



Malaysia's proposed amendments to citizenship provisions in its Federal Constitution:

The potential for progress being overshadowed by regression

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1. Executive Summary

- 1.1. If passed into law, most of the recent amendments proposed by the Malaysian Government to citizenship provisions in Malaysia's Federal Constitution will have a deleterious impact in terms of reducing the number of cases of statelessness in the country and from preventing new cases from arising. On the contrary, statelessness (particularly cases of statelessness amongst children and intergenerational statelessness) is likely to increase. Childhood statelessness can significantly stunt a child's development: lack of citizenship typically means that children cannot access basic services, including education and healthcare, increases their exposure to harmful and exploitative practices such as trafficking or indefinite detention, and severely curtails their future employment prospects and prosperity.¹
- 1.2. The exception is the proposed amendment which seeks to grant Malaysian women equal rights as Malaysian men to confer nationality to their children born overseas. This amendment is in keeping with global trends which are in favour of maintaining or improving equality between women and men where conferral of nationality to children is concerned. If passed, and applied effectively, and with retroactive effect, this amendment will help to prevent and reduce cases of statelessness amongst children.
- 1.3. The proposed amendments that seek to remove safeguards for children born on the territory who would otherwise be stateless, or for foundlings, appear to be out of step with Malaysia's international and regional obligations to prevent and reduce statelessness, and with global and regional trends, which are in favour of maintaining such safeguards or adding them to nationality laws where they do not already exist.

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¹ UNHCR, *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness* (Statelessness Report, 3 November 2015) <<https://www.refworld.org/docid/563368b34.html>>; Tharani Loganathan, Zhie X Chan, Fikri Hassan, Zhen Ling Ong and Hazreen Abdul Majid, 'Undocumented: An examination of legal identity and education provision for children in Malaysia' (2022) 17(2) PLOS ONE 1 <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0263404>>.

2. Introduction

- 2.1. Since mid-June 2023, it has been an open secret² that the Government of Malaysia is proposing significant amendments to a number of citizenship provisions in its Federal Constitution (“Constitution”). While efforts to reform the Constitution to grant Malaysian women equal rights with Malaysian men to confer nationality on their children represent a major win for gender equality and efforts to eradicate statelessness, the bulk of the proposed amendments seek to roll back key protections against statelessness, particularly for children. The inclusion of these safeguards in the country’s apex legal instrument since 1963, to serve as a bulwark against statelessness, is notable given that they were introduced before key international conventions containing the same safeguards had even come into force.³
- 2.2. The complexion of statelessness in Malaysia means that the majority of these proposed amendments, if passed, will not only represent a serious regression in terms of reducing the magnitude of the problem in Malaysia, but will also be out of step with regional and global trends which are focused on maintaining or increasing measures to prevent and eradicate statelessness.

3. The size and profile of stateless populations in Malaysia

- 3.1. Although no official data on the number of stateless people in Malaysia is available, estimates based on NGO-collected data are large. At the end of 2022, UNHCR reported 115,169 stateless people in the country. However, this figure is likely to be a significant underestimate as it only includes the number of stateless Rohingya refugees (103,380) in the country, and 9,040 non-displaced stateless persons identified through a mapping and registration campaign by Development of Human Resources for Rural Areas (DHRAA) in peninsular Malaysia.⁴ In contrast, the Centre for Human Rights Research and Advocacy (Malaysia) estimated in its submission to the 2018 Universal Periodic Review of Malaysia, that there were nearly 300,000 stateless children living in the country.⁵
- 3.2. According to several mapping studies,⁶ the stateless population in Malaysia includes longstanding residents who are stateless; persons rendered stateless by unequal provisions in nationality laws; abandoned children and foundlings; stateless adopted children; indigenous people (e.g., Orang Asli/Asal); nomadic peoples; and multigenerational migrants and refugees:

² Professor Shad Saleem Faruqi notes that in Malaysia, ‘there is the unbelievable practice of misusing the Official Secrets Act to keep all legislative proposals under wraps till the Bill is laid before Parliament’: ‘Proposed Amendments on Citizenship Laws in Malaysia: One Step Forward, Several Steps Back’, *Malay Mail* (online, 28 June 2023)

<<https://www.malaymail.com/news/what-you-think/2023/06/28/proposed-amendments-on-citizenship-laws-in-malaysia-one-step-forward-several-steps-back-shad-saleem-faruqi/76849>>.

³ These conventions are the Convention on the Reduction of Statelessness (1961 Convention), the 1966 International Covenant on Civil and Political Rights, and the 1989 Convention on the Rights of the Child.

⁴ UNHCR, *Global Trends: Forced Displacement in 2022* (Report, 14 June 2023) Table 5 <<https://www.unhcr.org/global-trends>>. DHRAA did not register stateless Orang Asli communities or those on the Borneo side of Malaysia due to resource constraints.

⁵ Human Rights Council (Working Group on the Universal Periodic Review), *Summary of Stakeholders’ submissions on Malaysia*, 33rd sess, UN Doc A/HRC/WG.6/31/MYS/3 (24 Aug 2018) 11 <https://www.upr-info.org/sites/default/files/documents/2018-10/a_hrc_wg.6_31_mys_3_e.pdf>.

⁶ M Bathmaloshanee, *Statelessness in Malaysia* (Report, DHRAA Malaysia, 28 April 2022)

<https://dhrmalaysia.org.my/wp-content/uploads/2022/04/STATELESSNESS-IN-MALAYSIA-REPORT-05042022_compressed.pdf>; M Nungsari and N Fong, *Human Rights and Statelessness in Peninsular Malaysia* (Report, SUHAKAM – The Human Rights Commission of Malaysia, 2023)

<https://suhakam.org.my/wpcontent/uploads/2023/03/SUHAKAM_Statelessness.pdf>; James Chai Yun Liew, ‘Homegrown Statelessness in Malaysia and the Promise of the Principle of Genuine and Effective Links’ (2019) 1(1) *Statelessness & Citizenship Review* 95.

- a. Persons with longstanding residence and their descendants who arrived in Malaysia or were born before Independence (31 August 1957) but became stateless because they did not register before Malaysia Day (16 September 1963). These stateless persons are often living in rural areas and are Indian persons of Tamil descent, persons of Chinese descent or persons of Siamese descent.⁷ There are no official records of the number of stateless persons in this category, but DHRRA (Development of Human Resources for Rural Areas) estimated at least 16,392 stateless persons in peninsular Malaysia between 2016 - 2023.⁸
- b. Persons rendered stateless by gender discriminatory provisions in the Constitution. Malaysia is one of 24 countries globally that continue to prevent women from conferring nationality to their children on an equal basis to men.⁹ There are two main circumstances where children born to a Malaysian citizen are vulnerable to statelessness because of nationality laws that permit gender-based discrimination and prevent parents from conferring their Malaysian citizenship:
 - i. First, a child may be born stateless if they are born outside of Malaysia to a mother who is a Malaysian citizen, and they are not eligible for citizenship through their father or according to the principle of *jus soli* in the territory in which they are born. This is because Article 14 (1)(b) of Part II of the Second Schedule of the Constitution only permits Malaysian fathers to confer their nationality to their children born overseas, not Malaysian mothers. In 2021, 2,300 applications for citizenship by mothers for their children born outside of Malaysia were under review with very little progress towards applications being accepted.¹⁰
 - ii. Secondly, children may struggle to access citizenship if they are born to an unmarried Malaysian father and non-Malaysian mother. Children born out of wedlock or to parents prior to a marriage being registered are at risk of statelessness because of gender discriminatory provisions in s 17, Part III, Second Schedule of the Constitution. In 2018, the Home Minister reported 12,667 children were denied Malaysian citizenship because they were born to an unmarried Malaysian father and a non-Malaysian mother.¹¹
- c. Abandoned children, also known as foundlings, may be at risk of statelessness due to being unable to prove connection to Malaysian parents. The Welfare Department recorded 1,933 stateless children in welfare homes in 2019.¹²
- d. Stateless children adopted by Malaysian parents do not automatically acquire Malaysian citizenship and are often still required to prove entitlement to Malaysian citizenship through biological parents. Numbers of stateless adopted children are unknown but there have been several court cases concerning applications for Malaysian citizenship.¹³

⁷ Nungsari and Fong (n 6) 30.

⁸ Ida Lim, 'Counting Malaysia's 'invisible' people: How many born here cannot be citizens despite their local roots', *Malay Mail* (online, 10 July 2023) <<https://www.malaymail.com/news/malaysia/2023/07/10/counting-malaysias-invisible-people-how-many-born-here-cannot-be-citizens-despite-their-local-roots/78296>>.

⁹ UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness* 2023 (7 March 2023) <<https://www.refworld.org/docid/640751284.html>>.

¹⁰ Nungsari and Fong (n 6) 37–8.

¹¹ Ibid 37.

¹² Ibid 33.

¹³ Ibid 35.

- e. Some indigenous people face risks of statelessness, as most live in remote areas and face barriers to registration and access to identity documents.¹⁴
- f. Nomadic people such as the Bajau Laut (Sama Dilaut) are also at risk of statelessness because of a lack of official documentation and the evidential burden to prove that they are not citizens of any other state if seeking Malaysian citizenship.¹⁵ The Semporna District Office and Sabah Parks authority have reported that there are 8,344 Bajau Laut, of which 45 per cent are estimated to lack citizenship.¹⁶
- g. Stateless refugees, in particular 103,380 Rohingya refugees who were registered with UNHCR Malaysia in 2022. Children born to stateless refugee parents are also at risk of stateless because Malaysian citizenship is subject to the parents' nationality.¹⁷ However, there are some limited pathways to citizenship through naturalisation but this is an arduous process for refugees to access.¹⁸

4. Current provisions in the Malaysian Constitution to prevent childhood statelessness

- 4.1. The Constitution contains some important protections to prevent statelessness, particularly amongst children. Under the Constitution, children born in Malaysia who would otherwise be stateless,¹⁹ and abandoned children, or foundlings,²⁰ acquire Malaysian citizenship by "operation of the law." When citizenship is acquired by "operation of the law," it is deemed an automatic, and non-discretionary right that the government needs to uphold based on a simple verification of facts. If this does not happen, affected individuals can and have challenged the Government's decision not to grant citizenship in the courts.²¹ Because there are no administrative guidelines or procedures regarding the implementation of these safeguards, the Government does not enforce these automatic provisions, the practical utility of these provisions is limited, and recourse must generally be sought through the courts.
- 4.2. Nationality can also be acquired by registration, which is a process by which persons can apply for citizenship. Citizenship by registration, unlike "under the operation of the law" is non-automatic and discretionary, and generally falls outside the purview of the courts.²² Article 15A of the Constitution can be viewed as a safeguard for children who don't qualify for citizenship by operation of the law, for example, foundlings, adopted children, and children born out of wedlock

¹⁴ Ibid 38; Bathmaloshanee (n 6).

¹⁵ Nungsari and Fong (n 6) 38; Asia Pacific Refugee Rights Network, *The Vulnerability of Bajau Laut (Sama Dilaut) Children in Sabah, Malaysia* (Position paper, March 2015)

<https://www.academia.edu/13191865/The_vulnerability_of_Bajau_Laut_Sama_Dilaut_children_in_Sabah_Malaysia>.

¹⁶ Nicole Girard, 'Caught Between the Sea and the Land: The Dilemma of Stateless Indigenous Seafarers' *Minority Stories* (online) <<https://stories.minorityrights.org/statelessness/chapter/caught-between-the-sea-and-the-land-the-dilemma-of-stateless-indigenous-seafarers/>>.

¹⁷ Nungsari and Fong (n 6) 40.

¹⁸ Ibid.

¹⁹ Article 14 (1)(b) of Part II of the Constitution together with Section 1(e) and Section 2(3) of Part II of the Second Schedule. Section 1(e) provides that 'every person born within the Federation who is not born a citizen of any country is a citizen of the Federation by operation of the law', while Section 2(3) stipulates the period, 'having at birth any citizenship which he acquires within one year afterwards.' This means that all stateless persons born in Malaysia, who have yet to acquire any citizenship within one year from the date of birth, are citizens by operation of the law.

²⁰ Section 19B of Part III of the Second Schedule and Section 1(a) of Part II of the Second Schedule of the Constitution. Section 19B of Part III of the Second Schedule of the Constitution, 'a newborn child found exposed', that is an abandoned child or foundling, also acquires Malaysian citizenship 'by operation of the law.' This is because such children are presumed to have been born to a permanent resident mother, and under Section 1(a) of Part II of the Second Schedule of the Constitution, a child born in Malaysia to at least one permanent resident parent is entitled to Malaysian citizenship.

²¹ *Wong Kueng Hui v Ketua Pengarah Jabatan Pendaftaran Negara & Lain-Lain* (Unreported, Federal Court, 2022).

²² Section 2 of Part III of the Second Schedule states that a decision of the Federal government under Part III of the Constitution shall not be subject to appeal or review in any court.

to a Malaysian father and non-Malaysian mother. However, in practice, very few applications under this provision are successful due to the uncertain and highly discretionary nature of the process.²³

5. Developments in Malaysia to address statelessness

- 5.1. The Government of Malaysia has acknowledged the problem of statelessness in the country and has taken some positive steps to address it.²⁴ For example, in 2017, the Malaysian Government acknowledged the existence of stateless Indians of Tamil descent by launching the Malaysian Indian Blueprint, under which it pledged to resolve statelessness and documentation issues for the this group within five years.²⁵ In 2018, the then Malaysian Prime Minister announced that the Government would grant citizenship to all permanent residency holders over the age of 60. This included stateless permanent residents from the Indian Tamil community and by mid-2019, 1,641 people from this cohort had acquired citizenship because of this initiative.²⁶
- 5.2. Following the case of *Suriani Kempe & Ors* (2021), in which the High Court ruled in favour of six Malaysian mothers to pass their citizenship to their children born abroad on an equal basis as Malaysian fathers, the Government appealed the decision, which was subsequently overturned in the Court of Appeal. Notwithstanding the Government's victory, because of active campaigning by grassroots organisations, in 2023 the Government announced its proposal to amend Article 14(1)(b), Section 1(b) of the Second Schedule of the Constitution to grant both parents equal rights to confer their nationality to their children born overseas. If passed and effectively implemented with retroactive effect, this amendment will help to resolve the statelessness of children born overseas to Malaysian mothers, and in prevent new cases from arising in the future.²⁷

6. The proposed amendments to citizenship provisions in the Federal Constitution

- 6.1. Together with the progressive reform to remove gender discrimination when it comes to Malaysian women not being able to confer nationality to their children born on an equal basis as Malaysian men, a number of other amendments to the Constitution have also been proposed. These amendments, and their likely impact, if passed, are set out below.
 - a. *Effective removal of a safeguard to grant nationality to children born on the territory who would otherwise be stateless (Article 14(1)(b), and Section 1(e) of Part II of the Second Schedule of the Constitution)*

²³ Nungsari and Fong (n 6) 57.

²⁴ 'UNHCR welcomes renewed commitment by Malaysia to end statelessness', *Malay Mail* (online, 10 October 2019) <<https://www.malaymail.com/news/malaysia/2019/10/10/unhcr-welcomes-renewed-commitment-by-malaysia-to-end-statelessness/1799033>>.

²⁵ Nungsari and Fong (n 6) 232.

²⁶ 'Home minister: Early stage of Pakatan's promise to solve stateless Indians' problem met' *Malay Mail* (online, 6 May 2019) <<https://www.malaymail.com/news/malaysia/2019/05/06/home-minister-early-stage-of-pakatans-promise-to-solve-stateless-indians-pr/1750279>>.

²⁷ However, see also Jaclyn L Neo, 'Malaysia's Proposed Citizenship Amendments: Gender Equality Moving Ahead but Other Challenges Surface' *ConstitutionNet* (online, 3 October 2023) <<https://constitutionnet.org/news/malaysias-proposed-citizenship-amendments-gender-equality-moving-ahead>>. Neo highlights that without further policy reforms, simply extending existing rights available to Malaysian fathers to Malaysian mothers would perpetuate some of the existing issues with this constitutional provision. While the Constitution is silent on this, the government has required proof of valid marriage at birth for citizenship eligibility. Children born outside of a valid marriage are treated as illegitimate, and, under current jurisprudence, not eligible for citizenship by operation of law. This poses significant evidentiary burdens, especially if the parents registered their marriage outside Malaysia.

- 6.2. Article 14(1)(b) and Section 1 (e) of Part II of the Second Schedule of the Constitution provide, that Malaysian citizens “by operation of the law” include “every person born in the Federation who is not born a citizen of any country otherwise that by virtue of this paragraph. The proposed amendments seek to change the words “by operation of the law” to “by registration.” The effect of this amendment, if passed, would be to make acquisition of nationality of those born in Malaysia, who would otherwise be stateless (e.g., children born to stateless parents, children born in Malaysia to Malaysian fathers out of wedlock, adopted stateless children, and some children from indigenous and nomadic communities), entirely subject to the broad discretion of the Home Minister.
- 6.3. Crucially, the change to “by registration,” would also remove decisions taken by the Home Minister under these provisions from judicial review by the courts. This is because, under Part II of the Second Schedule of the Constitution, “a decision of the Federal Government under Part III of this Constitution [which houses Article 14(1)(b)] shall not be subject to appeal or review in any court.”²⁸ As noted above, lack of government enforcement of these provisions to prevent childhood statelessness has meant that the courts have been the only form of recourse for those seeking to benefit from the protection these provisions.²⁹ But with these proposed amendments, even that avenue would be cut off, effectively rendering the safeguard redundant.
- b. Removal of the right to citizenship for children born to stateless permanent residents of Malaysia (Article 14 1(b), and Section 1(a) of Part II of the Second Schedule of the Constitution)*
- 6.4. Article 14(1)(b) and Section 1 (a) of Part II of the Second Schedule of the Constitution provide, that Malaysian citizens “by operation of the law” include “every person born within the Federation of whose parents at least one is at the time of birth either a citizen or permanently resident in the Federation.” The proposed amendments seek to remove the words “or permanently resident.”
- 6.5. The impact of this amendment, if passed, would mean that children born to stateless parents who are designated as “permanent residents,” such as those belonging to the Tamil-Indian communities as well as those of Chinese and Siamese descent, and some indigenous communities or communities of mixed descent, will no longer have an entitlement to automatic acquisition of Malaysian nationality. This amendment, if passed, risks prolonging and exacerbating intergenerational statelessness amongst these communities, most of whom have lived in Malaysia since before independence. The only pathway to citizenship (by registration) remaining for these children would be Article 15A of the Constitution, which itself is subject to a proposed amendment further limiting its applicability (see below).
- c. Effective removal of a safeguard to grant nationality to abandoned children or foundlings (Section 1 (a) of Part II of the Second Schedule, and Section 19B of Part III of the second Schedule of the Constitution)*
- 6.6. Section 1 (a) of Part II of the Second Schedule and Section 19B of Part III of the Second Schedule of the Constitution provide that an abandoned infant automatically acquires Malaysian citizenship. This is because the grant of nationality is predicated on the assumption that such foundlings “have been born there of a mother permanently resident there.” As noted above, Section 1 (a) of Part II of the Second Schedule confirms that citizenship is available automatically to those born to at least one parent who was “permanently resident in the Federation.”

²⁹ Nungsari and Fong (n 6) 72–73.

- 6.7. Removing those who are permanently resident from Section 1 (a) of Part II of the Second Schedule, has the effect of nullifying the intended impact of Article 19B as the presumption that a foundling's mother is a permanent resident will have no effect in terms of that child's ability to acquire Malaysian nationality, whether the grant of that nationality is automatic or discretionary. If this amendment is passed, abandoned children would need to have recourse either to Section 1 (e) of Part II of the Second Schedule or Article 15 A of the Constitution, but amendments limiting the applicability of both of those provisions are also proposed (see above and below).
- 6.8. Based on statistics from the Royal Malaysia Police, a total of 256 babies were abandoned between 2020 – 2022. This would mean a baby being abandoned, on average, every three days.³⁰ These statistics do not cover the additional number of young children, who are not infants and who may not be able to explain the identity of their parent, who are also abandoned. In the absence of a legal safeguard to ensure that these children do not remain stateless the population of stateless foundlings is set to increase dramatically.
- d. Compressing the period for citizenship applications by children (Article 15A of the Constitution)*
- 6.9. Stateless children who are unable to avail of the safeguards available to those who are otherwise born stateless, or abandoned, on the territory, may be able to apply for citizenship under Article 15 A of the Constitution. However, the grant of citizenship under this provision is highly discretionary, as it is by registration and only "in such special circumstances" as the Government sees fit. For a person to apply for citizenship under this provision they must be under 21 years of age.
- 6.10. The proposed amendments to this provision seek to reduce the age by which a person must make an application from 21 years to 18 years. As it takes an average of 3 – 6 years to receive a decision from the Home Ministry for an application under Article 15 A and given that multiple attempts normally need to be made, reducing the window available to stateless children to apply under Article 15A, further limits the opportunity for a successful result.³¹ If passed, this amendment would be that once stateless children reach the age of 18, they will only be able to apply for citizenship by naturalisation. The highly discretionary approach taken by the Government to naturalisation applications, together with strict documentation requirements and lack of clear guidelines, make naturalisation unviable for most stateless populations in Malaysia.³² These proposed amendments therefore risk perpetuating childhood statelessness into adulthood and increase the likelihood of intergenerational statelessness.
- e. Lengthening the period during which foreign wives can be deprived of their citizenship, rendering them stateless (Article 26 (2))*
- 6.11. Under Article 26(2), a foreign woman who has obtained her Malaysian citizenship through registration because of her marriage, can be deprived of her citizenship if her marriage dissolves within two years of the date of the marriage. The purpose of the clause is to deter "marriages of convenience," or sham marriages, undertaken for the purposes of acquiring Malaysian citizenship. Because Malaysia does not permit dual citizenship, women affected by this provision risk being

³⁰ 'Over 250 baby-dumping cases recorded in two years since 2020', *The Star* (online, 27 June 2023) <<https://www.thestar.com.my/news/nation/2023/06/27/over-250-baby-dumping-cases-recorded-in-two-years-since-2020>>.

³¹ Joshua Low, 'The Constitutional Amendment Creep: Perpetuating Statelessness in Malaysia', *New Naratif* (online, 30 August 2023) <<https://newnaratif.com/the-constitutional-amendment-creep/>>.

³² Nungsari and Fong (n 6) 61.

left stateless if their Malaysian nationality is removed and they have not reacquired their former citizenship or acquired a new one.

- 6.12. The proposed amendment to this provision seeks to delay the start of the two-year limit during which the citizenship of a foreign wife may be stripped from the date of the marriage to the date from which citizenship was acquired. The impact of this amendment, if passed, may be to trap a previously foreign wife in a potentially coercive or violent marriage, if she fears being left stateless should she leave such a before the stipulated two-year period is up.
- 6.13. Little has been provided by the Malaysian Government by way of evidence to support, or the rationale for the proposed amendments. One explanation offered has been the need for population control, particularly in Sabah, where there are fears that the practice of granting citizenship to those who have lived as residents (and their children) in the country for 15 – 30 years has led to unsustainable population growth.³³ However, as has been pointed out, this appears to be based on the flawed assumption that removing the possibility for permanent residents to automatically acquire Malaysian nationality will cause those people and their families to leave the country to another where their roots and ties are even weaker.³⁴ Given the unlikelihood of this happening, the effect of the proposed amendment would be to simply reinforce a sense of exclusion amongst long staying populations, and the frustration, underdevelopment and potential for conflict that long-term exclusion can precipitate.
- 6.14. Underlying most of the proposed amendments appears to be a desire to increase the State's discretionary power over citizenship matters and to limit oversight by the courts. This may, in part, be a reaction to the impact of not having clear and robust operational guidance on how the constitutional safeguards for children who would otherwise be stateless and for foundlings, are to be applied, and to the Malaysian courts' willingness to intervene and apply the law in such a lacuna. The proposed amendments also appear to be in response to an unsubstantiated fear of such safeguards being abused by 'foreigners' who would seek to gain access to Malaysian nationality, and thereby come to potentially challenge the Government's political hegemony and popular legitimacy.

7. Malaysia's international obligations to prevent and reduce statelessness

- 7.1. The Universal Declaration of Human Rights, provides that "Everyone should have the right to a nationality" and "No one shall be arbitrarily denied of his nationality".³⁵ Malaysia is not party to the two key international treaties on statelessness, the 1954 Convention relating to the Status of Stateless Persons, or the 1961 Convention on the Reduction of Statelessness. The 1961 Convention contains important safeguards to prevent childhood statelessness, including in the case of children who born on the territory who would otherwise be stateless, as well as foundlings. The right to a nationality is protected in other human rights treaties to which Malaysia is a party, including the Convention on the Rights of the Child (CRC), the Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD).
- 7.2. Malaysia has made reservations against most articles in these treaties which relate to the right to nationality: Article 7 of the CRC, Article 9 of CEDAW, and Article 18 of the CRPD. Notwithstanding its reservations to Article 7 of the CRC, it is notable that Malaysia has hitherto maintained

³³ Mohd Iskandar Ibrahim, 'Constitutional amendment on citizenship to be comprehensive: Home minister', *New Straits Times* (online, 22 June 2023) <<https://www.nst.com.my/news/politics/2023/06/923039/constitutional-amendment-citizenship-be-comprehensive-home-minister>>.

³⁴ Low (n 31).

³⁵ Article 15 of the *Universal Declaration of Human Rights* 1948.

safeguards in its Constitution to ensure that children who would otherwise be stateless and foundlings acquire nationality automatically. Further, notwithstanding its reservation to Article 9 of CEDAW, Malaysian mothers have equal rights with men to confer nationality to their children born in the country, and the Government is proposing to also ensure equal rights for Malaysian women in the case of children born abroad.

- 7.3. Importantly however, Malaysia has not entered a reservation to Article 8 of the CRC which provides in subparagraph 1 that “every child has the right to preserve his or her identity, including nationality.” Further, paragraph 2 of Article 8 provides that: “Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.” In his report of 2009, the UN Secretary General clearly noted that arbitrary deprivation of nationality includes, “arbitrarily preclud[ing] a person from obtaining or retaining a nationality.”³⁶
- 7.4. As such, and as Professor Jaap E. Doek, former Chairperson of the UN Committee on the Rights of the Child has argued that “[i]n case of doubts concerning the child's nationality, the obligation to prevent statelessness and to respect the child's right to preserve her/his identity would entail that the child is provided with the nationality of the country where he/she was born.”³⁷ Arguably, this would require Malaysia to ensure that children born on its territory, who would otherwise be stateless, including foundlings, are able “speedily” able to acquire Malaysian nationality.
- 7.5. Malaysia has also not made reservations to Article 3 of the CRC which gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. In its General Comment 14, the Committee on the Rights of the Child has stated that “[t]he right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.”³⁸
- 7.6. The Organisation of Islamic Cooperation, of which Malaysia is a member together with 56 other States has also adopted the Covenant of the Rights of the Child in Islam. Article 7 of the Covenant on the Rights of the Child in Islam provides that a child has the right from birth to have his or her nationality determined, that States parties should safeguard the child's identity, including his or her nationality, and will make every effort to resolve the issue of statelessness for any child born on their territory or to any of their citizens outside their territory. Furthermore, it provides that children of unknown descent have the right to a nationality. At the regional level, Malaysia has adopted the ASEAN Human Rights Declaration, which also protects the right to a nationality.³⁹ Malaysia is also represented on the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, which are two commissions that have mandates focusing, *inter alia*, on the human rights of stateless persons in the region.

³⁶ Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, 135th sess, UN Doc A/HRC/13/34 (14 December 2009) <<https://www.refworld.org/docid/4b83a9cb2.html>>.

³⁷ Jaap E Doek, ‘The CRC and the Right to Acquire and Preserve a Nationality’, (2006) 25(3) *Refugee Survey Quarterly: Nationality and Reduction of Statelessness, International, Regional and National Perspectives* 26, 31 <<https://doi.org/10.1093/rsq/hdi0143>>.

³⁸ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the Right of the Child to have his or her best Interests taken as a Primary Consideration* (art. 3, para. 1) UN Doc CRC /C/GC/14 (29 May 2013) <<https://www.refworld.org/docid/51a84b5e4.html>>.

³⁹ Article 18, ASEAN Human Rights Declaration (19 November 2012) <<https://asean.org/asean-human-rights-declaration/>>.

8. Global and regional trends when it comes to preventing childhood statelessness

- 8.1. It is useful to compare Malaysia's proposed amendments to its Constitution with trends globally and regionally when it comes to nationality law provisions which seek to prevent statelessness, particularly amongst children. At the global level, as part of its Global Action Plan to End Statelessness 2014 – 2024 (Global Action Plan), the UN Refugee Agency, which is mandated by the UN General Assembly to address statelessness, has explicitly called on all States to "have a provision in their nationality laws to grant nationality to stateless children born in their territory", and "have a provision in their nationality laws to grant nationality to children of unknown origin found in their territory (foundlings)."⁴⁰ The Global Action Plan also calls on all States to ensure that their nationality laws treat women and men equally with regard to conferral of nationality to their children and with regard to the acquisition, change and retention of nationality.⁴¹
- 8.2. Since the launch of UNHCR's IBelong Campaign to End Statelessness and the Global Action Plan, 12 States⁴² have introduced provisions in their nationality laws to ensure that children born on the territory who would otherwise be stateless, acquire their nationality. Two States⁴³ have introduced a provision to grant nationality to children who are found abandoned on their territory. Importantly, no States in the last 10 years have amended their nationality laws to remove existing provisions that grant nationality to children born in their territory who would otherwise be stateless, or to foundlings. In South-East Asia, the majority of States⁴⁴ retain nationality law provisions which automatically entitle foundlings to their nationality. Out of the 57 States that are members of the OIC, 77% (44 States),⁴⁵ also retain nationality laws which automatically entitle foundlings to their nationality. In this regard, the proposed amendments in Malaysia that seek to remove safeguards for children born on the territory who would otherwise be stateless, or for foundlings, are out of step with the global trend, which is moving in favour of the introduction of such safeguards.
- 8.3. Since 2014, three States⁴⁶ have reformed their nationality laws to give women equal rights as men to confer their nationality to their children. This leaves only 24 States (including Malaysia) globally, which do not have gender equal nationality laws. In South-East Asia, the only other State with such discrimination in its nationality law is Brunei Darussalam. Importantly, no States in the last 10 years have amended their nationality laws to remove existing provisions that given women and men equal nationality rights to confer nationality to their children. In this regard, the proposed amendments in Malaysia to give women equal rights as men to confer nationality to their children born overseas, are in step with the global trend, which is moving in favour of the introduction of such safeguards.

⁴⁰ UNHCR, *Global Action Plan to End Statelessness, 2014–2024*, Action 2 <<https://www.unhcr.org/media/global-action-plan-end-statelessness-2014-2024>>.

⁴¹ Ibid, Action 3.

⁴² These States are Albania, Armenia, Chile, Cuba, Estonia, Iceland, Kyrgyzstan, Latvia, Luxembourg, Moldova, Philippines, Tajikistan.

⁴³ These States are Chile and Panama.

⁴⁴ These States include Cambodia, Indonesia, Laos, Malaysia, Singapore, Timor-Leste, and Viet Nam. South-East Asian States without a safeguard for foundlings include Brunei Darussalam, Myanmar, the Philippines, and Thailand.

⁴⁵ These States include Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Burkina Faso, Cameroon, Chad, Djibouti, Egypt, Gabon, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Mali, Mauritania, Morocco, Mozambique, Niger, Oman, Saudi Arabia, Senegal, Somalia, Sudan, Suriname, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan and Yemen. States which do not include safeguards for foundlings, or where the safeguards do not provide an automatic entitlement to nationality include Bangladesh, Benin, Brunei Darussalam, Comoros, Cote d' Ivoire, Gambia, Maldives, Nigeria, Pakistan, Palestine, Qatar, Sierra Leone, and Togo.

⁴⁶ These States are Liberia, Madagascar, and Sierra Leone.

9. Conclusions:

- The majority of the proposed amendments to citizenship provisions in Malaysia's Constitution will have a deleterious impact in terms of reducing the number of cases of statelessness in the country and from preventing new cases from arising. On the contrary, if these amendments are passed, statelessness (particularly cases of intergenerational statelessness) are likely to increase.
- The exception is the proposed amendment which seeks to grant Malaysian women equal rights as Malaysian men to confer nationality to their children born overseas. This amendment is in keeping with global trends which are in favour of maintaining or improving equality between women and men where conferral of nationality to children is concerned. If passed, and applied effectively, and with retroactive effect, this amendment will help to prevent and reduce cases of statelessness amongst children.
- The proposed amendments that seek to remove safeguards for children born on the territory who would otherwise be stateless, or for foundlings, appear to be out of step with Malaysia's international and regional obligations to prevent and reduce statelessness, and with global and regional trends, which are in favour of maintaining such safeguards or adding them to nationality laws where they do not already exist.