

LEGAL ANALYSIS ON STATELESS PERSONS – ISSUES IN SABAH ¹²⁴

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Abstract

Communities have been identified as being at risk of statelessness In Malaysia. Massey's definition of *de facto* statelessness is used to provide an understanding of how communities in Sabah are potentially *de facto* stateless. The article will touch on the history of migration and relate it to how migration from Philippines and Indonesia has brought about this situation of statelessness in Sabah. The article delves into the causes of statelessness in general and the Sabah stateless in particular. The consequences of being stateless will then be analysed. The article concludes with suggestions on how to move forward in terms of Sabah including how incorporation of International Law and the liberal interpretation of the Federal Constitution of Malaysia can assist in providing status to the Sabah stateless.

Keywords: *de facto*, *de jure*, stateless

1. Introduction

Within Malaysian domestic system, certain segments of our community have been given the unenviable status of being 'stateless persons'. In 2006, about 20,000 undocumented Indians born in the State both before and after independence were without birth certificates.¹²⁵ Due to conditions of life, in remote areas, such as agricultural estates, they have been either unable to register their births or ignorant of the need to register their births. Some have tried to apply for citizenship but are faced with numerous obstacles such as errors made in their applications either due to their own mistakes or mistakes by the National Registration Department. The Orang Asli also suffer the same issues of lack of documentation as the Indians do. Various factors including lack of knowledge and

¹²⁴ The ideas behind this article were presented at a 'Workshop for Academics: Researching and teaching nationality and Statelessness' held on 27th & 28th September 2016, organized by USIM, UKM & UNHCR in Kuala Lumpur. The author has since put the ideas into written expression for purposes of publication.

¹²⁵ Ramdas Tikamdas, 'The Right to Identity and Citizenship under the Constitution and International Law' (Statelessness: An Obstacle to Economic Empowerment Conference, Kuala Lumpur, Malaysia, 2006, 2)

understanding of the importance of having documents causes the Orang Asli to be branded as stateless in Malaysia.

Focusing on the issue at hand, journalists have reported that a large population of street children exists in Sabah. Most of the children have been abandoned by their parents, who were illegal immigrants or refugees of Filipino or Indonesian descent.¹²⁶ They suffer the plight of being stateless due to the substantive issue of descent. Their lack of Malaysian descent coupled by failure to register their births in their respective States of descent causes them to be considered stateless persons in Malaysia.

1.1. Objectives of Research

The objective of this research is to determine whether or not the Sabah street children are in effect stateless. The research then turns to the history of migration in Sabah which then eases into the 2nd and 3rd objectives which are the causes and consequences of statelessness in Sabah respectively. The final objective turns to steps that can be taken by various stakeholders to improve conditions in Sabah in relation to stateless street children.

1.2. Research Methodology

This paper is a doctrinal paper that looks at various laws and literature pertaining to stateless persons within the international sphere in general and the domestic sphere (i.e. Sabah) in particular. The doctrinal analysis provides the platform for later quantitative and qualitative research to be conducted in this area of law specifically for Sabah.

2. The Concept of *De Facto* Statelessness

The concept of *de facto* statelessness becomes relevant as it is hypothesized that the Sabah stateless persons are stateless as of fact and not as of law. Hence *de jure* statelessness does not feature in this analysis.

According to Massey, as a general rule, non-enjoyment of rights attached to nationality does not constitute *de facto* statelessness. The exception lies where the person does not enjoy diplomatic protection and consular assistance of the State of nationality in relation to other States.¹²⁷

Massey's definition on *de facto* statelessness is as follows:

¹²⁶ Anon, 'Stateless kids to get a home' *The Star* (London, 21 February 2005) 18

¹²⁷ Hugh Masey, 'Legal and Protection Policy Research Series' (LPPR/2010/01), 31-32, 40

De facto stateless persons are persons outside the country of their nationality who are **unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.**

Persons who have more than one nationality are *de facto* stateless only if they are outside all the countries of their nationality and are unable, or for **valid reasons**, are **unwilling to avail themselves of the protection of any of those countries.**¹²⁸

Massey's definition of *de facto* statelessness becomes particularly important due to its adoption as part of the Summary Conclusions to the Prato Expert Meeting.¹²⁹ The Prato Conclusion goes further to highlight that prolonged non-cooperation including where the country of nationality does not respond to the host country's communications can be considered as a refusal of protection.¹³⁰ This notion may well apply to the stateless of Sabah.

In order to understand how statelessness is intertwined with irregular migration in Sabah, one has to look at the history of migration in Sabah.

3. Migration in Sabah

Historically, the Spanish conquest of the Philippines brought about migration from the Philippines to Sabah. Nomadic ethnic groups such as the Bajau Laut, who are also known as 'sea gypsies', have settled at the boundaries of Sabah.¹³¹ Another group that has settled at the Sabah shores are the Suluk people that originate from the Sulu Sultanate of the Philippines. By the 16th century, the Brunei Sultanate had extended its powers to as far as Luzon, Sulu and South West Borneo. The expansion of the Brunei Sultanate, coupled the geographical landscape of Sabah with its 250-mile coastline and more than 200 islands, provided easy access into Sabah for Philippine and Indonesian citizens¹³². Easy access into Sabah has given rise to the problem of stateless children residing in Sabah.

During the Mindanao insurgency in the Philippines under the authoritarian rule of President Marcos, migration took place from the Philippines to Sabah between 1970 and 1977. At that point in time, the migrants were considered refugees of Suluk and Bajau origin, settling in the towns of Sandakan, Tawau and Lahad Datu.¹³³ By 1974, 54,000 IMM13 documents were issued under Regulation 11 (10),

¹²⁸ Ibid 60

¹²⁹ United Nations High Commissioner for Refugees, 'Expert Meeting The Concept of Stateless Persons under International Law Summary Conclusions, Prato Conclusions' (2010) (II (A) 2) Prato Conclusions < <http://www.refworld.org/docid/4calae002.html>> accessed 20 March 2014

¹³⁰ Ibid (F) (12)

¹³¹ Kamal Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration into Malaysia' (2005) 49 International Studies Quarterly 106

¹³² TENAGANITA, Acting Today for Tomorrow's Generation (Regional Conference on Stateless / Undocumented Children In Sabah, Kota Kinabalu, Malaysia, 2005) 22

¹³³ Kamal Sadiq, (n 8) 106

Immigration Regulations 1963¹³⁴. The IMM13 document issued under the Regulations allows the holder to reside and work in Malaysia, but the card is renewable on a yearly basis.

After 1978, even more persons claiming to be refugees from the Philippines began to make their way to Sabah. Technically, however, the reasons for claiming refugee status ended following the peace treaty between the Philippine Government and the Moro Liberation Front of 1976.¹³⁵ As such, those that arrived after 1977 were characterised as economic migrants that were fortunate enough to be able to establish networks with earlier arrivals to Sabah.

Cross-border movement in Sabah also included Indonesians who utilised informal entry routes to come into Malaysia. Early cross-border movement between the 1950s to the 1980s was prevalent, albeit unnoticed, as the Indonesians who arrived were not in competition with the local population.¹³⁶ Many of them eventually received permanent residence status and even citizenship. By the 1980s, however, bilateral labour laws were signed in the hope of a systematic inflow of migrant workers. Unfortunately, since demand exceeded supply, illegal entry into Malaysia was rampant.¹³⁷ Hence, the stance of the Malaysian government became tougher by the 1990s with legalisation programmes introduced followed by security operations involving detention and deportation of illegal immigrants. The tough stand of the Malaysian government did not, however, stop undocumented migrants from Indonesia entering Malaysia.

In 2001, due to the strained relationship between the Malaysian and Philippine government,¹³⁸ the refugee status of Filipinos were revoked and further stay was conditional only upon receiving work permits.¹³⁹ The erratic policies of the Sabah State government have contributed to the next generation of Filipinos in Sabah being stateless.

As Malaysia is not bound by international treaty law that protects refugees and stateless persons, there is no obligation to create laws or specific procedures that allow for the granting of asylum or registering of refugees within the State. Nor is

¹³⁴ Immigration Regulations 1963, L.N. 228/1963

¹³⁵ Kamal Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration into Malaysia', (n 8) 106; Z Abuza, *Militant Islam in SEA: crucible of terror* (Lynne Rienner Publishers 2003) 39

¹³⁶ Vijayakumari Kanapathy, 'Controlling Irregular Migration: The Malaysian Experience' (Regional Symposium on Managing Labour migration in East Asia, Singapore, 2007), 7

¹³⁷ *Ibid*, 8

¹³⁸ In 2000, the terrorist group known as the Abu Sayyaf, kidnapped foreign tourists and Malaysian from a resort off the island of Sipadan. This caused a strain the relationship between the two countries.

¹³⁹ Asian Migration News, 30 April 2001 as cited in Amarjit Kaur, 'Refugees and Refugee Policy in Malaysia' [2007] *Journal of the UNE Asia Centre*, 87

there an obligation to repatriate those who are no longer or not considered to be refugees. This has led to the increase in the number of stateless persons in Sabah.

4. Causes and Consequences of Statelessness in Sabah

Earlier account on the history of migration in Sabah relates to the subsequent causes and consequences of statelessness in that region. The following provides an illustration of the various causes and consequences of statelessness in Sabah.

4.1. Causes of Statelessness in Sabah

Various causes of statelessness exist. In Sabah, foreign parents of Philippine or Indonesian descent tend to misunderstand the function of a birth certificate. Birth certificates are perceived by many as proof of citizenship when, in fact, the child's birth has to be registered in the respective consulate.¹⁴⁰ Hence, they have to go through a different process of registration compared to locals and may be unaware of this fact. Children of IMM 13 card holders can remain without proper documents due to a lack of knowledge on the part of their parents in Sabah. The child of an IMM 13 card holder is entitled to IMM 13 status, but the parents, due to their own ignorance, tend to apply for birth certificates rather than the IMM 13 card. This creates a lot of confusion as to the status of the child.¹⁴¹

There are various types of marriages that take place in Sabah. Marriages that are unregistered and mixed marriages are common in Sabah. By law, foreign workers are not allowed to enter into a marriage as long as they remain in the country. As such, their marriages are invalid and their children illegitimate. These children's births are not registered since one of the documents required upon registration is a marriage certificate.¹⁴²

Mixed marriage between Indonesian and Philippine nationals is not a new phenomenon. The law requires that such marriages be registered at both consulates. The Indonesian government has a further requirement that entails all marriages having to be registered at the Indonesian District Court in Jakarta for the marriages to be legally valid.¹⁴³ Such cumbersome procedures make it difficult for children born of such marriages to have their births registered.

Mixed marriages between locals and foreigners may also pose a problem. A study conducted on women of Philippine origin in East Malaysia finds that foreign women who came to work in Malaysia express their dream of wanting to marry

¹⁴⁰ TENAGANITA, 'Acting Today for Tomorrow's Generation' (Regional Conference on Stateless / Undocumented Children In Sabah, Kota Kinabalu, Malaysia, 2005) 31

¹⁴¹ Ibid, 34

¹⁴² C Olsen, 'Malaysia: Undocumented Children in Sabah Vulnerable to Statelessness' (Refugees International Bulletin, 13 June 2007)

¹⁴³ Undang-undang Republik Indonesia Nomor 23 Tahun 2006 Tentang Administrasi Kependudukan

local men.¹⁴⁴ However, where the local spouse has deserted the foreign spouse, the foreign spouse will not be able to register the births of their children with the National Registration Department. The children would normally be entitled to citizenship based on the *jus sanguinis* principle, but this is defeated due to lack of a marriage certificate.

Some of these children have been left behind by parents who were illegal immigrants. The illegal status of the parents is an inherent problem of theirs and an inadvertent cause of failure to register their births. Immigration crackdowns explained earlier exacerbate the situation.

In Sabah, some of the immigrants live in remote areas. Furthermore, there is a general lack of Philippine and Indonesian Consulate services and support in Sabah. The Philippine Embassy merely has a mobile consulate service that visits Sabah once every three months to handle important cases, such as emergency travel documents.¹⁴⁵ No permanent Consular service exists even though the need is dire due to the unresolved status of the ownership of Sabah in the eyes of the Philippine government.¹⁴⁶ Hence, the registration of births and issuance of passports are not on the agenda for the mobile consulate service. Passport renewals must be performed at the embassy in Kuala Lumpur. The Indonesian consulate services are available in major towns. Access to these services becomes an issue.

Prior to 1997, all children were issued a birth certificate. Since 1997, birth certificates of children born of foreign parentage have the words 'Daftar Asing' printed on their certificates.¹⁴⁷ Therefore, a great deal of confusion is caused by the various types of documents used to facilitate the work and integration of foreign workers.¹⁴⁸ Yet another problem pertaining to policy implementation that peculiarly arises in Sabah is that individuals may find their birth certificates being revoked without valid reasons being provided.¹⁴⁹ The Fact-Finding Mission to Sabah reports that individuals go to the Registration Department or take part in registration exercises in hope of getting an identity card only to get their birth certificates revoked. There have been cases where identity cards have been revoked and replaced by temporary identification receipts.¹⁵⁰

The conclusion can be drawn that the predominant cause of *de facto* statelessness amongst those residing in Sabah is due to the failure to register births. The failure

¹⁴⁴ A-M Hilsdon, B Giridharan, 'Racialised Sexualities: the Case of Filipina Migrant Workers in East Malaysia' (2008) 15(6) *Gender, Place and Culture*, 622

¹⁴⁵ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 39

¹⁴⁶ C. Olsen, 'Malaysia: Undocumented Children in Sabah Vulnerable to Statelessness' (n 34)

¹⁴⁷ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 31

¹⁴⁸ A-M Hilsdon, B. Giridharan, 'Racialised Sexualities: the Case of Filipina Migrant Workers in East Malaysia' (n 21) 619

¹⁴⁹ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 37

¹⁵⁰ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 38.

to register births, in turn, is predominantly due to various negative internal and external factors. Internal factors include, lack of knowledge, types of marriages and the illegal status of parents. External factors are remote place of abode, inconsistent policies and poor policy implementation. The consequence of failure to register births is the increase in negative social conditions. Hence it is a cyclical problem that will cease only if the negative social factors that lead to the failure to register births are addressed.

4.2. Consequences of Statelessness

The consequences of statelessness are grave. Within the international sphere, an individual lacks diplomatic protection as a result of statelessness. A person must utilize nationality in order to obtain redress within the international sphere. For a stateless person, redress may not be conceivable as no State may be prepared to represent the individual.

Batchelor is of the view that:

... the stateless person is denied the vehicle for access to fundamental rights, access to protection and access to expression as a person under the law.¹⁵¹

Therefore, within the municipal sphere, the stateless person may not be able to exercise some 1st generation rights (i.e. civil and political rights) or 2nd generation rights (i.e. economic, social or cultural rights).

Generally, the most important rights of children jeopardised relate to education and health. Education is still inaccessible to thousands of stateless children of Sabah.¹⁵² Children need to have a birth certificate or an identity card before they can be admitted into public schools in Malaysia.

Changes on birth certificates that took place in 1997 distinguishes foreign students from the local students and effectively denies them the right to public primary education. For stateless children without birth certificates however, the position has been constant. Such children have no right to primary or secondary public education as Article 12 of the Federal Constitution explicitly stipulates that there shall be no discrimination against any citizen with regards to admission to an educational institution maintained by a public authority.¹⁵³ Using the maxim *expressio unius exclusio alterius*, it is clear that non-citizens do not share these rights. The only option available to such individuals would be private education, which is too costly for most of the parents. In this respect, children of Indonesian descent have been more fortunate compared to the children of Philippine

¹⁵¹ Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 International Journal of Refugee Law 235

¹⁵² TENAGANITA, 'Acting Today for Tomorrow's Generation' (n17) 45

¹⁵³ Article 12 of the Federal Constitution of Malaysia 1957

parentage. In Kota Kinabalu, for example, the Indonesian government has set up the '*Sekolah Indonesia Kota Kinabalu*'.¹⁵⁴ The Philippine government has not ventured along the same path and one of the reasons is the fact that a large proportion of the individuals who left the Philippines were refugees.

Children who have some level of education find that they are unable to further their education due to the lack of requisite documents. A birth certificate or identity card is needed for children to sit for major governmental exams. Therefore, there is a lack of motivation to study as the stateless child is unable to continue his or her education beyond a certain point.¹⁵⁵ Even if the child is within some form of education system, there is lack of support in terms of scholarships or other forms of aid. Although initiatives have been undertaken by civil society groups to assist these children, there are also fears that the initiative would be perceived by the government as the 'harbouring of illegals', which is an offence under the Immigrations Act 1959/63.¹⁵⁶ Hence no concrete initiatives have been formulated to provide *de facto* stateless children some form of further education.

The lack of access to education indirectly leads to greater violation of international norms. Sabah children that are *de facto* stateless engage in employment in order to contribute to the family income. Amongst the types of work that they perform include washing cars; carting wheelbarrows of goods in the market; selling plastic bags; peddling contraband cigarettes; and shining shoes.¹⁵⁷ Places of employment include markets, constructions site, shops and restaurants.¹⁵⁸ This employment is informal and stops if raids are conducted in those places of employment.

Young Sabah girls who are *de facto* stateless are sometimes taken in as illegal maids within domestic settings. If lucky, their employers will provide them with some basic education or skills training. This, however, depends on the goodwill of the employer. In other instances, the young girls are abused without recourse to assistance from governmental authorities due to their stateless condition.

Peculiarly for the stateless children of Sabah, the emotional turmoil of being separated from their parents, having no status in society and no right to education tends to lead to loneliness, frustration and hopelessness, which surfaces through behavioural changes. The Tenaganita fact finding team to Sabah witnessed children as young as six years of age smoking the cigarettes that they were selling. Drinking alcohol and glue sniffing is also not uncommon for these stateless

¹⁵⁴ Muguntan Vanar, 'No documents, so street children of KK can't get into school' *Sunday Star* (London, 18 Jan 2009)

¹⁵⁵ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 50

¹⁵⁶ Section 55B of the Immigration Act 1959/63 (ACT 155)

¹⁵⁷ Muguntan Vanar, 'No documents, so street children of KK can't get into school' (n 31).

¹⁵⁸ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 62

children.¹⁵⁹ Street children have also been blamed for petty offences, such as theft, in various parts of Sabah.¹⁶⁰

Massive crackdowns on illegal immigrants also cause the *de facto* stateless person and *de jure* stateless refugee to fear arrest, detention and deportation. According to the Home Minister, the Home Ministry has been devising a mechanism that would enable the authorities to monitor all foreigners from the moment they enter the State until their departure from the State. One of the purposes of such a mechanism is to create an environment of fear and threat in order to compel foreigners without legal status to prepare to leave Malaysia immediately.¹⁶¹

There are various forms of detention that may occur. Administrative immigration detention occurs whilst asylum application is being processed. Additionally, there is pre and post criminal detention; and detention for the purposes of national security.¹⁶² The stateless person in Malaysia is subjected to the two latter forms of detention. Mc Bride argues that such irregular status should not be an automatic basis for pre-trial detention.¹⁶³

As a consequence of this method of detention, two problems arise for the stateless persons examined in the present research. Firstly, the stateless person, is living in the constant fear of arrest and detention. As they have no recourse to diplomatic protection, there would be no authoritative body to represent their interests. Secondly, for certain groups, such as the stateless children of Sabah, the arrest of their parents leads to an increase, rather than decrease, in the number of stateless children without any support and, therefore, concretizes their status of statelessness.

Street children in Sabah are also sometimes detained¹⁶⁴. Cases have been reported of the deportation of children to Indonesia or the Philippines if relatives or friends do not attempt to secure their release.¹⁶⁵ There has also been a positive initiative by the government of rescuing these street children and handing them over to the Welfare Department, who later verifies their circumstances, takes the necessary steps to keep them off the street and provides them some education.¹⁶⁶ A special

¹⁵⁹ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 58

¹⁶⁰ Muguntan Vanar, 'No documents, so street children of KK can't get into school' (n 31)

¹⁶¹ Statement by Datuk Seri Hishammuddin Tun Hussein, Home Minister, reported by Zuhri Azam Ahmad, 'Mechanism to monitor illegals, put 'fear into them'' *The Star* (Kuala Lumpur, 16 Feb 2010) <http://thestar.com.my/news/story.asp?file=/2010/2/16/nation/20100216143416&sec=nation> accessed 25 October 2012

¹⁶² The Equal Rights Trust Project, 'Stateless Persons in Detention' (2009) Legal Working Paper: The Protection of Stateless Persons in Detention under International Law, 32

¹⁶³ J. Mc Bride, 'Irregular Migrants and the European Convention on Human Rights' Council of Europe, Parliamentary Assembly, Committee on Migration, Refugee and Population, (2005) 21 AS/Mig/Inf, *Caballero v United Kingdom* (32819/96) 8 February 2000

¹⁶⁴ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 66

¹⁶⁵ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 67

¹⁶⁶ Muguntan Vanar, 'Sabah to rescue street children' *The Star* (Kuala Lumpur 9 July 2008)

federal task force has been set up that performs *Operasi Kanak-kanak Jalanan*, whereby children found on the streets or rounded up during state-wide anti-illegal immigrants exercises and sent to shelters.¹⁶⁷ Additionally, in an interview conducted with a Deputy Assistant Director of Immigration at Tawau, it was confirmed that children are currently being detained and deported together with their parents.¹⁶⁸ In this manner, the rights and safety of the children are safeguarded. Arguably, Malaysia is still attempting to achieve a balance between securitarianism and humanitarianism.

Stateless children are more susceptible to various diseases and health problems due to the fact that their living conditions are deplorable.¹⁶⁹ With the proliferation of clinics in Malaysia, some *de facto* stateless persons resort to getting treatment from private clinics as there may be clinics close to their place of abode. Rather than visiting government hospitals where their status of statelessness may be scrutinized and possibly lead to arrest and detention, private clinics may not insist on documentation, especially if the stateless individual is brought to the clinic by an informal employer. This, however, means higher cost of treatment.

In relation the stateless Sabah child, the cost of fees in the government hospital is double that the amount compared to what the Malaysian citizen pays even if the child is born in Malaysia.

De facto stateless persons tend to resort to other measures when encountering medical problems. Home delivery is what some *de facto* stateless persons resort to.¹⁷⁰ As a consequence of the home delivery, the child born will not have his or her birth registered. Self-medication using traditional methods is yet another common alternative for the stateless person, which naturally has its share of risks.¹⁷¹

5. Recommendations and Conclusion

In harnessing the existing strengths within the Malaysian Legal System, The Federal Constitution gives key provisions on the acquisition of citizenship in Malaysia that can be utilised to assist the plight of the stateless person. Amongst the key provisions are Article 14 (1) (b) read together with Section 1(e) Part II of the 2nd Schedule, which stipulate that those born within the Federation who are not citizens of any other country are citizens by operation of law. Article 19B Part III of the Second Schedule applies to abandoned new born children who are also

¹⁶⁷ Anon, 'Shelter in Kamanis takes stateless children off the streets' *The Star* (Kuala Lumpur, 27 February 2012)

¹⁶⁸ Interview with Surend Jayshree Praser, Deputy Assistant Director of Immigration, Tawau, Marco Polo Hotel, 8 July 2011, 7.45-8.10 pm. (Interviewee 1)

¹⁶⁹ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 54

¹⁷⁰ Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma over Their Future' (2009) 47 (1) *Southeast Asian Studies* 69

¹⁷¹ TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 58

entitled to citizenship by operation of law. Hence, the newborn stateless child could be made entitled to automatic acquisition of nationality. Citizenship by registration can be seen as a safety net for the abandoned child who has been unable to receive automatic citizenship by operation of law. Articles 15 to 18 of the Federal Constitution deal with citizenship by registration and the provisions cover a multitude of stateless persons. The provisions can be said to be protective of women and children, in particular, and work in line with the intentions of CEDAW¹⁷² and CRC¹⁷³ treaty regimes. Citizenship by naturalisation is also available via Article 19 of the Federal Constitution.

Even without accession to the Stateless Persons Convention¹⁷⁴, pertinent rights can be made available to stateless women and children residing in Malaysia as the human rights conventions transcend the concept of citizenship. While not all of the rights provided for within the Stateless Persons Convention are contained in CEDAW and CRC, nonetheless the rights most crucial to the stateless person are included, such as education, health and employment. These are the rights that at least allow the stateless person to lead an organised life within the State. The additional provisions within the CRC, which even the Stateless Persons Convention has not considered, include the right to life, non-separation from parents, family reunification, freedom of expression, privacy, prohibition against torture, collective right of the minority child and cultural life.

Applying the bottom-up approach, NGOs are able to assist in the plight of the stateless person. The proliferation of NGOs in Malaysia is most certainly a boon to the State's human rights development. This is one of our strengths that can be nurtured for the betterment of the stateless person. NGOs advocate UNHCR programmes and help develop UNHCR's activities. NGOs that work closely with the UNHCR in Malaysia include, but are not confined to, the Malaysian Social Research Institute, SUARAM, Amnesty International and Health Equity Initiative. Certain NGOs, such as the Borneo Child Aid Society have begun providing education for stateless persons in Sabah. The internal and external relationships of NGOs that are mandated to assist the stateless person should to be strengthened to ensure that all share the similar objective of protecting stateless persons and ultimately eradicating statelessness. Strong internal relations would mean that the local NGOs are able to form coalitions and address problems collectively. Such coalitions are much easier to create compared to creating an association of member States, since NGOs are not constrained by the international legal concepts of sovereignty, territorial integrity and non-interference.

¹⁷² Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)

¹⁷³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 13 (CRC)

¹⁷⁴ Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (Stateless Persons Convention)

In terms of external relations, transnational networking is the key to ensuring that the plight of stateless persons is addressed in equal measure worldwide. Such networks facilitate consistency of practice within the State and could lead to increased accession of relevant conventions. As stipulated by Tushnet, the transnational reach of NGOs provides a “universalist understanding of human rights” which is vital to the promotion of human rights within the State.¹⁷⁵

In referring to the top-down approach, it is an advantage to have the UNHCR already providing assistance to the refugees and stateless in Malaysia. Additionally, it is beneficial that SUHAKAM works as a conduit between civil society and the federal government. The UNHCR has various competencies within the State including acting as *amicus curiae* as in the case of *Tun Naing Oo v Public Prosecutor Tun Naing Oo v Public Prosecutor*¹⁷⁶. Perhaps, as proposed by Dolidze, the UNHCR can serve as a third-party interlocutor when third party intervention on behalf of a stateless person becomes necessary in instances where no State would be able to intervene in support of any application made by a stateless person in court.¹⁷⁷ SUHAKAM has worked together with the UNHCR in order to secure access to places of detention for the UNHCR. The Human Rights Commission of Malaysia Act 1999 (Act 597)¹⁷⁸ empowers SUHAKAM to improve human rights standards of the State. The hybrid approach is applied whereby, rather than ‘coerce’ the government into acceding the Stateless Persons Convention, SUHAKAM would be the best institution to coax the government into treaty accession since the institution has the closest nexus with the government compared to NGOs, the UNHCR or perhaps even other States. Continuous dialogue between the UNHCR and SUHAKAM, coupled with the link SUHAKAM has with the Malaysian government, is bound to have a positive bearing on the plight of stateless persons in Malaysia.

From the above analysis, it is clear that the Malaysian government is instrumental in improving the circumstances of stateless persons with the support of NGOs, the UNHCR and SUHAKAM. But the fate of stateless persons does not lie solely in the hands of the executive branch. The judiciary also has a pertinent role to play. Even though it is the State that is the subject of international law, the abstract entity of the State is made up of personnel from all three branches of government. As such, judicial reception of international law within the State is an important feature in providing protection to stateless persons. The judiciary should consider international law in good faith even though neither the Federal Constitution nor

¹⁷⁵ M Tushnet, ‘The Inevitable Globalisation of Constitutional Law’ (2009) 49(4) Virginia Journal of International Law 989

¹⁷⁶ [2009] 5 MLJ 680

¹⁷⁷ . Dolidze, ‘Lampedusa and Beyond’ Recognition, Implementation, and Justiciability of Stateless Persons’ Rights under International Law’ (2011-2012] 6(1) Interdisciplinary Journal of Human Rights Law 143

¹⁷⁸ The Human Rights Commission of Malaysia 1999 (ACT 597)

Human Rights Commission of Malaysia Act 1999 provides that the domestic court is bound by international law.¹⁷⁹

Just as transnational network systems broaden the perspectives of officers working within NGOs, cross-national dialogue is capable of opening the minds of the judges to employ varied interpretation techniques. This highlights the importance of cross-national dialogue¹⁸⁰. Discerning the *ratio decidendi* and *obiter dictum* through a simple reading of a judicial colleague's decision would not have the same effect as personally interacting with the judge and sharing thoughts and ideas. Judges should attend judicial conferences and interact with each other to enable the exchange of views on the various approaches that could be applied within the Malaysian context. The Malaysian judiciary has, in the past, employed a bold approach when interpreting provisions of the Federal Constitution in a liberal manner. Perhaps the time has come for further liberal reception and interpretation of international human rights instruments beginning with the UDHR.

Banks acknowledges that conventions are indeed indeterminate. Conventions:

...articulate a combination of rules and standards that grant State parties and adjudicators varying degrees of discretion.¹⁸¹

Failure to ratify or accede to a treaty may not prove detrimental to the State. Nevertheless, the entire operation of the international human rights legal regime depends on the principle '*pacta sunt servanda*'. A standardized approach to international law on stateless persons depends on accession to the three primary conventions which are the Stateless Persons Convention, the Reduction of Statelessness Convention¹⁸² and The Hague Convention¹⁸³. The Refugees Convention¹⁸⁴ ought to be acceded to as well. The Malaysian approach of acceding merely to a few specific conventions fails in protecting the stateless person at this point. As long as the Malaysian framework towards asylum is based upon national security, Malaysia will not accede to the primary conventions on statelessness such as the Stateless Persons Convention and the Reduction of Statelessness

¹⁷⁹ Rohaida Nordin, 'The Domestication of the Rights of the Indigenous Peoples (Orang Asli) in Malaysia' (Ph.D thesis, Lancaster University 2008) 145

¹⁸⁰ Li-ann Thio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) December (4) National Taiwan University Law Review 341

¹⁸¹ Angela Banks, 'The Trouble with Treaties: Immigration and Judicial Review' Fall (2010) 84 Saint John's Law Review 1257

¹⁸² Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (Reduction of Statelessness Convention)

¹⁸³ Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopted 13 April 1930, entered into force 1 July 1937) 179 UNTS 4137 (Hague Convention)

¹⁸⁴ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugees Convention)

Convention. The approach based on national security will eventually cause the gap between the stateless person and the citizen to become more apparent.

In conclusion, it is deduced that statelessness in children of Sabah contain specific causes and consequences that relate to the history of migration within the region. These instances of statelessness remain *de facto* rather than *de jure* in the view of the author which in fact lessens the burden of the State as the focus on the international community remains on the *de jure* stateless. Nevertheless, the recommendations presented maintain a gradual yet progressive approach towards protection of the stateless person residing in Malaysia in particular the Sabah stateless. It is opined that Malaysia already has part of the tools necessary to provide an opportunity for Sabah stateless to live like any other citizen in this country.