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# LEGAL PROTECTION OF INDONESIAN CITIZENS IN MIXED-MARRIAGE WITH ROHINGYA REFUGEES

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## Abstract

*There are 14 marriages that occurred between the Rohingyas and Indonesian citizens carried out in 2017. Only nine of them were reported to the refugees handling agency. Some have been made before coming to Indonesia and some after arrival. These situations resulted in legality problems of the marriage and its implications. The right to marry is fundamental in the life of human and is protected as human rights. However, Indonesia is not a signatory to the Convention on the Status of Refugees 1951 and has no legal mechanism to govern their marriages. Consequently, life for both asylum seekers and refugees is a relentless struggle and one of the significant challenges for them is in the area of marriage and family. This paper will discuss how Indonesian private international law provisions and the marriage law accommodate and protect the rights to marry stateless refugees in Indonesia. This paper primarily discusses the legal status of stateless persons and refugees amidst the lacuna in Indonesia. Noting the shift from the principle of nationality evident in case laws, this paper explores the possibility to use *lex domicili* as a surrogate connecting factor in determining the law applicable to stateless refugees' personal status. In relation to marriage, subsequent validation (*isbat nikah*) could be the solution to ensure family unity. As the lack of valid documentation remains a challenge, the goodwill of the couple to enter into marriage and establish a family become the most important element.*

**Keywords :** Indonesian Private International Law, Indonesian Mixed Marriage Law, Rohingya Refugee

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## I. INTRODUCTION

The people of Rohingya are considered as one of the minority groups who are most persecuted on the planet.<sup>1</sup> Their status is stateless, even in their own country, because of the discriminatory arrangement actualized by the Government of Myanmar, particularly when the ethnicity of Rohingya was prohibited from the list of 135 perceived ethnicities in Myanmar, through the alteration of the Burmese Citizenship Act in 1982.<sup>2</sup> By virtue of being deemed stateless, the United Nations of High Commissioner of Refugees

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<sup>1</sup> Haradhan Kumar Mohajan, "History of Rakhine State and the Origin of the Rohingya Muslims," *IKAT: The Indonesian Journal of Southeast Asian Studies* 2, no.1 (July 2018): 19-46.

<sup>2</sup> Warzone Initiatives, "Rohingya Briefing Report," *Equal Rights Trust Report* (2015), 3.

(UNHCR) estimates that more than 742,000 Rohingya individuals were driven away from their country because of the consolation of the ethnic and religious clash.<sup>3</sup>

Disembarked from Myanmar, Rohingyas seek asylum to neighbouring countries, one of them being Indonesia. According to the UNHCR Indonesia Monthly Statistical Report, Indonesia hosts 634 refugees originating from Myanmar by January 2020.<sup>4</sup> This number includes approximately 5% of the total population of asylum seekers and refugees in Indonesia. While the highest peak of the statistic once reached 1,791 persons, during the early Rohingya influx in May 2015.<sup>5</sup> This number is also influenced by Australia's Operation Sovereign Border (OSB) policy, a border security initiative which incorporates offshore processing, activities to disrupt and deter people smuggling, and interception of boats,<sup>6</sup> which had boats towed back.<sup>7</sup> This policy had asylum seekers initially heading toward Australia become *stuck* in Indonesia.

Following the paradigm of migration as a unidirectional flow-oriented towards a particular end, a stay in Indonesia as a transit country is considered a stay in a place 'where asylum seekers wait,' after which migrants travel on.<sup>8</sup> Indonesian policy as a transit country has eliminated their option to integrate permanently and prevent them from travelling.<sup>9</sup> In other words, Rohingya are faced with a state of uncertainty after arriving in Indonesia. Amidst the pro-

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<sup>3</sup> A. A. Ullah, "Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization," *Journal of Immigrant & Refugees Studies* 9, no. 2 (2011): 139-161. As cited on UNHCR, "Rohingya emergency," July 2019, accessed May 2020, available on <https://www.unhcr.org/rohingya-emergency.html>.

<sup>4</sup> UNHCR, "UNHCR Indonesia: Country Fact Sheet", (January 2020) available on: <http://reporting.unhcr.org/sites/default/files/UNHCR%20Indonesia%20Country%20Fact%20Sheet%20-%20November%202019.pdf>, accessed on May 2020.

<sup>5</sup> UNHCR, "UNHCR Monthly Statistical Report Indonesia", (May 2015).

<sup>6</sup> Kaldor Centre for International Refugee Law, "Turning back boats," 26 February, 2015 <https://www.kaldorcentre.unsw.edu.au/publication/turning-back-boats>. See also: Australia Home Affairs, "Operation Sovereign Border," available on: <https://osb.homeaffairs.gov.au/>

<sup>7</sup> Under the OSB policy, vessels patrol Australia's territorial waters and intercept boats carrying asylum seekers by either return vessels too just outside the territorial seas of their last country of departure or transfer asylum seekers directly to the territory of another government. The Australian Government refers to this category of asylum seekers as 'illegal maritime arrivals' and 'unauthorised air arrivals'. See Andrew & Renata Kaldor Centre for International Refugee Law, "Factsheet: Australia's Refugee Policy", (April 2019), [https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet\\_Australian%20Refugee%20Policy\\_Apr2019.pdf](https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Australian%20Refugee%20Policy_Apr2019.pdf), accessed on May 2020.

<sup>8</sup> Robyn C. Sampsona, Sandra M. Gifforda and Savitri Taylorb, "The myth of transit: the making of a life by asylum seekers and refugees in Indonesia," *Journal Of Ethnic And Migration Studies* 42, no. 7 (2016): 1136-1138. DOI: 10.1080/1369183X.2015.1130611.

<sup>9</sup> Antje Missbach and Wayne Palmer, "Indonesia: A Country Grappling with Migrant Protection at Home and Abroad," Migration Policy, 19 September 2018, accessed May 2020, <https://www.migrationpolicy.org/article/indonesia-country-grappling-migrant-protection-home-and-abroad>. See also: Sally Clark, "Reconstructing the Transit Experience: A Case Study of Community Development from Cisarua," in *Places of Privilege Interdisciplinary: Perspectives on Identities, Change and Resistance*, Nicole Oke, Christopher Sonn and Alison Baker, eds. (Leiden: Koninklijke Brill NV, 2018), 37.

longed period of waiting, Rohingyas are making a life for themselves. One of the key strategies being establishing a family, whether it is with Indonesia nationals or among themselves. This study focuses on the Marriage of Rohingya and Indonesian formed in Indonesia.<sup>10</sup> According to Mr Jaya Saputra, Head of Sub-Directorate of Immigration Detention and Deportation (interview, 25 October 2018) the motives behind these mixed-marriage is for refugees to be able to settle down and conviction of the raise of the possibility to get citizenship in Indonesia. However, other personal reasons also induce Rohingyas to marry Indonesian citizens.<sup>11</sup>

Marriage validity in Indonesia is determined by the religious laws and beliefs of the parties. Stateless refugees can marry on the ground of religious law without civil registration. However, the absence of formal documentation has great consequences to the status of the child, matrimonial property, qualification of the settlement of marriage and its implication of the male's obligation to give alimentation. The Marriage of Rohingyas also entails international implications. Firstly regarding the Rohingyas statelessness which raises questions on what law governing their personal status. Second, the validity of their marriage and the possibility of recognition of marriage formed in Indonesia in the country of asylum.

This paper will discuss how Indonesian private international law provisions and the marriage law accommodate and protect the rights to marry stateless refugees in Indonesia. This paper primarily discusses the legal status of stateless persons and refugees amidst the lacuna in Indonesia. This legal-normative writing will discuss those matters upon the prevailing regulation in Indonesian, namely Law No. 1 of 1974 regarding Marriage<sup>12</sup> and its implementation regulations, Law No. 12 of 2006 regarding Citizenship, Law No. 23 of 2006 regarding Civil Administration and the international instruments,

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<sup>10</sup> There is no clear figure on the mixed marriage between Rohingya and Indonesian citizen in Indonesia, as the marriage could not meet the criteria set out by Indonesia Civil Administration Laws present the formality to be formally officially documented. Reported *Liputan6* (local news channel) on September 10th, 2017, there are 14 marriages documented between the Rohingyas and Indonesians in Medan, where nine of them are recorded to a refugee handling agency. See: Muhammad Nuramdani, "14 Wanita Medan Menikah dengan Pengungsi Rohingya," *Liputan 6*, accessed 15 October 2018, <https://www.liputan6.com/news/read/3088850/14-wanita-medan-menikah-dengan-pengungsi-rohingya>, accessed on 15 October 2018.

<sup>11</sup> Many reasons induce Rohingyas to marry Indonesian citizen, especially Rohingya men to marry Indonesian women. A few have problems with their families back home. A few are desperately lonely and feel unsafe as they have never been away from their family before. They need a shoulder to cry on, moral support and protections. See Azizah Kassim, "Transnational Marriages among Muslim Refugees and Their Implications on Their Status and Identity," in *Islam and Cultural Diversity in Southeast Asia* Ikuya Tokoro et al., eds. (Tokyo: Institute for Languages and Cultures of Asia and Africa, 2015), 193.

<sup>12</sup> There were several claims were submitted before the Constitutional Supreme Court which were asking the amendments to this law in relation to the polygamous marriage, marital agreement and the minimum age to marry for the bride. The last two regulation were approved.

namely the 1951 Convention<sup>13</sup> and its 1967 Protocol to the Status of Refugees<sup>14</sup>, the 1954 Convention relating to the Status of Stateless Persons,<sup>15</sup> the 1966 International Covenant on Civil and Political Rights (ICCPR),<sup>16</sup> and also the Universal Declaration of Human Rights (UDHR).<sup>17</sup>

This writing suggests what Indonesia could do in order to provide legal protection to the marriage between refugee and Indonesian citizens or amongst them in Indonesia, and also to provide special administrative registration for refugees in regional level.

Noting the shift from the principle of nationality evident in case laws, this paper explores the possibility to use *lex domicilii* as a surrogate connecting factor in determining law applicable to stateless refugees' personal status. In relation to Marriage, Marriage upon the court and subsequent validation of marriage (*isbat nikah*) could be the solution to ensure family unity. As the lack of valid documentation remains a challenge, the goodwill of the couple to enter into marriage and establish a family become the most important element.

## II. LEGAL STATUS OF ROHINGYA REFUGEES

In the President Regulation No. 125 of 2016, as adopted from the article 1A of the 1951 Convention, a "Foreign Refugee" is defined as a foreigner who resides within the territory of the Republic of Indonesia due to a well-founded fear of persecution due to race, ethnicity, religion, nationality, membership of a particular social group, and different political opinions, and does not wish to avail him/herself of protection from their country of origin and/or has been granted the status of asylum-seeker or refugee by the United Nations through the United Nations High Commissioner for Refugees.<sup>18</sup> Foreign Refugee in this regulation did not emphasize the distinction between asylum-seeker and refugee status as they leave the rule of status determination in the hand of UNHCR. This regulation shows the government's commitment to accommodate the refugee in transit, such as detailed stipulations on which institutions are

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<sup>13</sup> United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>14</sup> United Nations General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

<sup>15</sup> United Nations General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117.

<sup>16</sup> United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, vol. 999, p. 171.

<sup>17</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>18</sup> Indonesia, *Presidential Regulation regarding Handling on Refugees*, Regulation number 125 year 2016, LN.2016-368: Art. 1.

tasked with managing refugees in Indonesia, and serves as a legal basis for regional administrations to propose operational funds for handling refugees and asylum seekers and providing temporary shelters.<sup>19</sup> In this case, Rohingyas, whether they are asylum seekers or refugees according to UNHCR, they are considered as foreign refugees under 2016 President Regulation.

In this case, Rohingyas also happened to be stateless. Being stateless possess another implication and consequences, that they may not be able to move about freely and has limited access to public services such as health care and education, participate in political processes, or have access to courts. This reality leads some to refer to citizenship as “the right to have rights,”<sup>20</sup> even though stateless persons are supposed to have fundamental rights under international law—one of the rights being the right to marry.<sup>21</sup>

This raises a question in the matter of Private International Law, especially to which legal system governs their private activities? Is their status as a refugee in anyway deprive their legal standing as a natural person (*‘natuurlijk persoon’*)? In the history of Private International Law, or may as well be referred to as the conflict of law, it is known statute personalia follows an individual wherever they may be. The modern private international law recognizes several points of contact that would determine the law governing a person, it is based on their nationality, domicile, or habitual residence. Indonesia is inheriting the Dutch rule of Private International Law regarding personal status in Article 16 of *Algemene Bepalingen van Wetgeving voor Indonesie (AB)*<sup>22</sup> by *concordantie*,<sup>23</sup> adopt nationality principle. The article stipulates: “*The laws concerning the rights, status and capacity of persons are binding on Dutch subjects (Nederlandse Onderdanen), (and are) now to be read as “Indonesian*

<sup>19</sup> The Presidential Regulation has eight chapters containing 45 provisions in total: 1) general provisions; 2) discovery and interception; 3) accommodation; 4) security; 5) supervision; 6) funding; 7) other provisions; and 8) closing provisions. See Antje Missbach, *et.al*, “Stalemate: Refugees in Indonesia — Presidential Regulation No 125 of 2016”, *Centre for Indonesian Law, Islam and Society: Policy Paper*, No 14 (2018), 10.

<sup>20</sup> *Trop v. Dulles*, 356 U.S. 86, 102 (1958). See also Thomas Hammarburg, Human Rights Commissioner, Council of Europe. “Viewpoint : No One Should Have to Be Stateless in Today’s Europe” (June 9, 2008), available at [http://www.coe.int/t/commissioner/Viewpoints/080609\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/080609_en.asp) (stating that “Having a nationality means in both law and practice to possess ‘a right to have rights’”), in Refugees International, “Nationality Rights for All: A Progress Report and Global Survey on Statelessness,” March, 2009, available at <https://www.refworld.org/pdfid/49be193f2.pdf>, p. 2.

<sup>21</sup> Recalling that article 16 of the Universal Declaration of Human Rights states that: (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. See United Nations General Assembly, Universal Declaration of Human Rights, Art. 16.

<sup>22</sup> Dutch East Indies, *Algemene Bepalingen van Wetgeving voor Indonesie (AB)*, Staatblad 1847, No. 23: Art. 16.

<sup>23</sup> See: Sudargo Gautama and Hanifa Wiknjastro, “Some Aspects of Indonesian Private International Law,” *Malaya Law Review* 32, no. 2 (December 1990): 417-432, especially on page 421.

*Nationals”, even when they reside abroad”.*<sup>24</sup>

Rohingya statelessness raises a legal question of which law constitutes their personal status in the absence of their nationality. According to Article 7 of Indonesian Citizenship Law Number 12 Year 2006 (Law No 12/2006), which stated that “all persons who are not citizens of the Republic of Indonesia shall be treated as alien,” with or without nationality, foreign refugees, including refugees and/or asylum seekers, are considered as ‘Aliens’ (or ‘*Orang Asing*’ in Bahasa). Aside from international private law provision in 16 (AB),<sup>25</sup> Indonesia did not have specific regulation of the personal status of aliens, in this case, refugees and/or stateless persons. However, doctrine provides that the absence of the primary connecting factor could be replaced by subsidiary connecting factor or *ersatzanknüpfung*.<sup>26</sup> In 1934, *Raad van Justitie* used domicile as a subsidiary point of contact in case of succession because the nationality of the deceased was uncertain. The law of the domicile was also applied by *Raad van Justitie Medan* decision in 1939 in determining one’s personal status.<sup>27</sup>

Another precedents also show that the Principle of Nationality was not applied rigidly, as seen on 2004 Central Jakarta District Court Decision in which matrimonial domicile become the decisive point of contact in determining the governing law for the divorce between a couple with different nationality (the plaintiff is a Netherlands national and the defendant is South African national).<sup>28</sup> Also in 1989 Tanjung Pinang District Court Decision, where Canadian couple petitioned for adoption for a refugee child from Vietnam in Galang Island,<sup>29</sup> the best interest of the child and the law where the child would have her central gravity used as governing law. Furthermore, according to the 1989, Tanjung Pinang District’s Decision referred to the provision in the 1965 Hague Convention on Jurisdiction,

<sup>24</sup> According to Gautama, revisiting J.J de Fliences, if we consider the text carefully there is no reference is made to foreigners residing in Indonesia. In practice, however, with the support of jurists and case law, it would appear that it applies indiscriminately to Dutch subjects (now Indonesian subjects) but also *in contrario* applied for foreigners in Indonesia. See: *Ibid*.

<sup>25</sup> Dutch East Indies, *Algemene Bepalingen van Wetgevingvoor Indonesie* (AB), Staatblad 1847, No. 23: Art. 16.

<sup>26</sup> Sudargo Gautama, *Hukum Perdata Internasional buku II buku ke-3 [Private International Law 2nd Book]*, 4th edition, (Bandung: ALUMNI Press, 2007): pp. 15.

<sup>27</sup> *Raad van Justitie*: Indonesia appellate court during Dutch Colonisation.

<sup>28</sup> Decision of Central Jakarta District Court, “Decision No.435/Pdt/G/2003/PN.Jkt. Pst” dated 7 July 2004”, pp. 10-11, in Tiurma M. Pitta Allagan, “Indonesia Private International Law: the development after The Development After More Than a Century,” *Indonesian Journal of International Law* 14 no. 3 (2017), 388.

<sup>29</sup> Tanjung Pinang District Court. “Decision No.205/Pdt.P/P/N/FPAT dated 20 May 1989.” in Tiurma M. Pitta Allagan, “Indonesia Private International Law: the development after The Development After More Than a Century,” *Indonesian Journal of International Law* 14 no. 3 (2017), 388.

Applicable Law and Recognition Regulations relating to adoptions, given the fact that it is yet ratified.<sup>30</sup> In 2015, the Academic Paper of Indonesia Private International Law Bill provided that if a stateless person has a domicile in Indonesia, the law of Indonesia is applied to him/her in determining his/her capacity.<sup>31</sup> This is in line with 1954 Convention Relating to The Status Of Stateless Persons, the personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence. This is in line with the 1951 Refugee Convention that also used refugees' domicile as a decisive connecting factor with the habitual residence as a subsidiary.<sup>32</sup>

James C. Hathway in "The Rights of Refugee under International Law" stated:

*"Indeed, a refugee who seeks recognition of this or her status, but who has not yet been admitted to a status determination procedure, may also be a person with neither a domicile nor a residence.... Unless the refugee applicant has a stronger attachment to some other state, the logical default position would be to refer to the usual rules which define personal status in the transit or asylum country confronted with the need to determine the individual's personal status."*<sup>33</sup>

As for doctrines, case law, and the 2015 Indonesia PIL Bill relaxed the implementation of the principle of nationality. This paper concludes that the personal status of stateless refugees could be determined by the law of their domicile as subsidiary to national law. Domicile refers to Article 17(1) (2) of Indonesia Civil Code, "[a]n individual is deemed to have as his domicile the place he has established his principal residence. In the absence of such residence, the actual location of his residence is to be considered as such a domicile." Deduced from the circumstances, as Indonesia is by the fact the domicile of the Rohingya, for them Indonesian law is applicable as law determining their legal rights, status, and capacity.

In the case of Marriage, Section II of 1974 Indonesia Marriage Law is

<sup>30</sup> *Ibid.*

<sup>31</sup> Tiurma M. Pitta Allagan, *International mixed marriage in Indonesia and ASEAN: international mixed marriage and its recognition in Indonesia towards one ASEAN community*. (Groningen: University of Groningen, 2019). DOI: 10.33612/diss.100378352341-342.

<sup>32</sup> Article 12: (1) "the personal status of a refugee shall be governed by the law of the country of his domicile, or if he has no domicile, by the law of the country of his residence." Available at: United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>33</sup> James C. Hathway, *The Rights of Refugee under International Law*, (Cambridge: Cambridge University Press, 2005), 217.



the law governing Refugees' the ability to marry. This requirement includes consent to marry, minimum age, parental approval for persons under 21, obstruction of marriage based on lineage, waiting time after the previous divorce ('*masa iddah*') and restriction to polygamy.<sup>34</sup> This matter would be discussed further in the next section.

This development is similar to Lao PDR's Family Law which applied national treatment for stateless persons in its territory. As comparison, Thailand private international law provides that stateless persons' personal status shall be governed by the law of a country where he has his residence.<sup>35</sup> In contrast with the Philippines, stateless persons are treated as foreigners; however, since they have no national law, they must provide an affidavit stating the circumstances which show their capacity to marry.<sup>36</sup> The affidavit could also be used for refugees to fill the absence of an official statement from the relevant consular or diplomatic office, because of the situation of refugees. Instead of such a statement, the Philippines requires an affidavit stating the circumstances showing the capacity to marry off the relevant refugees.<sup>37</sup>

Regarding the legal standing of refugees upon the courts of law, there are some court decisions that are worth mentioning. For instance, in Jakarta Barat Religious Court Decision No. 62/Pdt.P/2016/PA.JB, granted a petition of marriage validation subsequent to religious marriage nikah of a UNHCR cardholder, a Palestine national with an Indonesian bride for a marriage conducted in Indonesia.<sup>38</sup> In 2018, Cianjur District Court Decision No. 20/Pdt.P/2018/PN.Cjr granted the petition raised by an Iraqi, also a UNHCR cardholder, to declare the legitimacy of his child to issue further birth certificate, born in Indonesia from a marriage registered in Iraq with Iraqi bride, as a requirement for passport application in attempt for their repatriation to Iraq.<sup>39</sup>

UNHCR in Indonesia primarily issued UNHCR Card to recognized refugees who have undergone the Refugee Status Determination process. It entails protection, for example, from arrest by local law enforcement officers.<sup>40</sup> In Jakarta Barat Religious Court, UNCHR Card is admissible and accepted by the court as identification. In the contrary, it appears that in the Cianjur District Court, the petitioner was able to certify their identity (including nationality)

<sup>34</sup> Indonesian private international law should also respect all rights previously acquired by Rohingya (otherwise known as vested rights), for example, the marriage.

<sup>35</sup> Allagan, *International mixed marriage in Indonesia*, 342.

<sup>36</sup> *Ibid.*, p.342.

<sup>37</sup> *Ibid.*, p.343.

<sup>38</sup> Indonesia, Jakarta Barat Religious Court., Decision No. 62/Pdt.P/2016/PA.JB dated 2016.

<sup>39</sup> Indonesia, Cianjur District Court Tanjung Pinang District Court. "Decision No. 20/Pdt.P/2018/PN.Cjr No.205/Pdt.P/P/N/FPAT dated 20 May 2018."

<sup>40</sup> Asia Pacific Refugee Rights Network, APRRN Indonesia Fact Sheet. (2017). Available at: [http://aprrn.info/wp-content/uploads/2017/03/Indonesia-Factsheet\\_MAR-2017.pdf](http://aprrn.info/wp-content/uploads/2017/03/Indonesia-Factsheet_MAR-2017.pdf).

with a passport and put their UNHCR Card as a supplement. Both of the decision reflects the possibility for refugee access to the Indonesian civil court and Indonesian religious court.<sup>41</sup> However, this might not be the case for Rohingyas as they were not only refugees but also stateless persons. The 1954 Convention is the primary international law instrument defining and regulating the status and treatment of stateless persons. It affirms that stateless persons retain free access to courts and includes it as fundamental rights and freedoms.<sup>42</sup> Indonesia has not yet ratified this Convention. In practice, it is quite a challenge to find civil court decisions petitioned by stateless persons in Indonesia.

### III. MIXED-MARRIAGE WITH STATELESS REFUGEE

Marriage formed in Indonesia between Rohingya and Indonesian and Rohingyas among themselves is indeed categorized as International Mixed-Marriage. The rights to marry is protected by the Universal Declaration of Human Rights and the ICCPR, which are ratified and even stipulated in the 1945 Indonesian Constitution.<sup>43</sup>

According to article 57 of the 1974 Indonesian Marriage Act (Marriage Act 1974), the mixed Marriage in Indonesia is between two people governed by two different laws as consequences to the distinct nationalities and one person has Indonesian nationality.<sup>44</sup> It is evident that the law applicable to the material validity of persons marrying in Indonesia is according to their national law. The principle of *lex loci celebrationis* or the law where the marriage is celebrated shall be applied to determine the formal validity of an international mixed-marriage, in this instance, Indonesian marriage law is the law determining the formal validity of an international mixed-marriage.

#### A. THE VALIDITY OF THE MARRIAGE

In line with Indonesia private international law provision in 16 *Algemene*

<sup>41</sup> See: In Art 16 of the 1951 Refugee convention stated that Refugees shall have free access to the Courts of Law shall. See also: Article 16 of the 1954 Stateless convention which provides that a stateless person shall have free access to the Courts of Law on the territory of all Contracting States.

<sup>42</sup> The convention Art. 4

<sup>43</sup> In Indonesian regulation's history, the mixed marriage was regulated in the 1898 Dutch East Indies Mixed Marriage Act (GHR) which stipulated in Art.7 (2) that, "*Vershil van godiesnt, landaard of afkomst kan nimmer als beletsel tegen het huwelijk gelden*" In Indonesian: "*Perbedaan agama, bangsa atau keturunan sama sekali bukan menjadi penghalang terhadap perkawinan.*" See Dutch East Indies, *Regeling op de Gemengde Huwelijken* (GHR). Staatsblad 1898 No. 158 *Gemengde Huwelijken Regeling*), Staatsblad 1898, No.158. Art. 7(2) GHR. In literal English : "*the differences of religion, nationality or descends can never be considered as impediment to marry*" ), reflects the principle of the Indonesia marriage laws. According to Sudargo Gautama, Article 7 (2) of reflect the heat of the regulation of mixed marriage in Indonesia.

<sup>44</sup> Indonesia, *Law regarding Marriage*, Law Number 1 of 1974, LN.1974-1: Art. 5762.

*Bepalingen van Wetgevingvoor Indonesie (AB)*<sup>45</sup> regarding the which law governs one's personal status, it is apparent that 1976 Indonesia Marriage Law also adopts the nationality principle. Therefore, nationality becomes an important point of contact to determine the material validity of a marriage, namely one's ability to marry. However, in the absence of nationality as a connecting factor, this paper argues that *lex domicili or the law of a country where they have their domicile shall be deemed as applicable to determine one's ability to marry*.<sup>46</sup> Therefore, in the case of where a stateless person has a domicile in Indonesia, the law of Indonesia, specifically on Article 6 to 11 of the 1974 Indonesia Marriage Law, is applied to him/her in determining his/her capacity to marry.<sup>47</sup>

As stateless refugees are considered alien, the chapter regarding Mixed-Marriage in 1974 Indonesia Marriage Law is applicable to Marriage between Rohingya and Indonesian. Another challenge is faced by Rohingya as stateless refugees because of the requirement of Certificate of No Impediment issued by their country through the consulate as stipulated on Article 60 paragraph (1) of the 1974 Indonesia Marriage Law. This Certificate is a means to prove ability to marry to ensure legal certainty. If the requirements are not fulfilled, it could serve as an impediment of marriage and ground for annulment. In the mixed-marriage between the Rohingya refugees and Indonesian citizens, on which the refugees themselves are also stateless — according to Myanmar's 1982 Citizenship Law, which contained a list of recognized ethnic groups and the Rohingya were left out.<sup>48</sup> Therefore, Myanmar Law cannot serve as the law governing Rohingya personal status, namely their ability to marry. Due to their statelessness, Rohingya cannot claim their legal rights as Myanmar citizen to file a petition to obtain a certificate of no impediments to enter a marriage.<sup>49</sup>

On the contrary, it is apparent in the aforementioned 2016 Jakarta Barat Religious Court Decision, which validates a religious marriage of a UN-

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<sup>45</sup> Dutch East Indies, *Algemene Bepalingen van Wetgevingvoor Indonesie (AB)*, Staatblad 1847, No. 23: Art.

<sup>46</sup> Allagan, *International mixed marriage in Indonesia*, 308.

<sup>47</sup> The law of a country where they have their residence determines their capacity. Therefore, *animus mendi* does not need to be proven. The actual daily life which connects the person concerned to his/her surrounding sufficiently serves as the evidence of residence and further, determines the applicable law. See Allagan, *International mixed marriage in Indonesia*, 341.

<sup>48</sup> Mohajan, "History of Rakhine State," 19-46.

<sup>49</sup> Internally, Rohingya has been deprived from their rights to marry as In the 1990s, northern Rakhine State passed local orders that required all people in Rakhine State to gain permission before obtaining marriage licenses and newly married couples have to sign a declaration that they will not have more than two children. See: [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT\\_CEDAW\\_NGO\\_MMR\\_24280\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MMR/INT_CEDAW_NGO_MMR_24280_E.pdf). Also see: Mohajan, "History of Rakhine State," 19-46.

HCR cardholder, a Palestine national, with an Indonesian bride for a marriage conducted in Indonesia,<sup>50</sup> that the petitioner submit a letter issued by the Palestine Embassy in Jakarta. The letter dated 16 March 2016 is described to be an authentic deed made by the competent officials, in this case, the Palestine Embassy in Jakarta, stating that there is no impediment to enter into a marriage because the groom has already petitioned permission to the Palestine Embassy prior to the wedding.<sup>51</sup> Contrary to stateless refugees, as the Palestine refugee has effective nationality, their embassy could still issue the required documents. In this court decision also evident that Indonesian Law is the law applicable to the form of Marriage as Indonesia is the place where the wedding was celebrated.

Article 60 paragraph (3) to (5) of the 1974 Indonesia Marriage Law offers a solution to for the refusal of a certificate of impediment. The concerned party should first request the consulate to issue the certificate of no impediment. In the case of refusal, the concerned party could raise a petition to the Indonesian court (Religious Court for Moslems) to issue a decision regarding whether or not the refusal is reasonable. This decision is final and binding and issued without a formal hearing. If the refusal deemed by the court as unreasonable, the court decision could serve as a replacement of certificate of no impediment and is only valid in the period of 6 months after the court decision is given. However, up until the time this paper is written, there has been no court decision regarding this matter.

The formal validity of Marriage in Indonesia is determined by the religious laws and beliefs of the parties. Article 2 of Marriage Act 1974 states that a marriage is valid if it is solemnized according to the couple's religion. Based on this provisions, some scholars conclude that a marriage must be conducted in accordance with the religion's law and therefore, no marriage is valid if it is not in accordance with the religion's law of the respective couple.<sup>52</sup>

Furthermore, Article 2 paragraph (2) of the 1974 Indonesian Marriage Law requires the wedding to be documented. This paragraph did not specifically imply that without registration, marriage is invalid. The debate of the significance of formal registration as a requirement for the validity of Marriage in Indonesia has not reached a conclusion. Jurist like Bagir

<sup>50</sup> Indonesia, Jakarta Barat Religious Court, Decision No. 62/Pdt.P/2016/PA.JB dated 2016.

<sup>51</sup> *Ibid.*, p. 7.

<sup>52</sup> Hilman Hadikusuma and Zulfa Djoko Basuki are some experts who support that opinion. See Allagan, *International mixed marriage in Indonesia*, 19.

Manan and Neng Djubaedah argued that the lack of documentation would not nullify a marriage that is valid according to religious law. However, the legal status of such marriage would be in a limp footing. Nonetheless, formal documentation is important to ensure legal certainty of a marriage in order to protect all party, especially for women and children.

The Rohingyas and Indonesian couple are put in a predicament. They wished their marriage could be formally documented, but they are also faced with the challenge to fulfil administrative formality. In a sense that refugees did not meet the requirements for Indonesian civil weddings, namely for their lack of documentation. Certificate of No Impediment, birth certificate, a copy of ID, a copy of Passport and a domicile declaration, as the administrative requirements for civil weddings, are usually impossible to be obtained when refugees did not have effective civil protection from their origin country, moreover when they are in fact stateless. In practice, Rohingyas and Indonesian couple conducted their marriage according to religious practice only, unable to formally document their marriage. This type of marriage, while valid upon religious law, are limp.

## B. RELIGIOUS MARRIAGE WITHOUT DOCUMENTATION

Indonesian marriage law as *lex loci celebrationis* or the law where the marriage is celebrated is the law determining the formal validity of an international mixed-marriage. Now the question remained unclear is that what is the significance of documentation of marriage in determining the validity of a marriage celebrated in Indonesia. Taking into account the legal pluralism in Indonesia, the 1974 Indonesia Marriage Law accommodate a new kind of legal pluralism, a religious-based legal pluralism.<sup>53</sup> This paper only analyzes Islamic marriages of Rohingyas and Indonesia nationals celebrated in Indonesia.

Article 2 paragraph (2) of the 1974 Indonesia Marriage Law requires the wedding to be documented. According to Neng Djubaidah, in the perspective of Islamic Law, the primary function behind formal documentation is to announce a marriage, serving as one of proof of marriage and a form of an Islamic wedding celebration (*walimah*), as a tool of a sovereign to ensure legal certainty and order (*ketertiban*). So, there would not be any marriage that is

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<sup>53</sup> Previously, the legal pluralism is racial based (ethnic groups). See: S.Pompe and De Waaij-Vosters, "The End of Hukum Antar Golongan," *Bijdragen tot de Taal-, Land- en Volkenkunde, Deel 145, 2de/3de Afl.* (1989), pp. 365-369.

intentionally hidden (*nikah sirri*).<sup>54</sup> The good faith of the couple is significant to create a distinction between religious marriage without documentation and marriage intentionally hidden. Djubaidah argued that the inability and/or inertia to register a marriage could not be seen as a ground for marriage nullification.<sup>55</sup> In line with this view, Bagir Manan argued that validity according to religious law and marriage registration could not nullify one another, in the ground that the first paragraph of article 2 of 1974 Indonesia Marriage Law has a plain meaning that a marriage is valid according to the couple's religious laws and beliefs<sup>56</sup> and that the explanation of Article 2 paragraph (2) of 1974 Indonesia Marriage Law declares that marriage registrations is as important as death certification and birth registration. Therefore, marriage registration is not a decisive proof of marriage.<sup>57</sup>

However valid, this type of marriage is limp. Article 6 paragraph (2) of the Compilation of Islamic Law of Indonesia, a marriage without the supervision of the Civil Registry Officer shall be deemed defective. In the perspective of Civil Administrative Law, the legal consequences of marriage without documentation cannot be recognized as a preliminary requirement for a family certificate, adjustment of status in identification card, and birth certificate.

Therefore, it is important to explore the possibility of a marriage between Rohingya and Indonesia to be formally documented. In order for stateless refugees to marry an Indonesian citizen to be formally documented,<sup>58</sup> there are several ways that can be done. First, by celebrating the marriage upon the court. Second, by subsequent validation of marriage (*isbat nikah*).

Celebration the marriage upon the court could be done according to Article 21 of the 1974 Indonesian Marriage Law, which stated that in the case of refusal of formal documentation upon the civil registry, the court has jurisdiction to decide in small proceeding whether the reason of the civil registry's letter of refusal to register is reasonable or not. The reasonability is based on the very law of the 1974 Indonesian Marriage Law.

Another way to provide a way for stateless refugees (whether it is with

<sup>54</sup> There is a common misconception that marriage without documentation is *nikah sirri*.

<sup>55</sup> Neng Djubaidah, *Pencatatan Perkawinan & Perkawinan tidak Dicatat menurut Hukum Tertulis di Indonesia dan Hukum Islam [Marriage Registration & Unregistered Marriage according to Written Law in Indonesia and Islamic Law]* (Jakarta: Sinar Grafika, 2010), 147-152.

<sup>56</sup> See also : Article 4 of the Compilation of Islamic Law of Indonesia.

<sup>57</sup> Bagir Manan, "Keabsahan dan Syarat-syarat Perkawinan Antar-orang Islam Menurut UU No.1 Tahun 1974 [The Validity and the Requirement of Marriage between the Moslem according to Law No. 1 of 1974]" on National Seminar Nasional regarding "Hukum Keluarga dalam Sistem Hukum Nasional Antara Realitas dan Kepastian Hukum", held by the Supreme Court of the Republic of Indonesia, Hotel Redtop, 1 August 2009, p.1, in, Djubaidah, *Pencatatan Perkawinan*, 157-159.

<sup>58</sup> Marriage Act 1974 requires that registration is a must, but it is not the only thing for marriage validation.

Indonesia nationals or among themselves) to be able to formally marry, the couple could file petition for subsequent marriage validation upon the Islamic court called “*isbat nikah*”, which is a method that can be conducted by a husband and wife who have been married under Islamic Law and conceived a child during the marriage, to get recognition from the state. The marriage has to fulfil the validity requirements in the 1974 Indonesian Marriage Law and Islamic Law Compilation. In the Muara Belian District Court No. 0129/Pdt.P/2017/PA.Mbl, the lack of personal identification (Kartu Tanda Penduduk ‘KTP’ and Kartu Keluarga ‘KK’) did not prevent the concerned couple from raising a petition of “*isbat nikah*.”<sup>59</sup> This method could cause the child born from religious marriage to be recognized as legitimate children. Article 7 (3) Islamic Law Compilation (KHI) is the legal basis for couples who have conducted religious marriage to submit their “*isbat nikah*” to the local Religious Court.<sup>60</sup> It is also regulated on Article 7 Presidential Instruction No. 1 of 1997, stating “the case of marriage, on which cannot be proven by a marriage certificate, “*isbat nikah*” (the subsequent validation) can be submitted to the Islamic Court.” The above is in line with the stipulations stated in the Civil Administration Law, particularly on Article 35. It stipulates that the marriage registration obligation is also applied to a marriage which is determined by the court decision. It is evident in the aforementioned Jakarta Barat Religious Court Decision No. 62/Pdt.P/2016/PA.JB that the court decided in favour of the Palestine-Indonesian couple’s petition of subsequent validation of marriage (*isbat nikah*) conducted in Indonesia.<sup>61</sup> However, the refugee still has an effective nationality. As far as this paper is written, there is no evidence of subsequent validation of marriage (*isbat nikah*) between stateless refugees and Indonesian.

### C. THE IMPLICATION OF MARRIAGE WITHOUT DOCUMENTATION

The consequences of religious marriage without civil documentation is major to the status of the child, matrimonial property, qualification of the dissolution of marriage and its implication of the male’s obligation to give alimantation (*nafkah*), and the protection of women and children from arbitrary divorce (*talak*). In its relation to refugee resettlement, religious marriage could

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<sup>59</sup> Both parties married according to Religious Laws and cannot register themselves due to the absence of Personal Identification (*Kartu Tanda Penduduk* ‘KTP’) and Family Certificate (*Kartu Keluarga* ‘KK’). However, both of the party are Indonesian. Indonesia, Muara Belian Distric Court Decision, Nomor 0129/Pdt.P/2017/PA.Mbl, 2017.

<sup>60</sup> *Isbat Nikah* shall be concluded before the Religion Court after the relevant judge satisfies with any legal evidence in writing submitted by the relevant couple or affidavit given by two reliable witnesses before the judge.

<sup>61</sup> Indonesia, Jakarta Barat Religious Court Decision No. 62/Pdt.P/2016/PA.JB dated 2016.

affect family reunification of Rohingya-Indonesia family formed in Indonesia and how the final destination country protects the rights previously acquired with lack of documentation.

In the case of divorce, the validity of marriage becomes the preliminary question for the judge to settle as to whether or not the marriage is legally existed. Since the marriage was under the Islamic law that provides arbitrary divorce (*talak*) under Article 8 of the Compilation of Islamic Law (KHI). It is easier to enforce arbitrary divorce of marriage without documentation than to enforce divorce in a registered marriage, as there is no requirement for husbands to ask for confirmation from the court (*'penetapan'*) in the marriage without documentation taking into account of its defective nature. This topic needs further elaboration in order to protect the women/wife, men/father and children's rights after the dissolution of the marriage.

The consequences of religious marriage without civil documentation is major to the status of the child. There is ample debate between the experts on whether marriage without civil documentation can be considered as 1) illegitimate; or 2) defective.<sup>62</sup> According to the Marriage Act 1974, particularly on Article 42, a legitimate child is a child born from a lawful marriage. If we refer back to Article 2 of Marriage Act 1974, a religious marriage is considered as valid. However, if we compare to Law No. 24 of 2013 on Civil Administration (amendment to Law No. 23 of 2006 on Civil Administration), lawful marriage is proven by registration. Furthermore, Article 50 of 2013 Civil Administration, required the parents to be in a religious marriage and formal marriage, cumulatively, to be able to petition a subsequent child legitimacy. Therefore, without subsequent validation of marriage, a child born in a marriage that has not been registered is considered as a child born out of wedlock/illegitimate child (*Anak Luar Kawin*, "ALK").

According to Article 49 of the 1974 Indonesia Marriage Law, the recognition of a child is acknowledged -- as this refers to the child who's born of inside the marriage that is not legally conducted by the state's law but only considered as legal according to religious practice, -- whereupon this recognition has to be reported by the parents at the Department of Population and Civil Registration no later than 30 days from the date of the "child's recognition letter" by the father and approved by the mother (what is meant by "child recognition" is a father's acknowledgement of his child, born of a marriage that is conducted under religious law and approved by the child's biological mother). Furthermore, the report will be given to the Civil Registration Office, as they will record the register of the "child's recognition certificate"

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<sup>62</sup> Djubaidah, *Pencatatan Perkawinan*, 287-339.



and issues an excerpt of that. This procedure is also stated in Article 50 of the Marriage Law No. 1 of 1974, to extend the unlawful marriage, on which gives the implication of the status of the child to be “ALK” on the eye of the state (as referred to Article 42 of the Marriage Law No. 1 of 1974, stated “child is born when the marriage registration has not been done or the marriage has not been legally valid in the country, then the child cannot be called a legitimate child”). This implies that, although there is a recognition from the state by issuing a “child’s recognition certificate” (which is different from birth certificate), however, they are still considered as “ALK”.

Article 43 (1) of the 1974 Indonesian Marriage Act, as reviewed by Constitutional Court decision No.46/PUU-VIII/2010, acknowledges the legal relation to ALK with the mother and also the biological father if only proven by science and technology and/or other evidence according to the law.<sup>63</sup> In accordance with the 2006 Civil Administration Act, a child born outside a marriage shall be documented as the child of the mother, and therefore the birth certificate only mentioned the name of the mother.<sup>64</sup> This is also what happened in the case of Stateless Tionghoa Benteng.<sup>65</sup> As consequences of religious marriage and the absence of documentation of one or both of the couple, the child becomes “ALK” and primarily only has legal relationship with their mother.<sup>66</sup>

While welcoming Law No. 24 of 2013 on Civil Administration and the legal amendments entitling children of an Indonesian mother and a father who is not an Indonesian national to acquire Indonesian citizenship, the concern is about the absence of a mechanism to oversee the implementation of the legislation at all levels.

Regarding the nationality of the child, the Law No. 12 of 2006, Indonesia adopts *ius sanguinis* in determining nationality. The line for granting a nationality covers both sides, namely father and mother, in which this rec-

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<sup>63</sup> *R. v. Aisyah Mochtar*, No. 46/PUU-VIII/2010, Constitutional Court of the Republic of Indonesia (2010).

<sup>64</sup> Indonesia, *Law regarding Civil Administration*. Law number 24 of 2013, LN. 2013-124.

<sup>65</sup> Edi Purwanto, Stateless Tionghoa Benteng is a Tionghoa descendants community in Tangerang that became stateless persons because they were not recognized as citizen of People Republic of China and did not declare themselves as Indonesia nationals (proven by Proof of Citizenship of the Republic of Indonesia or SKBRI). Later, The Letter was lifted, but the administration to gain citizenship remains a challenge. Edi Purwanto, *Kompleksitas Kemiskinan Tionghoa Benteng [The Complexity of Poverty of Tionghoa Benteng]*, ed. 1, (Salatiga: Program Pascasarjana Universitas Kristen Satya Wacana, 2012) available on [https://repository.uksw.edu/bitstream/123456789/728/7/D\\_902007010\\_BAB%20VI.pdf](https://repository.uksw.edu/bitstream/123456789/728/7/D_902007010_BAB%20VI.pdf), pp. 143-144.

<sup>66</sup> It should be noted the socio-political complexity of the example. In practice they were counted as Tionghoa descend, regardless that the mothers were native (*'pribumi'*), they are required to show SBKRI to be formally documented. Although in 2000 SBKRI was lifted, the interview conducted in 2010 showed that SBKRI were still required to be shown, in *ibid.*,156-157.

ognized as a limited dual nationality.<sup>67</sup> However, in the case of the children whose father is stateless, therefore an Indonesian mother may give her nationality to her children.<sup>68</sup> In this situation, if a marriage is dissolved and children who are foreigners may be deported from Indonesia and separated from their mother.<sup>69</sup>

#### D. VESTED RIGHTS OF STATELESS REFUGEE

The legal problem arising out of marriage celebrated in Indonesia between a Rohingya and Indonesian extend to the problem of recognition of marriage as vested rights. The recognition of marriage is important to exercise the right of family reunification at times of resettlement in the country of asylum. According to Jinske Verhellen, “[n]on-recognition of the foreign marriage means that there is no registration of the marriage in the country of asylum and it, therefore, lacks the legal consequences of a marriage.”<sup>70</sup> In other words, in the case on non-recognition of the marriage, if the Rohingya Refugees finally get resettlement in the country of asylum, their Indonesian spouse might not be able to resettle with them.

The ability of Indonesian citizens to practice their rights of family reunification with their spouse in the future destination country and protects the rights previously acquired with lack of documentation is possible but not without challenges. Family reunification often depends on the refugee policy of the country of asylum. Marriages conducted in Indonesia as a transit country are categorized as marriages and family formed outside the country of origin before arrival in the country of asylum. The date and place of the marriage become crucial as the state practice of several countries of asylums require marriage to have existed in the country of origin.<sup>71</sup> Refugee policy of Finland,

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<sup>67</sup> Art. 4 point (c), (d) of Law No. 12 of 2006. “An Indonesian Citizen shall be: (c) a child born from a legal marriage of an Indonesian father and foreign mother; (d) a child born from a legal marriage of a foreign father and Indonesian mother; ...”

<sup>68</sup> Allagan, *International mixed marriage in Indonesia*, 119.

<sup>69</sup> Zulfa Djoko Basuki, “Dampak Perkawinan Campuran terhadap Pemeliharaan Anak (Child Custody) [translation: Impact of Mixed Marriage on Child Custody],” *Indonesian Journal of International Law* 3, no. 4 (2006): 235-236. See further the background of Law No. 12 of 2006 from the same author, Zulfa Djoko Basuki, *Bunga Rampai Kewarganegaraan, Dalam Persoalan Perkawinan Campuran [translation: Anthology of Nationality, in the Issue of Mixed Marriage]* (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2007), 1-6, 81-107.

<sup>70</sup> Jinske Verhellen, “Cross-Border Portability of Refugees’ Personal Status,” *Journal of Refugee Studies* 31, no. 4 (2018): 4, DOI:10.1093/jrs/fex026, p. 4..

<sup>71</sup> For example: Estonia, United Kingdom, Norway, and Switzerland. United Kingdom, Norway, and Switzerland apply less favourable treatment for marriages formed outside the country of origin. In Frances Nicholson, “The “Essential Right” to Family Unity of Refugee and Others in Need of International Protection in the Context of Family Reunification”, *Legal and Protection Policy Research Series*, Division of International Protection of United Nations High Commissioner for Refugees, (January, 2018), pp. 64-67.

Luxembourg, Malta, Slovenia,<sup>72</sup> require marriage to have existed before entry to the country of asylum.

Different country of asylums responds differently towards Traditional/ Customary (*Adat*) and Religious Marriages. Several countries such as Austria, Estonia, Italy, Romania, and Slovakia require couples to be formally married.<sup>73</sup> Although there are countries that responded in favour of Traditional/ Customary and Religious Marriage,<sup>74</sup> the formality of marriage would help refugees to have broader choices.

The respect for previously acquired rights is the limited public policy of a state. Principally, public policy prevents the operation of foreign law and recognition of rights that is contrary to their fundamental principle, such as rights resulting from child marriage.<sup>75</sup>

As for documentation, UNHCR's Summary Conclusions on family unity of 2001 stated that a flexible approach should be adopted, as requirements that are too rigid may lead to unintended negative consequences.<sup>76</sup> This is line with the report from Frances Nicholson that it is impossible to obtain documentation of the country of origin is a failed State or in the midst of serious conflict or indeed if the refugee is stateless.<sup>77</sup> UNHCR's Executive Committee underlines that when deciding on family reunification, the absence of documentary proof of the formal validity of marriage should not per se be considered as an impediment.<sup>78</sup> This is also applicable to the matter of the filiation of children. Again, different country of asylums responds differently towards documentation depending on their current policy regarding family reunification of refugees.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

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<sup>72</sup> Finland, Luxembourg, Malta and Slovenia were EU member states that requiring the family relationship to have existed before entry. This is in line with Article 9(2) of Family Reunification Directive. *Ibid.*, p. 67.

<sup>73</sup> Austria, Estonia, Italy, Romania, and Slovakia, Frances Nicholson, "The "Essential Right" to Family Unity of Refugee and Others in Need of International Protection in the Context of Family Reunification", *Legal and Protection Policy Research Series*, Division of International Protection of United Nations High Commissioner for Refugees, (January, 2018), p. 164.

<sup>74</sup> Countries with more flexible policy include Belgium, Finland, France, Ireland, Netherlands, Slovenia, Bulgaria and Canada., *Ibid.*, pp. 164-165.

<sup>75</sup> See: Jinske Verhellen, "Cross-Border Portability," 12

<sup>76</sup> UNHCR, Summary Conclusions, Family Unity; 71

<sup>77</sup> Frances Nicholson, "The "Essential Right" to Family Unity of Refugee and Others in Need of International Protection in the Context of Family Reunification", *Legal and Protection Policy Research Series*, Division of International Protection of United Nations High Commissioner for Refugees, (January, 2018), p. 70.

<sup>78</sup> UNHCR ExCom, Conclusion No. 24, *Family Reunification*, para 6, in Frances Nicholson, "The "Essential Right" to Family Unity of Refugee and Others in Need of International Protection in the Context of Family Reunification", *Legal and Protection Policy Research Series*, Division of International Protection of United Nations High Commissioner for Refugees, (January, 2018).

Rohingyas as refugees and as stateless persons have often been called the most persecuted minority in the world. One of the forms of discrimination is the administrative restriction in civil wedding documentation in Myanmar. In times of crisis, people who fled their country with fear of being prevented by law from being issued any legal documents. Therefore, in such a special case and special status, providing requirements for the formal validity of their weddings (civil weddings), is in fact impossible.

But the rights to find a family, therefore, becomes *non-derogable* rights that are protected by the Universal Declaration of Human Rights and the IC-CPR, which are ratified and even stipulated in the 1945 Indonesian Constitution.

These unique cases have helped us to identify the current relation between Indonesian migration law, private international law, and administrative law, especially the importance of religious weddings. Religious weddings under Islamic Law has become the one and only option. Although, this is not without consequences as this could harm Indonesian women and children for their weaker position in Islamic Marriage.

To provide an alternative way in order for them to be able to marry legitimately, there are several ways that can be done for stateless refugees to marry an Indonesian citizen to be formally documented.<sup>79</sup> *First*, by celebrating the marriage upon the court. *Second*, by subsequent validation of marriage (*isbat nikah*). The couple could purpose subsequent marriage validation upon the Islamic court called “*isbat nikah*”, which is a method that can be conducted by a husband and wife who have been married under Islamic Wedding and carried out child during the marriage, to get recognition from the state. This method could cause the child born from the marriage also lawful. Article 7 (3) Islamic Law Compilation (KHI) is the legal basis for couples who have conducted “*nikah siri*” to submit their “*isbat nikah*” to the local Religious Court. However, as far as this paper is written, there is no evidence of subsequent validation of marriage (*isbat nikah*) between stateless refugees and Indonesian.

This writing also recommends that if the religious marriages formed in Indonesia between Indonesian citizens and Rohingya refugees, the UNHCR may issue letter declaring the weddings, in which the couples have to report their marriages to the UNHCR beforehand. This document, however, is not a legally binding but only serve as supporting evidence of their marriage in the country of asylum, and also for the sakes of family reunification in the host country of resettlement.<sup>80</sup> This document has to be issued after some process

<sup>79</sup> Marriage Act 1974 requires that registration is a must, but it is not the only thing for marriage validation.

<sup>80</sup> According to our latest interview, which was conducted in 2019, a couple of refugees have stated that

in which the couples have to pass, which their marriage has to be confirmed with either *affidavit* or *isbat nikah*.

Moreover, it is recommended that the Indonesian government provide special records of the marriage and birth of the Indonesian-Rohingya couple. This could be regulated in several regions only, as the population of the Rohingya refugees mostly centralized on Medan, Makassar, and Aceh; for the sake of good administration. Although Indonesia is not a party to the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness, however, the 2006 Indonesian Citizenship Law has adopted several provisions in regards of the importance to reform the process of confirming or acquiring citizenship.

Further empirical research on the trend of Indonesians-Rohingyas mixed marriage should be carried out in parallel with the research of the intent of the Rohingyas to permanently reside in Indonesia in order to prevent a fraudulent change of connecting factors merely to get citizenship. If the marriage is conducted lawfully, where the judge can see the good faith of the marriage, therefore their status based on the marriage can be carried out in Indonesia. By this mean, the Rohingyas have the option to act based on Indonesian regulations, which this topic might possibly to be discussed in another paper. This paper solely focuses on the validity of the marriage.

At the national level, the legislative should make regulations regarding mixed-marriage with a stateless person, including but not limited to refugees. The adoption of the Article 12 of the 1951 Convention and the 1954 Convention should be included in the Bill of Indonesian Private International Law, as it will establish the subsidiary connecting factors as hard law and provide legal certainty for refugees and stateless persons. Recognition of foreign documents should also be considered in a special matter only, to prevent deprivation of basic human rights, namely the rights to marry.

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they “are eager to be resettled in the next country.” However, it does not rule out the possibility that they also want to be settled in Indonesia.

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