

## HONOURING PRIMARY EDUCATION FOR STATELESS CHILDREN: ANALYSIS OF MALAYSIAN LEGAL PERSPECTIVE AND CURRENT PRACTICE

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### ABSTRACT

Article 28 of the United Nation Convention on the Rights of the Child (CRC) 1989 recognise the right of a child to education. It urges nations to imperatively making primary education obligatory and freely accessible for all. This paper, which employ content analysis and library research, seeks to analyse the statutory provisions with regards to primary education, the implementation and limitation of free education for stateless children in Malaysia. The research is driven by the increased numbers of stateless children in Malaysia. However, they are denied entry into public school. The significant of the research is to look into the prevailing Malaysian law regarding access to education which provide answer to the hindrance for the stateless children to be admitted into public school. The key finding of the research indicates that while children are guaranteed of free primary education, it is meant only for Malaysian citizenship holder. Constitutional safeguard with regard to education was not extended to the stateless children. Currently, the primary education for the children of stateless refugees and stateless children of irregular migrants, are being cared by the Non-Governmental Organisation (NGOs). However only a few lucky groups of these children are able to receive primary education provided by the NGO's. Many other groups of stateless children were left unattended. Since Malaysia has ratified the CRC in 1995, it is commendable for the policy maker to ensure moves being taken to honour the ratification, thus granting the most important basic rights for children, that is, primary education legally accessible for all.

Keywords: Children, Education, Human Rights, Stateless, CRC.

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### INTRODUCTION

*'Education is a universal dream, one that grants transformative seeds of opportunity to every child. It is the dream of a young girl who pores over her books by candlelight and carefully tucks them into her bag for school the next day. It is the dream of a little boy who falls asleep to the humming rhythm of a city, and the same dream of children who wake up to the sound of boats returning from the early morning catch'*

*Minister of Education Malaysia (UNICEF, 2009)<sup>i</sup>*

The above words are the expression of the then Minister of Education, Malaysia, in 2009, to commemorate 20 years of the United Nation Convention on the Rights of the Child 1989 (CRC). It upholds the notion that education is the most important element in children development. It perceives the principle that all children, irrespective of their societal status, should be given opportunity to learn, live their life and living and survive the challenges. Thus, it is enormously vital to grant the rights of education to all children. The late Nelson Mandela, once articulated that *'Without education, your children can never really meet the challenges they will face. So it's very important to give children education and explain that they should play a role for their country'* (Mwangi, 2016). The United Nation through its human rights arm, continuously working to provide better future to the children especially to less fortunate among them. Distinct human rights provisions with regard to the rights of the children were specifically formulated in guaranteeing respect to the children's basic needs.

This research is motivated by the greater number than before of stateless children in Malaysia. They are from various background and situation which led them being stateless. The most common reasons of statelessness in Malaysia are the failure of parents' registration of marriage, failure of birth registration, children of irregular migrant and children of stateless refugees. One common features of them are that, they are being sidelined by the authority in terms of education by way of denying entry into public school. The literatures on the right of education mostly are written in the human rights viewpoint. However, little discussion is found on the legal national perspective on the rights to education especially in Malaysian outlook.

This paper is intended to scrutinise the prevailing international human rights' provision regarding to the general right of children to primary education. Stateless children and primary education will be briefly defined. The later part of the manuscript will discuss the legal position and practice with regard to access to primary education in Malaysia and the legal hindrance that impedes the opportunity of honouring such right to the stateless children. This research is primarily doctrinal. The method used in the study will be primarily based on the qualitative research methodology which comprises of the doctrinal analysis and empirical study approach.

### RIGHT OF THE CHILD TO EDUCATION IN HUMAN RIGHTS' FRAMEWORK

Since children are the most vulnerable object of victimization, rights either in the form of civil rights or constitutional rights or human rights are imperative in the event that children are to be treated with *'equality and as autonomous being'* (Freeman, 1992,

p. 52). In this sense, rights will equip the children with legal force, empower them with remedy as well as articulating redress to the given problems (*Ubi ius, ibi remedium*), in the event of inequality. Given rights in any form implies trusting the children's self-governance is as critical as any other person's rights. Thus, recognising the rights of children especially the right to education for all children regardless of their legal and social status is important and has constantly become the substantial concern of United Nations' human rights agenda.

Historically, the UN General Assembly by its resolution 217A(III) of 10<sup>th</sup> December adopted the Universal Declaration of Human Rights 1948 (UDHR). Article 26 of UDHR decreed that '*everyone has the right to education*'. It further asserts that the education shall be available freely at the elementary and fundamental phases and is a compulsion to every child. Article 26 (2) of UDHR further added that the outcome of the education shall be generated to the '*full development of the human personality*'. Provided education also should be able to postulate holistic end result of respecting human rights and fundamental freedoms, engaging of understanding, tolerance and friendship among different peoples and nations. The provisions of the UDHR are certainly of general appeal employing universal method imposing rights to every individual including child. Since then, the rights and principles enumerated in Article 26 of UDHR have been reiterated in various international treaties, declarations and instruments. For example, the same notion is found in principle 7 of the 1959 Declaration of the Rights of the Child which further elaborated that the purpose of education is to inculcate the ability to make sensible individual judgement, cultivate moral and social responsibilities to enable him to function as useful member of the society. Similar spirit was recapped in the 1960 Convention against Discrimination in Education, Article 22 of the 1951 Convention relating to the Status of Refugees, Article 5(e)(v) of the 1965 Convention on the Elimination of all Forms of Racial Discrimination, Article 18(4) of 1966 the International Covenant on Civil and Political Rights and Articles 13-14 of the 1966 International Covenant on Economic, Social and Cultural Rights. All these instruments uphold the children's right to education, irrespective of their social status and prohibit discrimination in respect of primary education.

Despite having numerous international instrument reiterating the rights of education for children, regrettably, those instrument were not widely accepted and ratified by nations, including Malaysia. However, the principles are covered by the most widely ratified convention worldwide that is the CRC. The CRC can be regarded as the main current international convention which uphold the children's rights. Article 28 and 29 of the CRC, in particular, reiterate most of the education rights pledged by the abovementioned international human rights instruments. As at August 2017, 196 countries round the globe including Malaysia have become state parties to the CRC. However, despite holding the status of the most widely ratified status, the convention nonetheless '*articulate a combination of rules and standard that grant states and adjudicators varying degrees of discretion*' (Banks & Angela M., 2010). Thus, nations are at liberty to make reservations. In this regard, Malaysia while ratifying the CRC in 1995, has made reservation with regard to the principle in Article 28 (1) as it is in contravention with Article 12 of Federal Constitution which shall be explained in the latter part of this essay.

#### THE MEANING OF STATELESS CHILDREN

Article 1 of the CRC defined a child as '*a human being below the age of 18*'. Stateless person is defined in the 1954 Convention Relating to the Status of Stateless Persons as '*a person who is not considered as a national by any State under the operation of its law*'. This phrase denotes that stateless person is a person who is lacking of recognizable official citizenship or nationality. This category of person indeed fails to establish any effective legal allegiance or association with any nations. Stateless children therefore are those group of people who are below 18 years' old who are unable to relate themselves with membership of any country. Worldwide, statelessness happened because of various reasons such as conflicts of nationality law, war, breakup of a country, victims of illegal human trafficking and involuntary losing a citizenship without gaining a new one. The United Nation Refugee Agency (UNHCR) estimates that, in 2015, there are at least 10 million peoples who are stateless. Out of the 10 million, 1/3 of them are children (UNHCR, 2017). The exact numbers of stateless children in Malaysia is unknown (Kumar, 2017), however, it is reported that approximately 290,437 persons who are below 18 years old living in Malaysia, do not own any citizenship (Iskandar Hassan, 2017). Nearly 15,394 children born in Malaysia between 2012 until January 2017 failed to be registered as Malaysian Citizen due to various reasons (Nik Imran Abdullah, 2016). Arithmetically, the data shows that, in Malaysia, the numbers of born stateless babies would be close to 8 in numbers daily. Ironically, the incident of statelessness in Malaysia happened because of four main reasons namely failure of marriage and birth registration, children of undocumented illegal and irregular migrant, abandoned children and children of stateless refugees (Razali, Nordin, & Duraisingam, 2015).

#### THE MEANING OF PRIMARY EDUCATION

The term of education has variety of definitions. In a broader sense, education involve '*all activities by which human group transmit to its descendant, a body of knowledge and skills and a normal code which enable that group to subsist*' (M'Bow, 1979). In this sense, education signifies the transmission of skills and knowledge from the older generations to their descendants to enable them to effectively and honourably living their life. This definition includes the formal and informal education (Beiter, 2006, p. 18) In sociology, education is '*the process of developing inner abilities and powers of an individual*' (Chandra & Sharma, 1996, p. 1). Thus, education in this sense will bring about changes in practice and usage to become a better person. United Nations Educational Scientific and Cultural Organisation (UNESCO) defined education as implying '*the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities*' (UNESCO, 1974). Thus, by this definition, education involves the formal and informal method of learning activities by which people were taught and trained to engage themselves within the social community.

The term education was not clearly defined in the CRC. Verheyde, while commenting Article 28 of the CRC, viewed that, education denotes the providing of both basic skills and life skills. Basic skills involved the imparting of the literacy and numeracy skills. Life skills is designed to develop the ability to *'make well-balanced decision; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationship and responsibility; critical thinking; creative talents; and other abilities which give children the tools needed to pursue their option of life'*. Verheyde also observed that Article 28 of the CRC refers to both formal and informal education (Verheyde, 2006, p. 13). It also infers a wide inclusive nuance to include various levels and types of learning processes (Hart, 2001, p. 19).

Some scholar equates and correlates basic education with primary education. Usually, the primary education is provided for when the children are physiologically and socially prepared to leave immediate family and start intellectual and social learning with friends (Blyth, 2013, p. 1). Article 28 of the CRC has not defined the duration of primary education. It neither states the beginning age nor the ending age for such education (Verheyde, 2006, p. 13). Thus, the giving of basic education/primary education is based on the curriculum and not the age of the child (Buck, 2014, p. 256).

According to the Malaysian Education Act 1996, primary education is *'a course of study at primary level which is designed for a duration of six years but which may be completed within five to seven year'* (Education Act, Section 2). Primary education is provided for by primary school. Primary school means a school providing primary education appropriate for pupils from the age of six years (Education Act, Section 2). Nonetheless, the sole provider of the primary education does not rest in the hand of Malaysian government only. The Education Act does not prohibit the provision of primary education by private institutions including the non-governmental organisations (NGOs). In this regard, the parents in Malaysia are at liberty to choose various models of education and the types of schools that suits their children's needs.

### SCOPE OF PROTECTION AFFORDED UNDER ARTICLE 28 AND 29 OF THE CRC

Dedication to uphold the rights of a child to education, based on the principle of equal opportunity and to provide the continuing support to such rights were enshrined in Article 28 (1) (a) and Article 28 (1) (b) of CRC. In realizing the commitment, the convention laid certain principles to be upheld by the state parties, inter alia, to *'make primary education compulsory and available free to all'* and to *'encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child'*. The provisions postulate a positive obligation by the state parties to make education available, accessible and receivable by all children (Verheyde, 2006, p. 12). The commitment to make education available can be fulfilled by the state parties by various models such as by making public schools accessible for all children, by funding institutions run by the non-state actors and by having a mixture of public and funded private schools (Verheyde, 2006, p. 17). Nonetheless, regardless of the models of the schools, the government is obliged to protect the enjoyment of such right in all aspect such as regulatory and supervision. Accessibility to the education means that it shall be physically accessible within the reasonable and safe distance, affordable to the parents and children and it shall not be discriminatory (Verheyde, 2006, p. 19). The most vulnerable group of children in the society should be given special attention. Verheyde regards compulsory and free access to primary education is a human rights tradition based on the principle that *'in the best interest of the child, education cannot be refused below certain level'* (Verheyde, 2006, p. 23). Parent's neglect, failure of registration and other hindrance shall not impede the child's access to education (Verheyde, 2006, p. 25).

Article 28 does not stand in isolation of other provisions of the CRC. Thus, it should be read together with other provisions of the CRC. Article 29 specify that the right to have access and obtain opportunity for education implies certain objective and standard to be achieved (Verheyde, 2006, p. 1). The outcome of the education shall focus on *'the development of the child's personality, talents and mental and physical abilities to their fullest potential'* (Article 29 (1) (a) adopting the human right's principles (Article 29 (1) (b), CRC), without neglecting the child's *'cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own'* (Article 29 (1) (c), CRC). Hart observed that Article 29 urges the state parties to ensure that the process would enable the children to value an objective adult life in a common society and to cultivate respect for the child's parents and society as well as other values such as cultural identity, language, cultural background and values of others' (Hart, 2001, p. 19).

In analysing Article 28 and Article 29 of the CRC, Verheyde divided the rights to education into three types namely the rights *'to education, in education, and through education'* (Verheyde, 2006, p. 2). The first type *'rights to education'* refers to the provisions with regards to the building of the capacity for education (CRC, Article 28 (1)) and the contents of education (CRC, Article 29 (1)). The second type *'rights in education'* encompasses the provisions of protection rights to the children embedded in the CRC (CRC, Article 28 (2)) including various participation rights of the child (CRC, Article 29 (2)) that need to be observed in the learning institution setting and processes. Finally, the *'rights through education'* refers to the indirect implementation of the CRC and other human rights standards by means of human rights education (CRC, Article 29 (1) (b)).

The CRC indeed, has provided the holistic approach to preserve the education rights to all children, including stateless children, without discrimination, encouraging them to participate in their own development and empowering them with tools for their survival. The UNICEF in its 2016 report, urged the state parties to level the playing field in education for all children and encouraged all the nation states to work restlessly in meeting the promise of the CRC for all children (Watkins, 2016).

### MALAYSIAN LEGAL FRAMEWORK CONCERNING ACCESS TO EDUCATION

The right to education is one of the fundamental liberties safeguards by the Malaysian Constitution. However, the protection is extended to the Malaysian citizens only. Hence, the non-citizens and the stateless children are excluded from the protection

afforded by the Malaysian Constitution. Article 12 (1) of the constitution states that (1) *‘without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth— (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees’ or (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation)*. Article 8 (1) states that *‘All persons are equal before the law and entitled to the equal protection of the law’*. Article 12 (1) definitely has limit the generalization of Article 8 (1) by expressly declares that the subject of non-discrimination is *‘any citizen’*. It follows that constitutionally, the non-citizens and the stateless children could be the subject of discrimination in terms of access to education, specifically access to the government and public school.

Being the highest law in Malaysia, the provisions of any law which are in contravention with Article 12 (1) of Federal Constitution would be rendered null and void. This explain why the preamble of the Malaysian Education Act 1966 constraints the purpose of education only for the Malaysian society. Preamble of the Act expresses that *‘the purpose of education is to enable the Malaysian society to have a command of knowledge, skills and values necessary in a world that is highly competitive and globalised, arising from the impact of rapid development in science, technology and information’*. It is suggested that the term Malaysian society literally is referring to those who are holding Malaysian Citizenship, in conformity with the spirit enshrined by Article 12 (1) of the Federal Constitution. Thus, the non-citizens and the stateless children are excluded from the application of the Act. The provisions of the Act ensure that Malaysian children are being afforded the right to access public school and receive education, at the expense of the Malaysian Government. In 2002, primary school attendance is made compulsory to all Malaysian children in conformity to the CRC provision. The Minister of Education is responsible to provide primary education to all Malaysian children in the government and government-aided primary schools. Nonetheless, parents have freedom to choose the types of education that is suitable to their children. The parents are allowed to decide on the type of school, language and medium of instruction that their child would be educated in (Tie, 2011, p. 52).

The National Education policy echoed the above legislation by emphasising on providing education to the citizens only. National Philosophy of Education is outlined in the following phrase: *“Education in Malaysia is an ongoing effort towards further developing the potential of individuals in a holistic and integrated manner so as to produce individuals who are intellectually, spiritually, emotionally and physically balanced and harmonious, based on a firm belief in and devotion to God. Such an effort is designed to produce Malaysian citizens who are knowledgeable and competent, who possess high moral standards, and who are responsible and capable of achieving a high level of personal well-being as well as being able to contribute to the betterment of the family, the society and the nation at large”* (MOE, 2012). Thus, the policy indeed is not all-embracing to cover the stateless children. It expressly excludes its application to the non-citizen’s children and the stateless children.

In 2009, the Ministry of Education has issued a Professional Circular 1/2009 on access and registration of unregistered children to public school. It states that the unregistered Malaysia children can register into public school on two conditions: the first is that one of the parent (either father or mother) is Malaysian and the second the application should be accompanied with a testimonial letter by the Head of Village testifying that the child is in fact a Malaysian Citizen. While this circular has provided a little avenue for undocumented stateless children to have access to school, it does not eliminate the problem in total. The access only applicable if the guardian can prove parent’s citizenship, leaving the abandoned stateless children, stateless children of irregular migrant and stateless refugees continuously in limbo. Having that scenario, it is concluded that the spirit of Article 28 and 29 of the CRC is legally and in practice not fully accommodated within the Malaysian legal framework.

Other statute that is worth mentioning is the Malaysian Child Act 2001. The legislation of the Act was intended to legalize matters relating to the care and protection of the children. The preamble of the Act while *‘recognising every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status’*, it did not properly attend the issue of access to general education of children except for the rehabilitation purposes.

## STATELESS CHILDREN AND ACCESS TO EDUCATION IN MALAYSIA

While attendance to primary education is made compulsory in Malaysia (MOE, 2002) (MOE, 2003), access to education of stateless and undocumented children is in reality a human rights challenge in Malaysia. Stateless children in Malaysia, can be categorised into several distinct groups namely the stateless unregistered children of Malaysian citizens, the abandoned children, the stateless children of irregular and illegal migrants, and the children of stateless refugees.

Many instances disclose that unregistered stateless children are being discriminately turn down from attending government school. The case of Tan Yao Chun has sparked the Malaysian attention when he was denied entry into the government public school. He was discriminately being made to stand outside the classroom because of his stateless status (Adie Suri Zulkefli and Seri Nor Nadiyah Koris, 2017). While the father is Malaysian citizens, the failure of his parents to register his birth renders him stateless. The effect of non-registration of birth is that a child will not have a birth certificate which contains all-important information such as the name, the relationship with the child’s parents, place and date of birth and importantly the nationality of the child (Nor Hafizah, 2013, p. 226). Nonetheless, the media attention has luckily solved his problem. By applying the 1/2009 circular, his access to primary public school is granted.

The stateless abandoned children living under the custody of welfare department’s shelter centre are facing the similar situation with the unregistered children of Malaysian citizens. In most situations, the citizenship of abandoned children will be written

'unknown status' in their birth certificate (Azizah Mohd, 2004, p. 225). Consequently, they are not afforded the constitutional protection with regards to education. In most situation, they access to primary education will be arranged by the welfare department as a matter as social and moral responsibility rather than a dictation of legal codes.

Community services provide the stateless children of irregular and illegal migrant little hope to have access to primary education. Most of the centres are located in the Eastern Malaysia operate by the NGOs. The centre such as the Humana Learning Centre, Stairway to Hope Learning Centre, Vision of Hope Learning Centre, Stairways to Success Learning Centre and 'Persatuan Kanak-kanak pelajar miskin' at least offer hopes, while not completely resolving the issue, to the children (Lumayag, 2016). The Human Rights Commission of Malaysia (SUHAKAM) in its 2015 report expressed the Commission's concern regarding the education for these children (BHEUU, 2015, p. 15). The Government responded that it was always the concern of the authorities to provide the opportunities and preserve the rights of education for children including children of non-citizens. However, the stateless children are not included in the categories that can be admitted to government schools or school government assistance based on Education Regulations. Alternatively, the National Security Council, the State of Sabah has established 12 alternative learning centres in Sabah, part is in collaboration with the United Nations Children's Fund (UNICEF) (BHEUU, 2015, p. 53). The education provided is basic education up to Year 6. The establishment of these centres would able to prevent, children who are unable to study in government schools, government aided-school or private schools, from engaging with criminal and unhealthy activities. Furthermore, the Government has set up a technical committee to examine alternatives policy for the stateless children who were placed in the immigration detention centres (BHEUU, 2015, p. 17).

Education for the children of stateless refugees in Malaysia, mostly dominated by stateless Rohingyas, is taken care by non-governmental organisations. The UNHCR has been providing funding for the primary education since the fled of Rohingyas refugees to Malaysia. Funding also is provided by Malaysian NGO's such as AIBukhary Foundation (Suzanna Pillay, 2017). The education processes are taken up by UNHCR partners, typically NGOs of faith-based group or community-based classes organised by the community. They set up learning centres or engage in education project (Hema Letchamanan, 2013). No less than 70 in numbers of such schools operate in Kuala Lumpur and Selangor (UNHCR Malaysia, 2017). According to UNHCR only 35% of the registered Rohingyas' children have access to education (Hariati Azizan, 2017). More than 5,000 refugee children attend such schools. The others are left unattended. Among the NGOs which run education for these children are Rohingya Education Centre operated by Rohingya Arakanese Refugee Committee (RARC), Rainbow of Love School for Refugee Children, Future Global Network Foundation (FGN), Pencerdasan Container Ummah Malaysia and Taiwan Buddhist Tzu-Chi Foundation. The efforts by these NGO's are commendable however they operate with very limited resources and the quality of the educations are questionable. The absence of government's recognition hampers the children's opportunity to further their education.

## CONCLUSION

Access to education and empowerment of children with quality education are two vital elements for development of every child. The endeavour to provide children the opportunity of having those selves' development components should begin with legal protection that afford them of such right. However, this research avails that in Malaysia, the legal codes in the form of Federal Constitution, Education Act and National Education Policy merely uphold the right to education to the Malaysian Citizens. Thus, the protection is not extended to the stateless children. Having said that, lacking the constitutional safeguard does not prevent the state to uphold such right to stateless children, since nothing in the Constitution expressly prevents the furtherance of such right to be extended to the stateless children. The Constitution does only mention the prohibition of discrimination in terms of education with respect of the citizens. Conversely, it also connotes that, while no safeguard is afforded to the non-citizens, it does not stop the state of extending the safeguard to the non-citizens. The Federal Constitution is unlikely to be amended, it is suggested that the government to take soft approach and practice, on human rights basis, by easing the conditions of entering public school for stateless children. Those who enters the centres or schools operated by the NGO's or Private institution should be given recognition, to enable them to engage for vocational training or higher education. While much has been done by the Government to increase the education standard it Malaysia, it should equally extended to the stateless children, on human rights basis, to honour them dignity by having equal opportunity to receive basic educations.

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<sup>i</sup> Speech by Tan Sri Muhyiddin Mohd Yassin, Minister of Education Malaysia, 'Reaching the unreached in Malaysia through education'. *Special Report on The State of the World's Children in conjunction of 20 years of celebrating the Convention of the Rights of the Child*. United Nations Children's Fund (UNICEF), 2009, 48.

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