



INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES



Mommy, Am I Malaysian? The Plight of Children Born Overseas to Malaysian Women

Hershan Ray Herman, Muhammad Izwan Ikhsan, Saiful Zizi Jalil, BibianahThomas, Azwan Azhran Perman, Yarina Ahmad

To Link this Article: <http://dx.doi.org/10.6007/IJARBSS/v12-i10/15247> DOI:10.6007/IJARBSS/v12-i10/15247

Received: 19 August 2022, **Revised:** 22 September 2022, **Accepted:** 01 October 2022

Published Online: 20 October 2022

In-Text Citation: (Herman et al., 2022)

To Cite this Article: Herman, H. R., Ikhsan, M. I., Jalil, S. Z., BibianahThomas, Perman, A. A., & Ahmad, Y. (2022). Mommy, Am I Malaysian? The Plight of Children Born Overseas to Malaysian Women. *International Journal of Academic Research in Business and Social Sciences*, 12(10), 2872 – 2886.

Copyright: © 2022 The Author(s)

Published by Human Resource Management Academic Research Society (www.hrmars.com)

This article is published under the Creative Commons Attribution (CC BY 4.0) license. Anyone may reproduce, distribute, translate and create derivative works of this article (for both commercial and non-commercial purposes), subject to full attribution to the original publication and authors. The full terms of this license may be seen at: <http://creativecommons.org/licenses/by/4.0/legalcode>

Vol. 12, No. 10, 2022, Pg. 2872 – 2886

<http://hrmars.com/index.php/pages/detail/IJARBSS>

JOURNAL HOMEPAGE

Full Terms & Conditions of access and use can be found at
<http://hrmars.com/index.php/pages/detail/publication-ethics>



INTERNATIONAL JOURNAL OF ACADEMIC RESEARCH IN BUSINESS & SOCIAL SCIENCES



www.hrmars.com

ISSN: 2222-6990

Mommy, Am I Malaysian? The Plight of Children Born Overseas to Malaysian Women

¹Hershan Ray Herman, ²Muhammad Izwan Ikhsan, ³Saiful Zizi Jalil, ⁴BibianahThomas, ⁵Azwan Azhran Perman, ⁶Yarina Ahmad

^{1,2}Faculty of Law, Universiti Teknologi MARA, Sabah Branch, ^{3,4,5}Faculty of Administrative Science and Policy Studies, Universiti Teknologi MARA, Sabah Branch, ⁶Faculty of Administrative Science and Policy Studies, Universiti Teknologi MARA, Shah Alam, Institute for Biodiversity and Sustainable Development, Universiti Teknologi MARA, Shah Alam
Email: hershanray@uitm.edu.my, izwanikhsan@uitm.edu.my, zizijalil@uitm.edu.my, bibianahthomas@uitm.edu.my, azwan0574@uitm.edu.my, yarina@uitm.edu.my

Abstract

Citizenship is a vital human right, especially to children, as other rights such as livelihood, education, healthcare, and employment depend on whether a person is a citizen or otherwise. Citizenship of children born outside of the country is an issue throughout the world, not just in Malaysia. While many countries, including the United States, the United Kingdom, Australia, and others, have granted equal rights to children born abroad to mothers or fathers who are citizens of those countries, this is not the case in Malaysia. In conducting the qualitative method, this study referred to online databases for judicial decisions and legislations such as the LexisNexis and CLJ, online newspapers, journal articles, textbooks, conference papers, and published theses and dissertation. International law instruments such as the Convention on the Rights of Child and the Convention on the Elimination of All Forms of Discrimination against Women. The major findings of this Article is that Malaysian citizenship law is patriarchal, as children of Malaysian fathers born overseas are entitled to be citizens under the operation of the law. Notably, Malaysian mothers are not entitled to such rights. This article discusses the constitutional provisions on citizenship in Malaysia and the challenges faced by children born overseas to Malaysian mothers with regard to education, healthcare, employment and property ownership. This Article also highlights courts' decisions which show the willingness to recognise gender equality in the citizenship law. This Article employs a qualitative approach by analysing the judicial decisions, statutory provisions and comparative benchmarking with Singapore legal system..This article concludes that the Constitution should be amended to fully recognise the concept of gender equality and acknowledge the right of Malaysian mothers who gave birth overseas to confer citizenship by operation of law on their children. The failure to act fast would lead those children to become stateless. For future research, this study recommends a fieldwork study into the problems faced by children born overseas to Malaysian mothers be conducted to obtain primary data

through interviews and observation with the groups aggrieved by the citizenship laws and policies.

Keywords: Citizenship, Gender Equality, Discrimination, Statelessness, Children Born Overseas

Introduction

Citizenship is an essential aspect of a person's life, including children. It gives the child an identity and a gateway to enjoying other fundamental liberties such as the right to livelihood, education, healthcare, and employment (Soh@Yusoff et al., 2019). International human rights instruments recognise the importance of the right to citizenship. Article 9(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obligates state parties to grant women equal rights to men to the nationality of their children. Meanwhile, Article 7 of the Convention on the Rights of the Child (CRC) requires the state parties to enable a child to be registered immediately after birth and have the right to a name and nationality. The state parties must also ensure the implementation of these rights follows their national law and obligations under the relevant international instruments. Otherwise, the child would be stateless (Leong, 2021).

Despite ratifying both CEDAW and the CRC, Malaysia placed reservations on Article 9 of CEDAW and Article 7 of the CRC. According to the Human Rights Commission's Independent Report to the Committee of CEDAW (2017), the reservation was made due to the contradiction of the Article with the Federal Constitution. Article 14(1)(b) of the Federal Constitution provides that every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State. However, there is no similar provision for a child born overseas to a Malaysian mother but to a foreign father. This clearly shows that Malaysia grants citizenship based on the paternal link. The strict policy on citizenship is due to "security concerns" as it is also a measure to prevent the influx of illegal immigrants who might abuse the process of citizenship acquisition (Bernama, 2011). As for Article 7 of the CRC, the Malaysian government expressed reservation on the said Article due to its incompatibility with the Federal Constitution, national laws, and government policies (Lim, 2019). In the parliamentary answer to an oral question, the Minister of Women, Family, and Community Development, Dato' Seri Rohani Abdul Karim, clarified that the reservation of Article 7 was made due to the government policy where exceptions shall only be granted via application (Parliament, 2015).

Methodology

This Article employs a qualitative approach by analysing the judicial decisions, statutory provisions and comparative benchmarking with Singapore legal system. In conducting the qualitative method, this study referred to online databases for judicial decisions and legislations such as the LexisNexis and CLJ, online newspapers, journal articles, textbooks, conference papers, and published theses and dissertation. International law instruments such as the Convention on the Rights of Child and the Convention on the Elimination of All Forms of Discrimination against Women. Besides, published government reports, statistics, and Hansards of the Parliamentary Debates were also analysed. This study triangulated the data found in the literature, comparative benchmarking and the statistics and reports.

Constitutional Provisions on Citizenship of Children

Part III of the Federal Constitution provides the legislative scheme for citizenship in Malaysia. Essentially, there are four methods to acquire citizenship: by operation of law, registration, naturalisation, and incorporation of new territory to the Federation. Citizenship by operation of law covers "those people who, under the Constitution, are citizens without volition on their part, without a choice in the matter by the government and without oath or (in most cases) formality" (Sheridan & Grove, 1987). Article 14(1)(a) grants citizenship to persons born in the Federation before Malaysia Day. Meanwhile, Article 14(1)(b) confers citizenship rights to every person born on or after Malaysia Day and with any qualifications specified in Part II of the Second Schedule.

Under Part II of the Second Schedule, every person born outside the Federation whose father is at the time of the birth a citizen and who was either born in the Federation or is at the time of the birth in the service of the Federation or of a State is entitled to citizenship by operation of law. There is no similar provision for a child born outside Malaysia whose mother is a citizen. In *Mohamed Sadik bin Mohamed Ali & Anor v Menteri Dalam Negeri & Ors* [2018] 7 MLJ 127, the High Court highlighted that for the application for citizenship under Article 14(1)(b), the applicant must satisfy the following:

- a) The child was born on or after Malaysia Day;
- b) He was born out of the Federation;
- c) At the time of his birth, his father was a Malaysian; and
- d) That his birth is registered at a consulate of the Federation within a year of its occurrence or within such a longer period as the Federal Government may in any particular case allow.

Once the above criteria are fulfilled, there is no discretion to grant or reject such an application. In *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573, the High Court held that the test to be applied is whether a person qualifies all the requirements of Article 14. Once the requisite conditions under these provisions are met, it is automatic that a person is a citizen by operation of law.

Article 14(1)(b), read together with s 1(b) of Part II of the Second Schedule, reflects the application of *jus sanguinis*, where the right of blood requires that the father of the children born outside Malaysia be a citizen at the time of the child's birth. In *Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others* [2007] 8 MLJ 1, the High Court emphasised that the father must have two distinct qualifications. First, the father must be a citizen at the time of the child's birth. Under Article 14(1)(b), this is a primary qualification. The requirement that he must register the birth within one year or such a longer period as the Federal Government may in any particular case allow is secondary and aims to supplement the primary condition. Under exceptional circumstances, Article 15A empowers the Federal Government to grant citizenship to persons under the age of 21 (Faruqi, 2019). Article 15A is generally restricted to the wives and children of citizens. However, the phrase "special circumstances" was not defined by the Constitution. Thus, it is subject to the Federal Government's broad discretion (Abu Backer, 2021).

Equality of Women, CTEB and Suriani Kempe's Case

The Second Schedule does not contain provisions for children born overseas to Malaysian mothers. Instead, it provides for Malaysian fathers only (Wong, 2021). The absence of the constitutional provision for women who give birth overseas to confer citizenship on their

children has attracted severe criticism. First of all, it was argued that the law is patriarchal and discriminatory towards women (Saleh et al., 2021; Faruqi, 2021). Secondly, the inability to be registered as citizens may render the children stateless (Soh et al., 2019). Thirdly, without citizenship, access to other human rights such as education (Loganathan et al., 2022), job opportunities (Duraisingam et al., 2020), and healthcare (Liew, 2021) are severely limited. Besides, the children also face challenges on the right to travel without fear of arrest and prosecution (Allerton, 2017).

The right to non-discrimination is essential to the international human rights system (Ahamat, 2012). The special position of the non-discrimination principle in international human rights law is mentioned in various United Nations human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Political Rights (ICESR) and the Convention on Elimination of Discrimination Against Women (CEDAW). For example, Article 26 of the ICCPR reads:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The principle of equality emphasises the likeness of possessing the same rights, privileges and immunities and being liable to the same duties (Westen, 1982). In Malaysia, Article 8(1) of the Federal Constitution declares that all persons are equal and entitled to equal protection under the law. Further, Article 8(2) outlaws discrimination based on religion, race, descent, place of birth or gender. The word 'gender' was inserted by the Constitution (Amendment) (No. 2) Act 2001, which took effect on September 28 2001 (Jewa et al., 2007). Previously, the Constitution did not expressly address the issue of discrimination on the basis of sex.

The judicial support for gender equality can be seen in *Noorfadilla Ahmad Saikin v Chayed Basirun* [2012] 1 MLJ 832. Here, the High Court held that terminating a temporary teacher because she is pregnant is discriminatory and amounts to a flagrant violation of the equality clause (Musa & Husin, 2019). The High Court acknowledged that the inclusion of gender in Article 8(2) is a step in fulfilling the Malaysian commitment to ratifying the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). In another case, *Chee Kok Choon v Sern Kuan Eng* [2005] 4 MLJ 461, the High Court rejected a male spouse's special position in a family merely because he is the breadwinner. Instead, marriage involves a genuine relationship between the partners. To hold otherwise is "to pay lip service to gender equality".

However, despite the unprecedented progress made to enhance the legal protections accorded to individuals and groups of individuals at the international level against discrimination, discriminatory acts in various forms are still in practice (United Nations, 2003). In Malaysia, one form of discrimination is with respect to citizenship rights which is a constitutionally permissible form of discrimination (Faruqi, 2022). Although General Recommendation 21 of the Committee on the Elimination of All Forms of Discrimination against Women states that nationality is critical to full participation in society and Article 15 (4) of CEDAW states that women must be given the same rights as men in relation to the movement of persons and the freedom to choose their residence and domicile, Articles 14,

15, 24, 26 and Part III of the Federal Constitution discriminate against women in relation to citizenship rights. Emphasis is given to the father's citizenship or residence.

Based on the literal interpretation of Article 14 of the Federal Constitution, any children born outside of Malaysia after independence "whose father is at the time of birth a citizen" are considered citizens by "operation of law". There is no equal provision which gives the same right to a child born outside Malaysia to become a citizen of Malaysia, whose mother is a citizen at the time of birth unless the child is born in Singapore. Instead, for such children to have access to citizenship, they must rely on Article 15 (2) of the Federal Constitution, which allows them to apply for "citizenship by registration" from the Federal Government subject to the discretion of the Federal Government on the approval of the application. This may result in the statelessness of such children, which directly violates Article 7 of the Convention of the Rights of the Child (CRC).

Be that as it may, there seems to be light at the end of the tunnel about Malaysian mothers' rights to pass their Malaysian citizenship to their children who were born outside Malaysia. In the recent High Court case of *Suriani Kempe & Ors. v Kerajaan Malaysia & Ors.* [2021] 8 CLJ 666, the main issue was whether the Federal Constitution gives a Malaysian mother the right to pass her Malaysian citizenship by operation of law to her child who was born outside Malaysia. In the Court's decision, Justice Datuk Akhtar Tahir read the humanising Article 8 of the Federal Constitution on equality to Article 14 of the Federal Constitution and stated that a Malaysian mother has a right to pass her Malaysian citizenship to her child who was born abroad.

In this case, the High Court also addressed the issues of judges' roles and the doctrine of separation of power. The Court upheld that a judge's function is not merely to interpret the law as it is. The Court is duty-bound to uphold justice and constitutional values, however clear the wording of the provisions. On separation of powers, although the defendant invoked that judges should not intervene in policy issues, the Court responded that Malaysia does not comply with the strict application of the doctrine due to the conjoined membership of the Executive and the Legislature. Besides, in applying the doctrine, an independent and impartial judiciary is a prominent feature and to oust the jurisdiction of the Court to check on the Executive would annihilate the doctrine (Faruqi, 2021).

In an earlier case of *CTEB v Ketua Pengarah Pendaftaran Negara, Malaysia* [2021] 4 MLJ 236, in delivering the majority judgement, Rohana Yusuf PCA expressed that the Malaysian citizenship law is riddled with gender bias and the rightful call is for the amendment of the Constitution in order to remove the discrimination. In delivering the dissenting judgement, Tengku Maimun CJ underscored that the right to life under Article 5(1) of the Constitution should be given a prismatic interpretation to include the right to citizenship. Although Article 8(2) expressly allows discrimination on matters pertaining to personal law, religious affairs, protection of aborigines, provision prescribing residence for election, appointment to any authority, or voting in that election, any provision of the State's Constitution being in force before Merdeka Day, and enlistment to the Malay Regiment, any derogation from the fundamental right must be construed narrowly. Article 26B(2) indicates that the Constitution protects people from statelessness as it disallows the government from depriving anyone of citizenship unless it is satisfied that it is not conducive to the public good that he should continue to be a citizen or as a result of the deprivation he would not be a citizen of any country.

The Aftermath of Suriani Kempe's Case

In the aftermath of the High Court's decision in Suriani Kempe's case, the Federal Government appealed to the Court of Appeal. Prior to the appeal being decided by the Court of Appeal, there was a positive development on this matter when the Home Minister, Datuk Seri Hamzah Zainudin, said that steps would be taken to amend the Federal Constitution to allow Malaysian mothers the right to confer automatic citizenship on their children born outside Malaysia. In addition, the National Registration Department has started the process of granting citizenship to the children concerned in Suriani Kempe's case (Yee, 2021).

The Court of Appeal's decision on the dispute was reported in *Mahisha Suhaila Abdul Majeed v Ketua Pengarah Pendaftaran & Ors* [2022] 1 LNS 1754. In a 2-1 split decision, the Court of Appeal overturned the High Court's decision. It held that the word "father" in Article 14(1)(b), Part II Section 1 (b) Second Schedule of the Federal Constitution is so clear that it would not require further explanation or different reading into it by another mode of interpretation. The framers of the Constitution never intended the said provision to include "mother". It is designed that citizenship by operation of the law of children born on or after Malaysia Day must follow the status of the father at the time of birth of the children. Nonetheless, in his dissenting judgement, S Nantha Balan JCA was of the opinion that the wording of Article 14(1)(b) read with s (1)(b) Part II Second Schedule of the Federal Constitution conflicted with Article 8(2) which prohibited gender discrimination. In applying harmonious construction, the word "father" should also include "mother" to give effect to Article 8(2) in interpreting the provision on citizenship rights.

Despite the decision by the Court of Appeal in Mahisha Suhaila's case, Datuk Seri Azalina Othman, Pengerang's Member of Parliament and the Chairman of the Parliamentary Special Select Committee on Women and Children Affairs and Social Development, filed a motion for the tabling of a Private Member's Bill (PMB) in Parliament on September 15, 2022. A PMB is a proposed law submitted by Members of Parliament who are not from the executive branch of government. As such, either a Member of Parliament from the opposition or the ruling party can submit a PMB for as long as he holds no position in the government (Kin, 2019). The purpose of the said PMB is to amend Part II of the Second Schedule of the Federal Constitution, Clause (1) (b), by inserting the words "or mother" after "father" and by adding the word "or mother" after "father" in Clause (1)(c).

In addition, four other Members of Parliament, namely Fuziah Salleh (Pakatan Harapan-Kuantan), Ahmad Fahmi Mohamed Fadzil (PH-Lembah Pantai), Alice Lau (PH-Lanang) and Hannah Yeoh (PH-Segambut) have also submitted similar Bills related to this issue. If amended, the clauses will read as follows (the amendments in BOLD):

Part II

[Article 14(1)(b)]

CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(a) ...

(b) every person born outside the Federation whose father **or mother** is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and

(c) every person born outside the Federation whose father **or mother** is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and ...

However, according to constitutional expert Emeritus Professor Shad Saleem Faruqi, there was no record of PMB ever being passed in the Malaysian Parliament (Thomas, 2021). Thus, the PMB proposed by Datuk Seri Azalina Othman Said may be disregarded by the government unless Parliamentarians support it.

The Legal Development in Singapore

Originally, Article 122(1) of the Constitution of the Republic of Singapore provided that any person born outside Singapore after the Constitution's commencement shall be a citizen of Singapore if his father is a Singapore citizen by birth or registration. However, it requires the birth to be registered at the Registry of Citizens or the Singapore embassy in compliance with the prescribed procedures. This provision emphasises the paternal lineage in granting citizenship to children born overseas in an analogous manner to Malaysia. After its separation from Malaysia, Singapore's citizenship law still mirrored the Malaysian regime, which was heavily influenced by the British Nationality Act (Choo, 2017). The patriarchal system continued to deny the right of Singapore women to acquire citizenship to their children born overseas (Choo, 2017). In Singapore, women do not enjoy the same rights as males when transferring citizenship to their offspring. Children born outside of Singapore born to a Singaporean woman married to a foreigner will not inherit Singapore citizenship (US Department of State, 1983).

In 2004, a remarkable amendment was made to Article 122 of the Singapore Constitution. Based on *jus sanguinis* principle, citizenship is granted if either one's father or mother is a Singapore citizen. The new Article 122(1) maintains that if the person was born before the 2004 amendment, he shall be a citizen if his father is a citizen by birth or registration. However, children born after the 2004 amendment are granted citizenship if their parents are citizens by birth, descent, or registration. Nevertheless, Article 122(2) enumerates several restrictions for children born overseas in acquiring Singapore citizenship. Firstly, the birth must be registered at the Citizens Registry or the respective embassy within one year or any such longer period that the government may allow. Secondly, the child must not acquire citizenship of the country in which he was born. Besides, under Article 122(3), if the child's father or mother is a citizen by descent, the child can only obtain citizenship if the parent has lawfully resided in Singapore for not less than five years before the child's birth or not less

than two out of five years immediately preceding the child's birth. According to the official report of Singapore's parliamentary debates, the Minister of Home Affairs highlighted that the Remaking of Singapore Committee recommended reviewing Article 122 of the Constitution (Parliament Singapore, 2004).

The government recognised that although Singapore is still primarily a patrilineal society, more men and women are leaving the country to work, study, or pursue other personal objectives. As a result, more Singaporean women are getting married to foreigners, and some may even start families abroad. In just over a decade, from 1991 to 2003, the number of foreign-born children grew from about 1,900 to 2,700. The government was aware of this new trend and wanted them to keep their family ties to Singapore. Therefore, the Singapore Government has examined this policy and intends to amend the Constitution to permit Singaporean women to pass citizenship by descent to their children who were born abroad. As a result, citizenship by descent is effectively made gender neutral (Parliament Singapore, 2004). The following table shows the statistics of people granted Citizenship by descent from 2009 to 2020 (National Population and Talent Division, Singapore, 2021)

Table 1

Number of Granted Singapore Citizenship by Descent (2009-2020)

Year	Number of Applicants Given Citizenship by Descent
2009	1,298
2010	1,232
2011	1,450
2012	1,307
2013	1,476
2014	1,345
2015	1,579
2016	1,513
2017	1,573
2018	1,576
2019	1,599
2020	1,344

Singapore is also a State Party to the Convention on the Elimination of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC), reflecting Singapore continuous commitment to rule-based international order. The Singapore government also exercises the right to reserve several provisions in the conventions to modify the obligation to suit and in harmony with Singapore national law. The Singapore government, in their Sixth Periodic Report submitted on November 25, 2021, to the Committee on the Elimination of Discrimination against Women, reiterates that Singapore reserves the right to apply the provisions of article 2, paragraphs (a) to (f), and article 16, paragraphs 1(a), 1(c), 1(h), and article 16, paragraph 2, on the ground that compliance with these provisions would be contrary to their religious or personal laws. Article 2 is CEDAW's Policy Measures provision, whereas article 16 tackles the area of Marriage and Family Life (MSF, 2021). Singapore also maintained reservations to articles 7, 9, 10, 22, 28 and 32 of the CRC (CRC, 2019).

Challenges Faced by Children Born Overseas to Malaysian Mothers

The difficulty Malaysian mothers face in conferring citizenship to their children born overseas may result in the children having statelessness status. There are various adverse consequences once a child is rendered stateless, such as the following:

a. Education

Education is one of the most critical privileges for Malaysian citizens. It allows one to obtain access to the Malaysian educational system easily. Since the Malaysian educational system is administered to young children at an early age, it would enable the children to get used to educational institutions starting from kindergarten and up to higher education (public universities, public educational institutions, and others). Although non-citizens can access schools in Malaysia (Lah, 2018), it does make it harder for them to get the overall benefits such as scholarships and access to higher learning. Since most public universities are giving local students cheaper fees, this would mean those non-local ones will have to pay more. This will affect those students born overseas to Malaysian mothers, making it harder for them to get the proper education they deserve.

As mentioned by Botiza, one of the non-citizen children in Sabah who was born overseas by a Malaysian mother, in The Star article:

"Every year, my mother has to go through a longer process to enrol me in school, and this process is repeated yearly, even though it's for the same school. And although I'm the child of a Malaysian, I'm not eligible to get textbook loans from school... And, this is a very difficult one for me – I don't get selected for any school competitions, especially those organised by the State Education Department." - as cited in Teoh (2022).

According to the Education Act 1996, only citizen children can enrol in government or government-aided schools. Those who are not citizens have to provide minimal documentation, such as a confirmation statement from the *ketua kampung* (village head), to prove that at least one of the parents of the children is a citizen or permanent resident. In some cases where the children have no document to support their application, they have no choice except to opt for private school enrolment. Following that, they are required to submit the application form prescribed in the first schedule, and it is based on availability. At a press conference organised by both the Penang government and Penang Women's Development Corporation (PWDC) in early 2021, Teoh, a mother, shared her story of enrolling her children in an international school despite her intention to enrol her children in a national school. According to her, even though non-citizen children are allowed to enrol in national schools provided that they can provide the required documents, it has to be based on the availability according to the quota, which prolongs the process of enrollment. As a result of these onerous procedures, she was left with no choice except to enrol her children in an international school to prevent them from missing out on education (Ragu, 2021).

Not only that, even though these children are allowed to attend school, they need to pay annual fees amounting to RM 120 for the primary level and RM 240 for the secondary level. Due to this requirement, it will become a burden to those who lack the financial means to pay for their children's school fees (State Economic Planning Unit Sabah & Unicef Malaysia, 2015). As a result, they are being left behind and losing access to education.

b. Healthcare

Citizenship would allow one to enjoy healthcare privileges that come with the public healthcare system. It is a well-known fact that Malaysia has one of the best healthcare systems in the world. Contrary to many countries and private healthcare providers in Malaysia, the payment for medical cases can be deemed unaffordable for many (Loganathan et al., 2020). The steep difference between Malaysian healthcare policies for citizens and non-citizens can be a challenge for those children born overseas to Malaysian mothers if they wish to reside in Malaysia. Therefore, hindering them from healthcare could be life-threatening if they are not treated.

At the individual level, children born overseas to Malaysian mothers will be denied government-subsidised healthcare. The Malaysian government's emphasis was that every child, regardless of nationality, may acquire healthcare at any public health facility (Rahmat et al., 2021). However, children with no nationality are classified as foreigners and charged according to foreign patient rates (Rahmat et al., 2021). Without government subsidies, parents of these children are forced to bear higher fees for medical attention, with admission deposits ranging from RM500 and RM1200 (Free Malaysia Today, 2022). Non-citizens have been charged between 24 to 100 times more than citizens to access public hospital care since January 2016, after the Fees Act (Medical) 1951 was amended for foreigners (The Star, 2020). This especially hit non-citizen children from low-income households the hardest.

Even for those who can cover the medical expenses, some are still subjected to second-class treatment due to social stigma. Many healthcare workers have a skewed view and are less willing to give the best care to them (Taib, 2013; Free Malaysia Today, 2022). At the national level, the government's inability to provide health protection to small segments of the population would pose a direct threat to the public health interest (Baltazar & Cheong, 2021). This is because these children live in the community, and failure to address the health issues would exacerbate the risk of infection within society.

c. *Employment and Property Ownership*

Employment for Malaysian citizens is also a privilege; this can be observed when applying for a job within the Malaysian public service since the public servants require applicants to be Malaysian in their requirements (Public Service Commission, 2022). This requirement limits children born overseas to Malaysian mothers if they wish to work in the public sector. However, non-Malaysians can work in the private sector, which is plausible but may be treated differently from those working with Malaysian citizens. Many companies are also looking for Malaysian citizenship as a requirement to work with them. This led to those without proper identity documentation working in the informal sector. Most stateless people support themselves on daily wages and have no formal contract between them and their employers due to their lack of documentation (Development of Human Resources for Rural Areas Malaysia, 2020). They need to endure labour exploitation and manipulation as they are working without valid permits (International Labour Organisation, 2019).

As regards the citizens' right to acquire property, it is protected under Article 13 of the Constitution. Being a citizen regardless of Bumiputera status makes it easier to obtain property in Malaysia due to the ease of making dealings and agreements. Although a non-citizen can own properties in Malaysia, the prices given to them might be higher than those of citizens, and other processes are required before applying for them (Ismayatim, 2019). This lacuna makes it hard for children born overseas to Malaysian mothers if they wish to buy any property in Malaysia compared to Malaysian citizens.

The Way Forward: Recognition of Gender Equality under Citizenship Law

Courts widely use the concept that "likes should be treated alike" to interpret equality (Westen, 1982). In *Datuk Haji Harun Idris v Public Prosecutor* [1977] 2 MLJ 155, the Federal Court laid several principles concerning equality. Firstly, the equality clause is not absolute. Secondly, the equality provision is qualified, and Parliament is allowed to classify citizens so long as it does not offend the Constitution. Thirdly, the prohibition of unequal treatment applies to both the Legislature and the Executive. Fourthly, the ban applies to both procedural and substantive laws. Fifthly, lawful discrimination may be stipulated by Article 8(2), such as different personal laws for Muslims and non-Muslims. Sixth, the Court should ask whether it is discriminatory or not. If it is not and the rule applies to everyone, it is a good law. However, if it is discriminatory, the Court should see whether the Constitution allows such discrimination. Seventhly, the Court has the power to determine whether the classification is reasonable or not.

It is submitted that the distinct constitutional treatment towards fathers and mothers under the citizenship law reflects the patriarchal traditions. It discriminates against women who choose to marry foreign nationals and give birth overseas. Thus, it is argued that the classification made under Article 14 is grossly unreasonable. With the inclusion of gender equality via Article 8(1) and the express declaration of the High Court in Suraini Kempe's case that the permissible discrimination under Article 8(2) must contain express stipulation "notwithstanding Article 8(1)", children born outside of the Federation to Malaysian mothers should be granted an equal right to nationality the same way as children born overseas to Malaysian fathers. Nonetheless, as rightly addressed by Rohana Yusuf PCA in CTEB's case, it is the duty of the Legislature to amend the Constitution to enable equal treatment for both Malaysian mothers and fathers whose children were born overseas. This is to remove the legal limbo on the status of the children, as Suraini Kempe's case is still awaiting an appeal to the Federal Court. At the High Court level, the rights of Malaysian mothers to confer Citizenship to their children born overseas was upheld. Nevertheless, the Court of Appeal overturned the High Court's decision by applying literal interpretation to the Constitution and looking into the legislative intent of the drafters of the Constitution.

From the decisions of the High Court and Court of Appeal, it is apparent that the Legislature is duty-bound to remove the uncertainties of Malaysian mothers who give birth overseas by tabling an amendment to the Constitution in order to provide equal rights to women in terms of citizenship. The political will of Parliament is needed to recognise gender equality. The inclusion of a prohibition of discrimination based on gender under Article 8(1) is illusory if amendments do not accompany it on other constitutional provisions that contravene the very concept of gender equality. It is submitted that based on Singapore's experience, granting women equal citizenship rights should be the default practise in Malaysia too. The statistics from Singapore indicated no floodgates of applications once the constitutional amendments were enforced. The concern that the proposed amendments would be abused is not founded on any justifiable grounds other than maintaining patriarchal laws. Keeping children born overseas with family ties to Malaysia may also contribute to developing human capital, economy, and social cohesion. For future research, this study recommends a fieldwork study into the problems faced by children born overseas to Malaysian mothers be conducted to obtain primary data through interviews and observation with the groups aggrieved by the citizenship laws and policies

References

- Abu Backer, H. S. (2021). *Janab's Key to Federal Constitution, Oath of Office, Rule of Law and Judicial Review with Public and Private International Law*. Kuala Lumpur: Janab.
- Ahamat, H. (2012). The Right to Equality and Non-Discrimination'. In *Human Rights Law: International, Malaysian and Islamic Perspectives*, Sweet & Maxwell Asia, Abdul Ghafur Hamid (ed.), Petaling Jaya,, pp. 123-140.
- Allerton, C. (2017). Contested statelessness in Sabah, Malaysia: Irregularity and the politics of recognition. *Journal of Immigrant & Refugee Studies*, 15(3), 250-268, DOI: 10.1080/15562948.2017.1283457
- Baltazar, M. A., & Cheong, A. R. (2021). Reaching stateless, undocumented and migrant communities during the COVID-19 pandemic: Lessons from the grassroots humanitarian effort in Sabah, Malaysia. *The Statelessness & Citizenship Review*, 3(1),131–141.
- Bernamea. (2011). *Syarat kewarganegaraan tidak dilonggar*. (Citizenship requirements are not relaxed). Retrieved from <https://www.malaysiakini.com/news/159445>
- Che Lah, F. (2018). Pendidikan untuk semua. (Education for all). *Harian Metro*. Retrieved from <https://www.hmetro.com.my/nuansa/2018/06/351664/pendidikan-untuk-semua>
- Che Soh @ Yusoff, R. C. S., Afandi, N. H. M. B., Hashim, N. M., & Hak, N. A. (2019). protecting the children's right to nationality in Malaysia: An appraisal. *International Journal of Academic Research Business and Social Sciences*, 9(6), 358–368.
- Choo, C. L. (2017). *Report on Citizenship Law: Malaysia and Singapore*. Global CIT.
- Committee on the Rights of the Child (CRC). (2019). Concluding observations on the combined fourth and fifth periodic reports of Singapore. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/194/42/PDF/G1919442.pdf?OpenElement>
- CTEB v Ketua Pengarah Pendaftaran Negara, Malaysia* [2021] 4 MLJ 236
- Development of Human Resources for Rural Areas. (2020). The Impact of COVID19 on Stateless Persons in Malaysia. Retrieved from <https://equalnationalityrights.org/images/zdocs/DHRRRA---The-Impact-of-COVID-19-on-Stateless-People-in-Malaysia--12th-April-2020.pdf>
- Duraisingam, T. J., Tee Say, K., & Muniandy, S. (2020). Rule of law, stateless Indians and employment rights. *UUM Journal of Legal Studies*, 11(1), 51-73. Education Act 1996 (Malaysia).
- Faruqi, S. S. (2019). *Our Constitution*. Subang Jaya: Thomson Reuters, p. 121.
- Faruqi, S. S. (2021). Case Commentary on Suriani Kempe v Kerajaan Malaysia [2021] 4 MLJ cxlix
- Faruqi, S. S. (2022) Women's rights: Progress or regress? *The Star*. Retrieved from <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2022/03/10/womens-rights-progress-or-regress>
- Free Malaysia Today. (2022). Make a law to guarantee healthcare for all children, says doctor. <https://www.freemalaysiatoday.com/category/nation/2022/02/12/make-a-law-to-guarantee-healthcare-for-all-children-says-doctor/>
- Internal Labour Organisation. (2019). *Situation and gap analysis on Malaysian legislation, policies and programmes, and the ILO Forced Labour Convention and Protocol*. ILO.
- Ismayatim, W. F. (2019). KPKT teliti mekanisme pemilikan rumah warga asing. (Ministry of Housing and Local Government scrutinizes home ownership for foreigners). *Berita Harian Online*. <https://www.bharian.com.my/berita/nasional/2019/09/606122/kpkt-teliti-mekanisme-pemilikan-rumah-warga-asing>

- Jewa, T. S., Buang, S., & Merican, Y. H. (2007). *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia*. 3rd edn. Petaling Jaya: Pacifica Publications, p. 259.
- Kin, K. C. (2019). *The Value of Private Member's Bills in Parliament: A Process Comparison between Malaysia and the United Kingdom*. Retrieved from Penang Institute Issues: <https://penanginstitute.org/publications/issues/the-value-of-private-members-bills-in-parliament-a-process-comparison-between-malaysia-and-the-united-kingdom/>
- Leong, T. K. (2021). Tanah tumpahnya darahku: The 'genuine and effective link' in establishing Malaysian Citizenship. *Statelessness & Citizenship Review*, 13(2), 309-329.
- Liew, J. (2021). Statelessness and COVID-19: An introduction. *Statelessness & Citizenship Review*, 3(1), 120-122.
- Lim, I. (2019). Unicef: Malaysia must go beyond discretionary citizenship approvals for stateless children. *Malay Mail*. Retrieved from <https://www.malaymail.com/news/malaysia/2019/02/14/unicef-malaysia-must-go-beyond-discretionary-citizenship-approvals-for-stat/1723095>
- Loganathan, T., Chan, Z. X., & Pocock, N. S. (2020). Healthcare financing and social protection policies for migrant workers in Malaysia. *PLoS ONE*, 15(12). <https://doi.org/10.1371/journal.pone.0243629>
- Mahisha Suhaila Abdul Majeed v Ketua Pengarah Pendaftaran & Ors* [2022] 1 LNS 1754
- Ministry of Social and Family Development (MSF). (2021). *Sixth periodic report submitted by Singapore under article 18 of the Convention, due in 2021*. <https://www.msf.gov.sg/policies/Women-Celebrating-Women/International-Obligations/Documents/Singapore%20Sixth%20CEDAW%20Periodic%20Report.pdf>
- Musa, N., & Husin, A. (2019). Towards gender equality in Malaysia: Legal and policy perspectives. https://www.researchgate.net/publication/332751792_towards_gender_equality_in_malaysia_legal_and_policy_perspectives
- National Population and Talent Division, Strategy Group, Prime Minister's Office, Singapore. (2021). *Population in Brief 2021*. Prime Minister's Office, Singapore.
- Salah, N. S. S., Abdul Shukor, S., & Ismail, W. A. F. (2021). Equality and Citizenship for women in Malaysia: Where and when?. *Malaysian Journal of Syariah and Law*, 9(1), 103-113.
- Noorfadilla Ahmad Saikin v Chayed Basirun* [2012] 1 MLJ 832
- Parliament, Malaysia. (2015). Pemberitahuan Pertanyaan Bagi Jawapan Lisan Mesyuarat Ketiga. Penggal Ketiga. Parlimen Ketiga Belas, Majlis Mesyuarat Dewan Rakyat. (Notification of Questions for Oral Answers of the Third Meeting. Third Term. Thirteenth Parliament, House of Representatives Meeting). Retrieved from <https://pardocs.sinarproject.org/documents/2015-october-november-parliamentary-session/oral-questions-soalan-lisan/2015-11-02-parliamentary-replies/soalan-12.pdf>
- Parliament, Singapore (2004). Official Reports of Parliamentary Debates, Tenth Parliament, Session 1, Volume 77, Session 9. Retrieved from <https://sprs.parl.gov.sg/search/report?sittingdate=12-03-2004>
- Public Service Commission. (2022). Pendaftaran. SPA. Retrieved from spa.gov.my/spa/soalan-lazim/versi-bahasa-melayu/pendaftaran-bm
- Ragu, D. (2021). We've been suffering for too long, say mums in citizenship rights quest. *Free Malaysia Today*. <https://www.freemalaysiatoday.com/category/nation/2021/10/08/weve-been-suffering-for-too-long-say-mums-in-citizenship-rights-quest/>

- Rahmat, N. E., Randawar, D. K., Jayabalan, S., Razak, M. U. A., & Azmi, I. I. (2021). Revisiting the laws and policies related to educational rights of stateless children in Malaysia. *International Journal of Academic Research in Progressive Education and Development*, 10(3), 1174–1184.
- Sheridan, L. A., & Groves, H. E. (1987). *The Constitution of Malaysia*. 4th edn. Malayan Law Journal Pte Ltd.
- State Economic Planning Unit Sabah & Unicef Malaysia. (2015). *Children In Sabah Situation Analysis*.
- Taib, F. (2013). Invisible, vulnerable and marginalised children in Malaysia. *Malaysian Journal of Paediatrics and Child Health*, 19, 1-5.
- Teoh, M. (2022). A right to belong in Malaysia. *The Star*. Retrieved from <https://www.thestar.com.my/lifestyle/family/2022/01/14/a-right-to-belong-in-malaysia>
- The Star (2020). Proposing a Non-Citizen Health Act for Malaysia. *The Star*. Retrieved from <https://www.thestar.com.my/opinion/letters/2020/01/11/proposing-a-non-citizens-health-act-for-malaysi>
- Thomas, J. (2021). Encourage Private Member's Bills, says constitutional expert. *Free Malaysia Today*. <https://www.freemalaysiatoday.com/category/nation/2021/09/07/encourage-private-members-bills-says-constitutional-expert/>
- United Nations. (2003). World Youth Report 2003. United Nations.
- US Department of State. (1983). *Singapore: Annual Human Rights Reports*. US Department of State.
- Westen, P. (1982). The empty idea of equality. *Harvard Law Review*, 95(3), 537–596, <https://doi.org/10.2307/1340593> at 537.
- Wong, J. (2021). High Court recognises the right to Citizenship of children born overseas to Malaysian mothers. Retrieved from <https://mahwengkwai.com/right-to-citizenship-children-born-overseas-malaysian-mothers/>
- Yee, X. Y. (2021). A happy day for three mums. *The Star*. Retrieved from <https://www.thestar.com.my/news/nation/2021/12/30/a-happy-day-for-three-mums>