



**THE LAWS OF CITIZENSHIP IN THE FEDERAL
CONSTITUTION OF MALAYSIA: AN ANALYSIS**

BY

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**A thesis submitted in fulfilment of the requirement for the
degree of Doctor of Philosophy in Law**

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JUNE 2011

ABSTRACT

In Malaysia the concept of common citizenship emerged in 1948 with the introduction of the Federation of Malaya Agreement 1948 after the abolition of the Malayan Union Plan. It was later changed in 1957 when Malaya achieved its independence. The research seeks to analyse on the historical development of citizenship law in Malaysia with a view to highlight on its applicability. In this regards analysis is made on the relevant Policy and Agreements which took place starting from the period of Malayan Union until before the enacting of the Federal Constitution. The discussion from the Islamic perspective evolves on the concept of *ummah* which elucidate that such concept is different from the Western concept of society and nationalism. The special emphasis of the thesis is the analysis on the laws pertaining to citizenship in Malaysia as provided under Part III of the Federal Constitution, which were largely based on the Reid Commission Report and the White Paper. Since there is no up to date research in this subject the research as such also aimed at identifying whether the exiting laws pertaining to citizenship suited well in this era of globalisation. The study evidently proves that the long enacted provisions on citizenship which have not been examined have led to several problems relating to citizenship particularly in matters of acquisition and deprivation of citizenship in Malaysia. Meanwhile the attitude of the courts in ruling their decisions on citizenship matters does not reflect their willingness to interfere unless they concern with the procedural safeguard particularly on natural justice. This is due to the ‘finality clause’ provided under section 2 of Third Schedule of the Federal Constitution. As such there are limited number of reported cases on this subject. The study reveals that though the country had experienced various stages of constitutional development, laws pertaining to citizenship have not changed significantly. Hence it is proposed that those provisions which were drafted in the light of problem and scenarios during the British administration need to be revised. Nevertheless one has to understand that besides the call to review citizenship laws in Malaysia the consent of the Conference of Rulers is also needed before such laws could be amended. It is hoped that this research will provide a reference and standard work for anybody wishing to understand on the law of citizenship in Malaysia.

خلاصة البحث

برز مفهوم عام للمواطنة أو الجنسية في ماليزيا في عام 1948 مع ظهور اتفاقية ملايا الفدرالية في عام 1948، بعد إلغاء خطة الاتحاد الملايا. ثم تغير هذا المفهوم في عام 1957 عندما حققت ماليزيا استقلالها في ذلك العام. واستندت القوانين التي تجسدت في إطار الجزء الثالث من الدستور الاتحادي إلى حد كبير على تقرير لجنة ريد والورقة البيضاء. وعلى الرغم من أن البلاد قد شهدت مراحل مختلفة من التطور الدستوري، فإن القوانين المتعلقة بالجنسية لم يتغير بشكل ملحوظ سوى تعديلات قليلة في هذا الشأن، كما أدت هذه التعديلات إلى العديد من المشاكل والقضايا المتعلقة بالمواطنة في ماليزيا. وعلاوة على ذلك، هناك عدد محدود من القضايا المبلغ عنها بشأن هذا الموضوع. ولذلك يسعى البحث إلى التحليل على التطور التاريخي لقانون الجنسية في ماليزيا بهدف تسليط الضوء على تطبيقه. ومن ناحية أخرى، تهدف أيضا إلى التعرف على القوانين الحالية المتعلقة بالمواطنة وتحليل ما إذا كانت تلك الأحكام مناسبة تماما في هذا عصر العولمة. وفي هذا الإطار يتم إجراء التحليل على السياسات ذات الصلة والاتفاقات التي وقعت بدءا من فترة الاتحاد الملايا حتى قبل تشريع الدستور الاتحادي. ويتم أيضا المناقشة عن التحليلات للمواد ذات الصلة في الدستور الاتحادي المتعلقة بالجنسية. وحيث أنه لا توجد بحوث حديثة في هذا الموضوع، فمن المأمول أن هذا البحث سيوفر مرجعا ومعيارا لعمل أي شخص يرغب في فهم قانون الجنسية في ماليزيا.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any degrees at IIUM or other institutions.

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**CITIZENSHIP LAWS IN THE FEDERAL CONSTITUTION OF
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State of Kelantan (Enactment No. 2 of 1952)
State of Negeri Sembilan (Enactment No. 2 of 1952)
State of Perak (Enactment No. 1 of 1952)
State of Selangor (Enactment No. 2 of 1952)

LIST OF ABBREVIATIONS

A.C	Appeal Cases (United Kingdom)
AMCJA	All Malaya Council of Joint Action
All E.R	All England Repoty
AIR	All Indian Report
BMA	British Military Administration
CEDAW	Convention on All Forms of Discrimination
Against	Women
CO	Colonial Office Papers
CJ	Chief Justice
CLC	Communities Liaison Commitee
CLJ	Current Law Journal
ed./eds.	Editor/ editors
edn.	Edition
et al	(<i>et alia</i>): and others
etc.	(<i>et cetera</i>): and others
ibid.	<i>Ibidem</i> (same as above)
id.	<i>Idem</i> (the same)
i.e.	id est (that is)
KB	King's Bench Reports (United Kingdom)
Ky	Kyshe's Law Reports
Ltd.	Limited
MIC	Malayan Indian Congress
MCA	Malayan Chinese Association
MLJ	Malayan Law Journal
n.	footnote
OIC	Organization of Islamic Countries
Ors.	Others
para./paras.	paragraph/paragraphs
Pte.Ltd./Pvt. Ltd	Private Limited
PUTERA	Pusat Tenaga Rakyat
QB	Queen's Bench (United Kingdom)
SSLR	Straits Settlements Law Reports
sultan	Malay Ruler
trans.	translated
UMNO	United Malays Nation Organization
UN	United Nation
v	versus
Vol./vols.	Volume/volumes
WLR	Weekly Law Review

TRANSLITERATION TABLE

ء	'	خ	kh	ش	Sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	هـ	H
ت	T	ذ	dh	ظ	ḍ	ق	Q	و	W
ث	Th	ر	r	ط	ṭ	ك	K	ي	Y
ج	J	ز	z	ظ	ẓ	ل	L		
ح	ḥ	س	s	ع	ʿ	م	M		

Short Vowels	
ـَ	a
ـِ	i
ـُ	u

Long Vowels	
ا + ـَ	ā
ي + ـِ	ī
و + ـُ	ū

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND OF THE RESEARCH

Generally ‘citizen’ refers to a member of a particular political community to which a person belongs. Citizens are people who belong to the state and who subject themselves to the domination of the state for the formation of their general welfare and for the protection of their rights, individual and collective.¹ Being a citizen of a particular state entitles a person to certain privileges and benefits. It also imposes certain responsibilities and obligations on the individual. The concept of citizenship is a new concept that emerged from the French Revolution which first established the principle and practice of citizenship as the central feature of the modern socio-political structure. However, it was the British (including crucially the American) experience over one and-a-half centuries prior to 1789 that laid the foundation for the transition from a monarch-subject relationship to a state-citizen relationship.² Starting from the French and American Revolutions the new idea had emerged where a member of a particular state belonging to the socio political culture could be unified to establish an independent nation state. This idea had spread throughout most European countries to as far as to the South American region where the people fought against the Spanish and Portuguese. Hence, in the middle of the 19th century this concept had formed a basic foundation for an establishment of a nation state.

¹ Kevin Tan et al., *Constitutional Law in Malaysian and Singapore*, Malayan Law Journal Pte. Ltd., 1991, at 376.

² Derek Heater, *What is Citizenship?*, Polity Press, 1999, at 4.

During that period a number of theories on citizenship were formulated starting with the ancient Greeks when Aristotle³ perceived citizenship as a privilege of the ruling class. It was later extended across the whole of society where, in more egalitarian times, Karl Marx⁴ had objected to modern democratic citizenship because it did not go far enough in emancipating the human race as a whole rather than emancipating society as a political unit. However, the current leading work on citizenship is through the provoking essay by TH Marshall⁵ entitled 'Citizenship and Social Class' wherein he argued that in a modern state there were distinct rights associated with citizenship: civil, political and social rights. The Universal Declaration of Human Rights constitutes the most authoritative and comprehensive statement on nationality. Article 15 of the Declaration provides that:

Everybody has the right to a nationality. No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality.⁶

In Malaysia, before 1948 there was no common citizenship embracing the whole country. A person at that time was neither a subject of the Ruler nor a British subject if he was born in Malacca or Penang. The Federal citizenship was first introduced in 1948 by the Federation of Malaya Agreement 1948. It was felt that citizenship was an essential part of the policy for the establishment of the Federation of Malaya and as such it was proposed to create a common form of citizenship for all those who regarded Malaya as their real home and as the object of their loyalty.⁷ In 1952 the Federation Of Malaya Agreement (Amendment) Ordinance 1952 was

³ Ernest Barker, *The Politics of Aristotle*, Oxford University Press, 1968, at 105.

⁴ J. M Barbalet, *Citizenship: Rights, Struggle and Class Inequality*, Open University Press, 1988, at 3.

⁵ T. H Marshall, 'Citizenship and Social Class,' cited in Paul Barry Clarke, *Citizenship*, Pluto Press, 1994, at 173-177.

⁶ United Nation, Universal Declaration of Human Rights 1948, See also Ian Brownlie et al., *Basic Documents on Human Rights*, Oxford University Press Inc., 4th edn., 2002, at 21.

⁷ Visu Sinnadurai, The Citizenship Laws of Malaysia, in Mohamed Suffian et al., (eds.), *The Constitution of Malaysia Its Development: 1957-1977*, Oxford University Press, 1978 at 70.

introduced amending the 1948 Agreement. The Federal citizenship was abandoned and a new status of citizenship of the Federation of Malaya was introduced in the State Nationality Enactment which was enacted in the nine Malay States. However, the citizenship laws were changed in 1957 when Malaya achieved its independence. The new laws which were largely based on the Reid Commission Report and the White Paper were then embodied under Part III of the Federal Constitution and not as before in the Federal Ordinance, which had to be read together with a number of state Enactments.

It may be recalled that citizenship was one of the controversial and touchy issues during the constitutional negotiations in 1956-1957 and the provisions encapsulated the agreements and compromises concluded at that point of time. Though the country had experienced various stages of constitutional development, laws pertaining to citizenship had not changed significantly. Only a few amendments were made to that effect. This had led to several problems and issues concerning citizenship in Malaysia.

Conflicting nationality and citizenship laws of different countries sometimes result in dual or multiple citizenship or statelessness. This is one of the problems that need to be addressed. A marriage between citizens of two countries produces either dual citizenship or statelessness that is if one country provides that a wife takes the nationality of her husband while the other does not. Naturalisation leads to dual nationality if the country of the former nationality refuses to permit its citizenship to be lost or renounced. Deprivation or loss or lost of citizenship means statelessness to an individual who does not become a national of any other country.

The importance of discussing this issue is because statelessness or dual citizenship or multiple citizenship leads to several problems relating to tax payment,

obligation to military service, the citizenship of children and protection in dealing with a foreign government. In Malaysia the reason for statelessness in most cases falls under the category of those who failed to register their birth under the Malaysian law.⁸ It was reported that the number of late registration of birth in this country amounted to 93,360 since January 2009.⁹ However the number is likely to increase by the end of this year.

Besides that, problems arise in the acquisition and deprivation of citizenship. In cases of citizenship by registration the law is vague with regard to certain qualifications prescribed under the constitution. One of the conditions prescribed in the application for citizenship is that the person must be of 'good character'. However, the loophole in the constitution is that it is silent on the meaning of 'good character.'

In discussing the issue of citizenship through registration there exist elements of gender discrimination which indirectly discriminate against women. The provisions of Articles 15, 23, 24 and 26 of the Federal Constitution do not reflect the spirit of Article 8(2) of the Federal Constitution which prohibits discrimination on the basis of gender. Furthermore, such provisions also do not reflect Malaysia as a signatory to the Convention on the Elimination of All forms of Discrimination against Women (CEDAW).

Besides, the attitude of the courts in deciding cases on citizenship does not reflect their willingness to interfere with such matters unless it concerns the procedural safeguards, particularly on natural justice, rather than interpreting the decisions of the ministers. This is because the position is unclear as to whether Malaysian courts could interfere with the decision of the Minister. The court's

⁸ Rouwen Lin, "Living in limbo," the star online, <http://star.com.my/lifestyle/story.asp?=/2009/4/19/lifefocus/350867&sec=lifefocus> (assessed 15th December 2009).

⁹ "Many still awaiting citizenship," *The Star*, 18th September 2009, at N30.

interference is only on the ground of procedure. This can be seen in how they ruled on the decision of the minister on this issue.¹⁰ In most cases it is the ‘finality clause’¹¹ which bar them from doing so. However it needs to be emphasized here that despite such clause the court should not stop from exercising its discretion to review citizenship cases through the *order of certiorari*. Furthermore, since it involves the rights of individuals the government must act fairly.

However, in practice this has no significance because the authorities can take into consideration relevant confidential information such as intelligence reports and the like without disclosure to the citizen. The court in the case of *Liew Shin Lai v. Minister Home Affairs*¹² emphasised that although the minister was duty bound to take into account and consider and give due weight to the report prepared by the committee of inquiry the minister had the ultimate discretion. As such the researcher views that even though power is left to the executive alone to decide; courts should, and to a certain extent, interfere with such decisions. This is because it is through the assistance of the court that a person can claim such a right.

With the trend of globalization today the citizenship provisions in Malaysia should be revamped or be given a little bit of adjustment to suit the trend. The government in this regard should look into those related laws by allowing certain flexibility in the law in order to attract qualified foreigners such as investors, professionals and talents that can contribute towards the advancement of the economy by offering them permanent resident status and later granting them citizenship. However it needs to be stressed that flexibility here does not mean that we should not

¹⁰ *Mak Sik Kwong v. Minister of Home Affairs* [1975] 2 MLJ 168.

¹¹ Refer to Part III 2nd Schedule of the Federal Constitution.

¹² [1970] 2 MLJ 7.

be selective. Perhaps the move by other countries in adopting certain flexibility in the law when granting citizenship could be adopted.

The above discussion proves that the long enacted provisions on citizenship which have not been examined have led to several problems relating to citizenship particularly in matters of acquisition and deprivation of citizenship. Since there are no definite works on the subject the researcher feels that research in this area of constitutional law is necessary to be further explored and analysed in order to provide a comprehensive citizenship law in Malaysia and to see whether the existing laws harmonise with the era of globalisation.

1.1 AIMS AND OBJECTIVES OF THE STUDY

- 1) To examine the historical background of the citizenship in Malaysia with a view to highlight on its applicability and its constitutional development. The study will highlight on various developments of citizenship law starting from the period of the Malaysian Union until the period of the drafting the Federal Constitution which was based on the Reid Commission Report and the White Paper.
- 2) To identify the existing laws relating to citizenship in Malaysia. In doing so the study examines the relevant legal provisions of citizenship laws as provided under Part III of the Federal Constitution.
- 3) To identify the weaknesses and loopholes of the present law concerning citizenship in Malaysia.
- 4) To offer suggestions for the improvement of citizenship law in Malaysia so that it harmonises with the more recent developments and trends.

1.2 STATEMENT OF PROBLEM

The research undertaken is based on the premise that the existing provisions relating to citizenship laws which have obviously been drafted in the light of problems and scenarios during the British administration and which had not been examined had led to several problems in the acquisition and deprivation of citizenship in Malaysia.

1.3 HYPOTHESIS

Within the framework of the study, the hypothesis that the study seeks to establish is that the rigidity in the citizenship laws in Malaysia is due to its entrenched provisions in the Federal Constitution. This has led to the laws not changing significantly though the country has experienced various stages of constitutional development. As such those provisions need to be examined since they had obviously been drafted in the light of problems and scenarios during the British administration. Although those provisions might be well suited the circumstances at that particular time but does not translate well in today's circumstances.

It should be emphasised here that whether it should be changed or not is not a matter for Parliament alone, as the consent of the Conference of Rulers is also needed. Citizenship is one of the matters apart from Islam and Malay privilege, which falls under the purview of the Conference of Rulers.

1.4 LITERATURE REVIEW

There are vast numbers of literatures available on the theoretical concept of citizenship, starting from the Roman and Greek Empire until the introduction of the

modern concept of citizenship. Nevertheless the writings of Derek Heater¹³, J.M Barbalet¹⁴, Keith Faulks¹⁵ and Paul Barry Clarke¹⁶ are referred most as those literatures explore comprehensively the historical and conceptual origin of citizenship.

Whilst much has been written on the constitutional law in Malaysia, there is no definitive work on the subject as yet. The discussion on the subject merely appropriates one chapter in those literatures.¹⁷ Most of the available literature on the law of citizenship merely explains the law as laid down in the Federal Constitution without making a connection with the recommendation under the Reid Commission Report and the White Paper. Though numerous literatures¹⁸ on the history of Malaysia are referred, the one written by Albert Lau¹⁹ is very significant when discussing the historical background as it provides a very extensive discussion on citizenship in Malaya. However his work is only limited to the period between 1942-1948; thus, it did not include the recommendations by the Reid Commission Report and the White Paper. Similarly, that written by A.J Stockwell²⁰ and James Allen²¹ which are of great relevance when discussing the historical background nevertheless focuses only the

¹³ Derek Heater, *What is Citizenship?*, Polity Press, 1999; Derek Heater, *Citizenship: The Civic Ideal In World History, Politics and Education*, Longman, 1990.

¹⁴ J. M Barbalet, *Citizenship: Rights, Struggle and Class Inequality*, Open University Press, 1988.

¹⁵ Keith Faulks, *Citizenship*, Routledge, 2000.

¹⁶ Paul Barry Clarke *Citizenship*, Pluto Press, 1994.

¹⁷ See L.A Sheridan et al., *The Constitution of Malaysia*, Malayan Law Journal (Ptd.) Ltd, 1987 at 127-176; Kevin Tan et al., *Constitutional Law in Malaysian and Singapore*, Malayan Law Journal Pte.Ltd., 1991at 376-416; Andrew Harding, *Law, Government and Constitution in Malaysia*, Malaya Law Journal Sdn. Bhd., 1996 at 21-30; R.H Hickling, *An Introduction to the Federal Constitution*, Malaysian Law Publishers, 1982, at 23-26; Hashim b. A. Sani, *Our Constitution*, The Law Publishers (Malaysia) Sdn. Bhd, 1980, at 70-79.

¹⁸ Barbara Watson Andaya and Leonard Y. Andaya, *A History of Malaysia*, Macmillan Asian Histories Series, 1982; Zainal Abidin Abdul Wahid (ed.), *Glimpses of Malayan History*, Dewan Bahasa dan Pustaka, 1980; Khong Kim Hoong, *Merdeka: British Role and the Struggle For Independence in Malaya 1945-1957*, Strategic Information Research Development, 2003.

¹⁹ Albert Lau, *Malayan Union Controversy 1942-1948*, Oxford University Press, 1991. See also Albert Lau, *Malayan Union Citizenship: Conditional Change and Controversy in Malaya 1942-1948*, *Journal of Southeast Asian Studies* vol. XX, No. 2, 1969 at 216-243.

²⁰ See A.J Stockwell, *British Policy and Malay Politics during the Malayan Union Experiment 1942-1948*, Malaysian Branch of the Royal Asiatic Society Monograph, No. 8, 1979; A.J Stockwell (ed.), *Malaya the Malayan Union Experience 1942-1948*, HMSO Publications, Part 1 & Part III, 1995.

²¹ James de V Allen, *The Malayan Union*, Monograph Series No. 2, Yale University Asia Studies, 1967.

period of the Malayan Union. Though the book written by Muhammad Nordin Sopiee²² provides a good reference it only discusses the historical development of citizenship law without relating it to the Reid Commission Report and the White Paper.

Some writers and scholars have published works on the subject. However, they are either outdated or merely look at the issues from the legal perspective. Mohamed Suffian²³ provides quite a detailed and comprehensive discussion of the law as laid down in the Federal Constitution. Since it was published in 1976 the discussion was mainly focused on the legal perspective without highlighting the problems or issues arising out of the citizenship law in Malaysia. Similarly the publication by Mohd Salleh Abbas.²⁴ Although the work is significant, it lacks comprehensiveness in discussing certain aspects such as the role of courts in dealing with the subject, as the discussion only briefly touches on the historical background of this subject. The reported cases compiled by S. Jayakumar²⁵ provide a useful reference of Malaysian and Singapore decisions in constitutional law. However it only incorporated the cases reported up to 1975 in the Malayan Law Journal. As such cases appearing subsequent to December 1975 were not included.

²² Muhammad Nordin Sopiee, *From Malayan Union to Singapore Separation: Political Unification in the Malaysian Region 1942-1965*, 2nd edition. Penerbit Universiti Malaya, 2005.

²³ See Mohammad Suffian, *An introduction to the Constitution of Malaysia*, 2nd edn., Government Printer, 1976, at 251-263. See also Mohammad Suffian, *Malaysian Citizenship*, Jabatan Penerangan Malaysia, 1970, at 1-26.

²⁴ Mohd Salleh Abbas, *Selected Articles and Speeches on Constitutional Law and Judiciary*, Malaysian Law Publishers Sdn. Bhd., 1984. See also Mohamed Salleh Abbas, "Amendment of the Malaysian Constitution", [1977] 2 *Malayan Law Journal* at xxxiv-xxxv.

²⁵ S Jayakumar, *Constitutional Law Cases from Malaysia and Singapore*, Malayan Singapore Law Journal Pte. Ltd., 1976 at 146-19. See also S. Jayakumar and F.A Trindade, Citizenship in Malaysia, 30 *Malayan Law Journal*, xlvi-lvii. This article discussed not only the citizenship provision of Malaysia but also incorporates the Singapore citizenship laws due to the inclusion of Singapore into the Federation of Malaysia.