless issue in several countries is transnational exploitations and human trafficking risking to stateless children (Nations, 2023; *Statelessness - United States Department of State*, 2023). Some countries apply policies in limiting access to stateless persons to enter public schools or health services (Nations, 2023; *Statelessness - United States Department of State*, 2023). Those countries do not prepare financial support to pay for stateless person's health services.

The above problem in Malaysian immigration was actually been regulated by the International human rights provisions relating to statelessness under the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These conventions as the main legal instruments provide a framework to protect and assist stateless individuals. The 1954 Convention on the Status of Stateless Persons defines what is meant by the stateless persons. The Convention mentions that those who are not considered as citizens by any country retain the rights of legal identity, travel documents and to access basic services such as education, employment and public assistance. The Convention prohibits the arbitrary detention of stateless persons and guarantees freedom of religion, freedom of movement and access to justice (Turner, 2012). On the other hand, the 1961 Convention on the Reduction of Statelessness focuses on preventing the statelessness. The Convention sets out principles and procedures for acquiring and maintaining a nationality aims to reduce instances of statelessness by ensuring everyone has a nationality and cannot be stripped of it arbitrarily. In addition, several other international and regional human rights instruments addressing statelessness at various levels. To protect rights of the stateless children, it has to understood that constant protection has to be carried out regardless of nationality. It is inherent in all children including

those who do not have a certain nationality or are stateless. Some of the most important human rights of children are the rights to life, survival, and development. Hence, every child has the right to live in safety and get basic needs such as food, clean water, medical care, and access to adequate education (Nations, 2023). Also, children have rights to the status of identity where they could require or obtain legal recognitions including birth registration. By a legal identity, they can access basic services. These all suggested under the provisions of international human rights in order to provide them rights, including the rights to be protected from exploitation, violence, abuses, forced labour, human trafficking, or any physical and emotional abuses (Nations, 2023). One most crucial and important rights that urgently needed to be given is the right to education where they could obtain quality, inclusive, and free education. These must be given in equal opportunities without discrimination. Also, they should have the freedom to express opinions and be involved in decision-making processes that affect their lives (Nations, 2023).

Problems Noted and What to be Done

Indonesia has taken various actions in regulating the issue of stateless people inside or outside the country. Within Indonesia, human rights provisions regarding citizenship are covered and guaranteed by the Art. 28D (4) of the 1945 Constitution of the Republic of Indonesia explaining that everyone has the right to citizenship status as the citizenship is one of the most important things in the life of a nation. Hence, The United Nation High Commissioner for Refugees estimates that currently there are 3.9 million stateless living in Indonesian (*Forced Displacement at Record 68.5 Million | UNHCR*, 2018). UNHCR mention that the group of people who experience statelessness in Indonesia are: 1) Ethnic Chinese Indonesians who do not have documents to prove citizenship because is incorrectly recorded and recognized as Chinese citizens; 2) Ethnic Arabs and Indians who do not have documents to prove citizenship or is incorrectly recorded; 3) Indonesian migrant workers who have lost citizenship under old Citizenship Law and cannot acquire under the new Citizenship Law; 4) A small number of Indonesians who were exiled from Indonesia because of political conflict in 1965 and; 5) Other people who become stateless because are classified as migrants without citizenship documents from China and cannot obtain Indonesian citizenship as they were not born in Indonesia. Also, the mentioned data above excludes refugees from conflict countries who were stranded in Indonesia get protection, or Indonesian citizens who lost citizenship status do not get any citizenship from other countries.

Indonesia also has enacted the Law of No. 12 of 2006 concerning Citizenship and several other implementing regulations. To protect stateless children in Malaysia, Indonesia has taken actions to ensure the well-being and rights of stateless children. Both the Ministry of Home Affairs and the Ministry of Law and Human Rights, with the assistance of civil society, have taken important steps to address the issue of statelessness in Indonesia (*Stateless People – UNHCR Indonesia*, 2023). The Indonesian government in Malaysia has been providing consular assistances to stateless children in Malaysia including facilitating communication with relevant authorities, providing documentation support, and offering guidance on legal procedures. Certain document needed by the children is encouraged by registering the births. This will helps in establishing their legal identity that potentially leading to their acquisition of Indonesian citizenship. The Indonesian Embassy in Malaysia and Indonesian consulate (Loganathan et al., 2022)s also provide assistance in advocacy and diplomacy to raise awareness while discussing the issue with

relevant Malaysian authorities for a better solution that promoting their rights. By this, Indonesia and Malaysia maintain bilateral cooperation on various matters related to stateless children. To support the idea, Indonesian civil society organizations and non-governmental organizations (NGOs) provide humanitarian and welfare support to stateless children in Malaysia. These organizations offer assistance in areas such as education, healthcare, and social services to improve the well-being and quality of life for stateless children.

Strengthening the Policies

The arguments on the human rights protection for stateless issues, especially Indonesian stateless children, in Malaysia are bumping with issues of politics, social, and economy in a complex question of various aspects (Loganathan et al., 2022). Razali mentions that in Malaysia, statelessness is always embroiled in wider moral and political arguments and the status of children born out of wedlock or illegals. He added that although laws apparently prevent child statelessness, the way to become citizen in Malaysia, especially for stateless children is unlikely to be honest (R. M. Razali et al., 2015). In Malaysia, large portion of the foreign and migrant population living in legally stateless status especially Indonesian children. Those stateless children face significant impacts on discrimination or persistent stigma against them (UNHCR, 2021), that generally regarded as '*pendatang haram*'. This causes biases to unfair behaviors from surrounding community members, friends, or teachers (UNHCR, 2021). Their limited access to state facilities costs them insignificant treatment and social gaps with other children (UNHCR, 2021). By this limitations. They are exposed to fear of being exploited, detained, or deported by the authorities directly affect their emotional stability and mental well-being. Initially, this social negative stigma and stereotypes is impacting their self-esteem and identity development in interacting with social life. Discussions on problems and impacts of the Indonesian stateless issue in Malaysia have generated variously into debates reflecting differing perspectives and opinions.

Having this picture, some argues that stateless children's rights limitation issue in Malaysia is a human rights violation conducted by the Government or parties related to the issue (Kaur, 2019; *Malaysia: Government Continues to Fall Short on Its Human Rights Protections - ARTICLE 19*, 2022), including the issue of refugee protection (<https://www.hrw.org/world-report/2022/country-chapters/malaysia>). That is why citizenship laws and policies still being debated especially regarding stateless individuals who feel difficulties in obtaining the citizenship under complex and stringent law. This includes the detention and facilities given by the immigration policies that also sparking debates as human rights violations. For this, demands on alternatives detention ways along with argues to implement international human rights standards in the way of humane and rights-based policies is rising. To this, critics on the violations (DIANA, 2014; *Equality and Non-Discrimination in Nationality Matters to End Statelessness Outcome Document Prepared Following the OHCHR/UNHCR Virtual Roundtable on Equality and Non-Discrimination in Nationality Matters to End Statelessness*, 2021; Schmidt, 2019) into a simple citizenship procedures will show statelessness problem support effectively. As the lack of documentation and legal status is a contentious issue, some argue that the government should provide proper identification documents ensuring their access to basic rights and services. However, to this question, others express concerns about potential implications and risk which is may be perceived under the national security issue. Another controversial debates are the access to education, healthcare, and legal services, especially for children,

revolving around the need for policies and practices of equal access. There are argument on providing a pathway to legal status or citizenship through a programs ensuring rights and integration into society. Conversely, opponents raise concerns about potential burdens on resources, national identity, or the potential for an influx of migrants. Indeed, the Malaysia's Immigration Policy designating undocumented Indonesian children as stateless citizen is not straightforward as it is significantly impacting other policies in of Malaysia's law (Selvakumaran et al., 2022). This mean that Indonesian stateless children in Malaysia will never obtain or having opportunities for adequate jobs as they do not have significant documents, educations, or skills as requirements in economic life (*About Statelessness*, 2023). To this, they still are open to informal jobs or any unstable economic activities. obstacles to these formal works are caused by other regulations of wages, social security, or employment protections (*About Statelessness*, 2023).

Meanwhile, Indonesia's political will in protecting stateless children in Malaysia is not optimum. Formally, the protection for stateless children should become a responsibility of the country they originated from. However, the Indonesian government has limitations in protecting or providing significant features to those stateless children, turning burdened situation to be in Malaysia's hands and capabilities. Indonesian Criminal Code Bill is also leave Indonesian stateless children in legal limbo (The Coversation, 2018). Although this should be properly resolved through diplomatic relations, diplomatic relations and cooperation between Indonesia and Malaysia have been directly affected by the situation of stateless issue and differences in law and policy between the two countries might be a meaningful challenge.

In fact, the Indonesian Government play blurred legal and social policies. Although Indonesia applied the Law of No. 12 of 2006 on broadmindedness to open opportunities in the citizenship, it does not merely implement the law and opening wide door to citizenship for stateless status. Accordingly, stateless status residents were informed to given the opportunity to apply for citizenship through procedures mentioned in the Government Regulation No. 2 of 2007 concerning Procedures for Obtaining, Losing, Cancelling, and Reclaiming Citizenship. However, the process of the citizenship is not simple as the Art. 3 (g) of the regulation explains that the application should write and provide a previous country's identification and those with the stateless status obviously could not be able to provide one. This is certainly contrary to the Constitution's spirit of the Art. 28D (4). The condition then is exacerbated by the impossibility to propose a constitutional review pursuant to the Art. 51 (1) of Law No. 24 of 2003 on the Constitutional Court that a case party should have a legal standing as a citizen.

On the contrary, regarding laws and regulations that do not support granting any citizenship, the Indonesian Government has several times reported to grant citizenship to stateless persons. This was shown when the authority granted citizenship to nearly 2,500 people of Indonesian descent who were previously stateless in the Philippines of 2017 (*Stateless Indonesian Descendants in Philippines Given Citizenship – Indonesia Expat*, 2017). The granting of citizenship was carried out on under reason that they are descendants of Indonesians whose rights are threatened as they do not own citizenship documents. To be sure, the process of this citizenship is allegedly linked to a political nuance in order to increase the votes of certain candidates in time of the General Election in 2019 (Faizal, 2020).

Having above questioned policies, Indonesian children with stateless status in Malaysia started following the flow of citizens working abroad, known as TKI (Indonesian Workers) who are one

of sectors contributing a significant amount of country's foreign exchange, Indonesian Government is responsible for facilitating their education in accordance with the 1945 Constitution Article 31 and the Republic of Indonesia Law Number 20 of 2003 concerning the National Education System. Also, in responding to the problem, Indonesia is conducting diplomacy with Malaysia in overcoming the human rights problem in term of:

1. **Completeness Official Documents** as formal education in Malaysia requires complete documents from students including birth certificates. This is because the children of TKI are born to parents who are married without a marriage certificate, so that birth certificates cannot be made. In connection with the regulation of migrant workers in 2002 by the Malaysian government regarding namely Malaysian Immigration Act Number 1154A/2002 (previously Immigration Act of 1959 and 1963). The regulation officially came into effect on March 1 stating that it is mandatory for migrant workers in Malaysia to work formally, have legal documents.
2. **Difficulties Accessing Formal Education Institutions.** As Malaysia has a Central Government Constitution which is in the Article 12 reads "prohibits discrimination against any citizen on the grounds only of religion, race, descent or place of birth in conforms to the principles of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), Malaysia is known as a country that is successful in developing education. However, Malaysia has to face several educational problems because there are still many people who are disadvantaged in getting access to education.

Therefore, to implement stateless children's rights, the Governments of Indonesia and Malaysia have conducted diplomatic activities in order to find a way out of the existing problems. In 2004, President Megawati and Prime Minister Abdullah Ahmad Badawi agreed on the access easiness to education services for the children of Indonesian Migrant Workers who are in Malaysia. On January 2006, the President of Indonesia held talks with the Prime Minister of Malaysia in Bukit Tinggi and agreed on cooperation in the protection of Indonesian Migrant Workers, The MoU broadly covers four aspects, namely the placement of informal migrant workers in Malaysia, misuse of social visit visas by migrant workers to work in Malaysia, education for migrant workers' children, training on culture, and so on.

CONCLUSIONS

The number of Indonesian children with stateless status has raised making the situation is decisively to be reconsidered essentially both Malaysian and Indonesia Governments. It is understood that interpreting rights to stateless is not effortless as tensions and complexities are always on. As issues on Indonesian stateless children in Malaysia has been researched, cases of humanity problems and rights should alarm and become awareness to all parties. International human rights provisions relating to statelessness had been enacted widely to provide framework in protecting and assisting stateless individuals but those stateless status still face various challenges and obstacles in fulfilling their rights. Indonesia as well has taken various actions based on the 1945 Constitution of the Republic of Indonesia to implement regulations such the Law of No. 12 of 2006 or the law no. 2 of 2017. However, arguments on such government policies still rise sceptical protection for stateless issues especially when they collide with matters in politics, social, and economics. Recurrently applications of law to stateless people and children in Malaysia showing complexity and stringent implementations demanded to be revised.

Hence, the application of law by Malaysian Government needs to reviewed under how the Malaysian government's recognition mechanism and legal protection could be given in less

administrative obstacles. The Malaysian government can develop and implement laws that recognize legal status while provide protection to individuals who are stateless, includes access to legal identity, official documents, or full access to basic rights such as education, housing, and healthcare. In terms of updating and strengthening citizenship verification process, the Malaysian government should treat transparent, fair, and clear principles of law and human rights regulations. Through the mentioned considerations, the Malaysian Government's partnership with Indonesia and other countries can be strengthened. On the other hands, Indonesia's political will in protecting stateless children should been optimized significantly. As protection for stateless become responsibility of the country they originated from, Indonesian government has to revised Indonesian regulations, including the criminal code, to be more applicable to the situation.

In addition, awareness and education campaigns aimed at increasing public understanding on problems of stateless, human rights, and the importance of protecting those individuals can be carried out through training for public administration officers, or other comprehensively approaches in fighting for the rights of stateless. With this, social justice of non-discriminatory matter towards individuals can be implemented in equal opportunities of accessing education, employment, housing, health services, and other rights according to the principles of human equality and justice. This can be done by involving active participation of various stakeholders, including civil society organizations and human rights advocacy groups. Responding to problem faced, Indonesia has done diplomacy steps with Malaysia in term of the completeness Official Documents to enter formal education in Malaysia. Also, the Governments of Indonesia and Malaysia have agreed on the access to education services for the children of Indonesian Migrant Workers even though there are prominent are still need to be strengthened.

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