

# CHAPTER I

## INTRODUCTION

### 1.1 Background

President Joko Widodo has released a statement that the Government of Indonesia would not repatriate Indonesian citizens involved in Islamic State of Iraq and Syria (hereinafter "ISIS"). He emphasized on the reason that the government prioritizes the security of 270 million Indonesians in the country rather than having to repatriate the Indonesian citizens who were involved in ISIS.<sup>1</sup> President Joko Widodo's consideration is on the safety of the nation, state and people stating that if they return, they will spread radical ideas, or do things that are against Indonesia's national security.

This created a debate on the repatriation of the Indonesian citizens ex-ISIS because it involves the concern regarding national security and human rights which creates a tension between national interest and human rights. As of January 2023, the issue of the repatriation of Indonesian ex-ISIS yet remains overshadowed as a result of the emergence of the coronavirus 2019 and shift of government priorities because of the pandemic. This can be seen from the lack of news and updates on this issue and most importantly there is no Presidential Decree or Ministerial Decree

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<sup>1</sup> Rakhmat Hakim, *Jokowi: Pemerintah Tak Berencana Memulangkan ISIS eks-WNI*. Nasional Kompas, 12 February 2020. <https://nasional.kompas.com/read/2020/02/12/17013951/jokowi-pemerintah-tak-berencana-pulangkan-isis-eks-wni>. (Accessed 14 October 2022)

of the Ministry of Law and Human Rights issued that was promised in 2020.<sup>2</sup> This created an issue that lacks regulation when it comes to the outcome of citizenship status of a person involved in ISIS.<sup>3</sup> A citizen is one of the important elements in forming a state because it has a reciprocal relationship that creates a rights and obligation between the citizens and the country which can come in the form of granting citizenship status. Citizenship can be interpreted in four ways.<sup>4</sup> First, it lets a person have legal status which creates a relationship and raises rights and obligations between the citizen and the state. Second, citizenship is a right for a person which enables them to define their position in the social and political areas of a community. Third, citizenship reflects the will and participation of individuals in a political state. Fourth, citizenship will act as the identity of an individual.<sup>5</sup> This shows how important citizenships are.

Article 15 of the Universal Declaration of Human Rights (hereinafter “UDHR”) stated that: “(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” As a member of the United Nations, the UDHR acts as an expression of fundamental values shared by all members of the international community,

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<sup>2</sup> Mahfud Sebut Status WNI eks ISIS Diatur Keppres dan Kepmen, CNN Indonesia, 19 February 2020 <https://www.cnnindonesia.com/nasional/20200218140547-20-475723/mahfud-sebut-status-wni-eks-isis-diatur-keppres-dan-kepmen> (Accessed 11 January 2023)

<sup>3</sup> Ali Abdillah, Polemik Pemulangan WNI Eks Isis: Mencari Solusi Terbaik, Tata Negara, 12 February 2020 <https://tatanegara.ui.ac.id/polemik-kepulangan-wni-eks-isis-mencari-solusi-terbaik/> (Accessed 15 November 2022)

<sup>4</sup> Rubenstein, Kim & Adler, *International Citizenship: The Future of Nationality in a Globalized World*, (USA: Indiana University Press, 2000), p. 6.

<sup>5</sup> *Ibid*, p. 4

including Indonesia. It is also clearly stated in Article 28D paragraph (4) of the 1945 Constitution that, “Everyone has the right to citizenship status.” It has also guaranteed one of a person's human rights which is right to citizenship. Therefore, from the 2 (two) articles, it shows that even if an Indonesian citizen is in ISIS, they could still maintain their citizenship and that becomes the debate in Indonesia.

The right to citizenship also includes children. Citizenship is available for everyone, including children. Children are the future of the nation and the next generation of the nation's ideals, which means that the state is obligated to fulfill the rights of every child to survival, grow and develop, participate, protection from violence and discrimination. The state, government, society, and family are obliged and responsible for the implementation of child protection, because children in terms of physical and psychological development are considered immature and still in need of protection.<sup>6</sup> So the repatriation of Indonesian ex-ISIS does not just talk about the men and women that ran away, but also the children of those men and women.

Since 2014, there has been a debate on the Indonesian citizenship of the ex-members of ISIS and their children.<sup>7</sup> ISIS are a group of terrorists with the aim to form a Muslim Sunni country. Indonesian citizens that joined the group are considered as Foreign Terrorist Fighters (hereinafter “FTFs”) which are individuals who travel to other countries from the community or other nationalities to carry out

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<sup>6</sup> Setyawan, D. *Pemenuhan Hak Anak Atas Akta Kelahiran Merupakan Bagian Dari Hak Sipil yang Harus Dilindungi Konstitusi*. KPAI News Article, 15 February 2014. <https://www.kpai.go.id/berita/artikel/pemenuhan-hak-anak-atas-akta-kelahiran-merupakan-bagian-dari-hak-sipil-yang-harus-dilindungi-konstitusi>. (Accessed 14 October 2022)

<sup>7</sup> *Polemik WNI Eks ISIS dan Aturan Kehilangan Kewarganegaraan*, CNN, 14 February 2020. <https://www.cnnindonesia.com/nasional/20200214113641-20-474581/polemik-wni-eks-isis-dan-aturan-kehilangan-kewarganegaraan>. (Accessed 13 October 2022)

acts, plan or prepare for, or participate in, terrorist acts or provide or receive terrorist training, including in an armed conflict.<sup>8</sup>

Terrorism is a form of crime that keeps on developing worldwide and it uses violence or threats of violence that cause an atmosphere of terror or widespread fear, which can cause mass casualties, and/or cause damage or destruction to vital strategic objects, the environment, public facilities, or international facilities with ideological motives, politics, or security disturbances.<sup>9</sup> There are debates that arise mentioning the pros and cons of repatriating them, which also concerns their citizenship status. On one side, if the ex-ISIS members have their citizenship, Indonesia is obliged to bring them back to Indonesia from the refugee camp in Iran and Syria. Indonesian Government has rejected the repatriation of Indonesian citizens that have joined ISIS and only accepts children under 10 years old or orphans.<sup>10</sup> The rejection is based on the fact that it might endanger the rest of the 270 million citizens in the country either with the spreading of radicalism, terrorism in the country, or even the spread of diseases. The legal basis for such rejection is regulated under Law Number 12 of 2006 on Citizenship (hereinafter “Citizenship Act”) Article 23 letter (d), (f), and (i) which stated that an Indonesian citizen loses its citizenship if they enter the foreign army without prior permission from the President, voluntarily take an oath or declare a pledge of loyalty to a foreign country

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<sup>8</sup> United Nations Security Council Resolution 2178 on Foreign Terrorist Fighters by States affected by foreign terrorist fighters, 2014.

<sup>9</sup> Article 1(2) of Law No. 5 year 2018 concerning Eradication of Criminal Act of Terrorism

<sup>10</sup> Bernie, M. *Mengapa Jokowi Perlu Pulangkan Anak-Anak WNI Eks ISIS?*, Tirto, 18 February 2020. <https://tirto.id/mengapa-jokowi-perlu-pulangkan-anak-anak-wni-eks-isis-ezAq> (Accessed 13 October 2022)

or a part of that foreign country, or/and stay outside Indonesia for more than 5 (five) consecutive years without a valid reason, not for state service, and intentionally not expressing their wish to remain as an Indonesian citizen before the 5 (five) year period ends.

This government mentions article 23 (d) and (f) as a basis to reject the repatriation of those Indonesian ex ISIS members with their analysis as such that the provisions in Article 23 letter d of the Citizenship Act do not include the word "foreign country" as in other paragraphs of Article 23. The interpretation of the word "foreign army" in this provision is not specific to foreign troops in official countries, but it could also be soldiers in non-state groups such as separatists, rebels, or international terrorist networks. This could refer to including those who join terrorist military groups even if they do not act on behalf of certain countries are legitimate, in this case one of them is ISIS. Meanwhile, the government argued for Article 23 letter f, part of a foreign country could have meant rebels who wanted to overthrow the legitimate government, and, in this case, ISIS is a terrorist organization in Syria using methods of terror to replace Syria and Iraq. The legal implication of losing citizenship is they lost their constitutional rights based on the 1945 Constitution which are only applicable to Indonesian citizens.

However, there are also counter arguments on the issue of the loss of citizenship (*penghilangan kewarganegaraan*) for the Indonesian ex-ISIS is not possible because it contradicts to the national and international law that were ratified by Indonesia such as Convention on the Rights of the Child, International Covenant on Civil and Political Rights, etc. Article 23 letter d and f mentioned

foreign army and foreign state. The category of foreign army in the letter d is that the army is attached to a country, which means that ISIS are only considered as terrorist troops. Moreover, ISIS does not have recognition of sovereignty as a country from any country in the world, and it does not fulfill the requirement of a state under Montevideo Convention 1933, so it is not a foreign state.

In the case of the children of Indonesian ex-ISIS, the government stated that only children under 10 years old will be repatriated and this is clearly against Law No. 35 of 2014 regarding Amendment to Law No. 23 of 2002 concerning Child Protection (hereinafter “Child Protection Act”) as those under 18 years old are still considered children and even so, the government will only select some and not all of the children under 10.<sup>11</sup> The government’s legal basis for rejecting is very unclear, and it conflicted with several laws on child protection, human rights, terrorism law, and other international and national laws. According to the explanation of Amendments of the Child Protection Act,

“Children are an inseparable part of human survival and the survival of a nation and state. In order to be able to take responsibility for the survival of the nation and state, every child needs to get the broadest opportunity to grow and develop optimally, physically, mentally, and socially. For this reason, it is necessary to protect efforts to realize the welfare of children by providing guarantees for the fulfillment of their rights without discriminatory treatment.”

Under the Child Protection Act Article 1 (1), children are those under 18 years old, including those still inside the womb which means that those under 18

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<sup>11</sup> Ahmad Naufal Dzulfaroh, *Polemik Pemulangan Eks Simpatisan ISIS dan istilah “Eks WNI” dari Jokowi*, Kompas.com, 14 February 2020 <https://www.kompas.com/tren/read/2020/02/14/061000465/polemik-pemulangan-eks-simpatisan-isis-dan-istilah-eks-wni-dari-jokowi-?page=all> (Accessed 15 November 2022)

are still under guardianship of a parent or a guardian and so cannot be held fully accountable for their actions. It is viewed that children cannot act based on their own feelings, thoughts and wants but their actions are based on their environment, such as their family and friends.<sup>12</sup>

According to Setara Institute Research Director Halili Hasan, in this context, children are victims of systems created by adults, including parents' preferences and because they are victims, the state must take over proactively to rehabilitate them. Further, BNPT Deputy for International Cooperation Andhika Chrisnayudhanto said, every country, including Indonesia, has an obligation to protect children who are victims of terrorist exploitation.<sup>13</sup> Article 59 of the Child Protection Act stated that the Government, Regional Government, and state institutions are obligated and responsible to provide special protection for children including children victims of terrorism network. This means that in this situation, the government has the obligation to protect the children and a way of doing so is by bringing the children back to Indonesia as citizens where it is safe. By not doing so, the children are deprived from their rights as citizens to be protected by their country. Moreover, children must be given protection regardless of their background and must be in accordance with the legal norms and positive laws relevant.

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<sup>12</sup> Angger & Fuady, *Sistem Peradilan Pidana Anak*, (Indonesia: Pustaka Yustisia, 1 January 2018), p. 10.

<sup>13</sup> JEO, *Dilema WNI Eks-ISIS: Dipulangkan atau Pulang Diam-diam?*, Kompas.com, 24 April 2020. <https://jeo.kompas.com/dilema-wni-eks-isis-dipulangkan-atau-pulang-diam-diam> (Accessed 16 November 2020)

The issue of children's involvement in terrorist networks, such as ISIS, has not been properly elaborated in Indonesian legislation. This may be due to the phenomenon of children being involved in terrorist networks which can be said to be a new phenomenon in legal discourse in Indonesia. Laws in Indonesia do not regulate this issue in detail and explicitly so that it can create confusion in dealing with children who are involved in terrorist networks. As a result, the rights of these children to obtain guarantees of certainty, justice and legal benefits are neglected. The position of children like this needs to be studied seriously, bearing in mind that this new problem has created quite complicated legal problems in Indonesia.

With the urgency of this problem, it is necessary to have a legal certainty regarding the citizenship and protection of the children of Indonesian ex-ISIS members to be certain on whether they can be returned or not. Therefore, this thesis tries to raise a deeper discussion and emphasize more about citizenship rights and legal protection for children of Indonesian ex-ISIS members.

There are deficiencies that must be recognized in the current citizenship, terrorism, and child protection regulations to respond to current problems. The existing regulatory design does not clearly regulate the loss of Indonesian citizenship status when a child was taken to the state of Iraq or Syria with their parents joining terrorist organizations such as ISIS and the implementation of the protection for the children. In this case, law has a very important role in creating the legal consequences of their actions. This is because the law regulates that the interests of each individual do not overlap with other individuals and the state. The

existence of these rules and the implementation of these rules give rise to legal certainty.<sup>14</sup>

## **1.2 Formulation of Issues**

Based on the description above, there are issues regarding the laws and regulation on the status of citizenship and the protection for children of Indonesian ex-ISIS. It can be concluded in the following research questions:

1. How does the law regulate on the citizenship for children of Indonesian ex-ISIS members?
2. How does the law on Child Protection protects the rights of children of Indonesian ex-ISIS members?

## **1.3 Research Purposes**

In light of the aforementioned research questions, the purposes of this research are:

1. To analyse and clarify the regulations on citizenship for children of Indonesian ex-ISIS members; and
2. To analyse and clarify the regulations on the protection for children of Indonesian ex-ISIS members.

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<sup>14</sup> Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, (Jakarta: Kencana Prenadamedia Group, 2008), p. 158

#### **1.4 Benefit of Research**

The benefits of this research will be divided into two, namely the theoretical benefit and the practical benefit.

In regard to the theoretical benefit of this research, the results of this study are expected to be a contribution to the development of legal studies and to be used as material knowledge, specifically in the area of citizenship of and the protection for children of Indonesian citizens who had been part of ISIS. This research will also enrich the literature in the field of law and academic world in hopes to contribute and provide an in-depth analysis on the regulation.

Regarding the practical benefit, the results of this study are expected to provide input and contribute thoughts for practitioners, especially regarding the loss of citizenship of Indonesian children who were once involved with ISIS. It is also expected to be a reference for the government regarding citizenship and to pay attention to the interests of citizens and the rights and obligations of citizens and acts as an illustration for Indonesian children regarding matters relating to ways to obtain citizenship, the causes of loss and gaining citizenship and protection for children who are victim of terrorism and is expected to be useful for students and lecturers to increase knowledge about citizenship.

#### **1.5 Writing Systematics**

The discussion in this research is done by grouping it into five chapters as described below with each chapter consisting of sub-chapters. Chapter I is an introductory part which includes a description of the background of the problem,

problem formulation, research objectives, research benefits, and dissertation writing systematics.

The background of this thesis is about the identification of decision made by the government inconsistent with the current law. This section describes several inconsistency and problems that arise through the decision made by the government. Based on the identification of these problems, important and urgent problems will be determined to be resolved through analysis.

The second chapter will include the theoretical review and conceptual review that underlies the research in this thesis that are explained as a basis for theory and problem solving. There is also a more detailed description of citizenship rights and their disappearance so that the procedures followed are appropriate. In writing the statute approach, the logical deduction method will be utilized, which is conducted by writing general theories regarding the subject matter and draw specific logical conclusions that is in accordance with the issues in this thesis.

The third chapter discusses the different types of research methods, types of research, research objects, procedures for obtaining the research materials and legal materials, whether primary or secondary, and non-legal bodies that support the discussion of legal issues, the nature of the analysis, measures in obtaining data during the research, along with the most ideal research technique that will be utilized in this thesis.

The fourth chapter will include the analysis of the research problems in accordance with the theoretical analysis, principles of laws and the relevant regulation. Further, this chapter describes the results of the research are mentioned

here based on legal theories, legal principles and statutory regulations, and answers to legal issues which are the focus of research in this thesis.

In the last chapter, following the analysis of the research question, a conclusion will be drawn on the research conducted and recommendations on the problems in this study. Conclusions are given based on the results of research on legal issues, recommendations will be put forward based on the issues and the analysis conducted in this research.

