

# Marriage Legalization For Indonesian Migrant Workers

(Implementation of “Justice for All” for Migrant Workers at Tawau, Sabah, Malaysia)

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**Abstract—** The number of Illegal Marriages (*sirri*) among Indonesian migrant workers abroad is quite fantastic. Illegal marriages raise many problems such as law issues: their marriages are not recognized by the state, children born without birth certificates and at risk of statelessness, have no access to education and health. Therefore, due to the extraordinary impact, especially for children, Indonesian Government makes an effort of marriage *ithbat* (legalization) for migrant workers who had conducted illegal (unregistered) marriage. The study provides an overview of the marriage *ithbat* implementation for migrant workers and observes the impacts. The research finds that the government still has to work hard to realize their duties and obligations in protecting the civil rights of migrant workers, because what they have done is still far from expectations. The complexity of the problems have become inextricably intertwined and coincide with each other, they are: the behavior and characteristics of migrant workers, the process of their arrival to Malaysia, the broker's treatment, the plantation owners' treatment, the Malaysian Government's attitude and service, and the attention of the Indonesian Government. Marriage *ithbat* program for migrant workers, which was intended only as a curative program, will fail and be an endless program if the most basic source of the problem is not prevented, namely the illegal entry of migrant workers to Malaysia.

**Keywords—** Migrant Workers; Marriage; Marriage Ithbat; Illegal Marriage; and Legality;

## I. INTRODUCTION

Migration is the choice of rights of every citizen to earn a better living. Based on a report from the National Agency for the Placement and Protection of Indonesian Workers (Badan Nasional Penempatan dan Perlindungan Tenaga Kerja Indonesia or BNP2TKI) in 2016, Malaysia is a favorite place for job seekers with a fantastic number of 87,616 people (BNP2TKI, 2016).

Further, seeing the large number of Indonesian Migrant Workers (IMW) in Malaysia and supported by the lack of control and the presence and role of the state will certainly lead to various forms of lawlessness (Giddens, 2003), such as illegal workers, illegal marriages and illegal children. The state of Tawau, Sabah, Malaysia is one of them. It is estimated that ± 150 thousand IMW are legal, while the illegals reach twice that amount (Sujoto, 2017).

The explicit lawlessness among IMW in Tawau is the rise of *sirri* marriage or unregistered marriage or in IMW terms in Tawau called kampong marriage conducted by IMW. This kind of marriage has been passed on from generation to generation and takes place continuously. Without realizing it, this kind of marriage model has plunged them into various problems like an endless vicious circle.

Thus, the *sirri* marriage of IMW in Tawau with all its problems becomes very significant to be studied. The research is conducted not only to see the impacts but also the government's effort in carrying out its obligations to respect, protect, uphold, and promote the human rights as set out in the constitution also serve as a benchmark for the government's success in protecting all citizens wherever they are.

## II. THE REALITIES OF THE MIGRANT WORKERS' LIFE IN TAWAU

Indonesia and Malaysia are neighboring countries, whose relations between the two societies have been closely interwoven even long before they declare independence. The IMW in Malaysia, especially in the Tawau region, is the object of this research. They come from various parts of Indonesia: Sulawesi, Sumatera, NTT, NTB and the rest are Javanese who work in the palm oil plantation, factory and urban or city (Tahir, 2017). An interesting data to note is that it is estimated that ± 80% of IMW come from Sulawesi and work in the palm oil plantation sector, fields or commonly called beluk (Herlina, 2017) and it turns out they are already there for three generations.

They work in groups in the palm oil fields under the auspices of a company. The conditions of the fields where they work and live are partly inland, surrounded by palm oil and the river, so making it very difficult to reach. Furthermore, the place lacks the access of transportation and it is guarded by security guards. Only authorized personnel are allowed to enter.

The income of IMW who works as manual labor at fields is estimated at RM 500 per month (Herlina, 2017). This amount is quite large for those with low educational background. The

amount of salary earned by IMW is certainly also a tremendous attraction for people to work and live in Tawau rather than in Indonesia. In addition to the basic salary earned, IMW get some facilities such as free housing, electricity, water, rice, sugar, oil and other basic necessities (Nani, 2017). This may make them feel at home in the fields and forget or ignore their legal identity as foreign citizens such as residence permit, work permit, and passport. The company also contributes to this lawlessness by protecting the IMW from the Malaysian Police raids by providing the passport identity by changing the name or identity of the IMW.

The crucial problems faced by IMW in Tawau as stated by Krishna Djaelani, Head of the Indonesian Representative Office of Tawau, include four issues (Djaelani, 2017). First, immigration issues, such as overstay, un-procedural stay (illegal) and other immigration issues related to citizenship. Second, labor issues, such as the absence of a work contract, a work permit, salary below the minimum wage standard or not in accordance with the employment contract. Third, legal issues, whether as perpetrators or victims such as drugs, human trafficking, murder, smuggling, and rape. Fourth, other problems such as accidents and death of IMW.

The large number of IMW entering Tawau, both legal and illegal, leads to the intensity of meetings and social interactions with both IMW and local residents. Given the age of the IMW mostly in the productive age of sex, then the attraction between the IMW of different sex becomes inevitable and leads to marriage.

### III. INDONESIAN MIGRANT WORKERS MARRIAGE

There are two kinds of IMW Marriage in Tawau, legal and illegal. For the IMW who have complete document, they hold their marriage in the country by way of marriage in the nearest Kantor Urusan Agama/KUA (Religious Affairs Office) from Tawau such as KUA Nunukan of Northern Kalimantan, or through the recording which is done in Tawau through the Sabah State Religious Affairs Department (JHEAINS). Up to now, it is recorded that 700 to 800 couples of Indonesian Citizens are officially married to their spouse, either with Malaysian Citizens or with other Indonesian Citizens enrolled in JHEAINS (Ismojo, 201).

In the meantime, illegal marriages are usually conducted by IMW who work and live in palm oil plantations. They prefer to carry out sirri marriage (unregistered), which is led by a person they consider as a public figure with a cost of between RM 100 without a marriage certificate (Irawati, 2017).

There is a striking difference in the practice of sirri marriage in Indonesia and Tawau. The Sirri marriage in Indonesia is a marriage that is deliberately kept as a secret because of confidentiality, while sirri marriage in Tawau is celebrated just like a regular wedding reception, however the marriage does not get the official record either from the government of Malaysia or Indonesia. The receptions frequently get the support from companies where IMW are working, for instance in the form of free electricity until the morning, rental of tents, chairs, dining, and other wedding supplies (Aimah, 2017).

There are four significant issues that cause IMW to conduct sirri marriage in Tawau, first lack of knowledge about law. IMW do not know that marriage have to be officially recorded by the government. They only think that marriage is a procession of worship that has no relation to the state administration. The validity of marriage is not related to the recording, as long as the requirement and essential principles are reached, then the marriage is valid. They are unaware that the recording of the marriage has a profound effect on other aspects of family law such as marital status, child status, other administration such as child birth certificate and passport. The lack of knowledge and understanding of IMW on the urgency of marriage registration and marriage procedure legally is due to the low level of education (Bulan, 2015).

Second, the factor of compulsion. This is because of their inability to prove their identity such as e ID card, passport or temporary residence permit from the Malaysian government. Many of them had their identities confiscated by the boss or employers, and also lost or expired.

Third, the geographical location of the plantation where Indonesian Migrant Workers are working with the Indonesian Representative Office in Tawau is exceedingly far away. The distance means more cost and time to do official marriage registration (Religious Court of Central Jakarta, 2012). Additionally, the permit to leave the field from the employer is quite difficult to obtain due to the extremely high responsibility of work and tight regulation of the company (Ramdani, 2015).

Fourth, the existence of a pakkeling (leaflet) of Sabah prohibiting IMW to get married while his residence permit is stated as an employee and guaranteed as a worker. That prohibition declares The Main Terms of Employment of Foreign Workers, where point 9 and 10 are stated as follows: "9. Foreign workers are not allowed to bring their family and dependents, (wife and children)." "10. Foreign workers are not allowed to marry each other or marry the locals." When this happens, the employer must report to the Immigration Department of Malaysia if there is a Foreign Worker who violates this requirement then the IMW will be deported. Nevertheless, there is an interesting fact to be observed as revealed by Hermono, a Principal Secretary of BNP2TKI and former of Deputy Indonesian Ambassador to Malaysia that the rules are strictly enforced in Malaysia Peninsula, but for Sabah and Sarawak the regulations are loosely applied as if the local government has been unconcerned about this matter (Hermono, 2016).

The phenomenon of lawlessness by IMW in Tawau Malaysia has become a snowball effect. It all starts with the departure from the homeland illegally, then they get illegal job and live illegally, get married illegally and finally have children without any documents or record from any country and has the risk of being stateless. This in turn denies the children the access to education and health. The most worrying to the IMW is that are always haunted by the raids from the Malaysian Police which can cause them to be deported.

#### IV. ITHBAT: EFFORTS TO MEET THE LEGAL NEEDS OF INDONESIAN MIGRANT WORKERS

It is a necessity for the government to provide legal protection for all its citizens wherever they are. One of the urgent legal requirements is gaining access in obtaining legal Identity. For instance, the ownership of legal identity for each person is a basic right that must be fulfilled in accordance with the UN Sustainable Development Goals (SDGs) Program, namely: Provide legal identity to all, including birth registration, by 2030. And the legal identity referred to in this paper is any form of law product that shows one's identity as proof of being a citizen. Such legal identities are: Identity Card, Family Card, Passport, Marriage Book, and Birth Certificate.

The production of legal identity is not centralized in one institution, it is dispersed in various institutions that make the problem complex. Moreover, the production of legal identity is carried out overseas. There are at least 5 institutions involved: the Ministry of Foreign Affairs as the organizer or administrator, the Supreme Court, in this case the Religious Court as the implementer of Ithbat Nikah which issued Verdict of Ithbat, the Ministry of Religious Affairs of Indonesia in this case the Director of Islamic Affairs as an institution that issues the marriage book, and the Ministry Domestic Affairs in this case the Directorate of Population and Civil Registration as an institution which issues the birth certificates of children, and the Ministry of Justice and Human Rights which issues a Passport for children born overseas.

The cooperation among the agencies is absolutely needed to realize this work. Therefore, a joint committee of inter-institutional committees is established on principles of prudence, usefulness, effectiveness, and efficiency. This is taken because the target is IMW who has limited cost and time. Then, to trim the bureaucracy, initial data is conducted to ensure that administrative requirements are met before the day of the trial.

Supreme Court Decree Number 084/KMA/SK/V/2011 concerning Marriage Legalization Trial Permit (Marriage Ithbat) in the Representative Office of the Republic of Indonesia is the legal basis for the implementation of marriage ithbat abroad. The trial is conducted for a day (One Day Service) and IMW immediately get two documents of the marriage book and marriage verdict. For those who have children, the document can be used on the same day to take care of the child's birth certificate. However, birth certificates cannot be issued on the same day. It takes a few months to be issued.

For the first time, on 20-23 June 2011 the Religious Court of Central Jakarta held a marriage ithbat trial abroad at the Indonesian Consulate General of Kota Kinabalu Sabah, Malaysia had tried 367 cases. While in KJRI Tawau for the first time held a marriage ithbat trial on December 17-21, 2012 by trying 491 cases (Religious Court of Central Jakarta, 2012). Up to now, the Consulate General of the Republic of Indonesia (KRI) Tawau has conducted a marriage ithbat trial five times starting from 2012 until 2016 with 2001 couples BMI. The following is marriage ithbat data at the Office of Representative of Indonesia Tawau (Ismojo, 2017).

Table 1. Data of marriage *ithbat* in Consulat of the Republic of Indonesia Tawau, Sabah, Malaysia

Year	Number of Cases Granted
2012	491
2013	795
2014	232
2015	247
2016	236

Although the number of IMW who inaugurated their marriage through marriage *ithbat* is quite a lot, however, this number is not comparable to the number of IMW who have *sirri* marriage (unregistered married) in Tawau. For that reason, the marriage *ithbat* program will be regularly conducted by KRI Tawau and become an annual program, with the goal that all illegal marriage of IMW can be inaugurated and legalized (Dwikandhini, 2017).

#### V. SEEING THE BENEFIT OF ITHBAT: EMPIRICAL EXPERIENCE

IMW who get legal identity through marriage *ithbat* in KRI Tawau acquire the following benefits:

- a) Their marriage gets legality with proof of *ithbat* verdict and marriage book.
- b) Children born after marriage *ithbat* may be registered at the local civil registration office (Jabatan Pendaftaran Negara Malaysia).
- c) Children have access to education, both at Indonesian schools and in Sabah schools, Malaysia, as result it can avoid child marriages, especially for girls (Rio, 2017).
- d) Facilitating the IMW to deal with all matters related to marriage, such as: divorce, child custody, division of common property, determination of heirs and division of inheritance.
- e) Mothers and children can access healthcare in Malaysian hospitals, in order to minimize the number of maternal and child deaths due to childbearing in the fields (Ismojo, 2017).
- f) Avoidance of various forms of discrimination, exploitation, human trade; and
- g) Gaining other rights, such as: following the general election for Indonesia, applying for a job, obtaining a passport and accessing social protection (Cate Sumner, 2014).

##### A. Field Constraints

Despite the above benefits, there are some obstacles in the implementation of Marriage Ithbat. First, it is misunderstood by some IMW. The simplistic assumption and ignorance became the most obvious reasons. This kind of thinking will

continue to increase the number of unregistered marriage of IMW.

Second, if the government cannot stop the Indonesians for illegally entering Tawau to work, then the number of sirri marriages cannot be suppressed, because the majority of those who do sirri marriage in Tawau are illegal IMW.

Third, marriage itsbat is not accompanied by solid facilitation and coordination among government institutions, so it seems less coordinated and not well integrated.

Fourth, the program is not coordinated with the local government. This is proven by the fact that several groups of ithbat participant have been arrested by Malaysian Police on their way to Consulate General of the Republic of Indonesia (KJRI) Tawau.

Fifth, the language barrier becomes an interesting issue. It is conceivable that IMWs who conduct Ithbat are not fluent in Indonesian language, as result when ithbat trials are held, the IMW need to be accompanied by interpreters, as they understand Malay language or the local language of the origin of IMW for example Bahasa Makassar (Bugis) better than Indonesian language (Religious Court of Central Jakarta, 2012).

Sixth, because there is an attempt to hide the identity to avoid the raids of Malaysian police, the IMW – even assisted by the company– falsify the identity by changing the name so that the identity used in the marriage is not the real name (Isti'anah, 2017).

Seventh, the data provided by IMW who apply for ithbat were invalid when the verification and trial process are conducted.

#### B. Measuring the Implementation of Justice for All through Marriage Ithbat

One of the duties of the Indonesian government is to provide the services to all levels of society, without exception (Justice for All or Access to Justice). All Indonesian citizens wherever they may be are entitled to access to justice and to obtain justice. According to Lawrence M. Friedman (Friedman, 2009 ) and Otto, quoted by Adrian (Vel, 2010) Justice for All or Access to Justice is not only seen procedurally, but also lies in the outcomes (Francioni, 2007). Based on the indicator of Access to Justice mentioned by Otto, the Indonesian government through the Representative Office of the Republic of Indonesia in Tawau has been sufficiently adequate for the following Access to Justice Principles (Vel, 2010).

1) People, notably poor and vulnerable. Access to justice is intended to all citizens, especially to the poor and the weak. The marriage ithbat program, marriage record, and the publishing of birth certificates that are provided by the government are ways for ensuring that Indonesian citizens in Tawau – without seeing whether they are legal or illegal – must gain the access to justice, by providing a breakthrough program and compressing the costs to the lowest so they are well served.

2) Suffering from injustice. The term injustice has a broad definition, so it is not easy to categorize the injustice

because of the subjectivity. The practice of sirri marriage that is conducted by IMW is a form of injustice which is quite difficult to define because of the difference in subjectivity and point of view. On one side, IMW assumes that sirri marriage is a common act to carry out and legitimate according to religion, but on the other hand, the importance of IMW to have a legal identity in regard not to be marginalized has become an urgent matter.

3) Have the ability to make their grievances be listened to. The existence of Cikgu (teacher) is as a public figure and role model for IMW in the field. The IMW consults and even complaints through the Cikgu due to their level of trust to the cikgu. Therefore, the Consulate General of the Republic of Indonesia (KJRI) Tawau uses the existence of Cikgu as a liaison or facilitator in making access to Justice in this program.

4) And to obtain proper treatment of their grievances. In the context of marriage ithbat, Cikgu along with the company registered and administered the IMW who have conducted sirri marriage, then reported to Consulate General of the Republic of Indonesia (KJRI). The Consulate General (KJRI) then forward the data to the Central Jakarta Religious Court and Office of Religious Affairs so the trial of ithbat marriage ready to be conducted.

5) By state or non-state institutions. In implementing the marriage ithbat program, not only state institutions such as Consulate General of the Republic of Indonesia (KJRI), Religious Courts or Religious Affairs Office are involved, but also private parties such as companies and Cikgu or volunteers help the implementation of this program.

6) Leading to rectify the injustices. IMW who register for conducting their marriage ithbat get the verdict of ithbat, which later can be used to make the marriage certificate and it can be used as the basis document to make the birth certificate. The birth certificate in turn can ease the children born from the marriage to get administrative services both in making other identities as well as access to their civil rights services such as education and health.

7) On the basis of rules or principles of state law, religious law or customary law. The presence of marriage ithbat means that the court acknowledges that the marriage, which has been conducted under the religion and/or custom is legitimate, therefore the trial process establishes the past legal event of marriage and declares it to be legally valid.

8) In accordance with the rule of law. The giving of legal identity to IMW into marriage ithbat practice, issuing of marriage book and birth certificate essentially is helping IMW to run the rule of law, in respect of creating law order.

## VI. CONLUSION

The marriage ithbat that is conducted at Consulate General of the Republic of Indonesia (KJRI) Tawau is useful in providing legal access to IMW, newly born child and children. However, these efforts have not touched upon all IMW who have carried out the illegal (unregistered) marriages, therefore more efforts are needed from the Indonesian government.

To create a dignified marriage, diplomacy is needed to have the Malaysian government to be more lenient and cooperative with the marriage program. This effort not only provides legal certainty for Indonesian citizens, but also helps them in data collection of population.

The handling of illegal marriage cases for IMW in Malaysia will be useless or will not be maximized if the following efforts are not made:

1. Cut all illegal access to Malaysia by applying Zero Tolerance to Illegal IMW because illegal marriages are mostly carried out by the illegal Indonesian migrant workers.

2. Provide a socialization to IMW about the urgency of marriage record. Do not let this program to be utilized by the IMW who abuse the law by way of illegal marriage, then carry out the marriage ithbat.

To optimize the administrative matters of marriage administration, it is time for every Embassy of the Republic of Indonesia to establish religious attaché, especially in the country that many Indonesian citizens live.

## REFERENCES

- [1] BNP2TKI. (2016, november 24). *Data of Placement and Protection of Indonesian Migrant Workers in 2016*. Retrieved june 8, 2017, from <http://www.bnptki.go.id>
- [2] Bulan, K. a. (September-December 2015). Pelayanan Pernikahan di Kabupaten Nunukan: Antara Mengatasi Keterbatasan dan Menjaga Kemaslahatan. *HARMONI*, Volume 14, No. 3, LIPI
- [3] Cate Sumner, AIPJ, PUSKAPA UI, PEKKA and Australian Family Judicature Team. (2014). *Studi Dasar AIPJ Tentang Identitas Hukum Jutaan Orang Tanpa Identitas di Indonesia*. Jakarta.
- [4] Francioni, F. (2007). The Rights of Acces to Justice under Customary International Law dalam Acces to Justice as a Human Rights . Oxford: Oxford Univiversity Press.
- [5] Friedman, L. M. (2009 ). Access to Justice: Some Historical Comment. *Fordham Urban Law Journal Volume 37, ed.1, Article 4*, <https://pdfs.semanticscholar.org/c11c/98cadcc2e98274b6cb373eeadca08380f815.pdf>.
- [6] Pengadilan Agama Jakarta Pusat. (2012). Laporan Sidang Itsbat Nikah di KJRI Kota Kinabalu dan KRI Tawau 17-21 Desember 2012. Jakarta: Pengadilan Agama Jakarta Pusat.
- [7] S, Ramdani. Wahyu. (2015). Kedudukan Isbat Nikah di Luar Negeri. *Asy-Syari'ah*, 112.
- [8] Vel, A. B. (2010). An Analytical Framework for Empirical Research on Access to Justice. *Law, Social Justice & Global Development Journal (LGD)*, [http://www.go.warwick.ac.uk/elj/lgd/20010-\\_1/bedner\\_vel](http://www.go.warwick.ac.uk/elj/lgd/20010-_1/bedner_vel).