

# **RIGHTS OF UNDOCUMENTED MIGRANT CHILDREN TO EDUCATION UNDER THE MALAYSIAN LEGAL FRAMEWORK: TOWARDS A HUMAN RIGHT APPROACH\***

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## **ABSTRACT**

Migration occurs for a variety of reasons, including political, economic, social, and environmental considerations. Migrants frequently bring members of their families to receiving countries in search of a new and better life. Like many other countries, Malaysia has long struggled with the issue of undocumented migrants, including children. One of the most critical issues concerning migrant children is the deprivation of their right to an education. This issue is a serious concern because education is regarded as a fundamental human right that can realize and fulfil various other rights. This paper aims to investigate Malaysian law concerning the right of undocumented migrant children to an education. It adopts qualitative research of doctrinal and comparative nature. It will comparatively analyse the existing Malaysian legal framework on the right of undocumented migrant children to education in light of international human rights standards established by international instruments. The article also attempts to identify the barriers that

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\* This paper is adapted from a paper presented at the International Conference on Law and Globalisation 2020.

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undocumented migrant children experience when trying to obtain an education. The paper concludes that the current Malaysian legal framework is incomprehensive and inadequate to guarantee the right to education of undocumented migrant children. As such, the paper provides recommendations towards the improvement of the existing laws and policies on this particular issue of concern.

**Keywords:** Undocumented migrant children, right to education, human rights, Malaysian law.

## **HAK KANAK-KANAK MIGRAN YANG TIDAK BERDOKUMEN KEPADA PENDIDIKAN DI BAWAH KERANGKA UNDANG-UNDANG MALAYSIA: KE ARAH PENDEKATAN MENGIKUT HAK ASASI KEMANUSIAAN**

### **ABSTRAK**

Penghijrahan berlaku kerana pelbagai sebab, seperti politik, ekonomi, sosial, persekitaran, dan lain-lain. Pada kebiasaannya, para pendatang akan membawa anggota keluarga bersama-sama mereka ke negara-negara penerima dalam usaha mencari kehidupan baru yang lebih baik. Sama seperti kebanyakan negara-negara lain, Malaysia merupakan salah sebuah negara yang telah sekian lama berhadapan dengan masalah pendatang tanpa dokumen. Salah satu masalah utama yang timbul adalah berkaitan dengan hak anak-anak pendatang tanpa dokumen untuk mendapat pendidikan. Isu ini merupakan satu perkara yang serius kerana pendidikan dianggap sebagai hak asasi manusia yang boleh membawa kepada realisasi dan pematuhan kepada ha-hak lain. Kertas kajian ini bertujuan untuk meneliti undang-undang Malaysia berkaitan dengan hak kanak-kanak pendatang tanpa dokumen untuk mendapat pendidikan. Kajian ini merupakan penyelidikan kualitatif yang bersifat doktrinal dan perbandingan. Kajian ini akan menganalisa sejauh mana undang-undang Malaysia yang sedia ada mengiktiraf dan menjamin hak anak-anak pendatang tanpa dokumen untuk mendapatkan pendidikan, dengan merujuk kepada garis panduan dan undang-undang hak kemanusiaan antarabangsa yang ditetapkan oleh instrumen antarabangsa. Kertas kajian ini juga akan cuba mengenal pasti halangan yang dihadapi oleh anak-anak pendatang dalam mendapatkan akses pendidikan. Kertas ini menyimpulkan bahawa kerangka semasa undang-undang Malaysia tidak mencukupi dan tidak komprehensif untuk menjamin dan melindungi hak untuk pendidikan kanak-kanak pendatang tanpa doukumen. Oleh itu, kertas ini memberikan cadangan untuk

penambahbaikan undang-undang dan dasar yang ada mengenai isu yang menjadi perhatian khusus ini.

**Kata Kunci:** Kanak-kanak migran tanpa dokumen, hak untuk pendidikan, hak asasi kemanusiaan, undang-undang Malaysia.

## INTRODUCTION

Migration is a natural phenomenon that occurs for various reasons, such as economic, social, political, environmental, and others. Some people voluntarily migrate to another place or country looking for better living conditions, employment opportunities, family ties, and safety. Some others are forced to move out from their place of origin due to political instability, internal conflicts, wars, discrimination practices, and others. The reports disclose that majority of those who migrate are young groups of the general population.<sup>1</sup> This fact automatically raises concern over the issues of families and children.

In their quest for a better life, migrants frequently bring their families and children to their destination nations. Despite the fact that most countries have been very prepared to open their borders to migrants, they have not been as liberal as they could have been when it comes to their immigration laws. In fact, many receiving countries impose different rigorous criteria and limitations on migrants before entering the countries. These restrictions have had an impact not only on the migrants themselves but also on their families, children, and dependants. Basically, there is a slew of problems revolving around undocumented migrant children. One of the crucial issues is the deprivation of the right to education. The lack of this fundamental right is one of the most pressing concerns facing them. This issue requires special attention as the denial of migrant children the right to education has extensive social repercussions.

The treatment of undocumented migrant children has been a controversial issue in Malaysia as it has been in other countries for

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<sup>1</sup> Barn R, Kriz K, Poso T, Skivenes M. "Child Welfare Systems and Migrant Families : An Introduction." In *Child Welfare Systems and Migrant Children : A Cross Country Study of Policies and Practices*. edited by Skivenes M, Barn R, Kriz K, Poso T. ( New York: Oxford University Press. 2015), 2.

many years. Undocumented migrant children are individuals who have entered the country illegally or have been granted permission to pass into state territory but have violated the rules of their stay, causing their presence to be considered irregular.<sup>2</sup> Undocumented children in Malaysia are a result of a variety of circumstances. There are at least six categories of undocumented children, namely;<sup>3</sup>

1. A child born in the territory, of a citizen couple who has not registered their marriage;
2. A child born in the territory, of a citizen couple who has registered their marriage but has not registered the birth of the child;
3. A child born in the territory, of a citizen mother and a non-citizen father;
4. Children born to irregular marriages;
5. Over stayers – child migrants who have extended their stay without legal permission even though their original presence in the country was lawful;and
6. Children born to irregular migrant parents.

Given the nature of the problem, it is challenging to determine the actual number of documented and undocumented migrant children in this country. According to the Asia Foundation, over 52,000 stateless children were projected to be living in Sabah alone in 2009.<sup>4</sup> In addition, a report conducted by the United Nations High Commissioner for Refugees (UNHCR) disclosed that 125,365 stateless persons were living in Malaysia as of 2012.<sup>5</sup> 40 % out of that number were children.

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<sup>2</sup> Waas, Laura van. “The Children of Irregular Migrants: A Stateless Generation?” *Netherlands Quarterly of Human Rights* 25, no. 3 (2007): 437–458.

<sup>3</sup> Makhtar, Maheran, Asari, Khairun Nisa. & Mohd Yusob, Mohd Lotpi. “Right to Education for Irregular Migrant Children in Malaysia; A Comparative Analysis,” *Pertanika J. Soc. Sci. & Hum.* 23 (S) (November 2015): 85 – 96.

<sup>4</sup> Anthea Mulakala, “Sabah’s Stateless Children,” *The Asia Foundation*. December 8, 2010, <https://asiafoundation.org/>.

<sup>5</sup> Linda A., Lumayag. “A Question of Access: Education Needs of Undocumented Children in Malaysia,” *Asian studies Review*. 40(2) (2016): 192–210.

In addition, the report from the Department of Ministry of Home Affairs estimated that the number of stateless children in Malaysia was around 290,000 as of 2016.<sup>6</sup> The data retrieved from various reports and surveys confirmed that the recorded number of undocumented children in Malaysia keeps escalating from year to year. This fact has sparked concern over protecting their rights, welfare, and interests, particularly in terms of educational opportunities.

This article aims to specifically focus on the issue of the right of undocumented migrant children to education in Malaysia. It is comprised of six sections. The first section provides background information about this particular group of children in Malaysia. It elaborates the definition and categories of undocumented migrant children. The second section covers education rights within the international human rights legal framework set by international instruments. The third section discusses the right of children to education as defined by the current Malaysian legal framework. It examines existing Malaysian laws and policies governing the right of children to get access to education. The fourth section provides a critical analysis of the problems that may deprive undocumented migrant children of getting access to education under the Malaysian educational system. It highlights inadequacies and flaws in existing laws and policies that contribute to the situation. The fifth and final sections summarize the issues and provide ideas for possible solutions.

## **RIGHT TO EDUCATION UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS**

The right to education encompasses all forms and levels of education and the standard and quality of education provided. It is a prerequisite for an individual to function fully as a human being to attain his or her needs in this life. In terms of child rights, education is critical because it is a fundamental human right that may pave the way for realizing numerous other rights. In other words, this right is essential because it

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<sup>6</sup> Nortajuddin Athira. "Malaysia's Stateless Children," *The Asean Post*. October 10, 2020, <https://theaseanpost.com/>.

is a prerequisite for the fulfilment of other rights such as social, economic, cultural rights.

In terms of the right of undocumented children to education, it has always been regarded as a crucial issue that demands specific attention. There is no doubt that migration may directly affect the right of children to education in diverse ways. Based on that reason, the international instruments have given special attention to this right. The provisions of the international instruments expressly guarantee the right of children, including migrant children, to education. Among the international instruments enshrining this right are the following;

***i- The Universal Declaration of Human Rights 1948 (UDHR)***

The UDHR is often deemed as the founding document of international human rights. It was adopted by the United Nations in 1948.<sup>7</sup> It categorically guarantees every individual's entitlement to all of the declaration's rights and freedoms, regardless of social background, birth, or other position.<sup>8</sup> In terms of the right to education, it is expressly stipulated under Article 26 of the UDHR. According to this Article, education is a fundamental right for all people, including children. This provision also emphasizes that the right to education must be made free of charge for all people, at least at the primary and secondary levels. By virtue of Article 26, the right of undocumented migrant children to get access to education is explicitly guaranteed, and it is included in the scope of universal protection.

***ii- The Convention on the Rights of the Child 1989(CRC)***

The United Nations adopted the CRC on the 20<sup>th</sup> of November 1989.<sup>9</sup> The CRC, which came into force in 1990, is the most ratified international instrument. Except for the United States, all United Nations member states have ratified the CRC. The CRC aims to protect the rights of every child in various aspects of life, irrespective of their

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<sup>7</sup> Adopted by the United Nation General Assembly Resolution 217 A on 10th December 1948.

<sup>8</sup> Article 2 of The Universal Declaration of Human Rights 1948 (UDHR).

<sup>9</sup> Adopted by the United Nation General Assembly resolution 44/25 of 20 November 1989.

nationality, race, colours, status, and others. As far as children's right to education is concerned, the CRC unequivocally recognizes and guarantees it regardless of their statelessness, nationality, and immigration status.

Article 28 of the CRC fundamentally affirms the right of children to education with the goal of gradually fulfilling the rights in a non-discriminatory and equal opportunity manner. It also highlights the importance and role of education for the entire development of a child's life, including personality, talent, mental and physical capacities, and ability to accept responsibility as a member of society. The Committee on the CRC summarizes the purpose of education for children as follows:<sup>10</sup>

The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem, and self-confidence.

To achieve this goal, the Convention urges all states to take necessary and appropriate actions so that all children within their jurisdiction are guaranteed and accorded the rights outlined in the Convention regardless of the child's race, ethnicity, colour, status, language, sex, political opinions, or national origin.<sup>11</sup> In addition, it also demands state parties to implement all necessary measures, which include administrative, legislative, and other means to ensure that the rights are duly established and upheld.<sup>12</sup> In reflecting the essence of this right, the CRC firmly stipulates that primary level education shall be made free and accessible to all children. The state parties are anticipated to make

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<sup>10</sup> UN Committee on the Rights of the Child (CRC), General Comment No. 1 (2001), Article 29 (1), The Aims of Education, 17 April 2001, CRC/GC/2001/1, para 2.

<sup>11</sup> Article 2 of The Convention on the Rights of the Child 1989(CRC).

<sup>12</sup> Article 4 provides “*States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*”

necessary arrangements and take all appropriate means and measures to guarantee free primary education for all children.<sup>13</sup>

Concerning the recognition and protection of migrant children's rights, the Committee on the CRC has explicitly stated in its General Comment that all children, regardless of their nationality, immigration status, or statelessness, must enjoy the rights stipulated in the Convention.<sup>14</sup> Furthermore, the Committee on the CRC, in a joint general statement with the Committee on the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), requires state parties to respect and protect the Convention's rights for all Children, regardless of whether they are considered regular or irregular migrants, asylum seekers, or other categories of migrants.<sup>15</sup> In addition, it also emphasizes the role and responsibilities of state parties to ensure the integration of migrant children into receiving societies. The state parties are obligated to coordinate effective implementation of their human rights and equal access to services to citizens.

### ***iii- The International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)***

The ICESCR was adopted in 1966.<sup>16</sup> According to Article 13 of the ICESCR, everyone has the right to education.<sup>17</sup> It asserts that this right

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<sup>13</sup> Article 28(1)(a) mentions “*States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular make primary education compulsory and available free to all.*”

<sup>14</sup> Committee on the Rights of the Child (CRC), General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6.

<sup>15</sup> Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22.

<sup>16</sup> Adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966.

<sup>17</sup> Article 13 states “*The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.*”

is essential because it promotes the complete development of the human personality and feeling of dignity and the strengthening of respect for human rights and fundamental freedoms. On this premise, the ICESCR underscores the need for basic and primary education to be made mandatory and accessible to each individual.

Apart from that, there are numerous international instruments that recognize and uphold children's right to education. Among these instruments are the International Covenant on Civil and Political Rights 1966 (ICCPR),<sup>18</sup> the Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD),<sup>19</sup> the Convention Relating to the Status of Refugees 1951,<sup>20</sup> the Convention Against Discrimination 1960,<sup>21</sup> and the UNESCO Convention against Discrimination in

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<sup>18</sup> Article 18(4) states “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

<sup>19</sup> Article 5(e)(v) states “*States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights..... The right to education and training*”.

<sup>20</sup> Article 22 states;  
“*The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.*  
*2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.*”

<sup>21</sup> Article 4 states “*The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education...*”.

<sup>21</sup> Article 5(e)(v) states “*States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic*

Education (CADE).<sup>22</sup> The provisions of these instruments clearly uphold the right of individuals, including children, to education.

To sum up, it is worth noting that the international instruments unconditionally uphold and recognize the right of children to get access to education. The international instruments consistently demand all countries to give special emphasis and priority to children's right to education. This is significantly due to the fact that education is a fundamental right that relates to the future interest and welfare of children. This right should be afforded to all children regardless of their legal status, race, ethnicity, social level, sex, national origin, or religion.

## **RIGHT TO EDUCATION UNDER THE MALAYSIAN LEGAL FRAMEWORK**

The right to education has been given legal recognition by the Malaysian court. In the case of *Jakob Renner (An Infant Suing Through His Father And Next Friend, Gilbert Renner) & Ors V Scott King, Chairman Of Board Of Directors Of The International School Of Kuala Lumpur & Ors*,<sup>23</sup> the issue arise as to the basic rights of children with special needs to education. In upholding the importance of child's right to education, Dato' Low Hop Bing J opined that child's basic right to education should be given priority and foremost consideration over other matters. The decision in this case implies the judicial attitude

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*origin, to equality before the law, notably in the enjoyment of the following rights..... The right to education and training”.*

<sup>21</sup> Article states “*For the purposes of this Convention, the term ‘discrimination’ includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education... ”.*

<sup>22</sup> Article states “*For the purposes of this Convention, the term ‘discrimination’ includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education... ”.*

<sup>23</sup> [2000] 5 MLJ 254.

that tends to hold the importance of children's right to education outweigh other considerations.

Malaysia has consistently prioritized improving its national education system and has made substantial efforts to do so. This is reflected in the establishment and implementation of various phases of national education policies and plans and the commitment of significant financial resources to improve the educational system. Since the incorporation of the National Education Policy into the Education Act 1961, various comprehensive education policies have been consistently introduced and implemented, including Education Development National Development Policy 1991-2000, Education Development Plan 2001 -2010, Education National Key Results Area (NKRA) 2010-2012, and Malaysian Education Blueprint 2013-2025.<sup>24</sup>

As far as a child's education in Malaysia is concerned, it is governed by several main statutes, namely the Federal Constitution, the Education Act 1996, and the Child Act 2001. These statutes specifically recognize and guarantee the right of children to receive formal education under the Malaysian education system.

However, a close analysis of the current Malaysian legal framework on education indicates this right is only exclusively afforded to children of Malaysian citizens. This right is not extended to non-citizen children. Consequently, this position renders non-citizen children, which include stateless and undocumented children, do not have a guaranteed or recognized right to education under current Malaysian laws.

### ***i- The Federal Constitution***

The Federal Constitution is the highest law in Malaysia. Any law which conflicts with the Federal Constitution's provision is void.<sup>25</sup> In terms of the right to education, it is stipulated under Article 12 of the Federal Constitution, which states the following;

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<sup>24</sup> Sivalingam, A.D."History of Malaysian Education System: Year 1824 to 2020," *Social Sciences Education eJournal*. 4 (7) (Jan 2021): 1-11, Linda A., Lumayag."A Question of Access: Education Needs of Undocumented Children in Malaysia," *Asian studies Review*. 40(2) (2016): 192-210.

<sup>25</sup> Article 4 of the Federal Constitution.

(1) “Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth—

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees’ or

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).”

Article 12 of the Federal Constitution is quite general in its statement of the right to education. It prohibits discrimination based on religion, race, descent, or place of birth in admission to public schools, fee payment, and administration of educational institutions and funding. However, the Article does not elaborate on the breadth, content, or quality of the fundamental education accorded to each citizen of Malaysia. Additionally, the provision restricts the applicability of this protection to the Malaysian citizens solely. The phrase “any citizen” implies that the right to an education is only protected against discrimination for Malaysian citizens. The Federal Constitution makes no reference to the non-citizen’s right to education.

## ***ii- The Education Act 1996***

The primary statute that governs the education system in Malaysia is the Education Act 1996. The Act aims to guarantee the right of all Malaysians to educational opportunities under the national educational system. The Act expressly stipulates that elementary education is compulsory for all Malaysian children. Section 29A of the Act provides that children of the Malaysian citizens who have attained the age of six years shall be enrolled in primary school for compulsory education.<sup>26</sup> The provision imposes an obligation on the parents to comply with this requirement. Any parents who fail to do so can be subjected to prosecution and, if found guilty, shall be liable to a fine up to RM5,000

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<sup>26</sup> Section 29A states “*Every parent who is a Malaysian citizen residing in Malaysia shall ensure that if his child has attained the age of six years on the first day of January of the current school year that child is enrolled as a pupil in a primary school in that year and remains a pupil in a primary school for the duration of the compulsory education.*”

or imprisonment up to six months, or both.<sup>27</sup> Unfortunately, this requirement is not extended to non-citizen children because the Education Act 1996 merely focuses on compulsory education for Malaysian children. The term “*Malaysian citizen*” in the provision expressly limits the obligation on the parents of Malaysian citizen to enrol their children for primary education. The Act makes no reference to the position of non-citizen children. In other words, it is crucial to reiterate that this compulsory education requirement applies exclusively to Malaysian citizens and not to non-citizen parents.

### *iii- The Child Act 2001*

The primary statute that governs child matters in Malaysia is the Child Act 2001. The government of Malaysia introduced this Act in response to the CRC’s 1989 ratification, which intends, among other things, to align Malaysia’s child-related laws with the CRC’s criteria, as well as international norms and practices.

The Act complies with the CRC’s standards by incorporating the fundamental principles of non-discrimination, children’s best interests, the right to life, survival, and development, and respect for the viewpoint of children.<sup>28</sup> These concepts have been included in a number of elements of the Child Act 2001, including those dealing with children’s welfare, interest, protection, custody, welfare, and others. However, a close examination of the Act reveals no provisions that specify and elaborate on children’s right to education, except for children charged and sentenced by the court for committing criminal offences. The Act merely mentions the discretionary power of the court in sentencing child offenders, which includes the power to send them to an approved school or a Henry Gurney.<sup>29</sup> Apart from that, the Act makes no reference or elaboration on the right of children to education. The absence of a specific provision on children’s right to education in the Act is much regretted as it is the primary Act dealing with child matters.

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<sup>27</sup> Section 29A (4).

<sup>28</sup> Mustaffa, A, “Diversion Under Malaysian Juvenile Justice System: A Case of Too Little Too Late?”, *Asian Journal of Criminology*, 11(2) (2016):135–153.

<sup>29</sup> Section 91 of the Child Act 2001.

In summary, a close examination of relevant and existing Malaysian legal framework reveals that the laws are exclusively concerned with education for Malaysian citizens. These laws and policies are implemented to ensure that each citizen of Malaysia is afforded the right to education under the national education system. In terms of non-citizen or undocumented children's education, the Malaysian current legal framework obviously does not provide adequate provision and mechanism to guarantee their right to access to education. The privileges relating to the right to education are certainly not extended to them. Despite numerous calls from various parties to the government concerning this matter, it seems that the issue remained unsolved and inadequately addressed.

### **DEPRIVATION OF UNDOCUMENTED MIGRANT CHILDREN FROM RIGHT TO EDUCATION**

In Malaysia, the topic of depriving illegal migrant children of their right to school is contentious. According to a survey, around 100,000 students are not enrolled in primary school, while another 250,000 are not enrolled in secondary school for various reasons.<sup>30</sup> Additionally, the research notes that a sizable proportion of non-citizen children, especially undocumented migrant children, are not registered in school.<sup>31</sup> One of the primary factors contributing to this matter is the lack of a clear and comprehensive legal framework dealing with undocumented children's access to education. Concerning the right of non-citizen children to get access to education, their position is ambiguous because Malaysian laws make no explicit reference to their entitlement to education. This position contradicts the international standards that unequivocally emphasize the right of children to education to be upheld and recognized irrespective of their background, position, legal status, or socioeconomic standing.

Indeed, a close examination of Malaysian present laws and regulations on this subject reveals that the position is discriminatory, as it denies undocumented children access to public and mainstream

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<sup>30</sup> Ministry of Education Malaysia. *National Review Report: Education for All, 2015* (Kuala Lumpur: Ministry of Education Malaysia, Malaysia, 2015).

<sup>31</sup> United Nations Children' Fund (UNICEF). *Children Out of School* (Kuala Lumpur: UNICEF, Malaysia 2019),124.

schools. Under the current laws, primary education is compulsory and free for all Malaysian citizens' children. As regards to non-citizen children whose parents are permanent residents, they are still eligible for primary education upon payment of specified fees. However, the position of undocumented children is totally different and unsatisfactory due to the fact that they are not eligible for elementary school enrolment. This is because the Education Act 1996 expressly prohibits minors without valid identification or birth certificates from attending government schools. As a result, all undocumented children are automatically denied the opportunity to get access to public school.

Due to various criticisms, particularly on the issue of stateless children's right to education, the Ministry of Education has issued a special circular for this category of children.<sup>32</sup> According to the circular, stateless children may be enrolled in a public school under two conditions. Firstly, stateless children are entitled to attend a public school if one of their parents is a citizen of Malaysia. Secondly, stateless children are also eligible to access public schools if they successfully received certification from the community leaders, such as the Head of Village, that they are citizens of Malaysia.<sup>33</sup> Unfortunately, undocumented children with foreign parents are still not covered by this law and policy.

The current status and practice under the Malaysian legal framework regarding the right of undocumented children to education practice have been vehemently criticized by various parties. This is primarily because it fails to guarantee the right of undocumented children to get access to education, resulting in their deprivation of this right. SUHAKAM, in its annual report 2021, has highlighted the issue of non-inclusiveness and discrimination pertaining to the right to education.<sup>34</sup> It has criticized the current Malaysian law and policy which deny refugee and stateless children from attending government

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<sup>32</sup> Circular 1/2009.

<sup>33</sup> Saman, M. & Mohd Badrol, N.H., "Honouring Primary Education for Stateless Children: Analysis of Malaysian Legal Perspective and Current Practice." *International Journal for Studies on Children, Women, Elderly and Disabled* 3, (January 2018): 33-38.

<sup>34</sup> SUHAKAM, *Mid-Term Report by the Human Rights Commission of Malaysia (SUHAKAM) on Malaysia's Third Universal Periodic Review* (Kuala Lumpur, SUHAKAM, 2021).

schools.<sup>35</sup> In addition, it also recommended the governing policy provided in Circular 1/2009, which stated that undocumented children can attend government schools as long as one of the parents is a Malaysian and a local leader can attest to the fact that the child is Malaysian should be reviewed as it clearly excluded stateless and undocumented children of foreign parents.<sup>36</sup> This practice is unbecoming as it is clearly inconsistent with the international standards set by the international instruments.

Apart from that, UNESCO has criticized this position and regarded it a critical problem requiring prompt action.<sup>37</sup> The UNESCO emphasized that this discriminatory practice has been prolonged for an extended period of time without any positive effort on the part of the government to properly address this problem. The report has expressed its concern over the deprivation of undocumented children from formal primary, secondary and other forms of education as this problem may have far-reaching effects on children's lives in the future.<sup>38</sup> The research highlighted particular instances in which thousands of undocumented children in Sabah were deprived of the right to education because they lacked birth certificates.<sup>39</sup> Similarly, Rohingya children in Malaysia also encounter the same problem. There are various reports which highlight that this group has been deprived of the right to get access to education due to their prolonged statelessness.<sup>40</sup>

Despite various criticism from international communities and non-governmental organizations, this matter remains unresolved for the time being. Due to the growing concern among various parties on this particular issue, it is pertinent for the government of Malaysia to seriously look into this matter and consider a proper mechanism to afford undocumented children access to public education.

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<sup>35</sup> SUHAKAM, *Mid-Term Report*, 13.

<sup>36</sup> SUHAKAM, *Mid-Term Report*, 13.

<sup>37</sup> UNESCO, *Global Education Monitoring Report 2019: Migration, Displacement and Education; Building Bridges, not Walls* (Paris: UNESCO, 2019), 45.

<sup>38</sup> UNESCO, *Global Education*, 45.

<sup>39</sup> UNESCO, *Global Education*, 45-46.

<sup>40</sup> UNESCO, *Global Education*, 129.

### *Alternative Learning and Education*

Due to deprivation of the right to formal education, the only alternative option available to these unfortunate children is to attend informal education provided by independent learning centres. Currently, the record indicates that many alternative learning centres have been initiated and set up, especially in Sabah, by non-governmental organizations, groups, and concerned individuals that aim to provide education to unfortunate children, including undocumented children.<sup>41</sup> These alternative learning centres are self-funded centres that largely depend on contributions and sponsor from various independent sources. Most of the staff and teachers are volunteers from non-governmental organizations.

While these alternative learning centres are much welcomed, they lag far compared to formal mainstream education in various aspects. The initiatives and efforts to provide alternative education for undocumented children are inadequate to address this problem effectively and incomparable to the mainstream education system. Basically, there are several weaknesses of alternative learning centres. Firstly, the number of alternative learning centres is limited as compared to the number of undocumented children, and inadequate to cater to the number of undocumented children which keeps increasing. For example, the study conducted by the Centre for Human Rights Research & Advocacy (CENTHRA) disclosed that the alternative learning centre set up for the Rohingya community at Selayang, Selangor was too small and is only able to accommodate 120 students.<sup>42</sup> It is estimated that only 20% of Rohingya children managed to have access to informal education provided by these alternative learning centres.<sup>43</sup> In addition, the UNHCR report revealed that the organization has worked closely with various parties, comprising non-governmental organizations, foundations, religious groups, and others,

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<sup>41</sup> UNESCO, *Global Education*, 34.

<sup>42</sup> Haque, M.M, Othman, Z & Mat, B., *Displaced Rohingyas Right to Work and Children Education in Malaysia: Recommendations for Malaysia's Universal Periodic Review (UPR, 2017-2021)* ( Putrajaya, Centre for Human Rights Research & Advocacy, 2022).

<sup>43</sup> Haque, M.M, Othman, Z & Mat, B., *Malaysia's Universal Periodic Review*,2.

to set up community learning centres in different parts of Malaysia.<sup>44</sup> Among these organizations are Dignity for Children Foundation, Buddhist Tzu Chi Foundation, Soroptimist International Johor Bahru and Future Global Islamic Network, Muslim Aid Malaysia, and Malaysian Social Research Institute.<sup>45</sup> Though the main target of the community learning centres set up by the UNHCR is refugee children, they also allow undocumented children to attend these centres to get access to education. As of 2021, there were 133 learning centres operated by the organization in Malaysia.<sup>46</sup> However, the study further disclosed that only 30% of stateless and migrant children are enrolled in such community learning centres.<sup>47</sup>

Secondly, these alternative learning centres are available only in limited and selected locations. According to UNHCR, there are around 133 learning centres operated by the organization in Kuala Lumpur, Selangor, Perak, Pahang, Negeri Sembilan, Melaka, Johor, Kedah, Kelantan, Pulau Pinang and Terengganu.<sup>48</sup> However, these alternative learning centres are inadequate to cater the high number of undocumented migrant children.

Thirdly, alternative learning centres are not seen as a suitable and viable alternative to mainstream schools due to weaknesses such as lack of accreditation, certification, coordination, recognition, and commercial value.<sup>49</sup> In addition, these centres are far lagging in terms of infrastructures, facilities, and professional staff. CENHRA, in its report, highlighted that most of the centres face the problems including

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<sup>44</sup> United Nations High Commissioner for Refugees (UNHCR). "Education in Malaysia." January 20, 2022. Retrieved from <https://www.unhcr.org/en-my/education-in-malaysia.html?query=education>.

<sup>45</sup> United Nations High Commissioner for Refugees (UNHCR). "Education in Malaysia."

<sup>46</sup> United Nations High Commissioner for Refugees (UNHCR). "Education in Malaysia."

<sup>47</sup> United Nations High Commissioner for Refugees (UNHCR). "Education in Malaysia."

<sup>48</sup> United Nations High Commissioner for Refugees (UNHCR). "Education in Malaysia."

<sup>49</sup> Saman, M. & Mohd Badrol, N.H., "Honouring Primary Education for Stateless Children: Analysis of Malaysian Legal Perspective and Current Practice." 37.

the lack of competent and experienced staff.<sup>50</sup> The report also mentioned that most classes at Rohingya learning centres are conducted by the Rohingya's elders, who apparently do not possess professional qualification and lack adequate knowledge to provide a high quality of education.<sup>51</sup> In terms of salary, these Rohingya teachers are not insufficiently paid due to a lack of financial resources.<sup>52</sup>

In Sabah, Sawit Kinabalu Group has set up 25 learning centres in various estates under their control.<sup>53</sup> They have funded all costs for running these centres for free education. However, these centres merely provide education up to the primary school level. In addition, the centres operate independently without proper coordination and supervision. In terms of accreditation, these centres are not accredited by the relevant government bodies and agencies. As a result, the education provided is not certified and recognized for the purpose of employment.

Lastly, some undocumented migrants reluctantly choose not to send their children to these alternative learning centres to avoid the risk of detention by the local authorities. The reports indicated that these alternative learning centres have been occasionally subjected to crackdown operations by authorities looking for undocumented migrants.<sup>54</sup>

Based on the above discussion, it can be observed that the alternative learning centres may, to a certain extent, provide the opportunity to undocumented children in Malaysia to get access to education. Unfortunately, these centres are left far behind and incomparable to mainstream education provided by the government in various aspects such as facilities, workforce, recognition, accreditation, and others.

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<sup>50</sup> Haque, M.M, Othman, Z & Mat, B., *Malaysia's Universal Periodic Review*,9.

<sup>51</sup> Haque, M.M, Othman, Z & Mat, B., *Malaysia's Universal Periodic Review*, 8.

<sup>52</sup> Haque, M.M, Othman, Z & Mat, B., *Malaysia's Universal Periodic Review*, 9.

<sup>53</sup> UNESCO, *Global Education*, 55.

<sup>54</sup> UNICEF, Mapping Alternative Learning Approaches, Programmes and Stakeholders in Malaysia.”(Kuala Lumpur: UNICEF 2015).

### *Contravene international standards*

To date, the government of Malaysia has ratified only three international instruments, namely the CRC, the Convention on the Rights of Persons with Disabilities (CRPD), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). As regards other core international human rights instruments, such as the International Convention on Elimination of All Forms of Racial Discrimination (ICERD), International Convention on Civil and Political Rights (ICCPR), Conventions Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and others, the Malaysian government has yet to ratify them. It is essential to note that any international treaty is only legally binding on a state upon ratification.

As far as the right to education of children is concerned, reference to the requirements of the CRC seems to be essential as the government of Malaysia had ratified the CRC on the 17<sup>th</sup> of February 1995. As a state party to the CRC, the Malaysian government is bound by the commitment to align laws and policies in various aspects affecting the right of children with the requirements of the CRC, except the requirements under the Articles that the country chooses to put reservations specifically.<sup>55</sup> It is unfortunate to note that the Malaysian government still opts to reserve Article 28 of the CRC, which concerns the right to education. Consequently, this reservation confers the country the right not to abide by the requirements stipulated under Article 28 of the CRC.<sup>56</sup>

It is noteworthy that Malaysian current laws and policies of denying access to education to undocumented migrant children run contrary to international standards. The international instruments have regarded this issue as a matter of utmost importance. The Committees of various international instruments have firmly and consistently urged state parties to take immediate and prompt action to address this matter. For instance, the Committee on the CRC has strongly criticized the practice of certain state parties, which uncompromisingly deprive children of their right to education due to a lack of birth certificates and

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<sup>55</sup> Mustaffa, A., Awang, M. B., Nawang, N. I., & Md Isa @ Yusuff, Y, *Preventive Detention of Children under Malaysian Laws: A case for Reform*. UUM Journal of Legal Studies, 11(2) (2020): 97-116.

<sup>56</sup> Article 21 of the Vienna Convention 1969.

documentation. It has advised those states to introduce alternative measures and mechanisms to ensure undocumented children are provided access to education in line with the requirement of the international standards.<sup>57</sup> While reminding all states of their responsibility to resolve all legal and practical issues concerning the birth registration of migrants, the Committee stresses that children are entitled to be immediately issued certificates upon birth irrespective of their parent's legal status.

In addition, the Committee on CESCR has also expressed its concern over the issue of deprivation of undocumented children from access to school. The Committee urges all states to cease the practice that denies children's right to education merely on the ground of the absence of birth certificates or legal documentation.<sup>58</sup> The Committee describes the deprivation of education based on birth certificates and documentation availability as an unacceptable form of discrimination against ethnic minorities and non-citizens. Therefore, it demands all states to discontinue discriminatory practices and policies against undocumented children immediately.

In the same vein, the Committee on the CERD reminds all states that the laws prohibiting racial discrimination should be used to equally protect the interest of both citizens and non-citizens, regardless of their immigration or legal status.<sup>59</sup> Deprivation of undocumented children from the right to education deliberately amounts to a discriminatory practice against the non-citizens and must be put to an end.

Based on the above arguments, it can be concluded that the existing Malaysian legal framework on education deprives undocumented migrant children of access to public and mainstream education. The current laws and policies specifically provide that the child may only be enrolled in a public school in two situations, either

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<sup>57</sup> The Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22.

<sup>58</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights, 13 March 2017, E/C.12/2017/1.

<sup>59</sup> UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on Discrimination against Non-Citizens, 1 October 2002.

if one of the parents is a Malaysian citizen or upon certification by the community leaders that the child is a Malaysian citizen. Undocumented migrant children are automatically not eligible to access public and mainstream education by virtue of this restriction, which is in direct violation of international standards. The strict requirement imposed by the laws and policies on eligibility to get access to education has unfairly deprived undocumented children in Malaysia of the opportunity to get public and mainstream education.

## **RECOMMENDATION**

The deprivation of undocumented migrant children under the current Malaysian legal framework is a controversial issue. Many parties perceive this position unsustainable as it runs contrary to the fundamental right of children enshrined under the human rights standards provided by the international instruments. The deprivation of access to education may have far-reaching effects on children in the sense that it may unfairly deny them the prospect of achieving their full potential in their life.

In conjunction with that, it is high time for the Malaysian government to take reasonable measures and devise appropriate mechanisms to address this particular issue. Firstly, it is vital for the Malaysian government to officially withdraw the reservation made to Article 28 of the CRC, which relates to the right to education. The reservation of this Article has posed significant challenges in the sense it disrupts various efforts to promote and extend the right to education to all children, including undocumented children.

In addition, it is essential for the Malaysian government to review existing laws and policies relating to the right of undocumented migrant children and align them with human rights norms and frameworks established by international instruments. In line with the established international human rights standards, the current Malaysian laws and policies should be amended to unconditionally allow undocumented migrant children equal access to education, irrespective of their nationality, status, or statelessness. To achieve this objective, it is pertinent to specifically insert a clear and specific provision that guarantees the right of undocumented children to education into the relevant existing laws. The inclusion of an unambiguous provision is crucial to avoid any confusion or misinterpretation.

Apart from that, it is also recommended that the review is made to the existing policies on education by entirely removing administrative barriers that bar undocumented children from getting access to education, such as documentation requirements. For example, the administrative condition under the current practice, which particularly obliges one of the parents of stateless children to produce proof of Malaysian citizenship, has caused an unnecessary burden on them. Some children eventually end up not attending any school as their parents cannot comply with the requirement. To avoid the recurrence of a similar problem, it is essential to ensure that administrative barriers should not cause any unnecessary difficulties to parents of undocumented children in the process of getting access to education.

Furthermore, it is also suggested that the right to education should be made available and accessible at all levels of education, namely, primary, secondary, and tertiary education. Access to education at all levels is vital as it may offer unlimited opportunities to children to develop their knowledge, ideas, experiences, skills, and talents. High standards and quality of education are instrumental in contributing to the development of children as they step into adulthood.

Lastly, as a short-term and temporary measure to address this problem, it is recommended that the government support and enhance the existing alternative learning centres, which provide free education to undocumented migrant children. The support from the government in various forms, such as monetary funds, facilities, and staff, may enable these centres to provide more appropriate and proper education for a larger group of undocumented children in this country.

The government must look into this problem and take prompt action to address it. Any delay or failure to appropriately address this problem may severely affect the right of undocumented migrant children and the reputation of this country in the eyes of international communities.

## **CONCLUSION**

To sum up, the deprivation of undocumented children's right to education under the current Malaysian legal framework is inconsistent with the requirement of the international standards. Undoubtedly, this

issue, which has been prolonged for many years, requires urgent attention and prompt action from the government of Malaysia. The time has come for the Malaysian government to review the existing legal framework relating to the right of undocumented migrant children to education. It is expected that the proposal to request the government to allow non-citizen children to get access to mainstream education will attract mixed reactions from people, depending on the angles they view this issue. Strong response and fierce resistance from quarters of people may be expected, particularly from those who view this proposed solution as an attempt to liberalize the educational system and a threat to the constitutional right of the citizen of Malaysia. While this argument is understandable, it is essential to view this matter from a more critical lens, the human rights perspective. Education is one of the fundamental rights of children. It is the key to personal development and the fulfilment of various other rights. More importantly, education is the determinant factor that may offer children limitless opportunities to improve their lives, escape poverty, secure employment, develop community and nation, and others. Based on that reasons, paramount and foremost consideration should be given to fulfilling children's right to education. All in all, children's best interests should always be given priority and take precedence over all other considerations. Children must be viewed as children first, irrespective of their nationality, immigration status, or statelessness.