

JURNAL CITA HUKUM

Indonesian Law Journal



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Welcoming contributions from scientists, scholars, professionals, and researchers in the legal disciplines to be published and disseminated after going through script selection mechanisms, reviewing sustainable partners, and rigorous editing processes.

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Legalizing Unofficial Marriage for Indonesian Migrant Workers in Malaysia *

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Abstract:

In recent decades, there has been a massive influx of Indonesian migrant workers or TKI (*Tenaga Kerja Indonesia*) in Malaysia, both legally and illegally. Unfortunately, both the legal and illegal migrant workers faced unofficial (*sirri*) marriage problems and their children. This study will analyze the legalization process for the Indonesian migrant worker marriage in Malaysia. The research was done in the region of Peninsular Malaysia, using qualitative research method. The result shows that the legalization process faced some obstacles such as; (1) Malaysian regulation which forbid marriage while under working contract for migrant workers; (2) The difficulty to fulfill the requirements for *itsbat nikah* (legalizing marriage) because of the distance factor to the Indonesian embassy, hard to get the leaving permit from the employer, and the strict administration for the *itsbat nikah* program such as the requirements of reference that the applicant has not been married yet in their place of origin. The *sirri* marriage that is performed by TKI in Malaysia caused many problems such as the one regarding the status of their children's nationality. They cannot be documented by giving them birth certificates, passport, and other documents. Also, their rights are unprotected by the law. This study will have implications on Indonesian government's policy regarding the protection of TKI's rights and his family.

Keywords: *Sirri Marriage, children status, Indonesian migrant workers, itsbat nikah*

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Pengesahan Perkawinan Sirri Bagi Pekerja Migran Indonesia di Malaysia

Abstrak:

Dalam beberapa dekade terakhir, telah terjadi gelombang besar pekerja migran Indonesia atau TKI (Tenaga Kerja Indonesia) di Malaysia, baik secara legal maupun ilegal. Sayangnya, baik pekerja migran legal maupun ilegal menghadapi masalah perkawinan tidak resmi (sirri) dan anak-anak mereka. Studi ini akan menganalisis proses legalisasi perkawinan pekerja migran Indonesia di Malaysia. Penelitian ini dilakukan di wilayah Semenanjung Malaysia, menggunakan metode penelitian kualitatif. Hasil penelitian menunjukkan bahwa proses legalisasi menghadapi beberapa kendala seperti; (1) Peraturan Malaysia yang melarang pernikahan saat berada di bawah kontrak kerja untuk pekerja migran; (2) Kesulitan untuk memenuhi persyaratan untuk itsbat nikah (melegalkan pernikahan) karena faktor jarak ke kedutaan Indonesia, sulit untuk mendapatkan izin cuti dari majikan, dan administrasi yang ketat untuk program itsbat nikah seperti persyaratan referensi bahwa pelamar belum menikah di tempat asal mereka. Pernikahan sirri yang dilakukan oleh TKI di Malaysia menyebabkan banyak masalah seperti yang menyangkut status kewarganegaraan anak-anak mereka. Mereka tidak dapat didokumentasikan dengan memberi mereka akta kelahiran, paspor, dan dokumen lainnya. Juga, hak-hak mereka tidak dilindungi oleh hukum. Studi ini akan memiliki implikasi pada kebijakan pemerintah Indonesia mengenai perlindungan hak TKI dan keluarganya.

Kata Kunci: Pernikahan Sirri, status anak, pekerja migran Indonesia, itsbat nikah

Легализация неофициального брака для индонезийских трудящихся-мигрантов в Малайзии

Аннотация:

В последние десятилетия в Малайзии наблюдался массовый приток индонезийских рабочих-мигрантов или TKI (Tenaga Kerja Indonesia - Индонезийские рабочие) как легально, так и нелегально. К сожалению, как легальные, так и нелегальные трудящиеся-мигранты столкнулись с неофициальными (Sirri) проблемами в браке и со своими детьми. В этом исследовании будет проанализирован процесс легализации индонезийских браков трудящихся-мигрантов в Малайзии. Исследование проводилось в районе полуострова Малайзия с использованием качественного метода исследования. Результат показывает, что процесс легализации столкнулся с некоторыми препятствиями, такими как; (1) Малазийское регулирование, которое запрещает вступление в брак при заключении трудового договора с трудящимися-мигрантами; (2) Трудность выполнения требований для ее бат-никах (легализация брака) из-за фактора расстояния до посольства Индонезии, трудностей с получением разрешения на отпуск от работодателя и строгого администрирования программы итбат-никах, таких как требования упоминание о том, что заявитель еще не состоял в браке по месту своего происхождения. Брак (Sirri), заключенный (TKI – индонезийские рабочие) в Малайзии, вызвал много проблем, например, в отношении статуса гражданства их детей. Они не могут быть задокументированы путем предоставления им свидетельства о рождении, паспорта и других документов. Кроме того, их права не защищены законом. Это исследование будет иметь последствия для политики правительства Индонезии в отношении защиты прав (TKI – индонезийские рабочие) и его семьи.

Ключевые Слова: брак (Sirri), статус детей, индонезийские трудовые мигранты, итбат никах

Introduction

In the '90s, Indonesian migrant workers or commonly known as *Tenaga Kerja Indonesia* (TKI) has started to enter Malaysia in a large number. Most of the migrant workers entered Malaysia as illegal workers. Experts stated that Indonesian migrant workers entered Malaysia illegally because of a coercive system implemented for documenting migrant workers in Indonesia that working as an illegal worker is an act to fight against the coercive system (Hugo, 1993: 36-70; Killias, 2010: 897-914; Shahrullah, Sherly, 2017: 123-134). A number of them are women working as housemaids, while the men work as hard laborers in the factory, construction, and plantation (Chin, 1997: 353-385; Clark, 2015: 105; Austin, 2017: 268-270).

Both the legal migrant workers and the illegal ones faced a problem related to their marriage and children. For the legal workers, it was mentioned within the contract that they are not permitted to marry just as stated in the Malaysian law for migrant workers. This was also applied to the illegal workers that came to Malaysia in an even bigger number than those coming legally so that when they got married in Malaysia, they performed an unofficial marriage known as *sirri* marriage (Addil, 2011: 104-111; Anggriani, 2017: 310-335). This marriage is deemed unregistered because it was not done under the supervision of marriage recording official by the Religious Affairs Office or *Kantor Urusan Agama* (KUA) and was done only in front of close relative under the blessing of *Ustadz* (religious cleric). This *sirri* marriage caused many problems that the TKI faced when dealing with the Malaysian government. One of the problems is that the children born from this marriage did not have a birth certificate. If they did not have a birth certificate, it can cause another problem like rejection to school admission, difficulties when making a passport, or losing the right to the inheritance. Therefore, women and children are prone to become a victim because they are not protected by the law and legal procedures (Gurowitz, 2000: 863-888).

Indonesian government through its delegation has put some efforts in trying to legalize the *sirri* marriage performed by TKI in Malaysia by going through the legalization program known as *itsbat nikah* (legalizing marriage). This effort has been juridically legitimized in the circular order of Indonesian Supreme Court Number 20 year 2010 regarding the guidelines for legal support, and attachment B of Indonesian Supreme Court order No.084/KMA/SK/V/2011 about the permission of stipulation of *Itsbat Nikah* in the Indonesian delegation offices. Indonesian Supreme Court through the Central Jakarta Religious Court has been going around supporting the workers

in Malaysia in 2011 and 2012. This program to process the *itsbat nikah* request was done in cooperation with the Ministry of Foreign Affairs through their embassy abroad. The request was usually filed by the Muslim TKI that performed a rightful marriage under the Islamic teaching to validate their marriage legally because they did not have a certificate of marriage since their marriage was not recorded officially in the KUA (Wahyu S, 2015: 11-122).

However, this program is still not effectively implemented to help legalize *sirri* marriage and the children born from it. In 2011, there were only around 600 requests of *itsbat nikah* filed. In 2017, Zainal Abidin noted in his research, there were only 292 marriage services filed in *Konsulat Jenderal Republik Indonesia* (Indonesian Consulate), Johor Bahru (Abidin, 2017: 1-20).

This problem needs to be brought to our attention to explain the problems faced on legalizing the *sirri* marriage of TKI and to contribute by providing legal analysis to search for a solution to protect TKI and their children.

Research Methods

This research uses the normative legal and empirical approach. Normative legal research was used to identify the policy and regulation of Indonesian migrant workers abroad. The empirical approach was used to see and analyze the reality of the condition faced by TKI and their children born from *sirri* marriage and mapped the problem and obstacles faced juridically, socially, and culturally in order to fulfill their rights. These methods are used to give recommendation or to support in taking a decision with relative values from two or more alternative actions (Soejono, 2003: 110).

The data was compiled by using three methods including interview, literature study, and observation. The interview was done to the Indonesian delegates, the woman right activists, teacher, and TKI in Kuala Lumpur, Selangor, Kelantan, Johor, and Klang, using purposive sampling. The observation was also done in the region housing TKI workers in Kuala Lumpur, Selangor, Johor, and Kelantan in October 2017.

The procedures in processing the data include: *First*, data reduction. The researcher chooses the focus of attention to simplify, abstract, and transform the rough data obtained; *Second*, data display, and; *Third*, conclusion drawing and verification. The analysis in this research was done using descriptive qualitative analysis method where the researcher describes the data or information

obtained on the field and then to analyze the legal problems faced by TKI marriage and their children born from *sirri* marriage in Malaysia.

Between Human Rights and Legalizing

According to the research done in Malaysia, there are some findings related to the reason behind *sirri* marriage. The first, the main factor behind the reason why TKI did not have a legal marriage document is that they performed *sirri* marriage. For legal TKI, the Malaysian government regulation binds them, as stated within their contract, that they are not permitted to marry. In corresponding to the rule of Malaysian immigration, TKI is not permitted to marry as long as they are still under the working contract, either with their fellow workers or with local residents. Indonesian citizens or *Warga Negara Indonesia* (WNI) in Malaysia are permitted to marry if they come under the student visa, professional working visa, social visa, or tourism visa. For TKI with temporary working visa of PLKS (*Pass Kerja Lawatan Sementara*), the regulation forbids them to perform a legal marriage in Malaysia (<http://kbrikualumpur.org/w/2017/02/25/>). Malaysian Immigration Act 1959/1963 section 8 (3) point 15, states that there is a prohibition for Indonesian migrant workers who work in Malaysia to marry. It states:

“Foreign workers are not allowed to marry with local residents or foreign workers who work in Malaysia. If a foreign worker is married using a *Pass Lawatan* (Temporary Work)/PL (KS) will be terminated and the foreign worker needs to be sent home to his home country.”

The reason behind why workers with PLKS are not permitted to marry, according to Marsianda (Acting Consular I, KJRI Johor Bahru), is that there is a regulation implemented by the Malaysian government that forbids foreign workers to perform a legal marriage in order to minimize the unwanted consequence for Malaysia as a nation. If foreign workers were given permission to marry legally, then (1) the government needs to provide insurance, school, healthcare facilities, and any other children-related needs; (2) If the wife had a job in refinery/factory and lived in dorm/mess, then the factory needs to prepare some facilities for the husband that can be a burden for the factory or the owner; (3) in every working contract for TKI in Malaysia, there is a dictum stating that if one was to marry, the contract will end; (4) If Malaysian Government permitted marriage for migrant workers working in refinery/factory and plantation, then the children of said marriage must be given the facilities like school and healthcare up to the most rural inland area. Aside from Malaysia, Singapore also forbids migrant workers holding a

temporary working visa of PLKS to marry as stated within their working contract (Abidin, 2017: 1-20).

This has become a dilemma. TKI who have reached productive age and have the right to marry, when they meet with their partner abroad, they can not legally be married because of their contract. This forced them to opt for *sirri* marriage. This problem was also stated by the attache for the Embassy of the Republic of Indonesia in Kuala Lumpur, Ari Purbayanto (Interview, October 3, 2017).

Meanwhile, for illegal TKI, of course, they can not marry legally because of their illegal status. Illegal TKI workers then, just as the legal ones, are opting to marry through *sirri* marriage. In fact, they perform the marriage with the blessing of their friends with minimal religious knowledge. This resulted in many of them which have been bound by marriage, perform another marriage or doing polygamy/polyandry and bore many children. This condition complicates the effort in resolving the problem regarding their legal status (Interview, October 3, 2017).

The requirements for submitting a Marriage Certificate in the Indonesian Representative of Malaysia are as follows:

1. Photocopy of identity document as Indonesian Citizen (Passport, SPLP /Indonesian KTP/ Family Card/school diploma / Birth certificate);
2. Fill in the *Itsbat* application form to the Central Jakarta Religious Court (free form at the Indonesian Embassy);
3. Fill in the Statement Form of not having another husband/wife both in Indonesia and in Malaysia (free form at the Indonesian Embassy);
4. Attach a certificate not to have a husband and wife from the *kelurahan* (sub-district) in Indonesia; and
5. Paying court fees in the amount of Rp. 116,000.

However, the implementation of *itsbat nikah* faced some obstacles such as:

1. Geographical condition. The offices located far from the targeted TKI considering many TKI workers are working in the rural area far from the central city as found in the region of Johor, Kelantan, Sarawak, and Sabah. This condition makes it difficult for TKI workers to travel to the offices because of the time and budget constraints.
2. The policy implemented by the working place that forbid the workes to leave the working area in order to reach the high productivity target and

working loads. This kind of policy is hard to be interfered by the Indonesian government because TKI workers are bound to their working contracts.

3. Dubiety over documents required for *itsbat nikah*. Many couples who performed *sirri* marriage found it difficult to prove the legality of the required documents. Moreover, it is quite difficult to gather around the witness for their marriage. Based on the observation by Mimin Mintarsih, it is very difficult to provide the administrative requirements to apply for *itsbat nikah*.
4. The applicant has already married with a husband/wife legally in Indonesia. This problem is a complex one when the TKI performed *sirri* marriage while still bound by their previous marriage, especially for women.

According to Mimin Mintarsih, woman rights activist and the head of PCI Muslimat NU Malaysia, The TKI are usually married to their fellow TKI workers, while some of them married with foreign workers coming from Pakistan, India, or Bangladesh. (Interview, October 2, 2017). Generally, this type of *sirri* marriage ended up with many problems afterward, such as the husband has to go back to their country because the contract has ended or caught by the Malaysian immigration officer. The biggest problem is when the marriage has an offspring. The children from this marriage will oftentimes be neglected (Interview, October 4, 2017)

One of the examples is Saripah (not her real name), a 30 years old woman from Bangkalan, Madura who married with a Pakistani worker through *sirri* marriage. Previously, she came to Malaysia with her husband as a fellow TKI worker. But after her husband had his second marriage there, she divorced him and later got married to a Pakistani worker. She got married in front of the Ustadz. From this marriage, she got 1 child who is currently still under five years old. Her husband has gone back to Pakistan and never sends any sustenance money to her and her child. To sustain their everyday needs, she works as a cleaning service in a clinic with the salary of 1000 ringgit a month. However, Saripah and her child didn't have a passport because of their illegal status (Interview, October 4, 2017).

Another example is Muhajirah (not her real name), a 34-year-old woman from Bawean who married with a Rohingya refugee and has a 6-year-old child so that her status changed from illegal to that of a refugee. Because of the refugee status, she won't be caught by the Malaysian immigration officer when

they conduct searches and her child can go to the school built by Malaysian government for the Rohingya refugees. However, she can not go outside of Malaysia and she can't go back home to Indonesia (Interview, October 4, 2017)

Aside from the *sirri* marriage in front of the *Ustadz*, many of the TKI workers also went to the southern Thailand border to seek local *Ustadz* that can perform a marriage ceremony for them. Usually, this happened in the area bordering Thailand like the Kelantan region. According to Pak Mat, the village chief in Gua Musang, Kelantan, many illegal workers in local plantation go to southern Thailand to get married. The reason behind their undocumented and illegal status is also unique. Many of them came initially as legal TKI but then became illegal ones because they ran away from their workplace because of several reasons such as salary, unprocessed permit, and other problems (Interview, October 5, 2017).

For example, Mr. Andi (not his real name), a man from Bugis who resides in Gua Musang, Kelantan that later became an illegal worker who worked at the local plantation. His marriage is undocumented so that his eight children didn't have any documents or birth certificates. His eldest son is 17 years old and worked in the same plantation without having attended school. This is also the case with his other children (Interview, October 5, 2017).

Commonly, the couple who performed *sirri* marriage in Malaysia will be haunted by the fear of getting caught by Malaysian Sharia police or the religious officer. For those who got caught, they will be sentenced with the fine and a 4 months jail time. Cases and services that were handled by Indonesian delegation through the KJRI Johor Bahru for the TKI workers included: *First*, man and woman working in the different workplace, each has a right for dorm facility, to meet, and to do romance in a hotel. If the woman was pregnant while still working, she has the right to wear loose clothing so that she can hide her pregnancy status. After entering the 7th month of pregnancy or there is a rupture in the amniotic membrane, she was to be carried to the clinic and the report has to be made to the KJRI Johor Bahru to prepare for the childbirth. Medically, if there is a rupture in the amniotic membrane, there is an urgent need to quickly enter the childbirth process to prevent the imperfections when the baby was born. *Second*, women are mostly in the inferior position both in the *sirri* marriage and in the premarital relationship. For example if there was a man (coming from Indonesia, Bangladesh, Myanmar, Nepal, or Indian descent) who has a working contract in Malaysia and the contract is almost due to end invited a woman TKI worker for a night in the hotel, and after the contract ends the woman got pregnant, the child will be left abandoned (Abidin, 2017: 1-20).

As stated before, unofficial marriage or *sirri* marriage that is performed by TKI in Malaysia caused many problems such as the one regarding the status of their children's nationality. Illegal migrant workers, like legal migrants, are used to doing *sirri* marriages. Even in practice, they were only married by their friends who had minimal religious knowledge. As a result, among those who have been bound by marriage, there is a new contract or polyandry and then has children. This adds to the complicated problem of resolving its legal status.

Ari Purbayanto asserts that the children of TKI workers born from *sirri* marriage in Malaysia are stateless or didn't have any nationality. They can not be documented by giving them birth certificates (Interview, October 3, 2017). Even for childbirth procedure according to Mimin Mintarsih, the TKI won't be accepted by the hospital. Generally, the hospital in Malaysia rejects to treat illegal TKI. This illegal TKI usually gave birth in private clinics which charge them very high. Aside from being stateless, the children of *sirri* marriage will not have any civil relation to their father such as guardianship, *nasab* or lineage, the right to foster care, or the inheritance right. This complicates the process of applying for legal documents such as birth certificate, passport, and visa (Interview, October 2, 2017)

Most of the children of *sirri* marriage in Malaysia cannot go to school even though they are already in the age before they got deported to their native region in Indonesia. The case of Mr. Andi is one of the real examples where all of his children didn't attend school. The Indonesian government has lobbied the Malaysian government to build the center for study and learning *Pusat Kegiatan Belajar Mengajar* (PKBM) or Community Learning Center (CLC). According to Prof. Ari, the discourse regarding the building of CLC unfortunately only permitted in the region of Sabah and Sarawak. In the Malaysia Peninsular area, CLC is still banned. However, KBRI still tried to organize a CLC secretly in some region such as Klang, Selangor, and Johor Bahru (Interview, October 3, 2017).

The education was done in the area of KJRI Johor Bahru. This education service was known as the Indonesian Community Center (ICC). ICC was founded on January 5, 2014, in Putrajaya, Malaysia. The education service was registered in the Ministry of Education and Culture of the Republic of Indonesia as *Sekolah Indonesia Terbuka* (SIT) with 25 students. Afterward, the name changed into *Sekolah Indonesia Johor Bahru* (SIJB). Nowadays there are 203 students registered in the school consisted of 179 elementary students and 24 junior high students.

Meanwhile in Klang, Selangor, at the time this research was done, there are only 80 students and 3 teachers. This education in CLC was held secretly because it doesn't have the legal permit from the Malaysian government. This CLC can be held because of the support from one of the Malaysian high-ranking official with a Bugis descent. According to Wirdaningsih, the manager of CLC in Klang, the activities of CLC are still very hard to operate because of the small fees received from the student, even though many neighboring school suspects that these children have a lot of money. Another problem faced by the children studying in Klang is that they are not free to move around. They can only play around their settlement area or in the CLC. When they are having an exam in Kuala Lumpur, the CLC is very concerned because they were nobody around that can ensure their safety. There is a high risk of them to be caught and admitted to jail. The ransom fee is quite high, between 4000 to 5000 Ringgit or around 15 million Rupiah (Interview, October 4, 2017).

The government itself through the Ministry of Education and Culture of the Republic of Indonesia has sent professional teachers. That is in order to provide quality education services. They were assigned to teach at SIKK and CLC in the Sabah, Sarawak and Peninsular Malaysia regions. In 2009 only 9 teachers were sent. In August 2017 100 teachers were sent to teach at CLC Sabah replacing the teachers sent earlier because they had finished their assignment. (www.jawapos.com/radarmadura/read/2017/11/04/24371/kbri-fasilitasi-pendidikan-anak-tki-di-malaysia)

According to the findings above, the regulation implemented by the Malaysian government for migrant workers is the main factor behind the reason why the marriage is not permitted for the TKI still bound by their working contract in Malaysia. Indonesian government ought to be able to do some lobbying to the Malaysian government so that there are some dispensations for TKI who can provide administrative requirements to be married legally. This is also in accordance with the Indonesian Marriage Law no.1 of 1974 art. 2 (1) and the Government Regulation no. 9 of 1975 art. 5 in which the Indonesian government asserted that every marriage must be documented according to the legal regulation.

Thus, it is imperative for the Indonesian government through its delegation abroad to provide legal protection for TKI workers in Malaysia. Government Regulation no.3 of 2013 art.2 (2) also stated that the rights of TKI as mentioned in part.1 should be defended, including the rights for TKI according to their working agreement, national law, local labor law, and international convention. This should open the way for Indonesian government

through The Ministry of Foreign Affairs or its delegation abroad to prepare a Memorandum of Understanding (MoU) with Malaysian government regarding the dispensation for TKI to legalize their marriage for those who can provide the administrative requirements needed.

Annual Consultation has been done by the Indonesian government under President Megawati in 2004 and President Susilo Bambang Yudoyono in 2006. This Annual Consultation should be done again in order to discuss the legalization of marriage for TKI workers in Malaysia. The bilateral relationship between Indonesia and Malaysia is an important factor to bring this bilateral discussion as an effort to fulfill the rights of TKI workers in Malaysia.

Itsbat Nikah is a solution for TKI workers to legalize their marriage in Malaysia which subsequently became a condition for legalizing their children status. *Itsbat nikah* is a legalization of marriage from the Religious Court for the marriage performed in accordance to the Islamic Sharia teaching but is not documented by the authorized officer so that the couple didn't have any legal documents or marriage certificate that can have an implication toward an unrecognized marriage, including the children born from the marriage, based on the Indonesian legal system.

Meanwhile, for illegal TKI, the lack of legal working documents is the main factor behind their inability to process other legal documents such as passport, certificate of marriage, and birth certificate for their child. Because of the high demand for TKI workers in Malaysia, the Indonesian government started to intensify the "clearance" (*pemutihan*) program as one of the means to minimize illegal TKI workers. However, this clearance program that was done by deporting the illegal workers and putting them into the blacklist cannot discourage WNI to become illegal TKI. As long as the demand remains in a high number, the illegal TKI workers will keep coming into Malaysia.

Thus, the problem in implementing this clearance also cannot be resolved without an agreement between both countries, Indonesia and Malaysia. The step to resolve this problem, again, lies in the bilateral agreement in the form of bilateral for a such as Annual Consultation that has been done before.

Based on the findings before, there is an outlook that the children of TKI workers born from *sirri* marriage in Malaysia are stateless (didn't have any nationality) as long as the status of marriage between the parents is illegal in the face of Indonesian legal system. This outlook is not exactly right because according to the Indonesian Law no.12 of 2006 about the Indonesian Nationality art.4 (g), the citizen of the Republic of Indonesia is children born out of legal

wedlock from an Indonesian mother. Thus, the child of *sirri* marriage that is born from TKI workers in Malaysia is also a citizen of the Republic of Indonesia or WNI.

As WNI, these children have the same rights as other WNI children. Indonesia has ratified the 1989 United Nations Convention on the Rights of the Child by the Presidential Decree no.36 of 1990 on August 25, 1990. With the ratification of this convention, Indonesia has agreed to provide policies regarding children's rights. *First*, An addendum in Art.28B (2) of the 1945 Constitution of Indonesia in the second amendment, which stated, "Each child has the right to live, grow up, and develop as well as the right to protection from violence or discrimination." *Second*, The President of the Republic of Indonesia, along with the People's Representative Council has authorized the Law no.23 of 2003 regarding Child's Protection. This law in a whole ensures, respects, and protects the rights of the child. *Third*, the Indonesian government formed the Ministry of Women Empowerment and Child Protection as a coordinating institution to advocate child protection in Indonesia. This ministry has a task to compile the National Action Plan and Development in the matter of children. *Fourth*, Indonesia formed the Indonesian Child Protection Commission or *Komisi Perlindungan Anak Indonesia* (KPAI) as an independent body to ensure, to respect, and to protect the rights of the child as stated in the basic principle of the Convention on the Rights of the Child.

In terms of the protection for TKI, the United Nations has declared in the International Convention on the Protection of All Migrant Workers and Members of Their Families art.1 (1) that this convention applies, except stated otherwise, to all migrant workers and members of their families without any discrimination on the grounds of gender, race, skin, language, religion or beliefs, political opinion or others, nationality, ethnic or social origin, citizenship, age, economic position, property, marital status, birth or other status.

Based on this, there are 10 principal children's rights that must be fulfilled: 1). The right to play; 2). Right to get an education; 3). Right to get protection; 4). Right to get name (identity); 5). Right to obtain national status; 6). Right to get food; 7). Right to get health access; 8). Right to get recreation; 9). The right to get in common; 10). Right to have a role in development.

Based on the findings of the fact that children of Indonesian citizens who are migrant workers in Malaysia, it can be concluded that the fulfillment of their rights is neglected. The right to access health, the right to play, the right to education, protection, national status, and recreation are very difficult to fulfill.

Educational rights have indeed been given by the Government by establishing CLC in the Sabah and Sarawak regions. But for those who live in Peninsular Malaysia, there is little that can be given to the children of migrant workers, related to regulations in Peninsular Malaysia which formally prohibit the establishment of CLCs. The new CLC is "hidden", like CLC in Klang, Selangor. While in rural areas or plantations such as in Gua Musang, Kelantan, the children of migrant workers do not get their education rights.

This is one of the challenges for Indonesia to be able to realize children's rights to education as mandated in Law Number 23 of 2002 concerning Child Protection especially in Article 9 Paragraph (1) and Law Number 20 of 2003 concerning the National Education System. The children of Indonesian Migrant Workers are also Indonesian children, as the next generation who must be considered, protected, fulfilled and guaranteed education so that they do not forget their homeland and the cultures of their own people.

Therefore, the government holds a central role to protect TKI abroad and their family members without discrimination on the grounds of marital status and the child's birth status. The right of the child is the principle of human rights that can not be revoked by everyone for any reason. Neglecting those rights is a violation of human rights.

This situation seems to have changed with the election of Mahathir Muhammad in 2018, where his government is committed to setting up schools for the children of Indonesian labor migrants in Peninsular Malaysia which were previously seen as illegal. This is certainly different from the conditions of the children of Indonesian migrant workers in Sabah and Sarawak where local governments have permitted the establishment of schools there for a long time. (<https://kl.antaranews.com/.../sekolah-anak-tki-diizinkan-berdiri-di-semenanjung-malaysia>, 8 January 2018).

Conclusion

Based on the findings and discussion above, it can be concluded that the legalization process for TKI marriage faced many obstacles such as: (1) The regulation of the Malaysian government that forbids marriage as long as the worker was still bound by the contract in Malaysia; (2) The difficulty in providing the required documents to apply for *itsbat nikah* because of geographical condition which placed them far from the Indonesian embassy and the difficulty to get a leave permit from the workplace along with the difficulty to prepare the administrative requirements.

This problem caused the TKI's child status and the fulfillment of the rights in Malaysia, especially their right to education, still faced many problems such as (1) the number of schools is still a little bit compared to the number of children of TKI. Even so, the location is very far from where they live; (2) The imbalance ratio of teacher and students where the number of the teacher is far less than the number of students; (3) The low awareness of TKI who generally holds no or little education to send their child to school. For them, even without any school diploma, they can still work at the refinery/factory, plantation, or construction projects with an adequate salary.

The other rights of the children of TKI are also neglected because of their undocumented status. The right to play, to get a recreation, to be protected and other rights are very difficult to be realized. Most of them are afraid to go far from their settlement because of the judicial raid by the Malaysian officer. When the raid happened, many of the children ran away with their parents to the forest and live in the hut there. This caused the children of TKI workers cannot exercise their rights to develop normally without any fear.

Based on this result, the Indonesian government should try to cooperate closer and to lobby the Malaysian government so that there will be a dispensation given to the children of TKI workers to obtain legal status from the *itsbat nikah* program held by the Embassy of the Republic of Indonesia or its delegation. On a higher level, Indonesian government can continue to hold Annual Consulting between the Indonesian government and the Malaysian government to handle the problem faced by TKI and their members of the family just like it has been done before by the previous administration.

As well as, the Government of Indonesia through its representatives must intensify its *itsbat nikah* program which reaches out to all TKI regularly, family planning counseling, "clearance" program of illegal TKI, and the increase in the number of schools for TKI's child.

References

- Abidin, Z. "Pencatatan Perkawinan Warga Negara Indonesia (WNI) di Johor Bahru, Malaysia", Paper, November 3, 2017, pp.120.
- Adill, S.U. "Analisis Hukum Terhadap Faktor-Faktor Yang Melatarbelakangi Terjadinya Perkawinan Sirri dan Dampaknya Terhadap Perempuan (Istri) dan Anak-Anak," Jurnal Dinamika Hukum, Vol. 11, Februari 2011, pp.104-111.

- Anggriani, R. *"Perlindungan Hukum Bagi Irregular Migrant Workers Indonesia di Kawasan Asia Tenggara (Dalam Perspektif Hukum HAM Internasional)"*, Yuridika, Vol 32, Iss 2, (2017), pp. 310-335.
- Austin, M. *"Defending Indonesia's Migrant Domestic Workers"* in Ward Berenschot, Henk Schulte Nordholt, Laurens Bakker (ed.), *Citizenship and Democratization in Southeast Asia*, Amsterdam: Brill, 2017. pp. 268-270.
- Buku Saku Tenaga Kerja Indonesia*, Tawau: Konsulat Republik Indonesia.
- Chin, C.B.N. *"Walls of Silence and Late Twentieth Century Representations of the Foreign Female Domestic Worker: The Case of Filipina and Indonesian Female Servants in Malaysia."* *The International Migration Review*, Vol. 31, No. 2 (Summer, 1997). pp. 353-385.
- Clark, M. *"Labour migration flows and regional integration in Southeast Asia"* in Juliet Pietsch, Marshall Clark (ed.), *Migration and Integration in Europe, Southeast Asia, and Australia: a Comparative*, Amsterdam: Amsterdam University Press, 2015, pp. 105.
- Gurowitz, A. *"Migrant Rights and Activism in Malaysia: Opportunities and Constraints"*, *The Journal of Asian Studies*, Vol. 59, No. 4 (Nov. 2000), pp. 863-888.
- Hugo, G. *"Indonesian Labour Migration to Malaysia: Trends and Policy Implications"*, *Southeast Asian Journal of Social Science*, Vol. 21, No. 1 (1993), pp. 36-70.
- Killias, O. *'Illegal' Migration as Resistance: Legality, Morality, and Coercion in Indonesian Domestic Worker Migration to Malaysia*, *Asian Journal of Social Science*, Vol. 38, No. 6 (2010): 897-914.
- Shahrullah, R.S.T.; Win S. *"Human Rights Protection for Indonesian Migrant Workers: Challenges For ASEAN,"* *Mimbar Hukum*. Vol. 29, No. 1, February 2017, pp.123-134.
- Soejono, *Metode Penelitian Hukum*, Jakarta: Rineka Cipta, 2003, pp.110.
- Wahyu S., R. *"Kedudukan Hukum Isbat Perkawinan Luar Negeri"*, *Asy-Syari'ah*, Vol. 17 No. 2, Agustus 2015, pp. 11-122.
- <https://www.jawapos.com/radarmadura/read/2017/11/04/24371/kbri-fasilitasi-pendidikan-anak-tki-di-malaysia>
- <https://www.jawapos.com/radarmadura/read/2017/11/04/24371/kbri-fasilitasi-pendidikan-anak-tki-di-malaysia>.

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http://kbr.id/berita/042017/50_ribu_anak_tki_di_sabah_malaysia_tak_punya_identitas_/89921.html

<http://www.mahfudztejani.com/2013/01/itsbat-perkawinan-solusi-perkawinan-sirri-tki-di.html>

<http://kbrikualalumpur.org/w/2017/02/25/wni-meperkawinan-di-malaysia/>

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