

Citizenship Rights in Malaysia: A Constitutional Reform

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ABSTRACT

This paper discusses the law in obtaining citizenship for children in Malaysia. This paper would highlight the relevant laws about citizenship and the problems that lie in our law, arising from the current issues faced by the citizens. It mainly revolves around citizenship by operation of law by virtue of Article 14 of Malaysian Federal Constitution. Two case study is the main pillar of this paper. First, the recent Federal Court decision on illegitimate children born to non-Malaysian mothers. This case dealt with so many interpretations of the provision of the Federal Constitution. Main provision that is disputed between majority and minority judgment is the use of Section 17 Second Schedule, Part III. Second, the issue of children that are born overseas to a non-Malaysian father. This is an on-going High Court suit filed by an NGO (Family Frontiers) and six mothers to seek a declaration that Malaysian women married to foreigners have the right under the Federal Constitution by declaring Article 14(1)(b) read with the Second Schedule, Part II, Section 1(b) of the Federal Constitution is discriminatory and is against the spirit of Article 8 of the FC that prohibits discrimination on the grounds of gender. To tackle the legal problems and discriminations faced by children and Malaysian mothers, this paper would address some aspect of the decision that needs to be reviewed and improved. Towards the end of this discussion, the authors suggest relevant constitutional amendments on Malaysian Federal Constitution in order to protect the rights and welfare of the children as well as to eliminate gender discrimination faced by Malaysian mothers.

Keywords: citizenship; nationality; legitimacy; Malaysian family law; discrimination; gender-bias.

INTRODUCTION

Nationality indicates the legal connection between a person and state. It does not only provide protection and security but also creates a sense of acceptance between individuals and state (United Nations 2003). It is natural for any human being to have the feeling of needing to be affiliated and be accepted by a group of people and the concept of nationality and citizenship offers that. The formation of the Federation of Malaysia has developed the concept of citizenship law and it even

existed before the independence period. Previously, the nine Malay States including Penang and Malacca which were colonized by British had formed the Federation of Malaya. Hence, the idea of citizenship previously consisted of two types: British and the nine Malay States nationality. Nevertheless, such segregated citizenship has changed and merged into a single citizenship namely, federal citizenship under the Malaysian constitution (Choo Chin Low 2017).

In the context of the right to citizenship, it is mentioned in Part III of the Malaysian constitution ranging from Article 14 to 31 and Second Schedule of

the Constitution. One of the ways to acquire citizenship is by operation of law. This is the highlight of our paper where the discussion would mainly revolve around citizenship by operation of law. Specifically, the issue of obtaining citizenship by operation of law for children in Malaysia. Our Federal Constitutions amalgamated the two guiding principles in determining citizenship of a person namely jus soli and jus sanguinis. Jus soli or “right of the soil” means that citizenship is determined by the birthplace of a person. Jus sanguinis or “right of blood” means that citizenship follows one or both parents who are citizens of a state (Nor Hafizah Mohd Badrol Afandi 2020).

There are two case studies which would be the key discussion of this paper. First, in regard to the recent Federal Court case of *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236. Secondly, an on-going suit at High Court of, *Suriani Kempe & 6 Others and Government of Malaysia*. This is the first case filed against the government with the intention to give equal rights to Malaysian mothers and fathers to confer citizenship to their children who are born overseas. In this case, the parties seek the court to declare that Malaysian women with foreigner spouses have the constitutional right under the Federal Constitution for their overseas-born children to have the right to be Malaysian citizens. Both of these case studies would underline the key problems faced by the children to acquire citizenship in Malaysia. The former is in relation to children who are born illegitimate to a non-Malaysian mother. The latter concerns children that are born overseas to a non-Malaysian father.

THE LAW

Federal Constitution

Law regarding citizenship has been regulated by the parliament in the Federal Constitution. There are four categories of citizenship under the Federal Constitution as stipulated between Article 14 to Article 22 of the Federal Constitution. The methods in acquiring Malaysian citizens are by operation of law, registration, naturalisation, and incorporation of territory. Among these methods, only citizenship by registration, naturalisation and incorporation of territory require application from the authorities through application to the Federal Government. Meanwhile, citizenship through the operation of law will be automatically acquired provided the conditions and criteria set out in the second schedule have been fulfilled (Chen 2003).

Citizenship by operation of law is governed under Article 14 and can be distinguished into two categories namely a person who was born before and on or after Malaysia Day on 16th of September 1963 following the qualifications specified in Part I and II of the Second Schedule respectively as stated by Chen (2003). However, the type that is to be highlighted in this writing is the latter. There are few requisite qualifications laid down specifically in Part II of Second Schedule in order to be categorized as citizenship under the operation of law on or after Malaysia Day. Part II of Second Schedule had listed 5 different situations, from Section 1(a) to (e) in qualifying a person as citizenship.

Part III of the Federal Constitution laid down the supplementary conditions to fill the loophole or gap in Part I and II of Second Schedule. Section 17 of Part III is one of the sections that governs

legitimacy of a child. In the case of *Lew Yee Hong @ Liew Yee Hong & Anor v Ketua Setiausaha, Kementerian Dalam & Ors* [2020] 8 MLJ 62, in relation to illegitimate children, Section 17 Part III Second Schedule can be interpreted as below.

“Interpretation

17. For the purposes of Part III of this Constitution references to a person’s father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person.”

Such section is applicable by virtue of Article 31 since it gives the authority to the application of supplementary provisions in Part III of second schedule. This can be seen in Article 31 of the Federal Constitution where.

“Application of Second Schedule:

31. Until parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.”

Section 17 provides the circumstances when a person was born illegitimately and is related to the person’s father or parent or to one of his parents referred in Part III of the Federal Constitution is to be construed to refer to the person’s mother.

Legitimacy Act 1961

Legitimacy Act 1961 is a Malaysian law that highlights the regulation revolving

around the legitimate children only. Under the Common Law, the law regulated that an illegitimate child would become legitimate once the biological parents are married at the time of birth (Meerah Deiwi Raja Gopal 2015). However, Section 3(1) and 4 of Legitimacy Act 1961 says a subsequent marriage of biological parents will legitimize an illegitimate child who was born out of wedlock provided such marriage is registered as stated by Meerah Deiwi Raja Gopal (2015). However, the question arises on how many days, months or years that legitimize the child after the subsequent marriage. Referring to Section 9 of Legitimacy Act 1961, it provides the legal rights of legitimate children that are equal to a legitimate person which include the right of maintenance and support, claim for damages, compensation, allowance, and benefit.

CASE STUDY

CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236, Federal Court

Facts & Decision of the case

The fact of the case is that the child was born in the Philippines. The child was born to parents where the father is a Malaysian citizen, and the mother is a citizen of the Philippines. Four months after the child’s birth, the child’s parents subsequently registered the marriage in Malaysia.

The issue is whether an illegitimate child born outside Malaysia, to a Malaysian biological father and a Filipino mother is entitled to become a citizen by operation of law pursuant to Article 14 of the Federal Constitution.

The majority decision of 4:3 was delivered by Tan Sri Rohana Yusuf. The majority decided that the child's citizenship follows the mother and not the father. To acquire citizenship by operation of law, it must be determined at the birth of the child. Also, pursuant to Section 17 Part III Second Schedule of Federal Constitution, it provides that when it comes to an illegitimate child, the citizenship follows the mother.

The minority led by Tengku Maimun Tuan Mat decided that Section 17 Part III Second Schedule of the Federal Constitution did not impose any additional conditions to Section 1(b) of Second Schedule. They view that in interpreting Section 14(1)(b) and Section 1(b) Part II 2nd schedule, there should be no reliance on Section 17 of Part III Second Schedule. Section 17 only applies when the identity of the father is unknown, or the child has no father.

The Commentary

The outcome of this decision has a significant impact on children who were born illegitimate to non-Malaysian mothers. The child is stuck with the effect of the constitution. The majority has taken the word of the constitution literally. It is indeed discriminatory against parents and illegitimate children who have the right of blood to be a citizen. It goes against the basic principle of citizenship 'jus sanguinis, right of the blood.

On the other hand, the minority has relied on the Working *Party of the Constitution of the Federation of Malaya 1957 in CO 941/86, its comments on Section 7(3), later become Section 17 of Part III*. The reasoning behind the inclusion of Section 17 is to provide for a situation where a child born outside of federation and identity of father was

unknown, the mother is sufficient to confer citizenship on that person. It was not meant to impose additional conditions on Section 1(b) Part II Second Schedule. The honourable judge also said, it is meant to supplement to fill up any lacunae in law. It is important to look at the intention of the drafter and their intention have never been to impose any additional requirement of a child being legitimate before the child can obtain or inherit citizenship. So, Section 17 only acts as an enabling provision to prevent the children being stateless. In fact, the header of Part III describes the entire part as 'Supplementary Provisions Relating to Citizenship'. Hence, it only assists the interpretation of Part I and II.

The case of *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307, must be given due consideration. The Court of Appeal decided that in the case of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the FC, citizenship by operation of law is anchored on elements of both concepts of jus soli and of jus sanguinis. Citizenship is claimed by virtue of these two rights, right of being born in the territory of Malaysia and by right of one or both parents who are themselves, citizens of Malaysia. Since it was an admitted fact that the first respondent was the biological father and parent of the appellant, and as a citizen of Malaysia at the time of the appellant's birth, the terms of art 14(1)(b) read with s 1(a) of Part II, Second Schedule were met. The fact that the appellant's biological parents were not married to each other at the time of the appellant's birth did not alter or diminish their capacities as parents of the appellant. Their marriage was properly solemnised and recognised under s 3 of the Legitimacy Act 1961 ('the Act'). As a

legitimate person, the appellant was entitled to rely on her father's citizenship.

The case above illustrates that a child that is born illegitimate that is subsequently legitimised has the locus to acquire citizenship where one of their parents is the citizen of Malaysia. However, this was not applied in the *CTEB*'s case. Legitimacy is something that the child cannot control. The effect of the constitution may bring absurdity and in this case absurdity in getting citizenship for a child whose one of their parents is Malaysian citizen. As said by YAA Nallini Pathmanathan (minority judgment), there must be an express provision or wordings on legitimacy if to impose legitimacy as a requirement for citizenship. In fact, it was inferred from Chapter 3 of the Draft Constitution that is equivalent to Art 31 of the Federal Constitution, Part III only functions to determine questions relating to citizenship not to modify or place additional conditions. Chief Justice Tengku Maimun also define the heading of Part III 'Supplementary' which serve as an aid to assist in the interpretation of Part I and II.

The decision in *CTEB* also discriminates against the parents. The father's existence is deemed to be ignored though he is a citizen of Malaysia. This clearly discriminates against the father where he has the right of the blood to inherit his citizenship to his child through *jus sanguinis* principle which is incorporated in Section 1(b) of Part II Second Schedule.

Suriani Kempe & 6 Others and Government of Malaysia (On-going suit at High Court)

Malaysia is one of the 25 countries in the world that denies men and women the equal right to confer nationality on their

children. Currently, children who are given birth by Malaysian women with non-citizen spouses are unable to acquire Malaysian citizenship by 'operation of law'. In contrast, Malaysian men have the privilege to register their children who are born overseas. However, the inequality arose when Malaysian women must make efforts to apply for their children's citizenship. Moreover, the application made the women often wait for years for an approval with the possibility of rejection without explanation. It can be concluded that gender discrimination in this specific issue is one of the factors that causes the increasing amount of statelessness in Malaysia.

Several case studies have exposed the inequality that Malaysian mothers have to encounter. As for the case of Temily Tianmay (2020), she reported that she was not qualified to automatically register her son's citizenship at the Malaysian Consulate in Hong Kong due to her gender. Hence, alternatively she needs to apply for an opaque application to ensure the right of citizenship could be granted to her son. In fact, according to her, the officer in charge stated that applications made by Malaysian mothers from 10 years ago are still pending until recently. This is one of the hassles that Malaysian mothers had to deal with, as compared to Malaysian fathers whose rights have been guaranteed.

The second evidence has been emphasized by Zaharah Othman (2020). Most of the time the application process is burdened with unreasonable delays. She further stated, "the process is fraught with delays and most of the time, there is no joy after waiting for almost two years. A mother who was lucky to secure citizenship for one child after two years of waiting, had the application for another child rejected. No explanation was given."

According to Zaharah, the available solution for this issue is that these mothers would return to Malaysia and give birth here, as they will be able to register their children. However, given the fact that we are living in a global pandemic, that solution is not practical. In fact, COVID-19 has multiplied the hassle (2020). When a mother had to return to Malaysia for emergency visits, or even due to a divorce, they had to take the unsettling risk that their non-Malaysian children might not be able to stay throughout the same period as them. This is because their children had not been granted Malaysian citizenship.

Therefore, due to arising number of cases, a lawsuit has been filed against the Government in December 2020.¹ The suit was filed by an NGO (Family Frontiers) and six mothers to seek a declaration that Malaysian women married to foreigners have the right under the Federal Constitution for their overseas-born children to have the right to be Malaysian citizens. In this current case, an originating summons was filed at the Kuala Lumpur High Court by the President of Family Frontiers, Suriani Kempe. The originating summons was filed to obtain a declaration that Article 14(1)(b) read with the Second Schedule, Part II, Section 1(b) of the Federal Constitution is discriminatory and is against the spirit of Article 8 of the FC that prohibits discrimination on the grounds of gender. Moreover, they emphasized a declaration that overseas-born children of Malaysian women should be granted the right to citizenship. They also want a declaration that the children of these mothers should be granted the right to citizenship and want the court to order all government agencies to issue citizenship documents, identity cards and passports, to all children born outside

Malaysia whose mothers are Malaysian citizens. This case is relevant as it will set a precedent that upholds the principles of equality and international conventions to which Malaysia is a signatory. The lawyer who represents the case, Dato' Dr. Gurdial Singh Nijar highlighted that the Federal Constitution's Second Schedule explicitly provides for automatic Malaysian citizenship to children born overseas to Malaysian fathers, however it is not the case for Malaysian mothers. The constitution did not expressly state the same, and it cannot pass on automatic Malaysian citizenship to their children born abroad.

According to Gurdial Singh Nijar (2020), he opined that there are few angles that can be identified when interpreting the constitution. By identifying these angles, the constitutional amendments could be justified. Firstly, the guiding principle when interpreting the constitution is the principle of giving full recognition and effect to fundamental rights and freedoms. This has been deliberated by Lord President Raja Azlan Shah in *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi Syed Idrus* [1981] 1 MLJ 29. Secondly, we must interpret guaranteed fundamental rights generously. As cited in *Lee Kwon Woh v PP* [2009] 5 MLJ 301, courts must interpret constitutional provisions conferring rights "with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford". Third, our courts give priority to the fundamental rights provision over other provisions. In the case of *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, the court mentioned that "When interpreting other parts of the Constitution, the court must bear in mind all the providing provision of article 8(1)" – the

“humanising and all-pervading provision”: Moreover, Article 8 can be found in the “fundamental liberties” part of the Constitution, in contrary to the citizenship provision. Finally, the provisions of the Constitution should be interpreted to accord with our international obligations since Malaysia has ratified the Convention on the Rights of a Child (CRC), and the Convention on the Elimination of all Form of Discrimination against Women (CEDAW).

In short, constitutional reform must be led by the policy makers to discriminate against gender bias and to empower equal rights to Malaysian mothers and fathers. Malaysia should follow Indonesia that had reformed its nationality law to uphold comprehensive gender equality (Susi Dwi Harijanti 2017).

CONSTITUTIONAL INTERPRETATION

Since the crux of our paper concerning the law regarding citizenship contained in the Federal Constitution, it is vital to know how the constitution shall be interpreted. It was laid down in the Supreme Court case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 citing the Privy Council’s decision in *Minister of Home Affairs and Another v Fisher and another* [1979] 3 All ER 21, that a constitution based on the Westminster model must not be treated as if it were an Act of Parliament and that ‘a constitution should be construed with less rigidity and more generosity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect

must be paid to the language which has been used.

It was also decided in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 that the constitution must be interpreted in light of its historical and philosophical context as to fully appreciate the reason why certain provision were drafted and included in our Federal Constitution. The above cases illustrate the importance of interpreting the constitution harmoniously by looking at the whole provisions relating to citizenship.

RECOMMENDATIONS

The Federal Constitution is a living document, and it needs to be treated in accordance with the development of the law and society. It is not cast in stone. Amendments were made to the Federal Constitution and they will continue to be made in the future.²

There are few amendments that need to be made. First, it is contained in Part II of the Second Schedule of the Federal Constitution which is by substituting the word ‘father’ with ‘parent’. This would promote the spirit and objective of Article 8(2) which is to eliminate discrimination based on gender. In fact, the right to citizenship comprises the right to liberty as enshrined in Article 5(1) which includes right to nationality.

Second, to repeal or amend Section 17 Part III of the Second Schedule of the Federal Constitution (Anon 2021). Though this provision is supplementary in nature, it is interpreted literally as to deny the citizenship of children who were illegitimate. The wording of Section 17 is drafted in the present tense and it is the current status of the legitimacy or illegitimacy of the children. So, the child

is known as a child born out of wedlock. But she is no longer illegitimate by reason of legitimation by the subsequent marriage of the parents. But there will be a problem for Muslim child that cannot be legitimised. So here we need to adopt the view of YAA Nallini Pathmanathan in the case of *CTEB*, where to not make legitimacy as a requirement for citizenship by operation of law. Thus, with these amendments, there would be no distinction between legitimate and illegitimate children. The refusal to grant citizenship to children by virtue of father's nationality creates a gender-bias situation that will affect the child badly (Mah & Wong 2021). The child did not ask or choose to be born as an illegitimate person.

Third, to amend Article 14 and Schedule II of the Federal Constitution in order to allow the children born overseas to Malaysian mothers to acquire their citizenship by operation of law.

CONCLUSION

The concept of citizenship or nationality has raised concern and trouble especially to the non- Malaysian born parents. This is because any child without citizenship is similar to a person living without an identity and statelessness. It may impact one's life in various aspects including their education, employment, voting rights and others as stated by Chen (2003).

It is a civil right that every child has a right to a nationality once they are born. The child is entitled to other rights once they have registered their birth and the state has a duty to respect such rights and in overseeing the laws that protect children's rights. The rights accorded are pertinent to the protection of fundamental rights enshrined in our Federal Constitution. In the absence of citizenship,

it will deprive the development and enjoyment of childhood (Roslina et al 2019). One of the purposes of granting nationality and citizenship to children is to ensure their welfare since the idea of disunion between parents and child may disturb their well-being. In the case of *Minister of Home Affairs v Fisher* [1980] AC 319, Lord Wilberforce stated that:

In their Lordship's opinion, in its context amounts to a clear recognition of the unity of the family as a group and acceptance of the principle that young children should not be separated from a group which as a whole belongs to Bermuda.

NOTES

¹ Suriani Kempe & 6 others and Government of Malaysia (on going suit at High Court).

² Mat Shuhaimi bin Shafie v Public Prosecutor [2014] 2 MLJ 145.

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