Hurdles to Home: An Analysis of the Principles Underlying Acquisition of Citizenship by Operation of the Law in Malaysia

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Abstract

Statelessness is a social problem that has plagued countries all over the world, stripping people of their fundamental rights to nationality and denying them other rights and benefits enjoyed by citizens of a nation, including access to education and healthcare. This article has two main aims. First, it scrutinises the citizenship law in Malaysia that affects a segment of the stateless population and seeks to analyse whether these laws comply with the underlying principles of jus soli and jus sanguinis. Second, it asks the important question of whether such laws strike an appropriate balance between individual rights and the public interests. At the end of the article, it is argued that the current law is unsatisfactory as it unjustly prejudices the population that can sufficiently demonstrate their link with the country.

Introduction

As cross-border migration and refugee influx occur, a growing number of populations in the world is facing the risk of statelessness – a situation where a person is not a citizen of any nation or state in the world. According to *Art. 1(1) of the Convention Relating to the Status for Stateless Persons 1954*, a stateless person, or otherwise known as a "non-citizen", is defined concisely as one who is "not considered as a national by any State under the operation of its law." Nationality being the legal connection between a nation and an individual, binding the nation to provide protection towards the individuals, and the individual to oblige to laws and regulations within the nation,[1] non-citizens and the deprivation of a nationality can have severe implications to individuals. Social, economic, and cultural rights and benefits including rights to education and healthcare granted to normal citizens would not be available to the

[1] United Nations 2003.

stateless.[2] In Malaysia, statelessness is a concerning social problem. According to UNHCR, there were 108,332 people in the stateless population in Malaysia in 2019,[3] but ironically at the national level, the stateless do not have records kept in the country, thus the number of "statelessness" has always been reported as zero.[4] Traces of the population can still be excavated through citizenship applications that have either been passed, or are pending approval.[5]

Statelessness is commonly associated with migration and transnational movements driven by employment opportunities or societal stability, which explains the support from locals on strict citizenship law to prevent refugees and immigrants from swarming the land. However, as listed in a DHRRA report, several categories of people who had never crossed the borders in Malaysia can also be stateless, including foundlings or children found abandoned locally, indigenous people who had been residing in rural areas and lacked documentation, and children born illegitimate to a Malaysian father or born outside of the Federation to a Malaysian mother.[6] Even though Malaysia has ratified the *Convention on the Rights of Children (CRC)*, reservations are eminent, preventing children of minority ethnic groups, descents with traceable lineage, foundlings or others from acquiring citizenship.

In this article, it is first argued that the principles underlying citizenship law lack consistency and coherence through a close examination on the Federal Constitution and its interpretation in recent cases. Second, it is suggested that the gap between the principles and its application should be closed by reference to the principle of effective link in order to strike the right balance between social and public policy considerations and an individual's right to nationality and justice.

Acquisition of Citizenship in Malaysia

In general, acquisition of citizenship can take place in one of the four ways stipulated in Part III of the Federal Constitution, specifically *Article 14 to 31* and the Second Schedule, which are

[2] David Weissbrodt, Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28(1) *Human Rights Quarterly* 245, 265; Singh R, 'Move to Grant Citizenship to Overseas-Born Children of Malaysian Mothers Lauded' *The Sun Daily* (Petaling Jaya, 2023).
[3] UNHCR, *Global Trends: Forced Displacement in 2019,* pp. 72–75.
[4] Lim I, 'Why Malaysia Has Zero Data on Stateless Persons: Decoding the Official View through Parliament's Lens' *Malay Mail* (Kuala Lumpur, 2023).
[5] Ibid.
[6] Ramalo M and Sinapan SM, 'Report: Statelessness in Malaysia' (DHRRA Malaysia, 2022) <https://dhrramalaysia.org.my/wp-content/uploads/2022/04/STATELESSNESS-IN-MALAYSIA-REPORT-05042022_compressed.pdf> accessed 12 November 2023.

by operation of law[7], registration[8], naturalisation[9], or incorporation of territory[10]. While citizenship by operation of law is automatically granted to a person upon birth if he or she is qualified under any of the five categories listed[11], the other three methods are to be done manually by application to Federal Government upon fulfilling the preconditions. The framework to acquire citizenship stipulated in the Federal Constitution expressly upholds the principles of *jus soli*, "the right of soil," and *jus sanguinis*, "the right of blood."[12] Following the Australian case of *Singh v Commonweath of Australia*[13], the former right places weight for citizenship on the place of birth, while the latter right allows a child to inherit citizenship based on parentage. However, a closer scrutiny on the case law and judicial interpretation of the Federal Constitution reveals a series of inconsistencies in the applications of these principles, especially cases concerning a child with one Malaysian parent.

First, the principle of *jus sanguinis* can be violated due to the gender-specific provisions in the Federal Constitution. According to *Section 1(b)*, Part II of the Second Schedule,[14] a Malaysian mother giving birth to a child outside of the Federation would not be able to confer her nationality to the child.[15] Second, the principle of *jus soli* may also be violated when a child is a foundling born in Malaysia but is not given citizenship under *Section 1(e)*, Part II of the Second Schedule of the Federal Constitution,[16] which is usually invoked where a child has been abandoned after birth in the Federation, or whose parents are unknown or stateless. Similarly, strict interpretation of the Constitution occurred in the case of *Azimah Bt Hamzah v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*[17]. The appeal was dismissed because she could not prove that her parents were stateless and there were traces that could lead to the nation of origin of the parents. When a child is born in Malaysia, following *jus soli*, he or she is deemed to be a citizen of Malaysia, following *s. 1(e),* Second Schedule of the Federal Constitution, as long as he or she is not "born a citizen of any country otherwise." This provision is a failsafe with an intention to catch those being born within the Federation and have not acquired

[7] Art. 14(1)(a) and (b), Federal Constitution.
[8] Art. 15, 15A, 16, 16A, and 18, Federal Constitution.
[9] Art. 19, Federal Constitution.
[10] Art. 22, Federal Constitution.
[11] Section 1, Part II, Second Schedule, Federal Constitution.
[12] See generally, *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 MLJ 308, [29].
[13] [2004] HCA 43; *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717.
[14] Art. 14(1)(b), Federal Constitution.
[15] *Kerajaan Malaysia & Ors v Suriani Kempe & Ors and Another AP* [2022] MLJU 1803.
[16] *Pang Wee See*, (n 12).
[17] [2023] MLJU 99.

citizenship within one year of birth. However, the courts in many cases have interpreted it in a way that requires exhaustion of other possibilities, such as the fact that he or she has a foreign parent, which might well confer citizenship of another country to the child.[18] While this is the reality for children born stateless, the law loosens its gateway for those who have "lived all her life in the Federation"[19] with no intention of registering for citizenship in another country, allowing them to acquire citizenship, on the basis of public interests and their welfare.

Third, an additional hurdle seems to be placed which extended beyond the two principles mentioned—legitimacy of the child. In the case of *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negera & Ors*[20], despite being born in Malaysia (satisfying *jus soli*) and having a Malaysian father (satisfying *jus sanguinis*), the appellant was denied of citizenship due to the fact that he was born out of wedlock and following *Section 17*, Part III, Second Schedule of the Federal Constitution, an illegitimate child will follow the citizenship of his mother. This case has followed the prominent case of *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors*[21]. The child was born out of wedlock outside of the Federation, rendering her an illegitimate child at the time of birth. A subsequent marriage took place five months after birth, which legitimised the child under *Sections 3(1)* and *(4) Legitimacy Act 1961*. However, the Federal Court held that the legitimisation could not reverse the citizenship status of the child which had been determined at the time of birth. Even though the father was a Malaysian citizen, her citizenship followed her Filipino mother by application of *Section 17*.[22] In particular, the majority, led by Rohana Yusuf PCA, decided that one's citizenship is determined at the time of birth and could not be altered by subsequent occurrences, thus enforcing the basic concept that law cannot, and should not, operate retrospectively to amend a birth right.[23]

Despite the unwelcoming outcome of the case, the rationale for the judgement is not unsound. It first relies on the hierarchy of the law. In *CTEB* case itself, Raja Azlan Shah FJ was quoted from *Loh Kooi Choon v Government of Malaysia*[24] on the fact that "the ultimate touchstone of constitutionality" is the Constitution, and not any other principles or Acts outside

[18] See, e.g., *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2015] MLJU 2059, 10–13.
[19] Mary Lim JCA (as her Ladyship then was), *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307, [70].
[20] [2018] 6 MLJ 548.
[21] [2021] 4 MLJ 236.
[22] Part III, Second Schedule of the Federal Constitution.
[23] (n 21), [60].
[24] [1977] 2 MLJ 187.

of it. Reliance on the *Legitimacy Act 1961* was not a good argument because as an Act of Parliament, it could not decide how the courts should construe the Federal Constitution, which is supreme law of the land. It was held that the effect of the 1961 Act should be confined to "the ambit of its operability" and to stretch the interpretation of that act to "supplement the provisions of the Federal Constitution" was deemed a fallacy. Moreover, no mention of citizenship rights was mentioned in the 1961 Act itself. Similarly, in *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)*[25], the adoptive "parent" in *Adoption Act 1952* was not to be understood as "biological" parents, and so *s. 9(1)* of the Act only conferred rights relating to the grant of adoption orders to the adoptive parents. To put it simply, the word "parent" in the Federal Constitution could not extend to adoptive parents to allow the parents to confer citizenship as of right to the adoptive child.

If the stance of *CTEB* was accepted, an earlier case, *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors*[26], would be standing across the arena as the direct opposition. In this case, citizenship was granted despite the parents being married subsequent to the birth of the appellant. It was held that, the fact that the parents were not married at the time of the child's birth did not "alter or diminish their capacities as parents of the appellant." This case was also the sole authority that stood for the determination of legitimacy of a child at the time of application, instead of at the time of birth. It allowed the reading of the Constitution to be altered and widened by *Legitimacy Act 1961* and *Adoption Act 1952*. Specifically, the courts interpreted the broad scope of the word "parents" as capable of being qualified by "lawful", "natural", "biological", "adopted" or even "surrogate", or any other description or adjective. They also held that *Section 17* did not apply because the child has been legitimised. After being overruled in *CTEB*, the liberal approach of the courts in qualifying the word "parents" in the Constitution has not been adopted by later cases.[27]

These interpretations therefore lead to a rather nonsensical series of outcomes to the status of the child – being born in a foreign country, having a Malaysian mother born in a foreign country makes the child less of a Malaysian than having a Malaysian father; the child's status progressively worsens by having one Malaysian parent than being abandoned and having

[25] [2017] (n 12), [22].
[26] [2018] 1 MLJ 307.
[27] See, *Chang Kee Shian v Regional Registrar Births & Deaths, Sabah & Ors* [2023] MLJU 1990.

absolutely no trace of the origin country of the parents. The law seems to only accept two extremes, disregarding and prejudicing against those who fall in between.

Citizenship Law as the Protector of Social Structure?

The existence of these problems begs the question of what the function of citizenship law is and should be. Strict reading of the Constitution has been justified with arguments such as the prevention of floodgates, the non-violation of retrospective law-making by altering a birth right, or the fact that legislative intent stemmed from the *Reid Commission Report 1957*, and the Hansard of the Legitimacy Bill in 1961.[28] The other side of the argument can be found in the dissenting judgement in *Kerajaan Malaysia & Ors v Suriani Kempe & Ors and another appeal*[29]. Nantha Balan JCA, quoting from a commentary, explained that all Constitutions must begin from somewhere in time, and at the time of their creation, they "necessarily reflect the existentialist realities of their time and place,"[30] but it does not mean that the Constitution should stay the same as time moves on and the society changes, as "a good Constitution must hitch itself to the stars; it must be aspirational and must contain seeds of change for a better tomorrow."[31]

From a family law perspective, the current law may be argued as a deterrence to irresponsible family planning that may potentially cause instability and fragility of family relations. In truth, however, lack of responsibility from the parents is not the usual circumstances encountered by illegitimate children in their attempts to obtain citizenship; it is the fact that the mother is stateless, lacking documents, which led to the non-registration of marriage.[32] The mother's statelessness may stem from being a migrant or marrying in a foreign country of which marriage certificate is not accepted or registered in Malaysia. The courts in these cases seem to be oblivious to the dire circumstances that the applicants were placed in and are keen to disregard the principles of *jus soli* and *jus sanguinis* by relying on arguments for Constitution supremacy. The case of *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian,*

[28] *CTEB,* [78].
[29] (n 16), [23].
[30] Ibid.
[31] Emeritus Professor Datus Dr Shad Saleem Faruqi – Case Commentary, (n 15) *Suriani Kempe v Kerajaan Malaysia* [2021] 4 MLJ.
[32] (n 6).

Malaysia[33] referred to *Merdeka University Berhad v Government of Malaysia*[34] and explained that, while the Constitution is not to be construed in a "narrow or pedantic sense", the Constitution is also not to be not stretched "in the interests of any legal or constitutional theory" to supply for omission or the correction of errors. With this, however, it does not sound reasonable to say that, upon adopting the strictest reading, the courts should disregard all general principles that work as guidance in support of the Constitutional text.

Individual Rights, Justice, and the Principle of Effective Links

The arguments posed above effectively undermine the principles of interpretation of the Constitution where an individual right is concerned. In *Dewan Undangan Negeri Kelantan & Anor v Nordin bin salleh & Anor*[35], the right theory of interpretation of the Constitution is said to be the "organic method" that allows the court to interpret the Constitution in a manner that is fit for the "present social conditions." By doing so, the courts would then be able to resolve the issues at hand appropriately without the use of ancient and outdated rules. Similarly, in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*[36], where there are two interpretations available, the court must adopt the one that could ensure the smooth and harmonious working of the Constitution and "eschew the other which would lead to absurdity or give rise to practical inconvenience or well-established provisions of existing law."

From the perspective of the larger society, citizenship law is significant as a building block for the growth and development of the community. Allowing diverse ethnic groups to enter and reside as a citizen in Malaysia can be consequential to the current social structure. While many raises the social security issue, an important factor must be taken into account—the different categories of statelessness. Statelessness may occur in two contexts: migratory, relating to migrants, and *in situ*, relating to people who are "in their own country" and have sufficiently stable and significant (substantial) link with the nation.[37] The law should distinguish between these two contexts and adjust the width of the law accordingly. While the former may require a stricter governance to ensure the welfare of a country in terms of national security and cultural diversity, the latter may have direct connections with a nation that warrants the grant of citizenship. That is to suggest that, as long as one of the principles of *jus soli* and

[33] [2022] 1 MLJ 71.
[34] [1981] 2 MLJ 356, 360.
[35] [1992] 1 MLJ 697, citing *Minister of Home Affairs and Another v Fisher and another* [1979] 3 All ER 21.
[36] [2004] 2 MLJ 257.
[37] Gábor Gyulai, 'Statelessness in the EU Framework for International Protection' (2012) 14(3) European Journal of Migration and Law 279.

jus sanguinis can be proven, citizenship shall be granted, subject to the discretion of the courts on a case-to-case basis. In his article, Liew explained that birth, long-term residence, or birth to a parent with citizenship are all considered important factors that connoted "genuine and effective links with a country."[38] The International Court of Justice in the case of *Liechtenstein v Guatemala (Nottebohm)*[39] applied the doctrine of "effective link", "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[40] Juxtaposed with the Malaysian approach, the principle of effective link is undeniably more flexible and liberal, allowing more discretion for the courts to judge the eligibility of an individual by reference to the wider context and background.

Conclusion

The law on citizenship concerns the fundamental right of a person residing in a country – a matter that can have ripple effects upon the society at large. This thus explains the reluctance of the courts to adopt more lenient rules in fear of floodgates and the disruption of the harmony of the society. The current application of citizenship law in Malaysia can be stringent at times but is not so defective as to require major amendments to the Constitution, other than the need to ensure gender equality, which has already been proposed and pushed forward early 2023[41]. By examining international law, it gives light to the rationale behind the principles of *jus soli* and *jus sanguinis* as factors that determine one's nationality. However, international law can never be more than a guide in the national courts. Ultimately, it is a battle between one's right to nationality and other principles that rein the interpretation of Constitutional texts. Any interpretation of the Constitutional text must stay within its boundaries, and it is up to the courts to decide, in consideration of all the facts and circumstances of a case, whether one's rights, coupled with public interests, can be overriding enough to create an exception.

[38] Jamie Liew, 'Homegrown Statelessness in Malaysia and the Promise of the Principle of Genuine and Effective Links' (2019) 1(1) *Statelessness and Citizenship Review* 95, 98.
[39] Nottebohm (Liechtenstein v Guatemala) (Second Phase) (Judgement) [1955] ICJ Rep 4.
[40] Ibid, 23.
[41] Singh R, 'Move to Grant Citizenship to Overseas-Born Children of Malaysian Mothers Lauded' *The Sun Daily* (Petaling Jaya, 2023).

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