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Legal and Social Issues of Stateless Children in Malaysia

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ABSTRACT

Malaysia does not have official records on the number of stateless people in the country. This lack of proactivity makes it challenging to identify the number of stateless people from the country's population of 'non-citizens'. For many stateless children, they are the products of this endless cycle of statelessness that transmits from one generation to the next especially when attempts to obtain a Malaysian citizenship from the National Registration Department fall futile. Though statelessness remains their only identity, it has also robbed them of State protection over the most fundamental human rights. This paper seeks to address the legal and social issues faced by stateless children in Malaysia. It begins by exploring the legal definition of a stateless child and the international minimum standard of protection that they are entitled to. The second part of the paper will then analyse the current Malaysian legal framework on statelessness, and how it fails to provide adequate protection for stateless children. This is followed by proposing potential solutions to the issue, such as amending the relevant laws and introducing awareness campaigns. Finally, the paper will conclude by outlining the importance of addressing statelessness in Malaysia and how this will benefit the stateless population.

Keywords: Children's fundamental rights, Gender discriminatory laws, Legal and social issues, Malaysian citizenship, Stateless children

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1. Introduction

Statelessness is a phenomenon that can happen to any person of any class and social status. A person can *become* stateless, or under different circumstances be *born* stateless. According to data collected by the non-government organisation (NGO) Development of Human Resources for Rural Areas (DHRRA) in Peninsular Malaysia from 2016 to June 2023, childhood statelessness makes up the biggest proportion of registered stateless cases (8,223 out of 9,392 persons).¹² This number comprises of children who were born out of wedlock in Malaysia to Malaysian fathers but non-Malaysian mothers, and children who have been adopted by Malaysian parents.³ The 'stateless' tag has been affixed to these children the moment they are denied of a birth certificate from the National Registration Department (NRD), despite being born in the country.⁴

As part of the Association of Southeast Asian Nations (ASEAN), Malaysia has experienced a growing number of stateless individuals as reflected in *Table 1* below. In 2016, a written Parliamentary response stated that there were 290,437 children who were born in Malaysia (including Sabah and Sarawak), but do not possess a Malaysian citizenship.⁵ This figure almost doubled in 2018 when the United Nations High Commissioner for Refugees (UNHCR) reported an approximate number of 450,000 stateless persons residing just in Sabah alone.⁶ Fast forward to 2021, it was estimated that there were 995,400 non-citizens in Sabah which represented more than a quarter of the state's population.⁷ Within this number, there were some 250,000 stateless youth of Filipino and Indonesian descent.⁸ The latest statistics report released by the Department of Statistics Malaysia in July 2022 showed an

¹ Ida Lim, 'Counting Malaysia' 'Invisible' People: How Many Born Here Cannot be Citizens Despite Their Local Roots' (*Malay Mail* (Kuala Lumpur, 10 July 2023) <<https://www.malaymail.com/news/malaysia/2023/07/10/counting-malysias-invisible-people-how-many-born-here-cannot-be-citizens-despite-their-local-roots/78296>>.

² 'Registered stateless cases' refers to applications that have been verified by DHRRA to be individuals who have ties to Malaysia (ie being born in the country) but who are genuinely stateless.

³ Lim, (n 1).

⁴ Development of Human Resources for Rural Areas, Malaysia, 'Report: Statelessness in Malaysia' <https://dhrmalaysia.org.my/wp-content/uploads/2022/04/STATELESSNESS-IN-MALAYSIA-REPORT-05042022_compressed.pdf>.

⁵ Nik Imran Abdullah, 'No Malaysian Citizenship for More Than 290,000 Children Born Here' *New Straits Times* (Kuala Lumpur, 31 October 2016) <<https://www.nst.com.my/news/2016/10/184708/no-malaysian-citizenship-more-290000-children-born-here>>.

⁶ Bureau of Democracy, Human Rights, and Labor, '2018 Country Reports on Human Rights Practices: Malaysia' (*US Department of State*, 2018) <<https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/malaysia/>>.

⁷ Tharani Loganathan and others, 'Undocumented: An Examination of Legal Identity and Education Provision for Children in Malaysia' (2022) 17(2) PLOS ONE e0263404 <<https://doi.org/10.1371/journal.pone.0263404>>.

⁸ *ibid.*

estimate of 2.6 million non-citizens in the country.⁹ This represents 8.0% of the population in Malaysia.¹⁰

It is important to point out that these figures are mostly estimations because Malaysia still lacks official records to tabulate this invisible population since the NRD does not segregate them from the ‘non-citizen’ category.¹¹ An analysis of this data reveals that the population of stateless people, in general, residing in Malaysia could possibly be even larger than what has been estimated.¹² This is because these estimated numbers do not cover the stateless population who are undocumented which causes them to fall outside the country’s existential radar.¹³ Estimates or not, these numbers constitute as crucial evidence in reflecting the lives of those whose fundamental rights are neglected and not protected even by the authorities of their home country.

Stateless Population in Malaysia 2016 – 2022

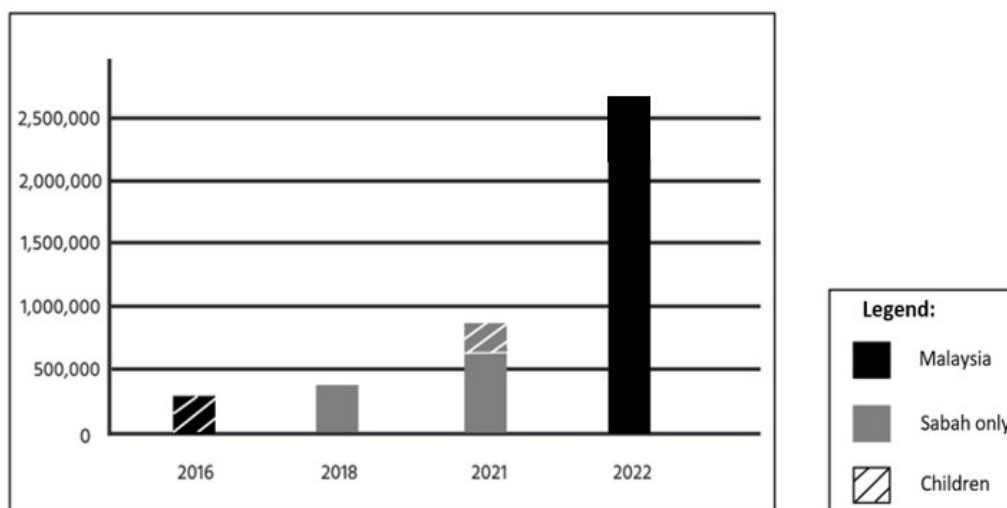


Table 1: Stateless Population in Malaysia 2016 – 2022.

Statistics sourced from the Department of Statistics Malaysia and local e-news report.

⁹ Ministry of Economy Department of Statistics Malaysia, ‘Quarterly Demographic Statistics’ (*Department of Statistics Malaysia*, 9 February 2023) <<https://www.dosm.gov.my/portal-main/release-content/6f55f6d9-8b7c-11ed-96a6-1866daa77ef9>>.

¹⁰ *ibid.*

¹¹ Ida Lim, ‘“Invisible” in Malaysia: Why Are People Born Here Stateless and Will the Government’s Citizenship Proposals Fix or Worsen the Problem?’ *Malay Mail* (Kuala Lumpur, 30 June 2023) <<https://www.malaymail.com/news/malaysia/2023/06/30/invisible-in-malaysia-why-are-people-born-here-stateless-and-will-the-govts-citizenship-proposals-fix-or-worsen-the-problem/76895>>.

¹² Lim (n 1).

¹³ *ibid.*

2. Methodology

The research methodology employed in producing this paper is doctrinal in nature to conduct a library-based analysis in light of newspaper articles since the issue of statelessness is still ongoing, several reported cases of statelessness in Malaysia, alongside relevant laws that highlight the basic liberties that must also be enjoyed by this invisible population. This paper also makes use of statistical data collected from the Department of Statistics Malaysia and other NGOs to emphasise the underlying need of upholding the principle of ‘social justice’ as propagated by jurisprudential philosophers like John Rawls, in that every person is deserving of the same and inalienable claim to equal basic liberties.¹⁴ Rawls’ ‘Justice as Fairness’ principle is relevant to this study that aims to bring to light the inadequacy of existing laws that fail to shield stateless children from the harsh reality that they are forced to face due to them being ‘invisible’ and unrecognisable by the law.

3. Defining a ‘Stateless Child’

Article 1 of the United Nations Convention on the Rights of the Child 1989 (CRC) defines a ‘child’ as a person below the age of 18.¹⁵ This is an internationally accepted definition which has also been adopted in Malaysia following its accession to the CRC in 1995 and subsequent enactment of the Child Act 2001. Currently, there is no legislation in Malaysia that clearly defines the terms ‘stateless’ or ‘statelessness’. As such, it is only fitting to fall back on the legal definition of a ‘stateless’ person provided in Article 1 of the United Nations Convention Relating to the Status of Stateless Persons 1954 (1954 Convention) as someone whom the State does not recognise as its national under the operation of its law.¹⁶ Thus, an individual below the age of 18 years old and who is not recognised by any country as its citizen is considered a stateless child. This means that such a child is not a member of any nation and will therefore be treated as a foreigner everywhere that he/she roams.

The above describes the terminology of ‘de jure’ statelessness—a category of individuals (including children) who neither possess a legal citizenship of any country nor have any linkages to the country at all. For instance, individuals found in the Soviet Union or Crimean Peninsula have become de jure stateless because their homeland in which they were once born in, no longer exists.¹⁷ These are persons who have lost their own nationality and have not subsequently acquired a new one therefore rendering them unrecognisable under the laws of all states.¹⁸ De jure statelessness may also arise if the person was never given any nationality at birth and nothing was done during their lifetime to resolve the matter.¹⁹

¹⁴ John Rawls, *Theory of Justice* (Oxford University Press 1971).

¹⁵ United Nations Convention on the Rights of the Child 1989, art 1.

¹⁶ United Nations Convention Relating to the Status of Stateless Persons 1954, art 1.

¹⁷ Abbas Hardani, ‘The Human Rights of Stateless Persons: A Case of Burma’s Rohingya’ [2014] 6 *Malayan Law Journal* cxx.

¹⁸ Hugh Massey, ‘Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness’ (2010) (United Nations High Commissioner for Refugees, LPPR/2010/01) 61-62.

The definition of statelessness extends beyond just permanently displaced communities and includes those individuals who are termed as *de facto* stateless.²⁰ Despite the absence of a formal definition in international law, a person is considered *de facto* stateless if they are individuals who possess the nationality of one country but has left to reside outside the territory of their own home country.²¹ They are people whose nationality has become functionally ineffective for reasons such as, *inter alia*, being unable to prove their identity and nationality due to a lack of official documentation. In other words, although such individuals can establish that they have a nationality, their exact nationality cannot be determined.²² As a result, these people cannot avail themselves of the protection of the State in which they are nationals.

Both categories of stateless persons face a similar, devastating plight. Nonetheless, the United Nations High Commissioner of Refugees have pointed out that whilst there are already laws in place to address the problems of *de jure* statelessness under the 1954 and 1961 Statelessness Conventions, there is no regime to protect individuals who are non-refugees but are *de facto* stateless.²³ The irony is that many stateless people, including that of children fall into the category of *de facto* statelessness for different reasons that will be explained in section 5 below.²⁴ Hence, despite being persons who have citizenship (unlike persons who are *de jure* stateless), they do not enjoy the rights attached to their citizenship and instead remain unseen and unheard by the authorities of their residing State.

4. International Laws Relating to Stateless Children

Laws propounded under international instruments dictate the minimum standard which ought to be complied with and followed globally regardless of ratification by the respective States.

The right to nationality is essentially pertinent because the acquisition of a nationality secures State protection to one's fundamental liberties in the face of the law. This right is entrenched in the Universal Declaration of Human Rights 1948 (UDHR)²⁵ as well as the

¹⁹ Kanageswary Selvakumaran, Tie Fatt Hee and Jal Zabdi Mohd Yusoff, 'A Legal Perspective on the Rights to Education for Stateless Children in Selected ASEAN Countries' (2020) 28(1) *Pertanika Journal Social Sciences and Humanities* JSSH-3389-2018 <<http://www.pertanika.upm.edu.my/pjssh/browse/regular-issue?article=JSSH-3389-2018>>.

²⁰ Norraihan Zakaria and Imran Hakim Mohamedsha, 'Stateless Children: A Question of Human Rights or Non-Traditional Security Threat?' (2019) 2 *Diplomatic Voice* 5-7 <https://www.idfr.gov.my/images/stories/research/DV_2_2019.pdf>.

²¹ Selvakumaran, Hee and Yusoff (n 19).

²² Hugh Massey, 'Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness' (2010) (United Nations High Commissioner for Refugees, LPPR/2010/01) 61-62.

²³ Massey (n 22).

²⁴ Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10(1/2) *International Journal of Refugee Law* 156–183 <<https://mcrj.in/wp-content/uploads/2022/02/Statelessness-and-the-Problem-Resolving-Nationality-Status.pdf>>.

²⁵ Universal Declaration of Human Rights 1948, art 15.

International Covenant on Civil and Political Rights 1966 (ICCPR).²⁶ Compared to the UDHR that carries only a persuasive influence, the ICCPR makes it compulsory for ratifying States to establish a national framework ensuring that every child born in their territory is immediately registered with a name after birth, and for them to acquire a nationality.²⁷ Whilst the ICCPR does not guarantee that all children born in member states are promised a citizenship, Article 24(1) specifically prohibits discrimination among children and obliges member states to protect all children in their territory—regardless of whether these children are citizens of the country.²⁸ The measures that are to be taken by each member state is neither dictated nor streamlined by the international instrument, but it is a social responsibility that must be fulfilled by the family, society, and the State in preventing the children from being ill-treated due to their stateless status.²⁹

Malaysia has not ratified the ICCPR despite seeking for membership in the United Nations Human Rights Council.³⁰ As a result, the country is neither duty-bound nor legally responsible for ensuring that children born on Malaysian soil are registered with the National Registration Department and are subsequently conferred a citizenship. Though the non-ratification of ICCPR may not be an urgent matter requiring attention from the government since Malaysia is already a State party to the Convention on the Rights of the Child 1989 (CRC), it must be highlighted that a reservation has been placed on this very same right to nationality.

Article 7 of the CRC stipulates that all children must be granted the right to a name and nationality.³¹ Despite ratification in 1995, Malaysia has not lifted the reservation on this very right due to its non-compatibility with civil laws and the parallel systems of Shariah law applicable to Muslim population.³² For instance, Shariah law under section 2 of the Islamic Family Law (Federal Territories) Act 1984 labels a child born out of wedlock to be an illegitimate child who does not possess the same inheritance rights as a legitimate child to his or her biological father.³³ This is due to the belief of *mazhab Shafi'i* that perceives an illegitimate child to be the child of another man, bearing no blood relations whatsoever with his or her biological father.³⁴ Thus, it can be implied that the Malaysian legal system—much

²⁶ International Covenant on Civil and Political Rights 1966, art 24(3).

²⁷ *ibid* art 24(2).

²⁸ *ibid* art 24(1).

²⁹ Human Rights Committee, 'General Comment No 17: Article 24 (Rights of the Child)' (Office of the High Commissioner for Human Rights, 7 April 1989) <[file:///C:/Users/User/Downloads/HRI_GEN_1_Rev_9\(Vol_I\)_\(GC17\)_en.pdf](file:///C:/Users/User/Downloads/HRI_GEN_1_Rev_9(Vol_I)_(GC17)_en.pdf)>.

³⁰ 'Rights Council Membership' (Article 19, 17 September 2021) <<https://www.article19.org/resources/malaysia-government-should-respect-human-rights-as-it-seeks-un-human-rights-council-membership/>>.

³¹ Convention of the Rights of the Child 1989, art 7.

³² 'Convention on the Rights of the Child: Report of the Roundtable Discussion' (*SUHAKAM*, January 2004) <<http://www.suhakam.org.my/wp-content/uploads/2013/11/ReportRTDonCRC.pdf>>.

³³ Islamic Family Law (Federal Territories) Act 1984, s 2.

³⁴ Umar Mukhtar Mohd Noor, 'Al-Kafi #806: An Illegitimate Child Will Become One's Mahram When Nursed by His Wife?' (*Mufti of Federal Territory's Office*, 3 September 2018) <<https://www.muftiwp.gov.my/en/artikel/al->

like that of other common law countries—does not recognise the relationship between a biological father and his illegitimate child.³⁵ However, the law gives cognisance to illegitimate children claiming rights to his or her biological mother although such rights (especially to inheritance) are very limited.³⁶

Additionally, two international instruments have been developed specifically to address the problem of statelessness. Firstly, the Convention Relating to the Status of Stateless Persons 1954 sets the minimum standard of treatment for stateless people to ensure that they enjoy basic human rights without discrimination. For instance, Article 22 requires stateless persons to complete elementary-level education in public schools, the same way that nationals have automatic access to.³⁷ Other rights that the 1954 Convention guarantees for stateless people are the right to identity (Article 27), the right to travel documents (Article 28) and the right to administrative assistance (Article 25).³⁸ It is pertinent to note that the enjoyment of these rights does not equate to the acquisition of a nationality. Hence, Article 32 urges member states to facilitate the naturalisation of stateless persons in hopes to eradicate all the hardships that come with being denied a nationality.³⁹ On the other hand, the Convention on the Reduction of Statelessness 1961 complements the 1954 Convention as it aims to prevent statelessness and reduce it over time. In achieving this objective, Article 1 requires member states to confer nationality to all children born in the country automatically or subsequently upon application.⁴⁰ The Convention has further vowed to prevent statelessness after birth by prohibiting the withdrawal of citizenship (lost; renunciation; deprivation of nationality) if doing so would cause the person to be stripped of his nationality and become stateless.⁴¹

At present, Malaysia is not a party to either one of the two Statelessness Conventions. The UNHCR has indicated that the Philippines is the only Southeast Asian nation to have ratified the 1954 Convention and to have recently joined the 1961 Convention.⁴² As a result, the UNHCR has made numerous calls for Malaysia to accede to both stateless conventions that would help strengthen its national legal framework and close the gaps in nationality laws that would otherwise lead to the incidence of statelessness.⁴³

kafi-li-al-fatawi/2580-al-kafi-806-an-illegitimate-child-will-become-one-s-mahram-when-nursed-by-his-wife>.

³⁵ Ainur Roslan, Nik Aziz and Fathin Shaharudin, 'Discrimination Against an Illegitimate Child According to Law and Society' (2021) 3 *Current Legal Issues* 16–21 <<http://journalarticle.ukm.my/17821/1/ARTICLE%203.pdf>>.

³⁶ Legitimacy Act 1961, s 11.

³⁷ Convention Relating to the Status of Stateless Persons 1954, art 22.

³⁸ *ibid* arts 25, 27 and 28.

³⁹ *ibid* art 32.

⁴⁰ Convention on the Reduction of Statelessness 1961, art 1.

⁴¹ *ibid* arts 6–9.

⁴² 'UNHCR Lauds Philippines' Accession to 1961 Statelessness Convention' (*UNHCR*, 25 March 2022) <<https://www.unhcr.org/en-my/news/press/2022/3/623dbef34/unhcr-lauds-philippines-accession-1961-statelessness-convention.html>>.

The result of analysing Malaysia's position in light of the abovementioned international regimes reveals that the decision of refusing to ratify the ICCPR and Stateless Conventions, as well as resisting to lift existing reservations on core Articles of the CRC has become the root cause to various discriminatory practices against children who have inherited statelessness at birth as discussed in section 6 below. What makes matters worse is that the non-implementation of international standards has conversely allowed for the application of gender-discriminatory provisions that arbitrarily deprive children (who are usually not born out of a legal marriage) from the supposed automatic right to a nationality at birth.

Focusing on section 17, Part III of the Second Schedule in the Federal Constitution, it upholds the spirit of Shariah law in recognising that an illegitimate child only has a relation with his or her biological mother, and not father. Thus, the constitutional provision permits only the biological mother to pass on her citizenship to the child even if the child is not legitimate.⁴⁴ To illustrate, the Federal Court case of *CTEB v Ketua Pengarah Pendaftaran Negara, Malaysia* shows that an illegitimate child born to a Malaysian father and Filipino mother whose marriage was not registered at the time, could not inherit his father's nationality by operation of law.⁴⁵ To avoid being stateless, the only option available to the said child is to make an application to be a citizen of the Philippines.

At this juncture, it is pertinent to read section 17 alongside section 1(b) in Part II of the Second Schedule of the Federal Constitution to understand the gender biasness of the current citizenship laws. A read of section 17 on its own gives the implication that illegitimate children can inherit the citizenship of their biological mother. Whilst this is not wrong, the existence of section 1(b) has caused many overseas-born children to be at risk of statelessness. This is because judges have interpreted the express wording of 'father' to mean that only Malaysian fathers can pass on their Malaysian nationality to their legitimate child. If the roles were reversed—in that it is the mother who is a Malaysian, she does not share the same privilege as a Malaysian father to pass on her nationality to her child by operation of law.⁴⁶ This was the 2-1 majority decision of the Court of Appeal in *Suriani Kempe & Ors v Government of Malaysia* which has attracted criticisms even from Malaysian Constitutional expert, Emeritus Professor Datuk Dr Shad Saleem Faruqi to reform this archaic citizenship provision that 'reflects our patriarchal past' because such provisions 'drafted 64 years ago cannot remain static'.⁴⁷

⁴³ 'UNHCR Welcomes Renewed Commitment by Malaysia to End Statelessness' (*UNHCR*, 10 October 2019) <<https://www.unhcr.org/en-my/news/press/2019/10/5d9e963d4/unhcr-welcomes-renewed-commitment-by-malaysia-to-end-statelessness.html>>.

⁴⁴ Federal Constitution, s 17, Part III of Second Schedule.

⁴⁵ [2021] 6 Current Law Journal 471 (FC).

⁴⁶ Loganathan and others (n 7).

⁴⁷ [2021] 8 Current Law Journal 666 (HC); Shad Saleem Faruqi, 'Case Commentary on *Suriani Kempe v Kerajaan Malaysia*' [2021] 4 Malayan Law Journal cxlix.

5. Stateless Children in Malaysia

Reference to Article 14(1)(b) and Part II of the Second Schedule of the Federal Constitution shows that the citizenship of a child in Malaysia is dependent on the marital and citizenship status of their parents by virtue of the nationality principle of *jus sanguinis*. Hence, for a child to acquire a Malaysian nationality, he or she must be born in the country to a set of legally married parents where either one of them is a citizen or permanent resident of the country when the child was born. Reality shows that this system has caused children to be at risk of statelessness despite them having direct links to the country by birth ('statelessness in situ'). In contrast, those born to parents who are not citizens of any nation belong to the 'genuinely stateless' classification.

5.1 Children 'At-Risk of Statelessness'

Those children born in Malaysia are at risk of being stateless due to legal complications such as the non-registration of parents' marriage, the unregistered birth of the child, the lack of administrative procedures and acquisition of citizenship laws in relation to adopted children, and foundlings.

5.1.1 Non-Registration of Marriage

For parents who fail to register their union, they risk their offspring to become stateless and illegitimate. This predicament was confirmed in *Lim Jen Hsian v Ketua Pengarah Pendaftaran Negara*⁴⁸ and *Chan Tai Ern Bermillo v Ketua Pengarah Pendaftaran Negara Malaysia*.⁴⁹ In both cases, the child was denied citizenship due to the unregistered marriage of their parents registered at the time they were born. This caused them to become illegitimate children whose citizenship follows his mothers' instead.⁵⁰

However, the Court of Appeal judgement in *Madhuvita Janjara Augustin (Suing through Next Friend Margaret Louisa Tan) v Augustin A/L Lourdsamy*⁵¹ illustrates the possibility that a subsequent registration of marriage after the birth of the child shall revoke the illegitimate status of a child. This is because the legitimacy of a child should be determined during the application for a citizenship. This ratio has gone against all other authorities and was recently overruled by the Federal Court in *CTEB v Ketua Pengarah Pendaftaran Negara, Malaysia* where the majority held that the legitimacy of a child shall in fact be considered at the 'time of birth'.⁵² Hence, a subsequent marriage would not legitimise the birth status of the child.

⁴⁸ [2018] 6 Malayan Law Journal 548 (CA).

⁴⁹ [2020] 3 Malayan Law Journal 634 (CA).

⁵⁰ Federal Constitution, art 17, Part III of the 2nd Schedule.

⁵¹ [2018] 1 Malayan Law Journal 307 (CA).

⁵² [2021] 6 Current Law Journal 471 (FC).

5.1.2 Unregistered Birth

According to section 2 of the Births and Death Registration Act 1957, all children born in Malaysia must have their birth particulars registered within the fourteen days of their birth. To do so after 14 days will cause the birth registration to be 'delayed'⁵³, and it will be deemed as 'late' if registered after 60 days in Peninsular Malaysia; or if it was registered after 42 days in Sabah⁵⁴ and Sarawak⁵⁵.

For this reason, a significant number of the indigenous community in Borneo such as the ethnic Penan do not hold proper identification documents to establish their nationality as Malaysians.⁵⁶ This is because they reside in the interiors of Sarawak that is miles away from the National Registration Department offices in town which makes it expensive and burdensome for them to register the birth of their children. The case of *Ong Boon Hua @ Chin Peng v Menteri Hal Ehwal Dalam Negeri, Malaysia*⁵⁷ provides that a birth certificate is conclusive evidence of a person's Malaysian citizenship. Hence, the contrary would disprove any claims of being a Malaysian citizen.

5.1.3 Adopted Children

Besides, children who are adopted also face statelessness because domestic adoption laws have kept silent on their citizenship rights.⁵⁸

Section 9 of the Adoption Act considers the adopted child as a child born out of the lawful wedlock to his adoptive parents. Upon adoption, the adoptive parents are accorded the parental rights of the child's biological parents which makes them the legal parents of the child at law.⁵⁹ However, nowhere in the Act does it say that the adopted child is entitled to inherit the citizenship of his new adoptive parents which would otherwise render them stateless.⁶⁰ The Court of Appeal in *Than Siew Beng v Ketua Pengarah Jabatan Pendaftaran Negara*⁶¹ held that the citizenship of an adopted child still follows that of his biological parents. This ruling takes on the interpretation of the court in *Foo Toon Aik v Ketua Pendaftar Kelahiran & Kematian Malaysia*⁶² where the word 'parent' in Article 14(1)(b) and section 1(a),

⁵³ Births and Deaths Registration Act 1957, s 11(1).

⁵⁴ Registration of Births and Deaths Ordinance (Sabah Cap. 123), s 22(1).

⁵⁵ Births & Deaths Registration Ordinance (Sarawak Cap. 10), s 24(1).

⁵⁶ 'Figures at a Glance in Malaysia' (UNHCR) <<https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html>>.

⁵⁷ [2008] 3 Malayan Law Journal 625.

⁵⁸ Registration of Adoptions Act 1952 (for Muslims); Adoption Act 1952 (for non-Muslims).

⁵⁹ Adoption Act 1952, s 9.

⁶⁰ Nur Athirah Syuhada Hasni and Nurshahirah Azman, 'A Case Study on Citizenship Application by Stateless Adopted Children in Malaysia' (2022) 1(1) Journal of Management and Business Studies <<https://journal.ucyp.edu.my/index.php/JMBS/article/view/149>>

⁶¹ [2017] 8 Current Law Journal 16 (CA).

⁶² [2012] 4 Current Law Journal 613 (HC).

Part II of the Second Schedule of the Federal Constitution refers only to the biological parents of the child who are legally married. Thus, it is the non-fulfillment of administrative requirements that has hindered many children from being recognised as a Malaysian despite being born and raised in the country.

5.1.4 Foundlings

Foundlings, newborn children who have been abandoned at birth by their biological parents but are later taken care of by others, constitute the last category of children at risk of statelessness.

The citizenship of an abandoned child is dictated by Article 19B, Part III of the Second Schedule of the Federal Constitution where it states that it shall be presumed that the foundling is a national of Malaysia if found therein.⁶³ The date when the child was found abandoned shall become his/her date of birth. Hence, until and unless the contrary is proven, the abandoned child is qualified to acquire citizenship through the operation of law. However, though the provision seems sufficiently straightforward, it is in reality difficult to implement given the lack of administrative guidelines to be followed by the NRD.⁶⁴ Besides, it is also impossible for foundlings, or their adoptive parents are acting on their behalf to furnish details of the child's biological parents which disqualifies them from acquiring citizenship by operation of law. Hence, it has become the norm of the NRD to grant foundlings with MyKAD (Green Identity Card) that allows the child to lawfully reside in Malaysia temporarily for 5 years until its next renewal. Sadly, this is not by any means a tool to confer nationality to the child.⁶⁵

For those more fortunate to be adopted, they have the alternative opportunity to acquire citizenship by applying for citizenship by registration under Article 15A of the Federal Constitution. This grants the National Registration Department (NRD) the 'special powers' to register any person below the age of 21 as a citizen if they deem it fit. This is a typical situation faced by foundlings living in welfare homes. For those who are more fortunate to get adopted, they have the alternative opportunity of acquiring citizenship by making an application for citizenship by registration under Article 15A of the Federal Constitution which grants 'special powers' to the NRD to register any person below the age of 21 years old as a citizen if it deems fit.⁶⁶ Unfortunately, there still lies the challenge of finding the birth certificate of the foundling when making such an application, especially if there is no evidence to prove the biological parentage of the child.⁶⁷

⁶³ Federal Constitution, art 19B, Part III of the 2nd Schedule.

⁶⁴ Development of Human Resources for Rural Areas, Malaysia, 'Report: Statelessness in Malaysia' (*dhrramalaysia*, 5 April 2022) <https://dhrramalaysia.org.my/wp-content/uploads/2022/04/STATELESSNESS-IN-MALAYSIA-REPORT-05042022_compressed.pdf>.

⁶⁵ *ibid.*

⁶⁶ Federal Constitution, art 15A.

⁶⁷ 'Can A Child Apply For Citizenship?' (*Consortium for Street Children*, March 2019) <<https://www.stretchchildren.org/legal-atlas/map/malaysia/legal-identity/can-a-child-apply-for-citizenship/>>.

5.2 Children Who Are ‘Genuinely Stateless’

The category of genuinely stateless children is comprised of the migratory, notably, Rohingya refugees and asylum seekers, Filipino migrants, and the Bajau Laut nomadic group in Sabah. These children are ineligible to acquire Malaysian citizenship as their preceding generation carries with them no nationality.

5.2.1 Children from Families with Migratory Background

As of October 2022, the UNHCR recorded an approximate figure of 83,430 refugees and asylum seekers in Malaysia.⁶⁸ Amongst this number, 105,870 are Rohingyas fleeing from Myanmar.⁶⁹ The Rohingyas have been seeking asylum in Malaysia as early as the 1980s to escape from a never-ending cycle of acute discrimination and persecution by the Burmese following the passing of the 1982 Myanmar Citizenship Law that deprived the Rohingya community of Burmese citizenship. The protracted situation in their home country has resulted in the Rohingya to begin a new life in Malaysia where they start their own families and work in construction sites to support their own livelihood. As a result, the Rohingya group has successfully assimilated with the local community since almost three generations have settled in Malaysia, particularly in Kuala Lumpur, Penang, and Johor.⁷⁰

Despite the growing Rohingya community, Malaysia has still not acceded to the 1951 Convention Relating to the Status of Refugees nor its 1967 Protocol. This makes the children of Rohingya descent most vulnerable amongst the group of stateless individuals because they are seen as non-existent by the law. It was reported that ratification of the 1951 Convention would posit the country as a hub for refugees and illegal immigrants and make it the duty of the State to accord protection to them including to provide them with the opportunity to be legally employed in the country.⁷¹ However, given the unsettled problem of unemployed locals that remains the government’s main concern, the idea of Malaysia signing the 1951 Convention is even more far-fetched which leaves this marginalised group to stay unprotected.

The statelessness issue can also be seen in Sabah. Firstly, Filipinos from Southern Philippines were amongst the first to seek refuge in Sabah even before the 1963 independence. Following the civil war in Southern Philippines during the late 1960s, Sabah again witnessed the insurgence of Filipino migrants escaping their home country in an

⁶⁸ Sebastian Strangio, ‘Malaysian Authorities Deported Asylum Seekers to Myanmar: Report’ *The Diplomat* (20 October 2022) <<https://thediplomat.com/2022/10/malaysian-authorities-deported-asylum-seekers-to-myanmar-report/>>.

⁶⁹ *ibid.*

⁷⁰ Azlinariah Abdullah, Azharudin Mohamed Dali and Mohamad Rodzi, ‘Surviving Stateless Refugees: The Uncertain Future of Rohingya’s Children in Malaysia’ (2018) 45(1) *Malaysian Journal of History, Politics & Strategic Studies* 177–195 <<https://ejournal.ukm.my/jebat/article/view/26050>>.

⁷¹ Yiswaree Palansamy, ‘Malaysia Will Not Sign UN Convention on Refugees, Says Minister’ *Malay Mail* (Kuala Lumpur, 12 March 2015) <<https://www.malaymail.com/news/malaysia/2015/03/12/malaysia-will-not-sign-un-convention-on-refugees-says-minister/857781>>.

attempt to save themselves.⁷² Fortunately, these migrants were granted a refugee visa called ‘IMM13’ which allowed them to temporarily reside and work in Sabah upon constant renewal. The children of these Filipino migrants are usually stateless because their parents are at a geographical disadvantage to register the birth of their child since the Philippine Consulate is located in Kuala Lumpur.⁷³ Not only does travelling to another State in the country put Filipino migrants more at risk of detention and deportation, but their right of movement under IMM13 is confined within the state itself. Hence, there is in fact no way of registering their child’s birth which causes them to also be trapped in the stateless limbo. The situation stands in contrast with migrants from Indonesia who in theory have better chances of seeking the assistance of the Indonesian embassy located in Kota Kinabalu—although practically, the acquisition of an Indonesian nationality in the city is a financial burden for Indonesian parents living in the highland areas of Sabah.⁷⁴

The subsequent group is the children of Bajau Laut Nomadic tribes of the Sama Dilaut community in Sabah. Nicknamed as ‘Sea Gypsies or Sea Nomads’, they live a semi-nomadic lifestyle at sea in their boats and huts built on the water of the Sulu-Celebes seas.⁷⁵ The derogatory label of statelessness became their only identity upon the formation of de jure nations surrounding their territory, ie Philippines, Malaysia, and Indonesia. Despite their cousins (East and West Coast Bajau) leaving behind their ancestral domain to integrate with the rest of the Malaysian society in Sabah, the Bajau Laut community remains an outcasts as they choose to preserve their way of life at sea.⁷⁶ Although their persistence in perpetuating their unique cultural identity is both respectable and commendable, the downside of their choices is that they inevitably run the risk of living as foreigners everywhere they roam and may even potentially be seen as a threat to the security of any nation. This problem does not end with the coming forth of a new generation if it remains that the need to seek a legal bond with a State is the least of the Bajau Laut’s worries.

Although nationality is the birthright of every child, it seems that there is a myriad of ways in which would cause a child to fall beneath the purview of the law and be treated as an ‘alien’ in one’s own birth state. Following this line of thought, the paper shall proceed to discuss the key legal and social issues faced by stateless children in Malaysia.

⁷² Jassica Jane Mohd Afsur Khan and Fauziah Fathil, ‘Stateless Filipino Children in Modern Day Sabah: Issues of Concern and Responses of the State Government’ (2020) 2(1) IIUM Journal of Human Sciences 55–63 <<https://journals.iium.edu.my/irkh/index.php/ijohs/article/view/146>>.

⁷³ *ibid.*

⁷⁴ Catherine Allerton, ‘Statelessness and the Lives of the Children of Migrants in Sabah, East Malaysia’ (2014) 19 (1-2) *Tilburg Law Review* 26–34 <<https://doi.org/10.1163/22112596-01902004>>.

⁷⁵ Wan Shawaluddin Wan Hassan and Diana Peters, ‘The Vulnerability of Bajau Laut as Stateless People in Sabah’ (2020) 26(2) *Jurnal Kinabalu* 1831–96 <<https://jurcon.ums.edu.my/ojums/index.php/ejk/article/view/2771>>.

⁷⁶ *ibid.*

6. Legal and Social Issues of Stateless Children

The inability to acquire nationality paves a road to tyranny where challenges and hardships lay ahead for a stateless child. Perceived as foreigners, stateless children are denied even the most fundamental rights of an individual granted by the State. This part of the article shall discuss the various legal and social issues faced by stateless children in Malaysia, particularly in regard to education, employment, access to healthcare and engagement in criminal activities.

6.1 Legal Issues: Education

Every child must be guaranteed the right to education, whether it be formal or informal education because it is the key that unlocks the many doors that an individual will go through in the different stages of life. According to the United National Educational Scientific and Cultural Organisation (UNESCO), education means more than just knowledge –it refers to the conscious and all-round development of an individual in terms of the summation of his personal capacities, skills, and attitude needed for proper integration into society.⁷⁷ In 2009, the former Minister of Education of Malaysia, Tan Sri Muhyiddin Mohd Yassin in his speech propounded that, *‘Education is a universal dream, one that grants transformative seeds of opportunity to every child.’*⁷⁸ Therefore, without education, a child would easily fall behind the social community and be at risk of exploitation. Education is a universal right guaranteed by many international instruments, including the Universal Declaration of Human Rights 1948 in Article 26. This is a positive obligation on the State to ensure free elementary education to be made available and accessible to all children without discrimination. The same is reiterated in the Convention of the Rights of a Child which Malaysia is a signatory to. However, since its accession in 1995, Malaysia has entered a reservation to Article 28(1)(a) of CRC which explicitly provides that primary education should be made free and compulsory to all children.⁷⁹ This is because the international provision contravenes with Article 12(1) of Malaysian Federal Constitution which guarantees the right to education for *‘any citizen’* notwithstanding the generalisation in Article 8(1).⁸⁰ Constitutionally, this means that Article 12(1) of the Federal Constitution has made non-citizens of the country including stateless children subjects of discrimination when it comes to education. Given that it is the supreme law in Malaysia, Acts of Parliament such as the Education Act 1966 has been drafted in conformity with Article 12(1) of the

⁷⁷ Mazura Md Saman and Nor Hafizah Mohd Badrol Affandi, ‘Honouring Primary Education for Stateless Children: Analysis of Malaysian Legal Perspective and Current Practice’ (2018) 3 *International Journal for Studies on Children, Women, Elderly and Disabled* 33–38 <https://www.ijcwed.com/wp-content/uploads/2017/11/IJCWED3_9.pdf>.

⁷⁸ *ibid.*

⁷⁹ ‘Convention on the Rights of the Child’ (*United Nations Treaty Collection*, 20 November 1989) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en>.

⁸⁰ Nur Athirah Syuhada Hasni, Nurshahirah Azman and Muhammad Nashriq Ismail, ‘Stateless Children’s Access to Tertiary Education’ (2021) 5(1) *Selangor Humaniora Review* 30–39 <<https://share.journals.unisel.edu.my/ojs/index.php/share/article/view/133>>.

Federal Constitution and evidence of this can be seen from the Act's preamble which addresses only the '*Malaysian society*'.⁸¹

The effect of Article 12(1) of the Federal Constitution has excluded all stateless children from the national education system. Children lacking proper identification documents, or whose status on the birth certificate shows '*non-citizen*' or '*undetermined*' will have their dreams for a proper education crushed the moment they try to enroll in a public school. Since the stateless community is trapped in the cycle of poverty, the option of enrolling into a private school is almost never considered due to the high tuition fees charged per semester. As a result, it was reported in a 2022 news article that a rough estimation of stateless children in the country who are denied education has surpassed 300,000, and this is not including those who are undocumented by the Government.⁸² Fortunately, the Ministry of Education in 2019 had launched the '*Zero Reject Policy*' to ease the entry of stateless children into government schools, thereby eradicating the discretion of school headmasters from deciding which stateless child can be enrolled. However, this formal policy is not without its flaws due to its eligibility criteria which accepts only stateless children with a claim towards Malaysian citizenship for enrollment.⁸³ Recently, the government has issued a new policy requiring the passport of stateless children adopted by Malaysian parents to be furnished (in addition to official adoption documentation) when enrolling in public schools.⁸⁴ The new policy has caused an uproar amongst the adoptive parents of these children because it is not possible for them to apply passports for their children who are considered nationals of their biological mothers' countries.⁸⁵ For stateless children who are unable to fulfil the criteria under the government policy, they are left to acquire basic education provided by the members of civil society. Various non-governmental organisations (NGOs) and faith-based groups have provided alternative learning centres for stateless children to ensure that they are not left behind in pursuing an education. In Sabah, collaboration between the National Security Council and United Nations Children's Fund (UNICEF) has established 12 alternative learning centres (eg '*Stairway to Hope Learning Centre*' and '*Humana Learning Centre*') for stateless children in remote areas of the State, including the children of Indonesian and Philippines migrant workers.⁸⁶ It was also reported that a local NGO had gone to great lengths to convert a floating Bajau house into a learning

⁸¹ Selvakumaran, Hee and Yusoff (n 19).

⁸² FMT Reporters, '*Putrajaya Not Following Policy on Education for All Children, Group Laments*' *Free Malaysia Today* (Petaling Jaya, 2 March 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/03/02/putrajaya-not-following-policy-on-education-for-all-children-group-laments/>>.

⁸³ Saman and Affandi (n 77).

⁸⁴ Opalyn Mok, '*Stateless Children Can't Attend School Under New Policy Requiring Passports, Penang Parents Say*' *Malay Mail* (George Town, 2 February 2021) <<https://www.malaymail.com/news/malaysia/2021/02/02/stateless-children-cant-attend-school-under-new-policy-requiring-passports/1946216>>.

⁸⁵ *ibid.*

⁸⁶ Loganathan and others (n 7).

centre to cater for the education needs of the Bajau Laut children.⁸⁷ In Peninsular Malaysia, education centres such as the Rohingya Arakanese Refugee Committee (RARC) and Future Global Network Foundation (FGN) are operated by NGOs to make education accessible to all children, irrespective of citizenship status.⁸⁸ As for tertiary education, Article 28 of CRC does not make it compulsory although it should still be made available and accessible to all children. Media reports show that the lack of a Malaysian citizenship has impeded stateless children from securing an education in local universities despite having completed secondary school education with flying colors. In 2019, it was reported that 10As SPM leaver, Wong Man Ling was unable to apply to Universiti Malaya because she is stateless as a result of her parents' illegitimate marriage (Malaysian father and Cambodian mother).⁸⁹ As her parents do not have the means to send her to a private university, her dream of becoming a dentist was suspended.⁹⁰ In another reported story featuring STPM 4.0 scorer, Omar Mokhtar, he was lucky enough to be offered free tertiary education from Universiti Utara Malaysia to pursue any course he desired despite his statelessness.⁹¹ From the discussion above, it can be seen that stateless children in the country are deprived of basic education. Almost all the time, good grades mean nothing if one fails to fulfill other miscellaneous criteria under the education policy. Although the journey of a stateless child to be educated in Malaysia is a rough one, not all hope is lost as Omar's case might just be the first unprecedented calling for future miracles of other deserving stateless children.

6.2 Legal Issues: Formal Employment

There is a saying that throughout the lifetime of an individual, most will be spent at work—and this is nothing but the truth. Hence, it only makes sense that Article 23(1) of the Universal Declaration of Human Rights directs States to incorporate necessary measures for the purpose of guaranteeing a person's right to engage in not just work, but in decent employment.⁹² This translates to the right to equal pay and the right to just and favorable conditions of work without any discrimination. Hence, stateless children in Malaysia who have attained the age of majority must not be ignored by potential employers for the sole reason that they lack a formal nationality.

More often than not, children at risk of statelessness are mistaken for asylum seekers, refugees, or migrants despite being born in the country because they do not have possession over their own birth identification documents. If these children do not shake off their

⁸⁷ Saman and Affandi (n 77).

⁸⁸ *ibid.*

⁸⁹ 'Formerly Stateless Girls Ace SPM Despite Issues' *The Star* (Putrajaya, 29 March 2019) <<https://www.thestar.com.my/news/nation/2019/03/29/formerly-stateless-girls-ace-spm-despite-issues/>>.

⁹⁰ *ibid.*

⁹¹ Ahmad Mukhsein Mukhtar, 'Stateless STPM High Achiever Gets to Pursue Tertiary Education' *New Straits Times* (Pokok Sena, 5 September 2022) <<https://www.nst.com.my/news/nation/2022/09/828648/stateless-stpm-high-achiever-gets-pursue-tertiary-education>>.

⁹² Universal Declaration of Human Rights 1948, art 23(1).

stateless identity before turning 21 years old, they lose the opportunity to be registered as a citizen under Article 15A of the Federal Constitution and hence, they would need to acquire a work permit as applied by foreigners who wish to work in Malaysia. This is the reality for many stateless children in the country, including Kak Yana's daughter who is stateless because her parents did not register their marriage according to Malaysian law.⁹³ The application of a work visa or employment pass makes up for the lack of identification documents that Malaysian employers require, although at the expense of one's inherent dignity as a true citizen born on Malaysian soil.

However, it must be noted that only children at risk of statelessness are able to apply for work permits.⁹⁴ This causes genuinely stateless children in Malaysia such as children of Rohingya refugees at risk of being exploited by corporations that are cutting costs to meet customer demands of lower prices.⁹⁵ It is a common but unethical practice when large companies reduce the wages of workers—some even lower than the bare minimum requirement. Due to the fear of getting caught for working without a permit, migrant workers and refugees are forced to endure labour exploitation of informal employment to maintain the livelihood of themselves and their families.⁹⁶ Furthermore, it is pertinent to understand that because stateless persons do not have citizenship, they are not protected by the labour laws in the country.⁹⁷ Also, as Malaysia is not a signatory to the 1954 Convention Relating to the Status of Stateless Persons, there is no legal duty to guarantee the basic employment conditions for refugees.⁹⁸ In its entirety, the current situation portrays an uncertain future for the marginalised stateless population with regard to employment.

6.3 Social Issues: Access to Healthcare

The national healthcare system, which many citizens take for granted, presents difficulties for stateless children in accessing its services and facilities.

Malaysia is not a party to the 1966 International Convention on Economic, Social and Cultural Rights (ICESCR) that recognises the right to enjoyment of standard, physical and mental health.⁹⁹ This explains the absence of national policies specifically addressing the healthcare problems faced by stateless people. For instance, Thailand has in 2010 introduced the special-government funded 'Health Insurance for People with Citizenship Problems (HIS-PCP) Policy' to encourage voluntary registration and enrollment of stateless

⁹³ Syaza Norazharuddin and Nur Hasliza Mohd Salleh, 'Being Malay, and Stateless in Malaysia' *Malaysia Now* (23 March 2022) <<https://www.malaysianow.com/news/2022/03/23/being-malay-and-stateless-in-malaysia>>.

⁹⁴ Loganathan and others (n 7).

⁹⁵ 'Situation and Gap Analysis on Malaysian Legislation, Policies and Programmes, and the ILO Forced Labour Convention and Protocol' (*International Labour Organization*) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_650658.pdf>.

⁹⁶ *ibid.*

⁹⁷ Employment Act 1955; Children and Young Persons (Employment) Act 1966.

⁹⁸ Convention Relating to the Status of Refugees 1951, art 24.

⁹⁹ International Convention on Economic, Social and Cultural Rights 1966, art 12.

individuals into a universal health coverage scheme.¹⁰⁰ A similar approach was also taken in the Philippines in 2018, where health insurance corporation (PhilHealth) operating under the Ministry of Health has vouched to protect Persons of Concern including stateless people in the country by enrolling them into the National Health Insurance Program.¹⁰¹ Although there is no explicit healthcare laws for the stateless, these policies in other ASEAN countries aptly provides stateless people access to healthcare. In Malaysia, healthcare is not easily accessible by stateless children for various reasons. Firstly, healthcare services for stateless children are expensive. As individuals who are not conferred a citizenship, stateless children automatically fall into the foreigner category if they are unable to furnish documents to prove their nationality. According to an official letter written by a panel of doctors published by *The Star*, non-citizens were charged between 24 and 100 times more compared to Malaysian nationals under the newly amended Fees Act (Medical) 1951 when accessing healthcare facilities and services in public hospitals.¹⁰² Secondly, public hospitals are not readily accessible in rural areas where certain stateless children live.¹⁰³ For instance, the Bajau Laut who lives in houses built at sea cannot afford to make trips to hospitals that are usually located in towns. The children of these sea nomads who are vulnerable to skin infections such as hookworm due to poor sanitation and hygiene practices are forced to 'live' with these diseases until traditional medicine is foraged to cure them.¹⁰⁴ Thirdly, stateless children fear getting caught by the authorities when stepping foot into government institutions to get access to healthcare. This is because the Director General of Health requires all government healthcare staff to report to the police the presence of undocumented foreigners, including that of children as per the Immigration Act 1959/63.¹⁰⁵ Not only does this policy impede the stateless population from getting the necessary help that they need when they fall sick, but it also creates ethical dilemma for healthcare practitioners who are trying to save lives. Without access to the national healthcare system, the stateless population is at greater risk of diseases spreading more rapidly. To prevent this, the Ministry of Health (MOH) in 2019 had launched a 'Compulsory Immunisation Programme' requiring all children including those who are stateless to be vaccinated against diphtheria and measles before they enroll into preschool.¹⁰⁶ Another noteworthy effort by the

¹⁰⁰ Proloy Barua and others, 'Healthcare Policies for Stateless Populations in ASEAN Countries: A Scoping Review' (2020) 22 *Journal of Immigrant and Minority Health* 597–620 <<https://doi.org/10.1007/s10903-019-00945-y>>.

¹⁰¹ 'PhilHealth Signs Inter-Agency Agreement for the Protection of Persons of Concern in PHL' (*PhilHealth*, 29 April 2018) <https://www.philhealth.gov.ph/news/2018/poc_protection.html>.

¹⁰² 'Proposing a Non-Citizens Health Act for Malaysia [Letter]' *The Star* (11 January 2022) <<https://www.thestar.com.my/opinion/letters/2020/01/11/proposing-a-non-citizens-health-act-for-malaysia>>.

¹⁰³ Wiki Impact Team, 'Malaysia's Invisible Poor: The Stateless Communities' (*Wiki Impact*, 23 March 2021) <https://www.wikiimpact.com/wp-content/uploads/2021/03/Latest_Mar23-Whitepaper-Malysias-Invisible-Poor_-The-Stateless-Communities.pdf>.

¹⁰⁴ *ibid.*

¹⁰⁵ Circular of the Director-General of Health No 10/2001: Guidelines for Reporting Illegal Immigrants Obtaining Medical Services at Clinics and Hospitals.

¹⁰⁶ Razak Ahmad and others, 'Vaccination Compulsory for All Kids' *The Star* (Petaling Jaya, 25 February 2019) <<https://www.thestar.com.my/news/nation/2019/02/25/vaccination-compulsory-for-all-kids-docs-start-with->

government is when the MOH announced free COVID-19 tests for both Malaysians and non-citizens for a short period of time.¹⁰⁷ Furthermore, an NGO called the Advocates for Non-Discrimination and Access to Knowledge (ANAK) had also aided the government by providing humanitarian aid to the stateless communities in Sabah during the pandemic.¹⁰⁸ Initiatives include breaking the language barrier of the stateless audience by using infographics and videos to communicate public health information about Covid-19.¹⁰⁹

6.4 Social Issues: Involvement in Crime and Substance Abuse

The lack of formal documentation has caused stateless children to be seen as threats to nationality security.¹¹⁰ As a result, they fall victim to almost all kinds of discrimination and become the vulnerable, marginalised population who live in constant fear of persecution by national authorities.¹¹¹ Under these circumstances of constant discrimination and neglect by the law and society, stateless children develop behavioural problems which eventually lead them to act in violence when they feel that all hope is lost.

As many stateless children are not educated, they inherit the predisposition of acting upon their feelings without having second thoughts of the possible consequences that may follow. It is in that moment that stateless children become easy targets of perpetrators to be used as mules to commit crimes.¹¹² Moreover, the circumstances arising from the lack of a nationality have also caused stateless children to fall into the trap of substance abuse. It was reported that unfortunately in the rural streets of Sabah, there are thousands of abandoned, stateless Bajau Laut children who have fallen into the severe addiction of sniffing plastic glue to overcome their hunger.¹¹³ In light of this, grassroot efforts such as '*Sekolah Pemulihan Gam*' was established in hopes to rehabilitate these children by helping them seek a viable solution to quit their addiction.¹¹⁴ However, given the fact that these initiatives are usually

immunisation-against-diphtheria-measles-as-they>.

¹⁰⁷ 'Malaysia Tested 73,000 Foreigners for Coronavirus, 3.7% Positive' (*Code Blue*, 14 August 2022) <<https://codeblue.galencentre.org/2020/08/14/malaysia-tested-73000-foreigners-for-coronavirus-3-7-positive/>>.

¹⁰⁸ Mary Anne K Baltazar and Amanda R Cheong, 'Reaching Stateless, Undocumented and Migrant Communities During the Covid-19 Pandemic: Lessons From the Grassroots Humanitarian Effort in Sabah, Malaysia' (2021) 3(1) *Statelessness & Citizenship Review* 131–141 <<https://statelessnessandcitizenshipreview.com/index.php/journal/article/view/303>>.

¹⁰⁹ *ibid.*

¹¹⁰ 'A Plea to Save Stateless Children from Citizens Trauma' *Free Malaysia Today* (11 December 2022) <<https://www.freemalaysiatoday.com/category/opinion/2022/12/11/a-plea-to-save-stateless-children-from-citizenship-trauma/>>.

¹¹¹ 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' (*UNHCR*, 2015) <https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf>.

¹¹² 'The Child's Right to a Nationality and Childhood Statelessness: Texts and Materials' (*institutesi.org*, 2020) <https://files.institutesi.org/crn_texts_materials.pdf>.

¹¹³ Syaza Norazharuddin, 'On Island Paradise, Teachers Work to Stop Stateless Children from Sniffing Glue' *Malaysia Now* (27 March 2022) <<https://www.malaysianow.com/news/2022/03/27/on-island-paradise-teachers-work-to-stop-stateless-children-from-sniffing-glue>>.

¹¹⁴ *ibid.*

made by charities or non-governmental organisations whose funding is limited, their small-scale operations are unable to tackle the issue of statelessness in its entirety.

7. Recommendations

Given the prevalence of statelessness in Malaysia, measures must be taken to address the issues faced by this marginalised population.

Firstly, to eradicate the problem of statelessness, it is recommended to amend gender discriminatory nationality laws under the Federal Constitution. Currently, the express use of the word '*father*' under section 1(b), Part II of the Second Schedule of the Federal Constitution allows only the father to pass on his Malaysian citizenship to his child who was born outside the Federation. The provision makes no mention of the child's mother, thereby implying that the mother cannot pass down her Malaysian citizenship to her child born overseas. This was affirmed in the Court of Appeal judgement in *Government of Malaysia v Suriani Kempe & Ors* which ruled that children born overseas to Malaysian mothers (but foreign fathers) are not Malaysians by operation of law upon returning to the country.¹¹⁵ Hence, a constitutional amendment to substitute the word '*father*' with the phrase '*parents one at least*' as seen in section 1(a), Part II of the Second Schedule would entail equal rights to both parents to confer nationality to their child born abroad.¹¹⁶

The latest news articles in July 2023 have reported that Datuk Seri Azalina Othman in the Law and Institutional Reform Department is preparing proposals to amend constitutional provisions pertaining to the citizenship issues involving children born overseas to Malaysian mothers.¹¹⁷ It is expected that such proposals will be presented after the state elections that are to take place in August in the states of Kelantan, Terengganu, Kedah, Penang, Selangor and Negeri Sembilan.¹¹⁸ Several changes that are to be presented in the proposed bill are to substitute the word '*father*' in section 1(b) and (c) of Part II of the Second Schedule to '*either parent*'.¹¹⁹

¹¹⁵ V Anbalagan, 'No "Automatic" Citizenship for Children Born Overseas to Malaysian Mums' *Free Malaysia Today* (Putrajaya, 5 August 2022) <<https://www.freemalaysiatoday.com/category/nation/2022/08/05/mums-cant-confer-citizenship-to-children-born-outside-malaysia-rules-court/>>.

¹¹⁶ Adib Povera, 'Children's Citizenship Issue: A-G Says Option is to Amend Federal Constitution' *New Straits Times* (Putrajaya, 21 August 2022) <<https://www.nst.com.my/news/nation/2022/08/824242/childrens-citizenship-issue-g-says-option-amend-federal-constitution>>.

¹¹⁷ Qistina Sallehuddin, 'Government to Present Proposals on Citizenship Law Amendments to Malay Rulers Council After State Polls' *New Straits Times* (Kuala Lumpur, 12 July 2023) <<https://www.nst.com.my/news/nation/2023/07/930227/govt-present-proposals-citizenship-law-amendments-malay-rulers-council>>.

¹¹⁸ *ibid.*

¹¹⁹ 'The Government's Proposed Amendments to Citizenship Provisions in the Federal Constitution' *Malay Mail* (10 July 2023) <<https://www.malaymail.com/news/what-you-think/2023/07/10/the-governments-proposed-amendments-to-citizenship-provisions-in-the-federal-constitution-hakam/78820>>.

Another recommendation is for the Malaysian government to look into the possibilities of acceding to the 1954 Stateless Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Positive impacts of ratifying the conventions include establishing a ‘Statelessness Determination Procedure’ (SDP) that identifies stateless persons by assessing their strong ties to the country.¹²⁰ For the many children who are stateless *in situ*, this determination procedure could potentially lead them to acquire a legal status as a stateless person which allows them to enjoy the fundamental liberties as lawful individuals residing in the country. If this is done, these stateless children will also be able to accumulate the necessary number of years of residence to facilitate them in acquiring a citizenship by naturalisation in the event their application of obtaining citizenship by operation of law fails.¹²¹ Unfortunately, articles have occasionally pinpointed the government’s unreadiness towards acceding to both international instruments.¹²²

As for practical methods to address the issue of access to education, it is suggested for temporary documentation to be issued to stateless children. This has been an initiative proposed by the Sarawak government to prevent stateless children from being left behind on education whilst their application for a citizenship at the National Registration Department is still pending.¹²³ Emphasis must be given to the word ‘temporary’ as this documentation that proves the identity of the stateless child as an individual born in the country is not in any way a promise to a Malaysian citizenship after the child turns 21 years old.

Fourthly, in terms of access to healthcare, a ‘Non-Citizen Healthcare Act’ should be passed to protect the basic health rights of all including that of non-citizens.¹²⁴ The basic health rights include immunisation against childhood illnesses for stateless children. Under the proposed Act, it is recommended for non-citizens whom the law considers to be residing illegally in the country to not be criminalised whilst undergoing treatment. If such a law is passed, it is hoped that parents will bring their stateless children to public healthcare centres for proper diagnosis of their illnesses for treatment. This means that the needs of the patient will be prioritised above all else irrespective of the fact that the child does not hold any official identity documentation.

¹²⁰ ‘Statelessness Determination Procedures: Identifying and Protecting Stateless Persons’ (UNHCR) <<https://www.refworld.org/pdfid/5412a7be4.pdf>>.

¹²¹ *ibid.*

¹²² Pristina Widya and Najamuddin Khairur Rijal, ‘The Role of the United Nations High Commissioner for Refugees (UNHCR) in Dealing with Stateless Problems in Malaysia’ (2022) 2(2) *Journal of Social and Policy Issues* 44–46 <<https://doi.org/10.58835/jspi.v2i2.46>>.

¹²³ ‘Baru Applauds Sarawak Cabinet’s Move to Issue Temporary Documentation to Stateless Children’ *malaymail* (Lawas, 12 April 2022) <<https://www.malaymail.com/news/malaysia/2022/04/12/baru-applauds-sarawak-cabinets-move-to-issue-temporary-documentation-to-sta/2053082>>.

¹²⁴ ‘Proposing a Non-Citizens Health Act for Malaysia’ *The Star* (11 January 2020) <<https://www.thestar.com.my/opinion/letters/2020/01/11/proposing-a-non-citizens-health-act-for-malaysia>>.

8. Conclusion

This paper has highlighted the legal and social struggles encountered by stateless children in Malaysia by first giving an insight to the situations that would cause a child to be born stateless. Research shows that there are many circumstances which have led children to be trapped in an endless and inescapable cycle of statelessness that has adversely impacted the livelihood of so many innocents in the country.

In addressing the legal and social issues faced by stateless children, the later parts of the paper showcase the implementation of government policies in their mission of overcoming the statelessness issue. Additionally, research has revealed the compassion of non-governmental organisations (NGOs) that have aided the government in ensuring that stateless children get a shot at a normal life in the same way as led by other Malaysian children. However, it can be concluded that though the efforts are commendable, the result is far from satisfactory due to the lack of funding and the large population of stateless children in the country. Thus, the government should give more attention to these individuals who are *invisible* before the law in hopes of providing a secure future for stateless children.

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