

## **A Legal Perspective on the Right to Education for Stateless Children in Selected ASEAN Countries**

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### **ABSTRACT**

Statelessness has a devastating impact on stateless children globally. Despite having international laws to protect human rights, the rights of stateless children are still at stake. Although the right to education is a fundamental universal right of all children as per Article 28 of the United Nations Convention on the Rights of the Child (CRC) and the ASEAN countries are signatory members of CRC, many stateless children within the region are still denied access to education. They suffer negative impacts due to denial of the right to education with no opportunities for further studies and employment, which eventually lead them to poverty. Thus, in this article, the stateless children's right to education of selected ASEAN countries is analysed from a legal perspective based on a qualitative doctrinal research method involving the United Nations' statistical reports, legislations and relevant laws/ policies of the said countries. The findings of this article establish that the inadequacy in national laws and the absence of birth registration denies stateless children to have the right to education in accordance with Article 28 of CRC. Hence, this research provides feasible proposals from a legal perspective to ASEAN countries to uphold the right to education for stateless children.

*Keywords:* ASEAN countries, CRC, stateless children, right to education

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### **INTRODUCTION**

According to Article 1 of the 1954 Convention Relating to the Status of Stateless Persons, the legal definition for stateless persons is "individuals who are not considered citizens or nationals under the operation of the laws of any country" (The United Nations High Commissioner for

Refugees [UNHCR], 1954). Statelessness is a condition that condemns millions of people and children into a devastating livelihood (Leclerc & Colville, 2007). The protection and human rights of stateless people may not be made available for many who seek asylum or refuge away from their homeland. Although international laws and treaties provide protection of human rights, children of stateless people often become vulnerable victims who fall prey to discrimination and oppression due to statelessness. The Right to Education (RTE) is a fundamental universal right for all children, as stipulated in Article 28 of the United Nations Convention on the Rights of the Child (CRC) (UNHCR, 1989). Despite the fact that ASEAN countries are signatory members of CRC, many stateless children within the region are still denied access to education, even at the primary school level as they face various challenges to be enrolled in government schools or colleges.

The denial of access to education and the non-availability of RTE creates a devastating impact on the stateless children. The United Nations' reports and research findings prove that statelessness shoves children into a perpetuated lifetime of marginalization across generations, often denied education or falling prey to vulnerability, crime, and vice. A stateless child has no national identification and becomes almost non-existent within the domicile country. Therefore, there is no protection or welfare provided by national law. Disappearance, exploitation, kidnapping, trafficking are among the

major risks faced by stateless children at all times. Hence, birth registration is a vital tool for any child, a fundamental legal identity to acquire the right to nationality and legal protection under any national law (Allerton, 2014). In Malaysia for instance, by virtue of Articles 14-22, Part I, II and III of the Second Schedule of the Federal Constitution and Rule 28 of the Citizenship Rules 1964 (Amendment 1996), a birth certificate of a child and the parent are prerequisite for an application of citizenship and its confirmation (National Registration Department of Malaysia, 2019).

The findings by the Institute on Statelessness and Inclusion (Waas & Chickera, 2017) discovered that one-third of 15 million stateless people are children without nationality. Every ten minutes, a child is born stateless (Waas & Chickera, 2017).

The United Nations High Commissioner for Refugees (UNHCR) has stated that the definition of stateless persons under domestic laws must be given due consideration (UNHCR, 2010). One needs to look at this issue in-depth and beyond the content of the relevant nationality laws of a state. The interpretation and application of legal provisions vary according to different states and the matter is handled on a case-by-case basis. Therefore, the executives, legislative and the courts ought to work together in construing the definition of stateless persons within the domestic and international laws to ensure adherence to the principles of human rights in serving justice for the stateless persons.

A stateless person may not be necessary without a state. There are stateless persons who may also be undocumented, hold an irregular immigration status or qualify for protection as a refugee. Therefore, the international definition of a stateless person needs to be interpreted in line with the domestic nationality law, in applying the definition of statelessness in practice and to determine if a person is considered as a national by any state under the operation of its law. The fact that a stateless person's circumstances can also be characterized by the use of other terms has no bearing on the finding of statelessness (UNHCR, 2010).

Historically there are two categories of (i) the De Jure Statelessness and (ii) the De Facto Statelessness (United Nations, 1949). The De Jure Statelessness refers to persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one (United Nations, 1949). Meanwhile, stateless persons de facto are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals (United Nations, 1949).

The definition of De Jure statelessness is found in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (Hugh, 2010). Although in law the status

of stateless persons De Facto differs appreciably from that of stateless persons De Jure, in practice it is similar (United Nations, 1949). The plight of De Jure and De Facto stateless persons are the same within the context of human rights. Therefore, nations often refer to the global definition of Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons in addressing issues for stateless persons and children.

However, the categorization of a stateless person may overlap with that of an undocumented, irregular migrant, asylum seekers or refugees. Thus, a stateless person's circumstances may not fall within the confines of the definition under international law. Hence it should encompass other categories of people who can become stateless due to different circumstances.

The objective of this study is to analyze the right to education (RTE) for stateless children in the ASEAN region from a legal perspective. The UNHCR reports and many researchers ascertain that the deprived condition of stateless children is mainly due to the absence of citizenship. This paper aims to establish findings to address the problem statement and propose feasible recommendations to enable ASEAN Member States (AMS) to strengthen their role in upholding accountability in protecting the stateless children by providing RTE.

The scope of this study is confined to a selected number of ASEAN countries that reveal significant changes, improvisation in domestic laws or policies to provide RTE for stateless children. Several other AMS

are not covered extensively due to overlaps in some aspects such as intergovernmental joint efforts between counterpart countries, non-availability of RTE and the relevant domestic laws for stateless children. The UNHCR and scholarly research findings confirm the insurmountable problems and challenges faced by stateless children in ASEAN countries. Their fundamental human rights such as the right to nationality, health care, and education are often neglected or denied (Allerton, 2014; Lumayag, 2016; Petcharamesree, 2015; Waas & Chickera, 2017).

This research elucidates the causes of statelessness and the status of RTE among stateless children within the ASEAN region. The causes of statelessness keep evolving in time and vary across regions. Gaps or conflicts in nationality laws are one of the key causes of statelessness, often preventing children from realizing their right to a nationality (UNHCR, 2016). A classic example is usually the discrepancy between the laws of the state where the person is born and that of the parents' nationality. Gender discrimination in nationality laws often condemns a child to statelessness, as in the case when either parent is unable to pass on their nationality to the child, especially if the child is born out of wedlock, or the father is a foreigner or stateless himself. Irregular migration and the failure to register births are a prevalent cause of statelessness across regions (Conklin, 2014). Insufficient or lack of birth documents, difficulties in acquiring such documentations become a great hurdle

for them to prove their eligibility to apply for citizenship as per the national laws (UNHCR, 2016).

However, the ASEAN region has a peculiar challenge, the lack of a unified definition of statelessness in domestic laws. Although the 1954 Convention provides the legal definition, the ASEAN member countries still fail to ratify or implement the definition of statelessness within their national laws and policies effectively. One best example is the Philippines, the first state in Asia to enact a statelessness determination procedure and protection framework for stateless persons by adopting the Department Circular No. 58 on Establishing the Refugee and Stateless Status Determination Procedure in 2012. However, the law is still subjected to procedural issues that can be improvised (Wass, 2012). Similarly, Vietnam and Laos provide a definition for stateless persons but lack in implementing protections (Caster, 2016).

Conversely, Myanmar's 1982 Citizenship Law which establishes one of the main criteria for granting Burmese citizenship on the concept of "national races," defined as those who settled in the Burmese territory in 1823, a year before the beginning of the British colonial era. The International Court of Justice (ICJ), deems the said law to be irreconcilable with core rule of law principles and the State's obligations under international human rights law, rendering it discriminative against various ethnic minority groups particularly

the Rohingyas (Efe-epa, 2019). Moreover, the refusal to implement the accepted international definition in Myanmar caused statelessness among the Rohingyas who had to seek refuge in other nearby ASEAN countries such as Thailand, Malaysia and Indonesia (Caster, 2016).

Notably, technical flaws in national laws can also contribute to statelessness (UNHCR, 2011a). In applying for a new nationality, the applicant is required to renounce his/her original nationality. While awaiting the approval, the applicant has an uncertain status as a renunciation of original nationality takes effect. In such instances, there are no grounds for naturalization or protection for the applicant. This naturalization process by itself can cause difficulties and create a risk of statelessness, especially by virtue of poorly drafted domestic laws with technical flaws that do not cater to protection mechanisms pertaining to nationality. In addition to this, political upheaval is a considerable factor as state succession can leave people without nationality, for example when the original state of nationality dissolves, it may render a person stateless without the nationality of the new state (UNHCR, 2011a).

Statelessness has negative effects on the status of RTE for stateless children within the ASEAN region. Although there are obligations and accountability for signatory countries to ensure the children's rights are protected as per CRC, many stateless children in ASEAN are yet to acquire RTE. Despite accepting international obligations to uphold the rights of children by ratifying

CRC, some are yet to ratify other related, important international legal instruments, for example, all AMS are signatory to CRC but only several choose to accede to the International Covenant on Civil and Political Rights (ICCPR) (The Office of the High Commissioner for Human Rights [OHCHR], 1976), namely Cambodia, Indonesia, Lao, Thailand, the Philippines, and Vietnam. The others have not ratified the ICCPR to date.

Both CRC and ICCPR emphasize the importance of birth registration and the right to acquire a nationality, as well as RTE for all children within the territory of state parties. However, stateless children in the ASEAN region are not likely to have RTE, often due to the absence of birth registration documents and nationality. The United Nations (UN) and its Special Rapporteur on RTE noted this as a serious problem that needs to be addressed accordingly by AMS. Hence, the factors of statelessness and RTE for stateless children within the ASEAN region ought to be scrutinized by every AMS, particularly by the ASEAN Intergovernmental Commission on Human Rights (AICHR) to render necessary legislative protection for them.

## **METHOD**

A qualitative doctrinal research method based on a number of scholarly research journals, reports and analyses contributed by the United Nations, ASEAN, the governments of AMS, Non-Governmental Organizations (NGOs, at the international and national levels) contributed towards

this research. A comparative analysis of the laws and policies within the domestic legal framework of selected ASEAN countries pertaining to the right to education for the stateless children were analyzed in line with CRC and other related international legal instruments. Some ethnography and field research findings from the researchers were also included to provide a sufficient understanding of the status of stateless children within the ASEAN region.

## FINDINGS

The consequences of stateless children begin before their birth. Stateless pregnant women frequently face inadequate pre-natal and post-natal care. Hence, their infants and children become stateless, do not receive adequate immunizations and proper essential medical care, and this is a serious compromise with regard to their right to health. As the children grow up, they are often denied access to primary education due to the lack of birth registration documents, which are practically a prerequisite for registration in schools and a requirement under all national laws. Similarly, in most countries around the world, stateless children do not have access to secondary education.

Denial and inaccessibility to RTE create a negative impact on stateless children. The children face a greater likelihood of restricted freedom of movement, arbitrary deportations, social exclusion, and vulnerability to trafficking, exploitation, exposure to criminality, juvenile delinquency, drug addiction, and even

terrorism. Their potential will be curbed due to the denial of further studies. They often live in perpetuated poverty as a result of unemployment and lack of economic opportunities.

Denial or limited access to education is discrimination and violation of human rights for children. The protection of children under the international treaty law was primarily established in the Declaration of the Rights of the Child adopted by the League of Nations in 1924, developed in time and became CRC in 1989. Article 28 of CRC and other related international treaty laws such the UN International Covenant on Civil and Political Rights (ICCPR) 1966, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979, the Convention on the Rights of Persons with Disabilities (CRPD) 2006, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the African Charter on the Rights and Welfare of the Child (ACRWC) 1990, Article 3(3) of the Treaty on European Union (2007), clearly lay out the rights for children that should be upheld by every country at all times. Many signatory countries of CRC face this problem due to the influx of migrants from other countries (UNHCR, 2015). Almost all scholarly journals, the United Nations' reports, and expert research findings have highlighted the detrimental impact of statelessness and the non-availability of RTE on stateless children. Hence, the UN and ASEAN have jointly embarked on legislative and judiciary reformations to protect the rights

of stateless children. However, in reality, stateless children in many ASEAN countries are still being denied of RTE. The following are the research findings in selected AMS pertaining to RTE for stateless children.

### **Cambodia, Lao PDR and Vietnam**

In Cambodia, three particular groups who are at risk of statelessness are some Vietnamese communities with long histories in Cambodia, Khmer Krom, and refugees. Numerous stateless children in Cambodia are out of school children (OOSC). The EAC-UNESCO Strengthening Education Systems for Out of School Children project (Educate A Child, 2014b) seeks to aid Cambodia in enrolling and retaining OOSC in quality primary education programs, as the nation is utilizing its internal resources for education. There is not much legal recognition for stateless people and children in Cambodia. However, the international community continues to render assistance to stateless children with some cooperation from the local community and government (Duoos & Morrow, 2013).

On the other hand, the education system in Lao PDR is slowly progressing despite the difficulties and constraints such as poorly paid teachers, insufficient funding and often ineffective allocation of the limited resources available. The UN and Aide et Action (AEA), an international NGO is actively engaged in improving the education of the people in Laos, by promoting access to school for the disadvantaged, improving the quality of primary education as well

as supporting and encouraging education programs for children migrant, who are stateless and geographically inaccessible (Educate A Child, 2014b).

Despite financial constraints and challenges, Lao PDR provides legal recognition to stateless people and children within its region. Decree of the President of the Lao People's Democratic Republic on the Promulgation of the Law on Lao Nationality, No. 35/PO 2004 details the definition and right to acquire nationality for stateless people and children in order to reduce statelessness. The law also renders opportunities for stateless people and children to enjoy ensuing rights upon acquiring Lao nationality. Article 7 Law on Lao Nationality 2004 provides a definition of a stateless person: an apatrid [stateless person] is "an individual residing in the territory of the Lao People's Democratic Republic who is not a Lao citizen and who is unable to certify his nationality". This definition provides a clear characterization of a stateless person in which the statelessness of a person can be recognized by law only if that person is residing in Lao PDR. The definition is very pragmatic since it refers to people who are unable to certify their nationality. This could remove the burden of proof, in practice, for people seeking to be recognized as stateless, thus facilitating them to access other ensuing rights, provided they fall within the ambit of Article 7, Law on Lao Nationality 2004 (UNHCR, 2010).

The Law on Lao Nationality includes provisions that can prevent the risk of statelessness amongst children born in Laos.

This is reflected in Articles 12 and 13 which state, “Children found in the territory of the Lao People’s Democratic Republic and whose parents’ identity is unknown will be considered Lao citizens” (Decree of the President of the Lao People’s Democratic Republic on the Promulgation of the Law on Lao Nationality, No. 35/PO 2004).

Conversely, Article 14 of the law may confer restriction and difficulty to apatride or stateless parents in seeking nationality. The stateless person or parent must fulfill all conditions prescribed by Article 14 in applying for the Lao nationality, failure of which the application can be declined. In addition, the determination of nationality of a stateless person or parent is subjected to the Standing Committee of the National Assembly of the Lao PDR’s approval, convened annually in accordance with each year’s quota (Article 27, Law on Lao Nationality 2004). The uncertainty in any stateless parent’s application for nationality would jeopardize the rights of their children. If the parents fail to acquire a nationality, this will automatically limit their children’s chances of acquiring nationality and other ensuing rights such as the right to health care and education.

Regardless of whether the status of parents of stateless children is recognized or not, Article 13 of the Law on Lao Nationality construes that the conferment of nationality to a stateless child is only viable upon registration at birth, for the child must be recognized as a stateless child residing within the region (UNHCR, 2014).

In Laos, birth registration and documentation are still important basic requirements for a stateless child, be it to acquire nationality or to be enrolled in a government school. In the absence of birth registration, RTE is still not regarded as a right for stateless children. There seems to be an absence within the domestic law of Lao PDR to recognize RTE as a fundamental right for stateless children, regardless of their nationality and birth registration. Hence, RTE for stateless children in Lao PDR is still in limbo (UNHCR, 2014).

As for Vietnam, UNHCR commends the country for codifying a definition of a “stateless person” in Article 3(2) of Law on Vietnamese Nationality 2008, which is generally consistent with the definition found in the 1954 Convention on the Status of Stateless Persons. Vietnam’s adoption of a clear, legal definition of statelessness is complemented by related provisions establishing that stateless persons and foreigners may apply for naturalization upon completion of at least five years of permanent residence in the country and fulfilment of prescribed requirements. The establishment of domestic laws and procedures for stateless persons to acquire nationality in Vietnam prevent children and their successive generations from inheriting statelessness despite being born to stateless parents (UNHCR, 2011b).

Vietnam has recognized rights for stateless children in line with CRC by adopting Decree No. 158/2005/ND-CP on Civil Status Registration and Management

2005 which entitles all children born in Vietnam to birth registration, free of charge and regardless of their status, whether citizens or non-citizens. The law permits the birth registration of children born abroad to Vietnam parents upon their return to the homeland. The Decree is supplemented by the Civil Code and the Law on Protection, Care and Education for Children, as the main legislative instrument, which complies with CRC (UNHCR, 2011b).

Vietnam also embarked to protect the rights of stateless people and children by enacting provisions of Law on Vietnamese Nationality 2008. Article 8 and Article 17 of the law aim to create conditions and opportunities to provide nationality to stateless children born in Vietnam regardless of their status and parents' identification. Even abandoned newborns and children found in Vietnam whose parents are unknown, automatically acquire Vietnamese nationality by virtue of Article 18. With birth registration, stateless children in Vietnam born to former Cambodian refugees (and stateless) parents as well as thousands of Vietnamese women who became stateless when they married foreign men, are able to access free education at the primary school level (McKinsey, 2009). However, there is yet to be any legal provision in Vietnam domestic laws that explicitly provides RTE for stateless children within its region.

### **Thailand and Myanmar**

Among AMS, Thailand seems to significantly advocate RTE for stateless children. Stateless people and stateless

children who seek refuge are given citizenship and education. Thailand's Constitution (Constitution of The Kingdom of Thailand 2007 [B.E. 2550]), clearly states that "a person", not specifically a citizen, has the right to receive 12 years of free education and the National Education Act 1999 provides that all children must attend 9 years of compulsory education (The United Nations Educational, Scientific and Cultural Organization [UNESCO], 2015).

However, in reality, very few children of stateless parents or unregistered migrants manage to send their children to schools. Stateless children are unable to receive K-12 formal education. As for the children who manage to attend "free" schools operated by non-governmental organizations struggle to further their studies. Many parents would prefer their children to work or some might even sell the children rather than sending them to school, due to poverty. In reality, most parents do not recognize the importance of education. Due to statelessness, their children will never be able to further their studies or work legally. Hence, access to higher education is not a possibility.

In principle, non-citizens or stateless children should have no problem attending high schools or universities in Thailand according to the government's Education for All (EFA) policy (UNESCO, 2015). However, reports still show that some educational institutions do not implement this policy, thus prompting non-citizen students to not enroll in order to avoid complicated circumstances. Most non-

citizen students do not continue their education after the sixth or ninth grade (The Isaan Record, 2016).

Regardless of this, aid for stateless children continues to take shape in Thailand and Myanmar. UNHCR and other NGOs constantly assist the stateless people and their children. The Human Rights Watch in Thailand, for instance, conducted a comprehensive study on stateless children of the Moken origin of Thailand and Myanmar who are deprived of their human rights. Governments of both countries are urged by UNHCR to immediately confer the basic human rights to these children and adults. The rights to citizenship, education, and health care are still a major concern for stateless children in Thailand and Myanmar indeed (UNHCR, 2015).

### Malaysia

One of the fundamental rights enshrined in the United Nations (1948) Declaration of Human Rights and Article 28 (a) of the CRC<sup>1</sup> is access to education. As a member nation of the United Nations, Malaysia acceded to CRC but entered a reservation to Article 28(a) when it adopted the Convention on 17 February 1995. Notably, compulsory free primary education is limited to children who are Malaysian citizens. Alternatively, the non-citizen children are required to pay

<sup>1</sup> Malaysia's reservation on CRC: The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to Articles 2, 7, 14, 28 Paragraph 1(a) and 37 of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

a minimal fee in order to be registered in government schools. Unlike the Malaysian children, the refugees, undocumented and stateless children in Malaysia have no access to formal education in government schools.

The policies and regulations for school children which are different for citizens and non-citizens limit stateless children's access to education. There is no law or policy laid formally for stateless children and Malaysia has yet to formally recognize Alternative Learning Programmes as an option to existing formal education (The United Nations Children's Fund [UNICEF], 2015b). And the fact that many stateless children are undocumented leaves their presence often unknown to the local communities and authorities. The stateless children are unable to access the national education system. However, they often rely on alternative learning centers managed by NGOs, foundations, churches, madrasahs and other non-government entities for basic primary education. The opportunities for private education in places such as Sabah, Sarawak or areas in West Malaysia are very limited with high tuition fees that are out of reach for the undocumented children.

Nevertheless, the government seems to show concern and support in providing education for stateless children. There are still many stakeholders in Malaysia, including government agencies, UNHCR, NGOs, corporates, foundations, faith-based agencies, communities, and individuals providing alternative learning opportunities to refugees, undocumented and stateless children in the absence of access to formal

government schools (UNICEF, 2015a). The civil society itself actively plays a significant role to aid the stateless children. Compassion is a ground to render some basic education to stateless children in Malaysia.

However, to date, the government has yet to formulate a-comprehensive law or policy on alternative education for immigrants, refugees, asylum-seekers, undocumented and stateless children in the country (UNICEF, 2015a). Nevertheless, there are cases that applied the provisions in the Federal Constitution to aid the stateless person and children in their effort to apply for citizenship. Despite that, the judgments by the courts in such cases vary according to the purposive interpretation and discretion of the presiding judges.

In 2018, a prominent case pertaining to stateless child, *Madhuvita Janjara Augustin (Suing Through Next of Friend Margaret Louisa Tan) v Augustin A/L Lourdsamy & Ors [2018] IMLJ* highlighted the interpretation and application of Article 14(1)(b) read with Part II Section (1) para (a) of the Second Schedule of the Federal Constitution in favor of the child at her best interest in a purposive approach.

However, the approach of the judiciary differed in *Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee Swee & Anor (2017)*. In that case, the status of citizenship in the birth certificate of the adopted child was stated as non-citizen despite the adopted parents were both Malaysian citizens. But due to the fact that the child's biological parents could not be traced, and the elements of both concepts of

*jus soli* and *jus sanguinis* were not complied by the respondent on the facts of the case. Hence, article 14(1)(b) read with Part II Section (1) para (a) of the Second Schedule of the Federal Constitution was deemed inapplicable as the requirements were not fulfilled.

Furthermore, Abang Iskandar JCA propounded that the adoption of a child was not automatically to be construed to grant citizenship to the child via the adoptive parents (who are a Malaysian citizen or permanent residence in the Federation). It was held that the Adoption Act 1952 referred in this case is subsidiary legislation qua the Federal Constitution. Therefore, it could not be interpreted in such a way as to augment what appeared to be a perceived lacuna in the Federal Constitution. Hence the appeal by the National Registration Department was allowed by setting aside the decision of the learned High Court Judge thereby giving the option for the respondent (the adoptive parents on behalf of the stateless child), to apply for citizenship under Article 15A of the Federal Constitution. In short, the judiciary demonstrated that the interpretation of Article 14(1)(b) of the Federal Constitution read with the Part II Section (1) para (a) of the Schedule of the Federal Constitution must be in line with the fulfillment of the requirements in the said provision.

On the contrary, the case *Madhuvita Janjara* established a broader interpretation of the meaning 'parents' to bear its ordinary common-sense meaning in reference to the Black's Law Dictionary [10<sup>th</sup> Ed, Thomson Reuters]), to include adoptive parents. The

case of *Foo Toon Aik (Suing on his own behalf and as Representative of Foo Shi Wen, child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* (2012) was referred to illustrate that the word ‘parent’ could not refer to a father of an illegitimate child and that the word ‘parent’ in Article 14 (1) (b) of the Federal Constitution referred to a lawful parent in a recognized marriage in the Federation, which corresponded to *Madhuvita’s* case as the father of the child (appellant) was her biological father who was a citizen of Malaysia.

The judgment delivered by Mary Lim Thiam Suan JCA at para 77 mentioned that “... *We agree with the submissions of learned counsel for the appellant that if the declaration sought is not given, if the appellant is not a citizen of the Federation, then she is stateless. That state would not and cannot be said to be in the best interest and for the welfare of the appellant. Consequently, the appellant satisfies the terms of Article 14(1)(b) read with section 1(e) of Part II of the Second Schedule to the Federal Constitution*”.

At para 79 of the judgment, the learned JCA held that “...*Given that the appellant and her underlying facts and circumstances have amply satisfied the primary rules of jus soli and jus sanguinis in the terms deployed in Part III of the Federal Constitution, in particular, Article 14(1)(b) read with sections 1(a) and/or (e) of Part II of the Second Schedule to the Federal Constitution, the appeal must be and is hereby, allowed in terms of prayer (iv)*”. The prayer was mentioned in para 80 of the judgment that “*the Registrar of Births and Deaths*

*Malaysia re-register the status of citizenship of the appellant as “Malaysian citizen” and her religion as “Christian”.*

The learned JCA further emphasized and reiterated the principles to be adopted when construing and interpreting the Federal Constitution as expressed in *Dato’ Menteri Othman Baginda & Anor v. Dato’ Ombi Syed Alwi Syed Idrus* (1984); “...*one is reminded that judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. As a “living piece of legislation”, the provisions in the Federal Constitution must be construed broadly and not in a pedantic way. The Court must recognize that the construction of the provisions of the Federal Constitution must be “with less rigidity and more generosity than other statutes” because the Federal Constitution is sui generis, “calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.*”

Hence the interpretation and applicability of Article 14(1)(b) read with sections 1(a) and/or (e) of Part II of the Second Schedule to the Federal Constitution pertaining to citizenship of a stateless child, in particular, would still be subjected to the facts of the case and the discretion of the judiciary.

Although the recent stance of the government on RTE indicates its endorsement of education for stateless children, it only seems to cater for children who are without birth registration and those

born to a Malaysian parent, thus having the right to seek nationality by virtue of the Federal Constitution (NST Team, 2017). This still leaves the status of RTE for other categories of stateless children, such as those with unknown parents, born to refugee parents (stateless or non-citizens), unresolved.

### **Intergovernmental Joint Effort – Malaysia-the Philippines-Indonesia**

Notably, there are continuous and positive intergovernmental joint efforts to promote RTE between Malaysia, the Philippines, and Indonesia to aid the stateless, who are also refugees. The Philippine and Malaysian governments are working closely in collaboration with the Indonesian government and the civil society in the nations, particularly in tackling the issues of citizenship and RTE.

Reports indicate two main types of community-based initiatives spearheaded by Filipino individuals in addition to the Philippine government's policy-level push to mitigate widespread illiteracy among the children (and adults). As for Indonesia, the government responded to the educational needs of the stateless children by sending Indonesian teachers to teach in local NGOs in the state and abroad, such as nearby countries like Malaysia and the Philippines with the cooperation of UNHCR, UNICEF and other international NGOs (Educate A Child, 2014a).

These non-formal and structured initiatives are carried out by at least five informal schools in providing free

education to the undocumented (who are stateless) children. The Humana Learning Centre (HLC), Stairway to Hope Learning Centre (SHLC), Vision of Hope Learning Centre (VHLC), Stairway to Success Learning Centre (SSLC) and *Persatuan Kebajikan Pendidikan Kanak-Kanak Miskin* (PKPKM) are the prominent centers that become informal schools for the refugees, undocumented (stateless children) in Sabah (Lumayag, 2016).

### **DISCUSSION**

The above-mentioned findings of this research are essential to promoting recommendations to strengthen the force of upholding human rights and RTE for stateless children within the ASEAN region. The aim of this research is to analyze and measure RTE for stateless children in selected ASEAN countries against CRC.

The findings establish that the national laws and policies in selected ASEAN countries relevant to RTE for stateless children are inadequate. Those countries ought to review and improvise their national legislations to meet international standards in human rights for children and in compliance with CRC, particularly Article 28. There is a need to enact national legislation and revise existing national laws pertaining to stateless people and children.

However, most importantly, ASEAN and AMS<sup>22</sup> need to have an effective legal and policy framework (Petcharamesree,

<sup>2</sup> For the purpose of this article, ASEAN Member States (AMS) is interchangeably used to refer ASEAN countries.

2015). The ASEAN countries bear responsibility and accountability to their people. As signatory member countries to CRC, AMS ought to uphold its legal and moral obligation to ensure RTE for stateless children in line with Article 28 of CRC, based on the core principles on “non-discrimination, best interests of the child, the right to life, survival and development and respect for the views of the child” (UNHCR, 1989). All AMS need to confront the issue of RTE and provide equal access to compulsory free primary education of an international standard for all children within this region as per CRC, without reservations.

## CONCLUSION

Research findings that inform ASEAN’s policies on human rights appear to be conservative and lack engagement. Between economic and political policies, economic cooperation has benefitted from a number of agreements, but political collaborations, especially those concerning human rights still lack behind. Among the issues identified by ICHR are RTE and statelessness, although the member states have been somewhat reluctant in acting on the latter. The protection and promotion of the human rights of people forced to migrate are the prerogative and discretion of the national governments.

Despite having international laws to protect human rights, the rights of stateless children remain at stake. There are still legislative gaps whereby AMS has limited national laws and policies to ensure RTE for stateless children and youth. To date, only

two AMS acceded to the 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees, namely (i) Cambodia (15 Oct 1992) and (ii) Philippines (22 July 1981). However, the Philippines is the only country that signed the 1954 Convention relating to the Status of Stateless Persons on 22 Jun 1955 and tasked itself with reducing statelessness. Further, the Philippines also deposited its instrument of ratification of the 1954 Statelessness Convention on 22 September 2011 (Human Rights Watch, 2015). Unlike the European Union which ensures its member states to abide by the international laws and treaties (Bourgonje, 2010), ASEAN has yet to exert its assertive role in ensuring AMS ratify several important international laws that will see to the protection of RTE for stateless children within this region as per CRC.

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