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BRIDGING THE GAP: STRATEGIES FOR FOSTERING INCLUSION AND RESILIENCE AMONG STATELESS AND REFUGEE COMMUNITIES IN MALAYSIA

Edited by
Teo Lee Ken & Hirzawati Atikah Mohd Tahir



**Bridging the Gap: Strategies for
Fostering Inclusion and Resilience
among Stateless and Refugee
Communities in Malaysia**

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Classes on Microsoft Office and Safe Internet usage for young Rohingya refugee girls in Selayang.

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Contents

Foreword	<i>Denison Jayasooria & Zoel Ng</i>	1
Introduction	<i>Hirzawati Atikah Mohd Tahir</i>	5
Contributors		12

Part I: Understanding Barriers, Formulating Better Strategies: The Legal and Economic Dimensions

1	Unpromising Future for Refugees and Stateless in Ampang <i>Nurul Syaza binti Mazelan</i>	18
2	Addressing Statelessness Among Sabah's Indigenous Communities <i>Mary Anne K. Baltazar & Aime Marisa Chong</i>	35
3	SDG Non-Compliance and Refugee Rights (The Case of Late Rafi Ullah in Malaysia) <i>Agha Abdul Sattar</i>	55
4	Legal Empowerment Approaches of the Stateless Community through Paralegals, Strategic Litigation & Policy Reforms <i>Sia Chin Chin</i>	69
5	Exploring the Dynamics of Public Debt and Economic Growth in Malaysia: The Impact of Economic Statelessness <i>Khairunisah Kamsin, James Alin, Mori Kogid, Norzaini Saup, Amy Faizah Nain, Hazlina Baba, Rohana Arpa, Akmal Nashren Abd Malik, Siti Rahma Malusirang, & Delores Pammie Joeh</i>	84
6	Towards Decent Work for All: Evaluating ESG-Related Policy and Regulatory Measures for Potential Application to Refugees' Right to Formal Employment in Malaysia <i>Sarah Adibah Hamzah & Rodziana Mohamed Razali</i>	96

Part II: Fostering Holistic Well-being: Reproductive and Health Care as Human Rights

- | | | |
|----|---|-----|
| 7 | Invisible Lives, Visible Needs: Organ Donation and Stateless Populations
<i>Faerozh Madli, Stephen Laison Sondoh, Yuzainy Janin, Dean Nelson Mojolou, Ag Kaifah Riyard Kiflee, Ng Yen Phin & Wong Sing Yun</i> | 146 |
| 8 | Lost Identity and Statelessness: The Consequences of Unregulated Third-Party Involvement of Assisted Reproductive Technology in Malaysia
<i>Nurhafizah Sahidan, Josephine Tang, Suryani Mohamed Suhane, Ching Hui Chi, Wan Firdaus Wan Ahmad & Sia Chin Chin</i> | 161 |
| 9 | Contraceptive Implant Failure in a Refugee Teenage Mother: A Case Study
<i>Za'aimah binti Zainon</i> | 180 |
| 10 | Utilisation of Community-Based Maternal Health Clinic for Refugees
<i>Zuraidah Che' Man, Za'aimah Zainon, Mohd Fairuz Ali & Shahrizal Azwan Samsudin</i> | 194 |

Part III: Moving Forward by Enhancing Community-led Initiatives: Case Studies and Best Practices

- | | | |
|----|---|-----|
| 11 | Building Resilience: Strengthening Partnerships for Rohingya Refugees in Malaysia under SDG 17
<i>Aizat Khairi, Mohd Ramlan Mohd Arshad & Andika Ab. Wahab</i> | 220 |
| 12 | Systemically Addressing the Issue of Refugee New Arrivals in Malaysia
<i>Douglas Teoh, Ronald Premus and Patrick Yaw Htoi</i> | 237 |

13	A Case Study on Climate Action Education Program for Enhancing Food Security Among Refugees <i>Noorul Huda Abu Bakar & Norani Abu Bakar</i>	261
14	A Case Study of The Impact of Vocational Education for Refugee and Irregular Migrant Youth in ElShaddai Centre <i>Ng Oi Leng</i>	281
15	Empowering Refugee Integration: A Case Study on PSPK's Community-Centric Approach in Selayang, Gombak <i>Keerthana Rajaderan and Hemaapadmaashini P</i>	292

Introduction

Hirzawati Atikah Mohd Tahir

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Conference Coordinator for MySDG Conference 2024*

In recent years, the plight of stateless and refugee communities has emerged as one of the urgent humanitarian challenges in the modern world. Malaysia is not an exception. The influx of refugees entering through the border with Thailand, and the rights of individuals being denied citizenship in their own country thus becoming stateless, leaves Malaysia in a precarious position. The complexity of existing laws that barely addresses the loopholes of managing these communities makes these them vulnerable.

MySDG Academy hosted the MySDG Conference 2024 on Stateless and Refugee Communities in Penang on 14 and 15 September 2024. Arising out of the papers presented are two publications. The first is *Unheard Voices: The Lived Experiences of Stateless Persons and Refugees in Malaysia* where we highlighted how stories and on the ground narratives as lived experiences are central resources in informing our understanding of the plight and needs of stateless and refugee communities.

For this second book entitled, *Bridging the Gap: Strategies for Fostering Inclusion and Resilience among Stateless and Refugee Communities in Malaysia*, we continue where Book I ended, by illustrating how these experiences can be used then to formulate better strategies, and the domains in which these multifaceted focuses are needed. There are three parts as we go through each by understanding the legal and economic barriers that these communities are facing; fostering holistic well-being through reproductive and health care; and finally

moving forward through the initiatives that organisations or local communities have done to address stateless and refugee communities to obtain what they deserve as a human being. From these three parts, there are 15 chapters in total.

In the first part of the book, *Understanding Barriers, Formulating Better Strategies: The Legal and Economic Dimensions* exposes the legal and economic barriers confronted by these communities. We also identify the best strategies for legal protection and economic empowerment to ensure these communities are able to adapt in the local communities and to be able to support themselves.

Chapter 1 *Unpromising Future for Refugees and Stateless in Ampang* begins with Nurul Syaza Mazelan exploring the issues faced by the stateless and refugee communities in Ampang via APPGM-SDG's grounded research process method, which is the issue mapping field research. Ampang is divided into two parts, one is governed by Wilayah Persekutuan Kuala Lumpur and the other under Hulu Langat district and these two localities have different social backgrounds. Nurul Syaza conducted grounded research at the latter where both communities face different contexts but similar challenges especially when it comes to access to healthcare, education and job employment. Despite being an urban area, Ampang also has stateless individuals due to various reasons. Late in registering child birth, foster care and abandoned child to mixed marriages between citizens and non-citizens further exacerbate the issue of Statelessness in the area.

Chapter 2 *Addressing Statelessness Among Sabah's Indigenous Communities* by Mary Anne K. Balthazar and Aime Marisa Chong discusses the issue of statelessness among indigenous communities in Sabah and the progress that the federal government, state

government and NGOs have done so far in addressing the issues and challenges faced by these communities. Chapter 3 *SDG Non-Compliance and Refugee Rights (The Case of Late Rafi Ullah in Malaysia)* by Agha Abdul Sattar highlights the challenges and recommendations for stateless and refugee communities from a SDGs' perspective focusing on the case study of a refugee namely Rafi Ullah.

In Chapter 4 *Legal Empowerment Approaches of the Stateless Community through Paralegals, Strategic Litigation & Policy Reforms*, Sia Chin Chin studies the legal empowerment approach taken by a civil society organisation, Development of Human Resources for Rural Areas Malaysia (DHRRA) in empowering and addressing the challenges of stateless individuals in Malaysia. DHRRA implemented three legal empowerment approaches for stateless individuals in Malaysia and these approaches include paralegal development, legal reform initiatives and strategic litigation. Strategic litigation is seen as an important pillar for DHRRA as it illustrates successful stories of obtaining judicial justice from two appeal court cases.

Chapter 5 *Exploring the Dynamics of Public Debt and Economic Growth in Malaysia: The Impact of Economic Statelessness* by Khairunisah Kamsin et. al. explores the dynamic of public debt and economic growth in Malaysia through the concept of economic statelessness, a novel and useful concept in our contexts. Chapter 6 *Towards Decent Work for All: Evaluating ESG-Related Policy and Regulatory Measures for Potential Application to Refugees' Right to Formal Employment in Malaysia* by Sarah Adibah Hamzah and Rodziana Mohamed Razali examines the refugees' right to access formal employment in Malaysia in terms of policy and regulations from an ESG's framework.

In Part Two, *Fostering Holistic Well-being: Reproductive and Health Care as Human Rights* argues how well-being should be understood as social

and holistic well-being, and this includes the provision of services to healthcare and reproductive care. Safety and access to good health and reproductive rights are also part of well-being and the upholding of human rights. Stateless and refugee communities face barriers in accessing healthcare in Malaysia. This includes lack of awareness over available healthcare services and fears over their undocumented status and financial capability.

Chapter 7 *Invisible Lives, Visible Needs: Organ Donation and Stateless Populations* by Faerozh Madli et. al. studies the relationship between organ donation and Statelessness through two approaches via a systemic review of different methods.

Chapter 8 *Lost Identity and Statelessness: The Consequences of Unregulated Third-Party Involvement of Assisted Reproductive Technology in Malaysia* by Nurhafizah Sahidan et. al. explores the consequences of unregulated third-party involvement in Assisted Reproductive Technologies (ART) that has led to an increase of stateless children due to prohibited commercial surrogacy. ART involves the in-vitro manipulation use of donated eggs, sperm, or embryos to help individuals or couples struggling with infertility to conceive a child. It emphasises the tension between Malaysian social norms, legal parentage, and the potential confusion over parental rights when third parties, such as donors or surrogates, are involved in ART. Key issues discussed include the potential for multiple individuals to claim parenthood, which may lead to parental confusion and legal disputes. The welfare, intimacy, and citizenship rights of children born through ART are particularly problematic, as these concepts are intertwined and crucial to the child's rights, including health, education, and inheritance.

Chapter 9 *Contraceptive Implant Failure in a Refugee Teenage Mother: A Case Study* by Za'aimah Zainon highlights the importance of accurate information and understanding of contraceptive methods among

refugee teenage mothers. It does so through the study of a case of contraceptive implant failure.

In Chapter 10 *Utilisation of Community Based Maternal Health Clinic for Refugees*, Zuraidah Che Man et. al. identifies the characteristics and the utilisation of the sexual reproductive health (SRH) services among the refugee communities. Their location of focus takes place in the northern region of Malaysia and is presented from a humanitarian organisation's perspective, Malaysian Relief Agency (MRA). MRA has a community-based SRH clinic in Sg. Petani, Kedah which can accommodate 40 to 60 patients per day. The top three SRH services that have been utilised by the refugees and asylum seekers communities are maternal and child health services (mostly antenatal services), followed by family planning and sexually transmitted infection (STI) clinics.

There should be no difference in treatment when it comes to healthcare whether they are stateless or refugees. They should be able to access the healthcare services they need to avoid future health risks especially by the vulnerable communities. To have good health is now a privilege for us, but for stateless and refugee communities, being able to get treatment is considered a privilege.

In the last part of the book, *Moving Forward by Enhancing Community-led Initiatives: Case Studies and Best Practices* seeks to affirm the need for bottom up and community led approaches in empowering stateless and refugee communities in Malaysia. We illustrate how, through case studies, there are best practices that can be identified and generalised to formulate effective models and strategies to address the needs of those communities.

Chapter 11 *Building Resilience: Strengthening Partnerships for Rohingya Refugees in Malaysia under SDG 17* by Aizat Khairi et. al. examines the importance of partnership in the process of empowering and building the resilience of the Rohingya community in Malaysia including the involvement of Rohingya community organisations. Chapter 12 *Systemically Addressing the Issue of Refugee New Arrivals in Malaysia* by Douglas Teoh Shang En shares initiatives taken by Young Lives through collaborative partnership to create the Crossroad Program for refugees who are new arrivals'. It calls for a more comprehensive and collaborative approach to refugee assistance in Malaysia. Chapter 13 *A Case Study on Climate Action Education Program for Enhancing Food Security Among Refugees* by Noorul Huda Abu Bakar and Norani Abu Bakar highlights the Blue Ribbon Global's initiative of an education programme called Education for Climate Action Program (E4CAP) in empowering youth refugees to address food security issues in Malaysia.

Chapter 14 *A Case Study of The Impact of Vocational Education for Refugee and Irregular Migrant Youth in ElShaddai Centre* by Ng Oi Leng illustrates the efforts taken by a CSO, ElShaddai Centre and its partners in developing the ElShaddai Advance Vocational Education (EAVE) Program since 2021. This initiative was a response to refugees who lost their jobs during COVID-19 and had difficulties to make ends meet. Therefore, the initiative was developed to equip refugee youths with the practical skills for education and employment.

Last but not least, Chapter 15 *Empowering Refugee Integration: A Case Study on PSPK's Community-Centric Approach in Selayang, Gombak* by Keerthana Rajaderan shares the initiatives taken by the Association of Social Services and Community Development of Gombak District, Selangor (PSPK) in empowering the refugees in Selayang through

education, vocational training, cultural integration, and community support.

This book serves as a call to action for policymakers, practitioners, and researchers to work together in bridging the gap among stateless and refugee communities with local communities. The authors have brought together critical insights, recommendations, and practical solutions that pave the way for a more inclusive and resilient future for Malaysia's stateless and refugee communities. The journey towards equality and justice is arduous, but through legal reforms, community empowerment, and the prioritisation of human rights, we can move closer to a Malaysia where everyone—regardless of status—has the opportunity to live with dignity and act for a better world.

Contributors

Agha Abdul Sattar is from the Saduzai tribe, originally hailing from Ghazni, Afghanistan. In August 2023, he earned a Professional Qualification in Human Capital Management from the University Science Malaysia. Agha is the founder of the Baluchistan Educational Social Society (BESS), which he established in 2011. From 2008 to 2016, he was instrumental in providing free primary education to underprivileged children in rural Hub Chowki, Baluchistan, Pakistan, founding three schools that successfully educated 350 boys and girls.

Aime Marisa Chong is a law graduate and working as a Policy & Advocacy Officer at Advocates for Non-Discrimination and Access to Knowledge (ANAK). She is passionately dedicated to the issue of statelessness in Malaysia and has been in this field for almost 6 years.

Douglas Teoh Shang En is the national director of Young Lives Malaysia, a nonprofit organisation dedicated to assisting refugees in achieving social mobility and improving their integration within Malaysia. He oversees the organisation's operations, develops capacity-building programmes, and forges partnerships with civil society, academia, and corporations. Additionally, he serves as a team coach and adjunct lecturer, training university students in social and team entrepreneurship. Furthermore, he is pursuing a PhD in refugee entrepreneurship through action research.

Faerozh Madli is a senior lecturer at the Universiti Malaysia Sabah. He holds PhD in Marketing. His areas of interest include marketing, social marketing, communication, education and technology adoption.

Keerthana Rajaderan is a seasoned professional with more than a decade of experience dedicated to community work. Specialising in managing urban poor community development projects, Keerthana's expertise extends to serving both local Malaysians and Refugees. Her focus is particularly concentrated on women and children, showcasing her commitment to fostering positive change in vulnerable communities.

Khairunisah Kamsin is currently pursuing a PhD by Research in Human Resource Economics at Universiti Malaysia Sabah (UMS), having begun in 2022. She completed her Master's in the same field at UMS in 2021 and earned her Bachelor's Degree in Economics from UMS in 2017. Her research delves into the relationship between trade openness and economic growth, particularly in ASEAN-5 and Japan. Khairunisah has published several research papers, including works on Malaysia, Thailand, and Japan's trade openness, in leading international journals.

Mohd Ramlan Mohd Arshad is a senior lecturer at Universiti Teknologi Mara Malaysia's, Faculty of Administrative Science and Policy Studies. Mohd Ramlan specialises in the administration of Refugees, Human Security, Civil Society Organization (CSO) Management, Human Trafficking, and Smuggling of Migrants. He has actively engaged in scholarly inquiry, written extensively, and provided professional advisory services about security, civil society, and migration. Two books that are now being published for 2024 and 2025 are titled "Rohingya Refugees in Malaysia: The Role of Civil Organizations" and "Global Refugees and Security Hybrids in Malaysia."

Ng Oi Leng is the present Deputy Chairwoman of ElShaddai Centre Bhd. Her role is overseeing the organisational function and direction especially in the area of education. Through ElShaddai, she has been actively engaging with the marginalised diaspora people in Malaysia namely the refugees, migrants and the stateless since 2014. She was a dental surgeon for 28 years before joining the CSO.

Noorul Huda Abu Bakar is a volunteer permaculture trainer at The Blue Ribbon Global and works with Accenture Malaysia. In addition to her responsibilities managing employees and operations, she leads the company's Employee Wellbeing Focal programme. With nearly 15 years of experience in customer service and operations management at IBM Malaysia, she is a certified project manager known for her strong cross-cultural and interpersonal skills, managing multinational and multilingual teams across the Asia Pacific region. Noorul has received several IBM awards, including Best Employee IBM ASEAN ITD, Best Team Leader Open Seats (Gold National Award), and the Eminence Award (Individual). Passionate about climate action, she advocates for sustainable living and design through permaculture principles.

Nurhafizah Sahidan received her bachelor's degree from the University of Mansoura in Egypt in 2015 and completed her housemanship at Hospital Tuanku Fauziah in 2017. From 2017 to 2018, she was assigned to Klinik Kesihatan Kangar. From 2018 to 2021, she later worked in the Department of General Surgery at Hospital Sultan Abdul Halim. She is currently the Principal Assistant Director in the Medical Legislation Section of the Medical Practice Division of the Ministry of Health Malaysia. Since 2021, she has been responsible for designing regulatory tools for healthcare facilities and services across Malaysia. In addition, she recently obtained a Master of Laws in Healthcare and Medical Law from Taylor University.

Nurul Syaza Mazelan is the Assistant Director of the Constituency Coordination Department and Head of the Mapping Unit, APPGM-SDG. With 7 years of experience as a town planning consultant and urban designer, she has been instrumental in shaping policies for federal, state, and local plans. Her expertise encompasses urban design and planning, focusing on developing strategies that promote sustainable and inclusive urban growth. Nurul Syaza's work involves coordinating with various stakeholders to create well-structured policies and plans that align with community needs and government objectives.

Sarah Adibah Hamzah is a PhD candidate at the Islamic Science University of Malaysia (Universiti Sains Islam Malaysia/USIM). She has fourteen years of experience writing and performing legal research. She began her passion in legal research and analysis in 2009. She was a researcher in the Jessup P. Mooting Competition from 2009 to 2012. Currently, she is employed at the Malaysian Human Rights Commission (also known as Suruhanjaya Hak Asasi Manusia Malaysia, or "SUHAKAM"). Her work at SUHAKAM is concentrated on advancing and defending the rights of marginalised groups, including refugees, people with disabilities, and victims of human trafficking. She has experience as a project manager for events such as the 2022 Judicial Colloquium, Persons with Disabilities Day 2022, Refugees Reproductive Rights in 2023 and A Day as VIP (visually impaired Persons) in 2024.

Sia Chin Chin is a Programme Director at Taylor's University. She was admitted as Barrister in the Gray's Inn, London in 2003 after reading law at Cardiff University (Bar Vocational Course) in 2002 and University of Sheffield (LLB) in 2001. In 2007, she was conferred Erasmus Mundus Bursary to complete her European Master in Law & Economics in University of Paul Cézanne (France), Ghent University (Belgium) and

University of Bologna (Italy). She was conferred PhD in 2020 from Taylor's University. She is a Fellow of Society for Advanced Legal Studies. She has national and international legal practising experience in Malaysia, Saudi Arabia and Italy for the past 20 years in legal aspects of research grants and corporate matters. Her primary areas of research are in legal empowerment, commercial law and lifelong legal education.

Za'aimah Zainon is a healthcare programme manager with over four years of experience at the Malaysian Relief Agency (MRA), three of which have been focused on managing healthcare initiatives. She has a strong background in community engagement and programme development, with a passion for gender equality and women's health. Committed to creating healthier, more resilient communities, Za'aimah advocates for accessible healthcare and equal opportunities, striving to address disparities and promote social justice at the grassroots level.

Zuraidah Che Man is a medical doctor and clinical epidemiologist based in the Department of Emergency Medicine at Hospital Canselor Tuanku Muhriz. Her expertise lies in supporting research initiatives, conducting focused research, and organising clinical research workshops both within and beyond her institution. She has a strong interest in recurrent stroke prevention and primary care-related research. Alongside her clinical duties, Zuraidah is dedicated to creating a collaborative learning environment, promoting curiosity, and driving improvement in the medical and research communities.

Part I:
Understanding Barriers,
Formulating Better Strategies: The
Legal and Economic Dimensions

Chapter 8

Lost Identity and Statelessness: The Consequences of Unregulated Third-Party Involvement of Assisted Reproductive Technology in Malaysia

Nurhafizah Sahidan, Josephine Tang, Suryani Mohamed Suhane, Ching Hui Chi, Wan Firdaus Wan Ahmad & Sia Chin Chin

ABSTRACT

Third-party involvement in Assisted Reproductive Technologies (ART) involves the in-vitro manipulation use of donated eggs, sperm, or embryos to enable infertile individuals or couples to have a child. However, due to fast emerging technologies and increasing market demand, it has a higher effect magnitude on the problem especially as ART has 'disrupted' the traditional concept of parenthood to the extent of citizenship of the child born from such a practice. A recent court case in Malaysia revealed the consequences of the use of third-party involvement in ART that resulted from a kind of misrepresentation of parental origin by hiring a surrogate mother to carry their child, and by forging the document during the child's birth certificate registration at the National Registry Department. This has resulted in an unresolved issue of the child birth registration process at the time of writing leading to matters about citizenship status, which affects the welfare of the child, especially on the right to health. This is an example of a few cases under-reported by the mainstream media that led to a fundamental concern in the ethico-legal dilemma of third-party involvement in ART practice which eventually led to commercial surrogacy. The practice is controversially prohibited under the National Assisted Reproductive Technology Policy 2021 and the Malaysian Medical Council Guideline on Assisted Reproduction 2006. In addition to other causes of statelessness in Malaysia, the infamous yet deeply ingrained medical practice of third-party involvement in ART could have the same undesired effects; and

questions whether the practice serves for the child's best interests in the traditional concept of Malaysian family. Lastly, it is recommended to formulate a legal framework for regulating third-party involvement in ART that is appropriate for Malaysia's population diversity, culture, and religion.

INTRODUCTION

Assisted reproductive technologies (ART) encompass all interventions that are involved in the in-vitro manipulation of both human oocytes and sperm or embryos for reproduction. In contrast, third-party involvement in ART refers to the use of donated eggs, sperm, or embryos to enable infertile individuals or couples to have a child. This third-party arrangement can also be utilised by couples who are unable to reproduce naturally, same-sex couples, and unmarried individuals relying on surrogacy to produce offspring.

The first in-vitro fertilization (IVF) centre in Malaysia was established by Pivet Laboratory in 1985. The first successful IVF pregnancy was produced in 1986. Subsequently, the rapid expansion of ART services was stimulated by the emergence and evolution of new IVF technologies. To date, at least 50 IVF centres have been established in Malaysia, with the majority being private enterprises. IVF centres that provide ART services in Malaysia have generated a revenue of almost RM 117.2 million in 2022 alone.

When examining the role of third parties in the context of ART, it is imperative to acknowledge Malaysia is a nation that strongly upholds the traditional concept of family. Therefore, the increasing availability of third-party ART has led to numerous ethical and legal challenges. Despite the current policies that prohibit the use of third-party involvement in ART practice in Malaysia, such procedures are already embedded.

It is undeniable that ART service delivery is crucial in driving the country's economic growth, which is in alignment with the country's ambition to achieve sustainable development goals (SDGs). At the SDGs Expert Insight Series Forum, the discussion centred on how to better support the private sector to catalyse actions needed to achieve SDGs by 2030. In addition, the recent Healthcare White Paper (HWP) tabled in the Parliament in June 2023 also emphasized the importance of enhancing public-private partnership (PPP) by strengthening the existing policies, legislations, and regulations to facilitate healthcare reform in the country.

THIRD-PARTY INVOLVEMENT OF ART IN MALAYSIA: A CASE SUMMARY

The conventional ART method involves using the couple's own gametes to create an embryo, ensuring the child is their biological offspring. When couples fail to use their gamete, donated gametes or embryos can be used which is considered as third-party involvement of ART. The most recent study shows that infertile individuals have a positive attitude toward ART and indicates the acceptance of a donor egg is preferred rather than embryos and sperm.¹ In general, a third-party involvement in ART could be a donor of sperm, ovum, or embryo or with a surrogate. These 'third-party' options allow individuals or couples to move forward with family building when they might not otherwise be able to.

A case of *National Registration Department (NRD) Seremban v Yudisthira* (2023) revealed the involvement of third parties in ART services using a surrogate mother.² The accused had deliberately submitted false

¹ Dereje Bayissa Demissei and others, 'Attitude Towards Assisted Reproductive Technology: Acceptance of Donor Eggs, Sperms, and Embryos as Treatment of Human Infertility: A Systematic Review and Meta-Analysis' (2024) 21 *Reproductive Health*.

² Kosmo Online, 'A Man is accused of Presenting False Information about the Birth of a Baby Using the Surrogacy Method' (Kosmo,2023) <https://www.kosmo.com.my/2023/07/04/lelaki-didakwa-kemuka-maklumat-palsu-kelahiran-bayi-guna-kaedah-ibu-tumpang/?utm_source=divr.it&utm_

information when registering the birth of a baby who was born through surrogacy. The accused also hid the information about the mother who gave birth to the baby and committed the offence at the NRD in March 2022. Hence the defendant was charged under section 36(1)(b) of the Birth & Death Registration Act 1957 (Act 299).

The offence was detected by the NRD following the accused's submission of questionable information, where it is seen as a standard procedure for hospitals to include accompanying photographs of the mother and child. Nevertheless, the accompanying photograph depicts a different person, namely the defendant's wife, who is a foreign national. Further investigation revealed that the baby was born using surrogacy where the surrogate mother was a Malaysian citizen.

Judge Nurul Saqinah Rosli imposed a fine of RM2,000 or if fails to pay the fine, the defendant can be jailed for six months. Hence, it is safe to conclude that the case resulted in the deception of parental origin as evidenced by NRD. Nevertheless, since the surrogate mother is a Malaysian, it is clear that the baby is still eligible to apply for citizenship. However, if the surrogate mother turns out to be a foreigner, the baby would have to face difficulties ahead to getting NRD approval according to the intended parent's desire.

REGULATORY GOVERNANCE OF ART PRACTICE IN MALAYSIA

At present, the Guidelines on Assisted Reproduction 2006 (GAR 2006) by the Malaysian Medical Council (MMC) and the National Assisted Reproductive Technology Policy 2021 (NART 2021) are the guiding documents for HCPs in the provision of ART services. Among the objectives of the guideline are to ensure that registered medical

medium=facebook&utm_campaign=kosmo+online&fbclid=IwAR3xbIT1QO-P18341HNBimDkXfQJkyv1YpUJTYRzR3KlnI86QPWKGOgRLaw> accessed date 29 October 2023.

practitioners (RMP) are fully aware of the codes of professional medical practice, issue directives and guidelines from time to time regarding propriety in professional practice, and prevent abuse of professional privileges.

Despite the GAR 2006 needs to be read in conjunction with the Medical Act 1971 and the Code of Professional Conduct 2019, which is legally binding, however, NART 2021 holds no regulatory authority towards the RMP in the private sector.³

When arguing about third-party involvement in ART, the analysis showed that both instruments mentioned above reflect inconsistency. Section 8 of GAR 2006 ambiguously seems to allow the use of donated eggs, embryos, and sperm to cure human subfertility in others using the ART technique. However, Section 15 of GAR 2006 prohibits the mixing of gamete or embryos of different parental origins. These two sections portray contradiction to each other despite falling under the same guideline. While NART 2021 clearly expresses the intention to prohibit especially embryo donation and considers it unethical.⁴ NART 2021 also acknowledges due to legal implications surrounding surrogacy, the welfare, and the rights of the child, thus surrogacy is prohibited.⁵

In 2012, The Medical Development Division of the Ministry of Health published a standard entitled Standards for Assisted Reproductive Technology (ART) Facility - Embryology Laboratory and Operation Theatre which stipulates the minimum standards required for any ART facility operating in Malaysia. It provides a proper guideline in the setting up of ART centres which includes a minimum standard required for clinical and laboratory practice. Furthermore, it also serves as a useful guide for scientific personnel and clinicians in

³ Ibid.

⁴ MOH, 'National Assisted Reproductive Technology Policy' (2021) 9.

⁵ Ibid 13.

maintaining a high standard of practice, whereby ensuring the safety of couples undergoing treatment and their embryos.

The rapid advances in medical science have resulted in the struggle of legislation to keep up with the current pace. It is questionable, however, whether self-regulation adequately protects the public interest in relation to ART activities.

This also explained that the use of surrogacy agreements is not enforceable by law in Malaysia, even if there is a signed legal contract between commissioning parents and surrogates.⁶

This unenforceability is also supported by subsection 24 (e) of the Contracts Act 1950 where the Court regards it as immoral or opposed to public policy. Every agreement of which the object or consideration is unlawful is void. It is stipulated that any surrogacy agreement made between the commissioning parents and the surrogate mother may be rendered void for being against public policy.

Therefore, RMPs who practice third-party involvement in ART not in accordance with the guidelines are likely to still inadvertently be held accountable for ethical misconduct under the Medical Act of 1971, despite that there is no criminal sanction for the above unethical misconduct.

Moreover, it remains a struggle and debatable for RMP, especially in the private sector to ethically uphold Hippocrates' Oath in terms of patient autonomy, and protecting the best interest of the children born from ART practice as ethical perceptions vary among RMP. This brings to marked differentiation in the practice involved in third-party reproduction provided by ART services between both sectors.

⁶ Ibid.

Currently, there is no specific legislation in Malaysia that can effectively regulate the entire ecosystem of third-party reproduction, which includes the donor bank, identification of suitable donors, counselling and consultation for all parties involved, and ensuring transparency in the process.

THE PRICE OF ADVANCEMENT: A TICKING TIME BOMB OF STATELESSNESS

Currently, given the aforementioned situation, the participation of third parties in assisted reproductive technology (ART) could potentially be challenging due to the adherence to Malaysian social and legal norms around the conventional family structure, which has significant importance in the local culture. Legal parentage will remain a subject of debate, causing negative consequences for both the parents and children involved in third-party assisted reproductive technology (ART).

This is because the use of third-party involvement in ART can result in at least three potential individuals claiming their right to be the child's parent, which can lead to parental confusion. All of the aforementioned issues will inevitably involve a variety of ethico-legal dilemmas regarding the child's welfare, legitimacy and even citizenship rights. These concepts are considered distinct; however, they are interconnected in the determination of children's rights, including the right to health, education, inheritance, and the right to know their parents (origin) which impacted them throughout their lives.

Welfare of the Child

Children, particularly the very young or the unborn, cannot make healthcare decisions for themselves, and so this responsibility must

fall on someone who can take it.⁷ When parents make decisions for their 'born' offspring, they must do so in the child's best interest. They must consider the ethical and legal responsibilities that parents owe even to their unborn children.

The best interest v significant harm to the child

Cressida argued that resolving disputes that require striking a balance between respecting parental authority and protecting children will always be fraught with complexity.⁸ However, in reality, the courts are often seen using the 'best-interest' approach in ensuring children are given adequate, appropriate care. She later emphasized that society also must find a way to walk the line between protection and tolerance of different views. She concluded that the principle of 'significant harm' is a way forward to better respect parents' responsibility and authority over their children.

Sliding to a harm threshold can make all the difference in cases where there is a contentious value dispute but there is no substantial risk of the child suffering significant harm.⁹ This prevents the court from substituting its opinions for the parents in determining what is best for the child. By establishing a clear boundary at the point where serious harm occurs, a genuine dedication to honour diverse perspectives is demonstrated, while simultaneously safeguarding children in times of necessity.¹⁰

The involvement of third parties in reproductive processes presents unique difficulties in establishing the best interests of the child, particularly in the preliminary stages when the child is not yet born. According to common law, foetus does not enjoy the legal rights as

⁷ Cressida Auckland, 'Parental Rights, Best Interests and Significant Harms: Who Should Have the Final Say over a Child's Medical Care?' (2019) 78 *The Cambridge Law Journal* 287-323.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

afforded by the law to a legal 'person'. It is only at the point of birth that the foetus, now born alive as an infant, acquires legal status, rights, and liabilities as a distinct individual.

Chin Yoke Teng v William Ui Ye Mein's case is deliberated to decide on the issue of whether the foetus has the legal capacity to sue.¹¹ The case was based on a breach of a promise to marry, and the first Plaintiff who was pregnant at the time of trial had unnamed the unborn foetus as the second Plaintiff. The judge ruled that, while the unborn child has life along with certain rights under Malaysian law, and is protected from injury by Penal Code Act 574, no authority can claim that the unborn child has legal personality to follow suit.

The judge then stated that the legal system only confers on the natural person as a human being who has the right to sue and to be sued. He further explained that a human being is defined as a living human conferring to a person that holds various rights, duties, and obligations which is not interpreted to include an unborn child.

This is a concerning dilemma, especially for healthcare practitioners considering the ethical principles of maleficence and beneficence, where healthcare professionals should assess and balance the effects of the ART practices they offer on society, religious beliefs, and even the child's long-term welfare.

For example, in the case of baby Gammy, the child's welfare was at risk as the intended parent refused to care for him and abandoned him because he was born with a disability.¹² This leads to practitioners ethically debating on whether the welfare of the child born through ART and the family concept necessarily fall under the purview of the medical profession's obligations when such procedures are made available to infertile couples or whether the liability should fall totally

¹¹ *Chin Yoke Teng & Anor v William Ui Ye Mein* [2005] 2 MLJ 480.

¹² Sonia Allan, 'Baby Gammy Case Reveals Murky Side of Commercial Surrogacy' (*The Conversation, 2014*) < <https://theconversation.com/baby-gammy-case-reveals-murky-side-of-commercial-surrogacy-30081>> accessed on 3 October 2023.

on the hand of the request which the intended parent when deciding the best interest of the child.

Legal Parenthood

Section 112 of the Evidence Act 1950 stipulated that birth during the marriage is conclusive proof of the legitimacy of the child unless this conclusive presumption is rebutted on evidence of *'no access'* between the husband and the wife at the possible time of conception of the child.

According to author *Kho Feng Ming*, traditionally, parenthood is a straightforward biological fact where a child is conceived through the sexual intercourse of the parents and born after gestation in the mother's womb.¹³ He later explained that under the common law basic substantive rule, for a child's relationship with her parents to be legitimate, the child must first be able to prove; 1) who her mother is; 2) who her father is; and 3) her parents were parties to a valid marriage at her conception or latest, her birth.¹⁴

It is ideal to accept that from the above statement, the first fact defines that a legal mother is the women who deliver or gives birth to a baby. However, with the advances of modern medical technology, the first and second fact is nowadays considered highly challenging with the arrival of DNA tests to confirm paternity.

In addition, subsection 7(2) of the Birth and Death Registration Act 1957 considers the 'father of a child' as one of the qualified persons to inform the Registrar of the birth of the child, but it does not clearly define what are the criteria of being accepted as the legal father.

¹³ Kho Feng Ming, 'Section 112 of Malaysia Evidence Act: Major Areas of Concern and The Way Forward' (2018) 3 International Journal of Law, Government and Communication 10-20.

¹⁴ Ibid.

This brings us to an argument in the case of *Yudisthra. M*¹⁵, if he decided not to forge the document, with the assumption that the sperm used was his, would he be deemed as the qualified father? Though he is not in a valid marriage with the surrogate mother, however looking into the definition of father, Section 2 of the Adoption Act 1952 also defines father as a person in relation to an illegitimate child means the natural father. One may presume that 'natural' can be defined as biologically related, thus in the case of *Yudisthra. M*, he may be able to proclaim his right as the 'father'.

Furthermore, subsection 45(1) of the Evidence Act 1950 allows the result of a scientific test to be admissible as evidence where the court opined to have a scientific explanation, and the result must be done by a person especially skilled in such science. This creates a vast grey area in what Malaysian law considers legal parenthood in the case of third-party involvement of ART whereby not just biologically related individuals but commissioning parents, as well as surrogate women, could proclaim their right as legal parents.

Surprisingly in the recent case of *CAS v MPPL & ANOR* in the Court of Appeal, the judge concluded that the presumption of legitimacy through section 112 of the Evidence Act does not bar inquiries into the paternity of the child and that paternity (*by fact*) and legitimacy (*by law*) are two separate and distinct concepts.¹⁶ The judge also added that it is in the best interest of the child to know who is his or her biological parent.

The above-mentioned case is believed to have a controversial impact, especially on Shariah law applications. This is because legitimacy is considered strongly related to the paternity of the parent under Shariah law. Shariah law uses the maqasidic approach to protect its five essential values that are a necessity to human existence on earth.

¹⁵ Ibid (n 2).

¹⁶ *CAS v MPPL & Anor* [2023] 2 MLRH 36.

One of them is *hifz al-nasl* or *nasab*, where the approach determines the protection of the progeny which requires the couples to act in a way that is beneficial for the resulting child and protects the sanctity of the marriage. Hence, Shariah Law in Malaysia considers that the child is illegitimate by altering the *nasab* of lineage if third-party reproduction is used despite the child being born under a valid marriage certificate.

Furthermore, in the case of *Nik Elin & Tengku Yasmin v Kelantan State Government 2023*, 16 provisions on Shariah criminal offences were declared invalid by the Federal Court.¹⁷ Though the Chief Justice further explained that the court decision has nothing to do with the substantive principles of Islamic law or its position in this country, on the other hand, the use of third-party involvement of ART, is foreseen in regards to the legitimacy and paternity dispute would have the possibilities of facing the same fate as *Nik Elin's* case as Federal Court is considering a supreme court in Malaysia's legal system and able to supersede the shariah court decision at the worst scenario where such practice could involve Muslim and non-Muslim parties in one process. Additionally, other laws specify the arrangement of legal rights regarding parental custody and guardianship of children. Section 5(1) of the Guardianship of Infants Act 1961, in the case of a legitimate child, both the father and mother are granted equal rights over their children under the law. By Section 89(1) of the Law Reform (Marriage and Divorce) Act 1976, the law permits the authority to grant custody and guardianship to either one parent or both parents in the event of a divorce.

A controversy arose regarding the application of the Guardianship of Infant Act 1961, which initially only applied to legitimate children. Conversely, custody and guardianship were granted to the mother in the case of illegitimate children. However, the matter was resolved in

¹⁷ *Nik Elin Zurina & Tengku Yasmin Natasha Iwn Kerajaan Negeri Kelantan* [2024] CLJU 232.

the Federal Court decision of Sean O'Casey, where the Court determined that the biological father of an illegitimate child also possesses the legal rights of a legal father.¹⁸ This indicates that the provisions of section 1(3)(a) of the Guardianship of Infants Act 1976 are also applicable to a child born out of wedlock.

Surrogacy itself is debatable whether the use of the method can allow the child born from it to be considered as naturally legitimate as various scientific and religious factors contribute to it despite the recent study showing most religions allow the use of surrogacy.¹⁹ However, it still does not confer the solution of the legitimacy of the child discussed previously.

In determining legal parenthood in third-party involvement of ART, a clear policy should be placed regardless of whether a child is legitimate or illegitimate as the welfare of the child remains the primary issue in legal custody.

The current usage of third-party involvement is perceived as being unparallel with legal circumstances surrounding legal parenthood and the Malaysian law landscape is not yet well prepared to fully accommodate such practice. This practice will subsequently have a significant impact on the welfare of the child from various angles of the child's life, particularly in relation to the issue of citizenship.

Citizenship of the Child: The Cross-Border Surrogacy Arrangement

Cross-border surrogacy is also a challenging issue in third-party involvement of ART especially in dealing with the statelessness of the child born from it.²⁰ Conflicts in national laws regarding the

¹⁸ Sean O'Casey *Patterson v. Chan Hoong Poh & Ors* [2001] 3 CLJ.

¹⁹ Md Shaikh Farid and Sumaia Tasnim, 'Assisted Reproductive Technologies: Comparing Abrahamic Monotheistic Religions' (2023) 15 *Asian Bioeth Rev* 53-67.

²⁰ Koen Lemmens, 'Cross-border Surrogacy and the European Convention on Human Rights: The Strasbourg Court caught between "fait accompli", "ordre public" and the best interest of the child' (2024) *Netherlands Quarterly of Human Rights* 42 174-194.

conferment of citizenship and the lack of international consensus on the legality of surrogacy have resulted in the birth of children who are not recognised as citizens of any nation.²¹ In such cases, any cross-border surrogacy may result in a child born through it being granted citizenship in either the country of birth or the receiving country of the commissioning parents. When neither country recognises a child as a citizen, they become stateless.

Development of Human Resources for Rural Areas, Malaysia (DHRAA) in its report²² also categorised 'persons rendered stateless by gender unequal provisions in Nationality Law' whether children born out of legal wedlock to Malaysian fathers or children born to Malaysian women overseas. This report significantly highlights the repercussions if Malaysian intended couples or individuals seek surrogacy methods, especially in the light of cross-border practice but seeking Malaysian citizenship to be granted to the child that is born from it.

DHRAA further commented that Malaysia has been identified as one of 25 countries in the world that denies women the right to confer nationality on their children on an equal basis with men. At the same time, it is also one of the 3 countries in the world that denied men equal rights in conferring nationality to their children who are born out of wedlock.

Section 17 of the Second Schedule, Part III of the Federal Constitution prohibits men from transferring nationality to their children if the child

²¹ Emma Batha, 'International Surrogacy Traps Babies in Stateless Limbo', Reuters Health News (The Hague, 18 September 2014) <<https://www.reuters.com/article/us-foundationstatelessness-surrogacy/international-surrogacy-traps-babies-in-stateless-limboidUSKBN0HD19T20140918>> accessed 15 August 2019.

²² DHRAA Malaysia, 'Report: Statelessness in Malaysia' 5 April 2022 <https://dhrramalaysia.org.my/ESS-IN-MALAYSIA-REPORT-05042022_compressed.pdf>

is born out of a legally recognized marriage. It also conferred that children born to unmarried couples would have to on the mother's nationality. In 2016 only, it was reported that more than 17,000 marriages between Malaysian men and female China nationals were unregistered between 2011 and 2015, which raises concerns about the citizenship status of their children.²³

The figure itself is worrisome considering a child to be born out of wedlock when there is no legal marriage registration. This can result in statelessness if the children cannot acquire nationality from their mothers before the birth of the child.

The occurrence of children possibly being made stateless as a result of the aforementioned rules became widespread when the Law Reform (Marriage & Divorce) Act 1976 was implemented on March 1, 1982. This law specifically applies to those who are not Muslims, and it declares any customary or cultural marriages, as well as marriages performed according to Chinese or Hindu traditions, that took place after 1st March 1982 and were not officially recognised, to be void. Malaysian legislation will henceforth only acknowledge civil marriages that have been duly registered.

CONCLUSION

There is a problem that without formal regulation of ART, practices may develop which into serious risks to third-party involvement in ART services and subsequent children. Legislative solutions will provide clear rules for dealing with conflicts of interest between the parties, children, and parents, as well as issues relating to the status of children born as consequences of ART. Therefore, the law in Malaysia should have a role and clear attitude regarding regulating third-party involvement in ART, to regulate this important activity, and

²³ Bernama, 'More than 17,000 Unregistered Marriages between Malaysian Men and China Nationals' (New Strait Times, 21 March 2016 <https://www.nst.com.my/news/2016/03/134241/more-17000-unregistered-marriagesbetween-msian-men-and-china-nationals> accessed at 30 June 2024.

consequently encourage and allow positive practices and avoid other negative unintended impacts resulting from activities of ART.

With the general question of the need for legal regulation of ART answered in the affirmative, the issue arises of the evaluation of proposed legislative frameworks. One approach is to view the proposals in the light of the interaction between marriage, genetic contribution, and inheritance. Moreover, the proposed solutions could be viewed with reference to the protection of human rights, in particular the right to found a family and the rights of children.

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CONFLICT OF INTEREST

The authors declare that the research was conducted in the absence of any commercial or financial relationship that could be construed as a potential conflict of interest. This project is investigator initiative research and is registered in the National Medical Research Register, NMRR ID-24-00004-AOL. Ethics approval was obtained from the Medical Research and Ethics Committee, Ministry of Health Malaysia (24-00004-AOL), and Human Ethics Committee Taylors University (HEC 2023/336).

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