

Legal analysis on the Right to Livelihood for Stateless Persons in Malaysia

Tamara Joan Duraisingam* and Harmahinder Singh Iqbal Singh

Taylor's Law School, Taylor's University, 47500 Subang Jaya, Malaysia

ABSTRACT

In Malaysia, there are various communities that have stateless persons in their midst. As the Malaysian government is not a party to the Convention Relating to the Status of Stateless Persons 1954, these individuals have limited rights or no rights within the State. Of all rights that individuals are entitled to, the right to livelihood would be one of the more important rights. Unfortunately, the Federal Constitution of Malaysia does not expressly provide for this right to livelihood for all persons living in the State. However, a liberal interpretation of existing law is possible. There have been instances where judges employed a liberal approach to the interpretation of provisions of the Federal Constitution of Malaysia. This study attempted to analyse the current position of stateless persons in relation to the right to livelihood in Malaysia by applying the concept of livelihood through a liberal interpretation of the right to life under art 5 of the Federal Constitution of Malaysia. The research encompassed a content analysis of international law, domestic law (including the Federal Constitution), and theories of incorporation of international law into the domestic sphere. The research further delved into the possible inclusion of the right to livelihood for stateless persons through the liberal construct of law in Malaysia.

Keywords: Conventions, livelihood, refugees, stateless

ARTICLE INFO

Article history:

Received: 13 August 2019

Accepted: 13 May 2020

Published: 25 September 2020

E-mail addresses:

Tamarajoan.Duraisingam@taylors.edu.my (Tamara Joan Duraisingam)

Harmahinder.Singh@taylors.edu.my (Harmahinder Singh Iqbal Singh)

*Corresponding author

INTRODUCTION

The Federation of Malaysia is one of the States that has taken strides in attempting to reduce statelessness within its jurisdiction. Although the term 'statelessness' or 'stateless person' is used within the international

sphere, this term does not feature within the Federal Constitution of Malaysia. A stateless person is one 'who is not considered a national of any state under the operation of its law'. This is according to the Convention Relating to the Status of Stateless Persons 1954 (Stateless Persons Convention). Whilst the international system of law uses the term 'nationality', the domestic system through the Federal Constitution proffers the term 'citizenship'. The refugee on the other hand would be one who is persecuted in his / her home state for reasons of race, religion, nationality, has a membership of a particular social group or political opinion, and thus unable to receive protection from his / her home state. This is provided for in art 1A (2) of the Convention Relating to the Status of Refugees 1951 (Refugees Convention). Due to the finer points of international and domestic definitions, communities in Malaysia who are dealing with statelessness are distinctively categorized, as evident in the discussion below.

Communities such as the Rohingya, Non-citizen Indians, Sabah stateless have in this decade been successfully identified and recognized as either being stateless or at risk of statelessness. Rohingya, have been considered both refugee and stateless due to citizenship laws effected by the military junta in the 1970s and 80s in Myanmar. The non-citizen Indians have had problems in relation to their documentation in Malaysia from the time of Malaysian Independence but have been recently clearly categorised as stateless by virtue of the Malaysian Indian Blueprint 2017. The Sabah situation,

on the other hand, is complex as there are varied circumstances of statelessness within the communities in Sabah: there are for example refugees from the Philippines who received IMM13 immigration status in Sabah; children of migrants born in Sabah with births unregistered; illegal immigrants with undocumented families and the Bajau Laut who live in territorial waters.

Although the Indian community has been quite clearly categorised as stateless through domestic policy, the same is not true for all stateless persons in Malaysia. As such, each stateless community should be addressed distinctively. Whilst groups of stateless persons continue to be identified; and effort is being taken to register these groups and provide them with some legal recourse, the fact remains that until they are capable of acquiring citizenship as provided for in the Federal Constitution of Malaysia, they are eschewed from enjoying all the rights available to the Malaysian citizen. For purpose of this paper, the focus will be on the right to livelihood, which remains one of the most important second-generation rights. This study attempts to analyse the law in relation to livelihood for stateless persons in Malaysia. International and domestic law on livelihood is analysed. The analysis is supported by further evaluation of theories in relation to the incorporation of international law within the domestic sphere. The thesis of the paper suggests that stateless persons residing in Malaysia could be entitled to the right to livelihood through the liberal interpretation of domestic law and the incorporation of international law

rules. The terms right to work, employment, and livelihood are used interchangeably. Within the Federal Constitution of Malaysia, the term livelihood is used since the term employment is not present as an individual right in the constitution. International law uses the terms of employment or work in international conventions.

LITERATURE REVIEW - THE RIGHT TO LIVELIHOOD IN INDIA, MALAYSIA AND THE INTERNATIONAL SYSTEM

Articles 5 – 13 of the Federal Constitution of Malaysia provide for nine pertinent fundamental liberties encompassing both civil and political rights as well as economic, social, and cultural rights. The Malaysian constitution does not specifically use the term human rights, but rather uses the term ‘fundamental liberties’. Thio (2009) contrasted this with the later Westminster based constitutions influenced by the European Convention on Human Rights (ECHR) and subsequent European Court of Human Rights jurisprudence. In the case concerning the Bermuda Constitution i.e. *Minister of Home Affairs v. Fisher* (1980) the court highlighted that emphasis on the ECHR only took place after 1960 with the independence of Nigeria. Art. 5 of the Federal Constitution of Malaysia provides for the right to life. It stipulates that “no person shall be deprived of his life or personal liberty save in accordance with the law”. There have been cases that have stretched the meaning of the right to life to include the right to livelihood. Malaysian courts refer to Indian jurisprudence as art.

21 of the Indian Constitution 1949 is *in pari materia* (similar) to art. 5 of the Federal Constitution of Malaysia. Referring to Indian cases, the case of *Francis Corlie v. Union Territory of Delhi* (1981) held that the right to life included the right to live with human dignity and all that goes along with it. This would include the bare necessities of life such as adequate nutrition, clothing, and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, mixing and commingling with fellow human beings. It further stated that the right to life includes basic needs and the right to carry on such functions and activities as constituting the bare minimum expression of the human-self. In the case of *Olga Tellis v. Bombay Municipal Corporation* (1986), pavement dwellers contended that they had a right to live. Furthermore, one cannot exercise this right without the means of livelihood. The right to life is illusory without a right to the protection of the means by which life can be lived. Life and livelihood go hand in hand in India. Later cases, such as *State Of U.P v. Charan Singh* (2015) still refer to the case of *Olga Tellis v. Bombay Municipal Corporation* (1986).

In Malaysia, the seminal case on point would be the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* (1996) where Gopal Sri Ram, JCA stated:

They (Judges) should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true

intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression “life” in art. 5(1) is given a broad and liberal meaning. Adopting the approach that commends itself to me, I have reached the conclusion that the expression “life” appearing in art. 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members.

In the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors* (1997), the term “deprivation of life” under art. 5(1) of the Federal Constitution of Malaysia included the right to livelihood. Deprivation of a clean environment results in deprivation of livelihood, which in turn results in deprivation of life. The term is twice removed.

Clean environment = livelihood
= life.

The case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* (1998) revolved around the cancellation of a re-entry permit into Sabah. This affected the right to livelihood of the respondent. Gopal Sri Ram JCA in the Court of Appeal cited his own judgment of the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan*

(1996) and was of the view that “‘life’ and ‘personal liberty’ are both equally dynamic concepts and should be treated in like fashion”.

Other cases include *Lembaga Tata tertib Perkhidmatan Awam v. Utra Badi* (2000). In this case, tarnishing the reputation of the appellant affected the right to life according to Gopal Sri Ram JCA. In *Nor Anak Nyawai v. Borneo Pulp Plantation Sdn. Bhd.* (2001) according to Ian HC Chin J, customary land rights fell under the right to livelihood. The interpretation of the right to life here is again twice removed from the core right. While in *Lembaga Tata tertib Perkhidmatan Awam v. Utra Badi* (2000) case, right to life encompassed the right to live with common human dignity, in *Nor Anak Nyawai v. Borneo Pulp Plantation Sdn. Bhd.* (2001), the right to life encompassed the right to livelihood which in turn encompassed the right to customary land rights.

In the Federal Court decision of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* (2002), Mohd Dzaidin FCJ was of the view that art. 5 should be read as a whole and disagreed with the Court of Appeal interpretation of the right to life. Nevertheless, cases post *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* (2002) paint a different picture. In *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* (2010) it was decided that “other freedoms may be found embedded in the ‘life’ and ‘personal liberty’ limbs of art. 5”. Gopal Sri Ram FCJ gave *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* (1996) case a breath of fresh air in the case *Lee Kwan*

Woh v. Public Prosecutor (2009) where it was held that art. 5 (1) is meant to be prismatically read together with art.8.

Relying on *dictum* from the cases of Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan (1996), Sivarasa Rasiah v. Badan Peguam Malaysia & Anor (2010), and Lee Kwan Woh v. Public Prosecutor (2009), in the case of Muhamad Juzaili bin Mohd Khamis and Ors v. State Government of Negeri Sembilan and Ors. (2015), Mohd Hishamudin CJA provided a stretched interpretation of the right to life when three transgender individuals were detained for crossdressing. It was asserted that the law, in that case, s.66 of the Syariah Criminal Enactment 1992 (NS) prevented the appellants from moving in public to reach their places of work and as such rendered the right to livelihood illusory.

Looking at international law, the conventions on human rights are both general conventions that cover the international community at large and specific conventions that cater to groups such as stateless persons, women, and children. General conventions such as the International Covenant on Civil and Political Rights 1966 (ICCPR 1966) and the International Covenant of Economic, Social and Cultural Rights 1966 (ICESCR 1966) cover first and second generational rights respectively. Art. 6 of the ICESCR 1966 provides for the right to work. This right is for all human beings and not limited to citizens alone. Art. 7 stipulates that the State should recognise the right of everyone to just and favourable conditions of work. However, a study conducted

by Refugee International on stateless persons of Bangladesh, Estonia, and United Arab Emirates (UAE) showed that lack of citizenship and identification cards led to unemployment, underemployment, and lower salaries (Lynch, 2005).

The Stateless Persons Convention, bespoke to persons who are stateless as of the law, offer rights of employment. The articles referring to the right to employment are the right to wage-earning employment (art. 17 of the Stateless Persons Convention 1954), self-employment (art. 18 of the Stateless Persons Convention 1954), and liberal profession (art. 19 of the Stateless Persons Convention 1954).

The Convention on the Reduction of Statelessness 1961 is another convention aimed at ensuring the reduction of future statelessness in a State party to the convention. It ensures that all children born in a State acquire nationality either based on the *jus sanguinis* (descent of parents) or *jus soli* (by birth) rule.

In spite of its lack of accession to the general human rights conventions and the conventions on stateless persons, Malaysia is party to a number of Human Rights Conventions that cover specific groups of persons. According to Tikamdas (2006), accession to international conventions, such as the Convention on the Elimination of Discrimination against Women 1979 (CEDAW 1979) and the Convention on the Rights of the Child 1989 (CRC 1989) show proof of Malaysia's commitment towards protecting all persons whether documented or not.

Malaysia became a party to CEDAW 1979 on 5 July 1995. Art. 11 of the CEDAW 1979 provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights”. Particular rights include the right to work as an inalienable right, the same employment opportunities, free choice of profession and employment, equal remuneration, social security, and protection of health.

The spirit of the Convention is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, in the equal rights of men and women. The operational words of art. 1 being “on a basis of equality of men and women”.

The Malaysian government acceded the CRC 1989 on 17 Feb 1995. The CRC in its art. 32 protects children from work that threatens the health of the child. The State has the responsibility of protecting the child and ensuring that there is a minimum age requirement. As such, the State regulates the work conditions for children.

METHOD

This conceptual paper focusses on the plight of the stateless person in Malaysia and the possible right to livelihood based on the provision of the law. The study is via library research and cumulative synthesis. Extant literature on the right to livelihood is uncovered through the systematic study

of case law. The study employed content analysis of current laws and methods of interpretation of constitutional law. There is a comparative analysis of Indian cases. The Indian Constitution provides fundamental liberties similar to what exists in Malaysia. The paper focusses on the right to life and the stretching of the interpretation of this right to include the right to livelihood. The study examined both international and domestic laws. The research juxtaposed the right to employment within international law with the right to livelihood as provided for within the domestic constitutional setting.

In terms of reception of international law into the domestic system, the transformation and incorporation doctrines apply. These doctrines form the theoretical basis of the analysis. Conventions would need to be acceded to and incorporated as part of the domestic law. Customary international law on the other hand does not necessarily apply automatically. As there is a conservative reception of international laws within Malaysia, these theories are juxtaposed with the more liberal construct of the federal constitution through case law. As such, judicial interpretation techniques were examined.

The interchangeable use of the terms ‘livelihood’, ‘work’ and ‘employment’ is evident in this research. Domestic interpretation of the right to life includes livelihood thereby positioning it as the domestic term used. International law conventions on the other hand seem to use the terms ‘work’ or ‘employment’. ICESCR

1966 uses the term 'work' whereas in the Stateless Persons Convention 1954 uses 'employment'.

In the course of conducting this research, certain limitations were identified. There is criticism as to the usage of the doctrinal research method for this type of study. Doctrinal research is viewed in a negative light. Most critics use the term 'arm chair research' to describe doctrinal research. This implies that the researchers are detached from the populations aggrieved. There is a realization that research studies in the field of law should not be confined to pure legal matters (Yaqin, 2007). The researchers are of the view that doctrinal research is more suitable in instances where the focus of the research lies in the constitutional concept of the right to livelihood and international law provisions rather than the stateless populations. The main purpose of the research was to focus on the rights that could be made available to the stateless person and to strengthen the right so that all persons regardless of their status as stateless were able to enjoy rights and privileges that were usually only made available to citizens. The predominant purpose of the study, therefore, was to come up with an effective and inclusive interpretation of the right to livelihood as encompassed in domestic constitutional law.

The second limitation is the lukewarm reception of international law within the domestic sphere. Although there are many articles internationally that provide for the right to livelihood, the reality paints a very different picture. Most Asian states are not

party to all the conventions and even if they are, operationalising the provisions in their ideal form may not be feasible. International law articles in turn are very general and do not provide clear guidelines as to how a State is going to realise a particular right. Hence the theory and the practice may not be all that aligned when it comes to international law incorporation into the domestic sphere.

The decision to conduct a doctrinal study leads to a separate issue whereby the right to livelihood is generalised for all stateless groups. Therefore, it may not address the intricacies of each stateless group effectively. Whilst one group of stateless individuals may need to depend heavily on the broad /liberal interpretation of the right to life, other groups may not require this as there may already be integrated network systems within the community that provide for livelihood in an informal manner. Identifying individual groups' needs demands individual socio-legal studies for each group and may be research better suited for collaboration with social scientists. Foster and Lambert (2016) acknowledged that the lack of empirical data did challenge the global protection of stateless persons. In spite of its small geographical size, lack of empirical data appears to be a problem in Malaysia as well.

RESULTS

The Federal Constitution of Malaysia, as young as it is, has not incorporated the right to livelihood as a clear standalone right. Furtherance of social human rights was not part of the important scheme of things

back when the Reid Commission drafted the Federal Constitution. Countries such as Malaysia and Singapore that acquired independence before the 1960s do not use the term human rights, but can still benefit from the liberal interpretation of their respective constitutions using judicial interpretative techniques.

In terms of case law in Malaysia, the court utilised judicial interpretative techniques and employed a liberal interpretation of the right to life. This is seen in the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* (1996). Although the case specifically referred to a public service officer who is a citizen of the State, nevertheless the phrase ‘members of a society’ as used in the case would include stateless persons who live in society. This is buttressed by the fact that the word person incorporated in art. 5 is a clear indication that the article refers to citizens and non-citizens alike (Faruqi, 2008).

Although there are no cases on the right to life and the stateless person to-date, it can be deduced that such a stretched interpretation of the word ‘life’ covers what it means and who it benefits. As such all persons ought to enjoy the right to livelihood in the State as long as their existence in the State is not tainted with illegality.

Within its context, one notes that art. 5 of the Federal Constitution of Malaysia does contain a proviso that relates to immigration. Detention of a person is usually for no more than twenty-four hours. Within that timeframe, he/she will appear before a magistrate. However, it is possible for a

non-citizen to face detention for up to 14 days (art. 5(3)).

Divergent viewpoints may crop up in relation to this provision. Firstly, is to interpret the proviso to mean that stateless persons would fall into the category of an illegal immigrant and therefore be eschewed from a liberal construct of art. 5 of the Federal Constitution of Malaysia. At the other end of the spectrum, the contention is that stateless persons form a specific category of persons who are not merely immigration offenders. *De jure* stateless persons (stateless persons as of law) such as Palestinians and the Rohingya have acquired a certain level of status in the country due to the backing of the UNHCR and other organisations. Other stateless persons that are *de facto* stateless (stateless as of fact) such as the undocumented Indians have been recognised as stateless via policy. Governmental/organisational efforts are already underway to ensure that these individuals acquire documentation. As such the stateless would be the ‘non-citizens’ other than those caught for immigration offences and therefore ought to benefit from the liberal interpretation of art. 5. As it stands, no cases form a clear principle of law that stateless persons are entitled to the right to livelihood in their State of residence via art. 5 of the Federal Constitution of Malaysia. This stretched interpretation of ‘life’ remains an idea rather than a tangible expression of rights.

The concept of rule of law within the international system of law on the other hand clearly envisages the thick conception,

which readily provides for rights to all human beings. International law provides various provisions safeguarding the right to livelihood through conventions. Unlike domestic law, international law provides a platform to protect non-citizens in ways that rarely differentiate them from citizens (Opeskin, 2016).

All human beings ought to enjoy fair remuneration, safe, and healthy working conditions, rest, and leisure. Currently, only citizens are able to exercise these rights. Since the provisions of the Stateless Persons Convention are not considered as customary international law, the convention is dependent on State accession. Malaysia has yet to accede to this convention. Even if provisions on the right to work were part of customary international law, it may not bind Malaysia as Malaysia generally subscribes to the pure dualist doctrine of incorporation of international law within the domestic sphere. For international customary law to apply, there must be a transformation of custom into domestic law (*PP v. Rajappan*, 1986).

Analysis of the Reduction of Statelessness Convention 1961 revealed that children of refugees and stateless parents would acquire nationality within Malaysia thereby slowly eliminating the issue of stateless persons in Malaysia. Based on art. 14 of the Federal Constitution of Malaysia, it is evident that Malaysia applies the *jus sanguinis* principle, which means that citizenship is acquired by the descent of parents. However art. 14(1) (b)

read together with Part II, s.1 para (e) of the 2nd Schedule of the Federal Constitution of Malaysia stipulates that every person born within the Federation who is not a citizen of any other country are citizens of Malaysia by operation of law. These safeguards would address statelessness.

Referring to CEDAW 1979 and CRC 1989, the focus of CEDAW 1979 is not the woman citizen but all women, which raises the presumption that the convention provides the platform to ensure all women in the State regardless of citizenry or non-citizenry as our case may be are entitled to work. Further analysis of the convention, in particular art. 1 of CEDAW 1979 however described otherwise.

The operational words of art. 1 of CEDAW 1979 being “on a basis of equality of men and women”. The focus of CEDAW is not to provide rights as such but to provide equality of rights. This indicates that if the stateless man does not receive the right to employment, then the right is not available to the stateless woman as well. This statement is repeated in art. 11 of CEDAW, which refers to the employment rights of women. As such, although CEDAW does provide for the right to employment, it remains illusory to the stateless woman unless and until this right is available to men. Art 32 of the CRC 1989 on the other hand serves as a protective provision rather than a rights-based provision. From this analysis, one deduces that the only conventions that Malaysia has acceded to containing provisions on women and children’s right

to employment are not coterminous with the right of employment for the stateless person.

DISCUSSIONS

Evaluating why stateless persons acquire minimal rights and protection within the State of residence, Weiner (1993, as cited in Lilienthal et al., 2015) surmised the perception as follows: stateless persons are threats to 1) the State that they have come from, 2) the State of residence and 3) the relationship between the two states. Firstly, they would be a threat if they have arrived whilst opposing the regime of the home State and the resident State may use them as a military threat. Secondly, the resident State may perceive them as a threat to security. Furthermore, they may be a cultural and socio-economic threat within the resident State. This sense of unease comes from the higher echelons of government right down to the citizens of the State (Lilienthal et al., 2015). Due to the perception of threat rather than an opportunity, States like Malaysia are reluctant to accede to conventions that provide rights to these stateless communities. The 'securitarianism' approach is employed (Dean et al., 2015). Migration in general (which includes movement of stateless persons) can be viewed as a threat to national security (Metevlev, 2016). Regional bodies such as ASEAN consider emigration as a right but immigration as a matter of national sovereignty and security (Petcharamesree, 2016). Both Feller (2006) and Nathwani (2000) had criticized the approach whereby securitarianism trumps humanitarianism.

Popular misconceptions that take place within strict immigration control include the mischaracterization of those in need of asylum. Stateless communities are not given rights as statelessness is sometimes seen as a consequence of illegal migration especially in relation to the Sabah stateless in Malaysia.

It is only very recently that the government has chosen to classify certain communities as having stateless persons in their midst, the first being the Indians who are earmarked as stateless in the Malaysian Indian Blueprint (Prime Minister's Office, 2017) of the former government. There are as of yet no governmental policies clearly categorizing other groups (like the Rohingya community and the Sabah stateless) as stateless and providing the communities rights based on this categorization.

There is a general reluctance to see statelessness as a Malaysian problem (Allerton, 2017). For example, rather than focus on the statelessness of Sabah children, the media tends to focus on the fact that they are street children (Allerton, 2017). Further, Chai (2019) stated that public discourse revealed that there was a guarded approach to the stateless issue. This is due to a misunderstanding that if citizenship is resolved for any stateless person in Malaysia, then all stateless persons will have access to citizenship regardless of their link to the State.

Internationally, statelessness has failed to emerge as an issue that attracts the attention of the general parlance. Kingston (2009) was of the view that the story of

statelessness failed to emerge due to three factors. Firstly, the story of statelessness is difficult to construct. A clear image of a stateless person does not develop in the mind of society and the narrative on statelessness is not easy to understand. Stories on refugees and street children are more graphic and well received by the media. Secondly, the issue lacks credible solutions at a global level. Various causes of statelessness exist and each cause may require a separate solution. The Rohingya, stateless Indians and Sabah stateless could be classified as stateless due to different factors and would require different methods of resolving the issue of statelessness. There is difficulty in creating awareness about the message. Thirdly, there is a lack of political will because there is a close link between statelessness and the concept of sovereignty thereby causing the home ministry to focus on security rather than rights. The politics of invisibility exist for certain persons in Malaysia who lack legal status (De Vries, 2016). Lack of visibility coupled with a reluctance to classify persons as stateless makes it difficult to earmark persons entitled to the right to livelihood.

As such, two propositions emerge:

1. It is when the government recognizes statelessness through policies, that the individual enjoys citizenship rights encompassing the right to livelihood.
2. The conduit to livelihood would be through citizenship and not statelessness since the government of Malaysia recognizes very few communities as stateless (clearly only the Indians at present) and Malaysia has not acceded to the relevant conventions providing for rights and reduction of statelessness. Therefore, these conventions do not apply.

The term 'livelihood' is used in the propositions as a reference is specifically made to the Federal Constitution in analyzing applicable domestic law. The question arises as to who determines which rights are to be safeguarded and why is it some rights may be eschewed? There has been a longstanding debate within human rights scholarship about a hierarchy of human rights (De Wet & Vidmar 2012). It is indeed a step in the right direction that contemporary conventions contain the right to livelihood, although the term used is either the right to work or employment depending on which convention is being referred to. The breadth and width of application however remain as vague as in the case of interpretation of the Federal Constitution of Malaysia. In relation to the provisions of rights within the Stateless Persons Convention, there is no indication as to a hierarchy of rights. A stateless person may have priorities in terms of rights received. Priorities include the right to livelihood and housing in the State of residence. Extant literature does not reflect rights that are of a priority compared

to others. However, referring to the right to livelihood *per se*, in relation to minority conventions, more elementary rights, such as the right to residence and to work, were never touched (Arendt, 1976).

Malaysia does not provide for most of the rights to the stateless person. The only 1st generation rights provided include the right to religion under art. 12 and nationality for the newborn when art. 14(1) (b) is read together with Part II 1(e) of the Second Schedule of the Federal Constitution of Malaysia. Second-generation rights included, albeit on a piecemeal basis, is the right of administrative assistance through the UNHCR and rights to property theoretically as per art. 13 of the Federal Constitution of Malaysia. Although it is theoretically possible to protect stateless persons through domestic law, such laws have been of minimal effect in practical terms. Through the General Assembly Resolution 3274 (XXIX) of 1974 read together with art. 11 of the Reduction of Statelessness Convention 1961, the UNHCR has been given the mandate to deal with both refugees and stateless persons in the examination of their claims and presenting their claims to the appropriate authorities. It is recommended that an appropriate agency should be entrusted with the effective protection of stateless persons beyond reactive and non-functional tasks so far conferred upon the UNHCR (Goodwin-Gill, 1994). Malaysia is yet to be well equipped for accession to the Stateless Persons Convention as even States that have acceded to it for years do not necessarily comply with all

international treaty obligations (Bianchini, 2017). The UNHCR's focus and rightly so is on refugees residing in Malaysia. UNHCR does not have the mandate to negotiate on stateless persons' right to livelihood. Its mandate only covers the scope of art. 11 of the Reduction of Statelessness Convention 1961.

CONCLUSION

Based on the aforesaid analysis, there are ways in which stateless persons may enjoy the right to livelihood without having to be a citizen in the State. Theoretically, the law seems liberal enough for this safeguard to exist. Practical application of the law however confines the right of livelihood to the citizen of the State. The former Malaysian government tended to shy away from the issue of statelessness. In fact, the Former Home Minister did comment that Malaysia did not have stateless persons ("No Stateless People", 2015). However, statelessness is a gaping wound that will fester and one day explode if no entity addresses the matter as soon as possible. The current government has yet to look at opportunities for the stateless. Relevant conventions such as the ICESCR 1966, the Stateless Persons Convention 1954, and the Reduction of Statelessness Convention 1961 exist that allow stateless persons to enjoy rights within a State. The stateless residing in Malaysia may not benefit from international law since primary conventions on stateless persons do not apply in Malaysia. It would not be feasible to accede to these conventions as they provide a host of rights

for the stateless that the State may not be able to accommodate. Even if accession of the three conventions above takes place, the right to livelihood may not feature as a pertinent right within the hierarchy of rights. Although the UNHCR at present has the mandate to present a claim on statelessness to the appropriate authorities, the mandate does not reach as far as for the UNHCR to assist in facilitating the right to livelihood for the stateless person. The recommendation based on this analysis is for the executive to be cautious in terms of accession to conventions but the judiciary to be liberal in the interpretation of art 5 of the Federal Constitution of Malaysia. Until the government provides for some allowances for stateless individuals to work in this country or the judiciary stretches the liberal interpretation of the right to livelihood to include stateless persons, this group of individuals would have to rely on the mission of NGOs and the goodwill of civil society.

ACKNOWLEDGMENT

The ideas of this article were presented at the International Conference on Human Capital 2018, Taylor's University and supported by Taylor's University.

REFERENCES

- Allerton, C. (2017). Contested statelessness in Sabah, Malaysia: Irregularity and the politics of recognition. *Journal of Immigration and Refugee Studies*, 15(3), 250-268.
- Arendt, H. (1976). *The origins of totalitarianism*. New York, USA: Harcourt Brace Jovanovich.
- Bianchini, K. (2017). A comparative analysis of statelessness determination procedures in 10 EU States. *International Journal of Refugee Law*, 29(1), 42-83.
- Chai, J. Y. L. (2019). Homegrown statelessness in Malaysia and the promise of the principle of genuine and effective links. *Statelessness and Citizenship Review*, 1(1), 95-135.
- Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18. 1979, 1249 U.N.T.S. 13.
- Convention Relating to the Status of Stateless Persons, Sept. 28. 1954, 360 U.N.T.S. 117.
- Convention on the Reduction of Statelessness, Aug. 30. 1961, 989 U.N.T.S. 175.
- Convention on the Rights of the Child, Nov. 20. 1989, 1577 U.N.T.S. 3.
- Dean, K., Kiik, L., Lazzarino, R., Guillou, A., Kulla, K., Arnez, M. A. (2015). *State rhetoric versus people crossing borders in Southeast Asia. An ongoing negotiation*. Retrieved July 10, 2020, from <https://www.aai.uni-hamburg.de/soa/personen/arnez/medien/seatide-online-paper-4.pdf>.
- De Wet, E., & Vidmar, J. (Eds.). (2012). *Hierarchy in international law: The place of human rights*. Oxford, England: Oxford University Press.
- De Vries, L. A. (2016). Politics of (in)visibility: Governance-resistance and the constitution of refugee subjectivities in Malaysia. *Review of International Studies*, 42(5), 876-894.
- Feller, E. (2006). Asylum, migration and refugee protection: Realities, myths and the promise of things to come. *International Journal of Refugee Law*, 18(3-4), 509-530.
- Foster, M., & Lambert, H. (2016). Statelessness as a human rights issue: A concept whose time has come. *International Journal of Refugee Law*, 28(4), 564-584.

- Francis Corlie v. Union Territory of Delhi* AIR 1981 SC 745 (Ind.).
- Goodwin-Gill, G. S. (1994). The rights of refugees and stateless persons. In K. P. Saxena (Eds), *Human rights perspective and challenges (in 1990 and beyond)* (pp. 394-395). New Delhi, India: Lancers Books.
- International Covenant on Civil and Political Rights, Dec.16,1966, 999 U.N.T.S. 171.
- International Covenant on Economic, Social and Cultural Rights, Dec.16,1966, 993 U.N.T.S. 3.
- Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors* 1997 3 MLJ 23 (Mal.).
- Kingston, L. N. (2009). *Legal invisibility: Statelessness and issue (non) emergence* (Doctoral thesis), Syracuse University, USA.
- Lee Kwan Woh v. Public Prosecutor* 2009 5 MLJ 301 (Mal.).
- Lembaga Tatatertib Perkhidmatan Awam v. Utra Badi* 2000 3 MLJ 218 (Mal.).
- Lilienthal, G., Ahmad, N., & Dorloh, S. (2015). Juridical personality and anti-immigration discrimination: A socio legal examination in the Malaysian context. *Malayan Law Journal Arts*, 6, 12-23.
- Lynch, M. (2005). *Lives on hold: The human cost of statelessness* (Vol. 2). Retrieved July 10, 2020, from http://www.refugeeinternational.org/files/5051_file_stateless_paper.pdf
- Metelev, S. (2016). Migration as a threat to national security. *Indian Journal of Science and Technology*, 9(14), 1-6.
- Minister of Home Affairs v. Fisher* 1980 AC 319 (UK.).
- Muhamad Juzaili bin Mohd Khamis and Ors v. State Government of Negeri Sembilan and Ors* 2015 3 MLJ 513 (Mal.).
- Nathwani, N. (2000). The purpose of asylum. *International Journal of Refugee Law*, 12(3), 354-375.
- No Stateless People, Says Zahid. (2015, April 20). *Daily Express*. Retrieved December 9, 2018, from <http://www.dailyexpress.com.my/news.cfm?NewsID=99073>
- Nor Anak Nyawai v. Borneo Pulp* 2001 6 MLJ 241(Mal.).
- Olga Tellis v. Bombay* AIR 1986 SC 180 (Ind.).
- Opeskin, B. (2016). Book reviews: The human right to citizenship: A slippery concept. *International Journal of Refugee Law*, 28(2), 355-359.
- Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* 1998 3 MLJ 289 (Mal.).
- PP v. Rajappan* 1986 1 MLJ 152 (Mal.).
- Prime Minister's Office. (2017). *Malaysian Indian blueprint*. Putrajaya, Malaysia: Malaysian Indian Blueprint Secretariat.
- Petcharamesree, S. (2016). ASEAN and its approach to forced migration issues. *The International Journal of Human Rights*, 20(2), 173-190.
- Faruqi, S. S. (2008). *Document of destiny*. Petaling Jaya, Malaysia: Star Publication (Malaysia) Berhad.
- Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* 2010 2 MLJ 333 (Mal.).
- State Of U.P v. Charan Singh* 2015 CA no 2381 of 2007 Supreme Court of India (Ind.).
- Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor* 1998 3 MLJ 289 (Mal.).
- Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* 1996 1 MLJ 261 (Mal.).
- Thio, L. (2009). Reception and resistance: Globalization, international law and the Singapore constitution. *National Taiwan University Law Review*, 4, 335-383.

- Tikamdas, R. (2006). The right to identity and citizenship under the constitution and international law, statelessness: An obstacle to economic empowerment. *Forum by Era Consumer*, 1-5.
- Weiner, M. (1993). Security, stability, and international migration. *International Security*, 17(3), 91-126.
- Yaqin, A. (2007). *Legal research and writing*. Petaling Jaya, Malaysia: LexisNexis.

