



Legal Protection of Stateless Persons Arising From Cross-Border Marriage: Indonesia and East Timor Case Study

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Abstract

Statelessness is a continuing international legal issue, with individuals lacking the protection of fundamental rights within the jurisdiction of a State. One aspect contributing to this problem is customary cross-border marriage between people of different nationalities, particularly in local border towns, for a variety of reasons. This study examines how the phenomenon causes statelessness and undocumented people and how international human rights instruments require States to comply. This legal study compares the East Timor Constitution. According to the study, statelessness and undocumented people due to cross-border marriage by custom upset women and children since it is hard for them to get residence documents.. Cross-border marriages between East Timorese men and Indonesian women are customary and unregistered in Indonesia and East Timor. The research shows that Indonesian women/wives in East Timor cannot exercise their rights because they are not East Timorese nationals. Since women in border communities are unaware of the consequences of marrying a non-national and the requirements of naturalization in East Timor, living in the neighboring state for long periods of time causes statelessness as they lose their Indonesian nationality (if they don't renew their passport after 5 years) and aren't recognized as East Timor nationals.

I. Introduction

Statelessness is a legal term regarding the loss of citizenship, or the absence of a recognized relationship between the individual and the State. Meanwhile a stateless person is defined as “a natural person who is not considered a national by any country” (Garner, 1999). This condition is recognized by both national law and international law, which can

arise as a result of disputes over national citizenship laws, due to changes in sovereignty over territories and due to denationalization by the country where the person concerned is a citizen ([Starke, 2008](#)).

Under Article 15 paragraph (1) of the Universal Declaration of Human Rights 1948, it is stated that: “*Everyone has the right to a nationality*”, and paragraph (2) states that “*No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality*”. Based on this provision, from the perspective of human rights, it is the right for everyone to have citizenship or nationality, and therefore it is an obligation for the state to respect certain citizenships of a person.

In order to carry out this obligation, Article 1 of 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws stipulates that “*It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality*”. In this regard, international law basically provides the conditions for granting citizenship to the domestic jurisdiction of the country concerned. However, there is a limitation that this national provision does not conflict with international principles or provisions related to nationality issues.

Nationality has an important role because it determines the benefits that citizens are entitled to and the obligations they must perform. However, in some cases, by leaving the definition and provisions regarding nationality to each State, it will cause a conflict between the national provisions of one State and another ([Edwards, 2019](#)). This will ultimately have implications for the rights of citizens to obtain the protection of their country and the various benefits that arise as stipulated by international law.

An example is the conflict of legal provisions in the field of nationality between Law No. 12 of 2006 concerning Citizenship of the Republic of Indonesia ([Law No. 12 of 2006](#)) and East Timor’s Lest Decree-Law No. 1 of 2004 of Regulation on the Law on Citizenship, as well as provisions regarding nationality contained in the Constitution of the Democratic Republic of East Timor. This has resulted in the unprotected rights of Indonesian women who marry traditionally with men from East Timor and then reside in East Timor due to the loss of their citizenship due to various reasons. In addition, it also raises problems related to the citizenship of children born from cross-border marriages through local custom.

In general, an individual can lose his nationality through several events, namely: a) renunciation, for example through a declaration of renunciation of the citizenship of the person concerned if he or she is of age; b) revocation, for example due to a special denationalization law issued by the country of origin of the citizenship of the person concerned; and c) a long stay abroad ([Edwards, 2019](#)).

In the perspective of human rights, people with stateless status are included in the category of *vulnerable persons*, namely people who are vulnerable to abuse of power from a stronger party, thus requiring protection from international human rights law. This is

based on the argument that as long as an individual is a human being, then he/she has and needs human rights.

In this study, the focus stateless persons is not due to their *refugee* or *asylum seeker* status, but rather the loss of citizenship is due to cross-border marriages traditionally carried out by people on the border between States. For example, cross-border marriages that occur on the border between Indonesia and Timor Leste, cross-border marriages on the borders of Malaysia ([Hashim, 2019](#)), Vietnam-China ([UNFPA, 2018](#)), Thailand-Laos ([Phukongchai, 2022](#)), and between Malo-Burkina Faso-Ivory Coast in East Africa ([Bloom, 2021](#)).

Cross-border marriage is marriage between individuals with different national or residency statuses ([Williams, 2021](#)). It is where social reproduction is no longer confined within the nation-state but takes place transnationally ([Leng, 2021](#)). The occurrence of cross-border marriage comes with various causes and reasons from different regions of the world, including, but not limited to, the consequence of armed conflict, migration, State succession, nomad practices, customary practices of ethnic and border communities, and other social and economic purposes.

In the case of the loss of one's citizenship due to the customary marriage process, which is generally not registered, it will cause a conflict of interest between the individual interest and the public interest. To solve this problem, individual rights are often limited by the concept of the public interest, although in its implementation this concept is often misused.

Human Rights as the original reason was intended to be a '*trump card*' for the sufferer ([Orend, 2002](#)). Rights as a '*trump card*' are often a problem, when there is a conflict between one right and another. For this reason, based on the "specificationism" argument which states that each right consists of a group of qualifications that state when or not the qualifications of the right are valid, it is necessary to consider the context in which the conflict occurred. Thus there will be the possibility of different views whenever there is a conflict.

Based on the opinion that the law is required to solve all problems that arise as a result of various social transactions, the management of conflicts between interests becomes the domain of the main function of law.

For this reason, in this study, the issue of stateless persons caused by cross-border customary marriages will be studied from a human rights perspective, focusing on the State's responsibility to provide legal protection through the effectiveness of the rights possessed by stateless persons. The study was also conducted by examining the effectiveness of legal protection in several States that have the same or almost the same cases.

This study uses a legal research approach. Research that is based on a normative legal approach involves the finding of legal rules, legal principles, and doctrines of the law to address the particular issue of law ([Marzuki, 2008](#)). The results of the study of

law in the form of an argument, theory, or new concept serve as the basis to address the legal issue ([Christiani, 2016](#)). Secondary data is the main data in this study. This study is intended to examine the legal protection of stateless persons under international law as a consequence of cross-border marriage by custom.

II. The Potency and Impact of Loss of Citizenship Due to Cross-Border Marriage by Custom

Cross-border marriages that result in the emergence of stateless person status can occur through several events, among others, through marriages carried out by people of different nationalities without going through the proper procedures, as is done by undocumented migrant workers with someone who has stateless status due to illegal entry into the State. In addition, it can also occur as a result of traditional marriages being carried out in border areas, which due to the high dowry causes these marriages to not be carried out in the Church or to be registered.

Similar to this in the Thai-Lao border community, over half of rural Laotians do not have the official documents required for marriage registration. This because importance is placed on local values, customs & norms, and how to maintain kinship with cross-border families, rather than on legal status ([Phukongchai, 2022](#)). As a consequence, family members in such communities may hold Thai, Lao, or even dual citizenship. Thus the lengthy stays across the border leads to family members at risk to losing their nationality and without marriage registration, their children are also at risk to become stateless.

For the case of Sino-Vietnamese cross-border marriages, most of the Vietnamese women residing and married in China are illegal immigrants. In addition to the lack of education of laws and regulations on nationality and marriage, Vietnamese women are unable to obtain supporting documents required or obtain a passport and visa. Therefore, couples cannot go through legal marriage registration procedures in China. As their marriage are invalid, Vietnamese women then is not recognized and protected by Chinese law; not to mention the possibility lose their nationality and become stateless persons ([UNFPA, 2018](#)).

In Malaysia, tendencies of statelessness towards children are caused by the failure of cross-border couples to register their marriage but are only bound by wedlock. This is due to the lack of recognition or rather a restrictive threshold for cross-border marriage to be upheld as it considered to be *syubhah* (means a sexual intercourse performed with a presumption that it is a valid marriage but in actual fact the marriage is not valid) under Malaysia's Islamic Family law ([Hashim, 2019](#)).

Based on the Convention Relating to the Status of Stateless Persons 1954, 'statelessness' is divided into two categories, namely *de jure* statelessness and *de facto* statelessness. '*De jure statelessness*' is a condition where a person does not have any citizenship identity

and therefore does not get his rights as a citizen based on the national law of the State concerned (Tucker, 2014). Meanwhile, 'de facto statelessness' is a condition where a person cannot prove the effectiveness of his national identity, therefore he also does not get access to effective protection.

The condition of statelessness generally affects women or children who are born, although there are exceptions in some countries, such as customary marriages on the border of the Republic of Indonesia and the Democratic Republic of East Timor (East Timor). When a customary marriage occurs between a woman who is an Indonesian citizen and a man of East Timor, in general the woman will be brought to East Timor and stay there. For women who do not have residence documents due to lack of knowledge or do not consider it important, they will have to face the issue of citizenship in East Timor. For women who are documented, they can renew their citizenship status at the Indonesian Embassy in East Timor, or apply for East Timor citizenship even though it is very difficult. This is different when the undocumented woman/wife lives in East Timor for a period of time until she meets the provisions regarding the time limit for the loss of citizenship according to the Indonesian Citizenship Law.

The opposite condition occurs towards children born in cross-border customary marriages. If he/she is born to parents from East Timor, the potential for this state of statelessness is unlikely to occur, as long as he can prove that his father or mother or both parents are from East Timor. This refers to the provisions of Article 3 of the East Timor Constitution, which states that:

1. *There shall be original citizenship and acquired citizenship in the Democratic Republic of East Timor.*
2. *The following citizens shall be considered original citizens of East Timor, as long as they are born in the national territory:*
 - a) *Children of father or mother born in East Timor;*
 - b) *Children of incognito parents, stateless parents or parents of unknown nationality;*
 - c) *Children of a foreign father or mother who, being over seventeen years old, declare their will to become East Timorese nationals.*
3. *Irrespective of being born in a foreign country, children of a Timorese father or mother shall be considered original citizens of East Timor.*
 - a) *Children of an East Timorese father or mother living overseas;*
 - b) *Children of an East Timorese father or mother serving the State outside the country;*
4. *Acquisition, loss and reacquisition of citizenship, as well as its registration and proof, shall be regulated by law.*

By referring to the provisions of Article 3 of the East Timor Constitution, the status of children from marriage also raises the issue of citizenship, not because children from cross/customary marriages will be stateless, but instead have the potential to have dual

citizenship, whether the child was born in Indonesia or in East Timor. This is further clarified by the Provisions on Procedures for obtaining citizenship as provided for in Section 1 Decree-Law No. 1 of 2004 regarding Regulation on the Law on Citizenship which regulates the citizenship status of a child whose one of the parents is a citizen of East Timor, that *“a person born in the territory of East Timor or born in another country but whose birth certificate states that one of the parents is the color of the country East Timor, has the right to Timorese citizenship”*.

Thus, the status of a stateless mother in East Timor will not affect the citizenship status of the child as an indigenous citizen of East Timor as stated in Section 3 Article 2 (b) of the East Timor Constitution which states that *“the following citizens shall be considered original citizens of East Timor, as long as they are born in the national territory (children of incognito parents, stateless parents or parents of unknown nationality”*. This is reaffirmed through the provisions in Article 1 (b) Section 8 Law No. 9 of 2002 (Law on Citizenship) regarding Original citizenship which states that: *“a child of incognito parents, stateless parents or parents of unknown citizenship”*.

In Malaysia for example, cross border marriage that occurs between individuals where one is of Malaysian nationality, their children have the potential of being undocumented, specifically towards Muslim children. Malaysian law requires that that parents must ensure that their marriage be valid under hukum syara' and law under the Islamic Family Law (Federal Territories) Act 1984 (hereinafter known as IFLFTA 1984), for a marriage to have legal status. Under Section 113 of IFLFTA provides that children that are born out of *syubah* intercourse (involving cross border marriage) the marital status will be declared as invalid ([Hashim, 2019](#)).

The case of Thai-Lao is similar to Indonesia's case; cross-border marriages are still not acknowledged by the authorities because their registration was not made under the Thai and Lao laws. In addition to the unrecognition of cross-border marriage, Thai and Lao laws are seen to be one of a complicated, costly, and time-consuming process ([Phukongchai, 2022](#)).

For women or wives, even though their existence is accepted by the community, because of their stateless status, they do not get their rights as citizens of East Timor, especially the right to express their political aspirations in election activities. For children who ultimately have to be stateless, it will make it difficult for these children to gain access to education.

This is also certain for children in Malaysia born out of cross border marriage. It is estimated that there are 50,000 undocumented children in Malaysia ([Yeo, 2012](#)). Children born without parents registering their marriage will have the effect of their right to education as the Ministry of Education requires the parents to provide the student's birth certificate and/or identity card and parents' identity card and marriage certificate ([Hashim, 2019](#)). Additionally, they are denied access to healthcare and other public services, putting them at risk of exploitation and poverty ([Hashim, 2019](#)).

III. Legal Protection for Stateless Persons in the Perspective of International Human Rights Law

In accordance with the development of legal disciplines regarding the protection of human rights internationally, international human rights law has also developed as a branch of public international law. This has the consequence that because international human rights law is part of public international law that regulates State conduct, international human rights law also regulates State behaviour, especially human rights. The State in this case is not only intended to refer to the government, but also the legislative and judicial bodies, including all State apparatus/law enforcement officials.

According to Thomas Buergenthal *“International Human Rights is the law that deals with the protection of individuals and groups against violations by government of their internationally guaranteed rights and with the promotion of these rights”* (Buergenthal, 1995). Through this definition, the State has an obligation to protect, guarantee and fulfil human rights. This is because the State has the power, so that in the context of human rights, the State is required not to abuse its power (abuse of power).

Abuse of power and State omission on these obligations will result in human rights violations. Thus, human rights violations can occur as a result of the State doing something (violation by commission) or as a result of the State not doing something (violation by omission).

As Rhona K. Smith views, *“All Peoples demand, and deserve, to be treated as the equal(s) of other inhabitants of the State in which they live. Such equality, as has been noted, dependent on the abolition of all forms of discrimination. Racial discrimination is deemed particularly acute as individuals are discriminated against solely an account of the colour of their skin or their ethnic origin, factor over which they clearly have no control...”* (Smith, 2007).

The principle of equality, the prohibition of discrimination and positive obligations imposed on each country are intended to be the basis for state actions to protect certain rights. Equality requires equal treatment, in which the same situation must be treated equally, and with debate, which in different situations is treated differently (Smith, 2007).

The prohibition of discrimination is an important part of the principle of equality, where if everyone is equal, then of course there is no discriminatory treatment. Meanwhile, the principle of positive State obligations arises as a logical consequence of the provisions under international human rights law that the individual is the right bearer, while the State is the duty bearer of human rights.

By law, the State is the party that is obliged to protect, guarantee and fulfil human rights. While concretely, the State’s obligations regarding human rights are realized by protecting the human rights of each individual from abuse of State power, guaranteeing the existence of human rights of each individual in legal provisions and in their implementation and fulfilling the human rights of each individual.

Likewise with someone who is stateless. The condition of statelessness in general will result in him having the potential to be denied his citizenship status by the State.

Therefore, according to international law, a person should not be in a state without citizenship status to the point that he does not get guaranteed legal protection.

Based on the Universalist Theory in which human rights are universal - hence human rights are owned by individuals regardless of the values or culture possessed by a society or in a country - combined in the context of a stateless person, it is appropriate that human rights overcome geographical boundaries as well as differences in race, gender, religion, language, culture inherent in a person. As a consequence of this understanding, even people with stateless status are entitled to legal protection from the State.

The issue of human rights violations is always associated with the obligations of the State or parties who are legally obliged to protect (safeguard) and respect international human rights norms.

Referring to the opinion of Victor Conda, "*Violation of human rights is a failure of a conduct of another party legally obligated to comply with international human rights norms. Failure to fulfill an obligation is a violation of that obligation. A violation gives rise to domestic or international remedies for such state conduct*" ([Conda, 1999](#)), this means that human rights violations will always be attributed to the State which in this case is operationalized by all its apparatus (State agents).

Based on the preamble of the UDHR which states that "*human rights should be protected by the rule of law*", this means that the State must protect human rights through legal means. Thus, human rights must be regulated through legal mechanisms, which are packaged in the form of legal products that substantially must refer to international human rights legal instruments. However, the State can also elaborate on particular local elements into legal instruments in the context of regulating human rights, as long as this does not conflict with universal human rights values as stated in various international human rights law instruments.

In general, State responsibility will arise if the State commits things such as breaching/violating an international agreement, violating the territorial sovereignty of another country, damaging the territory or property rights of another country, using armed violence against another country, harming the diplomatic representatives of other countries, or misconduct in treating foreign nationals ([Harris, 1998](#)).

Based on the concept of State responsibility, a State is responsible if it violates its obligations under international law. The International Law Commission/ILC states that violations of State obligations which are classified as "international wrongful acts" include gross violations of human rights, which are categorized as international crimes.

Human rights provide moral and legal guarantees for individuals to exercise control and encourage regulation in the practices of State power over individuals, it ensures the existence of individual freedom in dealing with the State and requires the State to meet the basic needs of individuals within its jurisdiction.

A. Legal Protection against Statelessness under the Convention on the Elimination of All Forms of Discrimination

Nationality is an important right for the fulfilment of other human rights; it determines the rights and benefits that nationals are entitled to ([McDougal, 1974](#)). In this regard, Article 9 of the Convention on the Elimination of all forms of Discrimination (CEDAW) endows to women equal rights with men. Furthermore, the second part of the article states that *“they shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”* This governs that a woman’s nationality should not automatically be changed by marriage or a change in her husband’s nationality. The right to nationality for women under Article 9 of CEDAW also extends to cases of cross-border marriage, where women spouses marry husbands of different nationality and reside in the bordering State ([Edwards, 2019](#)).

In this case, cross-border marriages that occurs in local/rural border communities risks causing statelessness for women/wives that migrates to the husband’s State ([UNHCR-EC, 2009](#)). Looking specifically at the Indonesian-East Timor border, cross-border marriages between East Timorese men and Indonesian women are carried out by custom and are not registered under the laws of Indonesia or East Timor. As field research shows, Indonesian women/wives that reside in East Timor lack the fulfilment of their rights as they are not legally considered nationals of East Timor, for example, they are unable to participate in elections. As women in border communities are unaware of the impact of marriage to a non-national, and considering the requirements of naturalization in East Timor, residing in the neighboring State for long periods of time causes statelessness as they lose their Indonesian nationality (occurs if an individual does not renew his/her passport after 5 consecutive years), and is also not recognized as an East Timor national.

Noting the conflict of nationality laws between States, especially bordering States, the failure of both States to accommodate women that married are non-nationals breaches Article 9 of CEDAW and constitutes as discrimination against women defined under Article 1 of CEDAW.

B. Legal Protection against Statelessness under the Convention on the Rights on the Child

Depending on the nationality law of States, not only does cross-border marriage lead to the cause of stateless persons, but children born out of it are at risk of statelessness. Hence having an effect on fundamental rights such as the rights to education, health care, and social services ([Edwards, 2019](#)).

The rights of children under international human rights law are specifically address in the 1989 Convention on the Rights of the Child (CRC). Article 7 of CRC

provides the State's obligation for every child to acquire a nationality ([Edwards and Waas, 2014](#)). It states that "*the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*" Here, the CRC Committee affirmed that States must ensure that 'all necessary measures are taken to prevent the child from having no nationality' ([Doek, 2006](#)).

The effects of cross-border marriages towards children differs in many States as States adopt different principles of nationality. States that adopt the *jus sanguinis* principle (nationality determined by the nationality of one or both parents), Meanwhile States that adopt the *jus soli* principle (nationality determined by birth on the territory). With this understanding, a child born on the territory of a State where nationality at birth is established by *jus sanguinis* and whose parents are citizens of *jus soli* States, is considered to be stateless. Because the child was not born in its territory, the State of the parents refuses to grant nationality, and the State of the child was born likewise declines as the parents are foreign nationals ([Samore, 1951](#)).

Instances of children and parents having different nationalities would frequently occur if *jus soli* alone determined nationality at birth. Meanwhile, children of stateless parents would similarly be stateless if *jus sanguinis* were the exclusive standard ([Samore, 1951](#)).

Due to the nature of cross-border marriages conducted by rural communities, children born through mere wedlock (without registration) coupled with wives residing abroad for long period stay, children of such are potent to statelessness since birth registration would be difficult, leading to the inability to access healthcare, education and social services ([Ziemele, 2007](#)).

With children and women at heightened risk of statelessness as a cause of rural cross-border marriages, States have positive obligations under international human rights law, specifically CEDAW and CRC, to enforce and take necessary measures to ensure that none are left without nationality.

IV. Conclusion

In conclusion, cross-border marriage by the custom in the border areas leads to a chain of legal consequences due to several factors including the absence of marriage certificates required for nationality applications, constant illegal border-crossing visits between the nationals, and the lack of awareness of border residence to obtain identity and residence documents. Moreover, other than statelessness, the conflict of nationality principles recognized by the laws of States may also lead to undocumented persons, statelessness and also dual nationality. Looking specifically at the Indonesian-East Timor border, cross-border marriages between East Timorese men and Indonesian women are carried out by custom and are not registered under the laws of Indonesia or East Timor. As field research shows, Indonesian women/wives that reside in East Timor lack the

fulfilment of their rights as they are not legally considered nationals of East Timor, for example, they are unable to participate in elections. As women in border communities are unaware of the impact of marriage to a non-national, and considering the requirements of naturalization in East Timor, residing in the neighboring State for long periods of time causes statelessness as they lose their Indonesian nationality (occurs if an individual does not renew his/her passport after 5 consecutive years), and is also not recognized as an East Timor national. Noting the conflict of nationality laws between States, especially bordering States, the failure of both States to accommodate women that married are non-nationals breaches Article 9 of CEDAW and constitutes as discrimination against women defined under Article 1 of CEDAW

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