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TRANSNATIONAL MARRIAGE AND ITS EFFECTS ON CITIZENSHIP LAWS IN MALAYSIA

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ABSTRACT

In an age of increasing globalisation, the trend of marriage had also experience its changing pattern. People are increasingly marrying across national boundaries rather than to a current geographic location. Transnational marriage is a marriage between two people from different countries. In recent years transnational marriage occurred due to globalisation, migration of labor, increased communication and other factors when foreigners come into contact with each other in a particular country. The increasing frequency, intensity and scale of transnational migration alongside with innovations in transportation and communications technologies have generated new challenges to the concept of citizenship. Citizenship laws in most countries in the world are beyond doubt of utmost importance. They define certain rights and privileges to be gained from being a citizen of a particular state such as the right to vote, right to hold a passport, right to join the government services and others. At the same time they also impose certain responsibilities and obligations on the individuals. Under the Malaysian citizenship law it is clear that a person can acquire citizenship by any one of the four ways, i.e. birth; descent; registration and nationalisation. The aim of this paper is to elucidate on transnational marriage and the issues facing citizenship such as dual or multiple citizenship, gender inequalities and other matters arising out of such marriage. The paper which is a pure doctrinal research seeks to explore on some of the provisions of the Federal Constitution relating to citizenship with a view to highlight whether those laws do reflect the trend of transnational marriage in today's era of globalisation.

Keywords: Citizenship, Citizenship laws, Federal Constitution, transnational marriage, globalization

INTRODUCTION

Marriage migration across borders is not a new phenomenon. It has been pervasive all over the world in the past decade. As said love has no boundaries so does marriage in this era of globalisation. History proved that it occurred in many parts of the world. During the British colonisation in India for example the British men in the colonies generally did not want Indian wives; they wanted middle-class British girls who could share the high purpose of Empire. This had resulted the East Indian Company shipped single women from Britain to India, in the hope of providing wives for its employees and women still made the journey in search of husbands even after the practice had ended. The effects of World War II provide another example of cross border marriages on a large scale when servicemen stationed

overseas met and married local women, who often migrated to join them after the war. Today the number of transnational marriages has grown steadily in many parts of the world. In Singapore for example the National Population and Talent Division figures showed that such trend has grown steadily in the past 10 years. About eight in 10 transnational marriages were between Singapore grooms and non resident brides. In Malaysia according to a report by Bernama, Dewan Negara said in a statement that the number of local men who are looking for foreign wife is on the rise each year. This trend had started gradually almost a decade ago and has grown steadily over the years.¹

DEFINITION OF TRANSNATIONAL MARRIAGE

Transnational marriage or international marriage literally refers to marriage between two people from different countries. In today era of globalisation people no longer enter into marriage with those from current geographical location but marrying across national boundaries. Transnational marriage is a by-product of the movement and migration of people. The term cross border and transnational marriage are commonly used though are used interchangeably indicate a different conceptual emphases. The term cross border marriage emphasises geographical, national, racial, class and gender and cultural borders constructed in the hosting societies while the term transnational marriage emphasises a transnational network and space created by the actors themselves; as well as the transactions of economic resources, symbols and political and cultural practices between the sending and receiving communities. Cross border marriages link kin groups of different national origins to a new social unit and create affiliations and obligations across different nation states.

FACTORS OF TRANSNATIONAL MARRIAGE

Contemporary communication technologies, mass migration and increased ease of travel may expand the increasing trend of marriages across borders or transnational marriage. In addition globalisation had also contributed to the increasing number of transnational marriage among young couples as it makes it easier for them to cross the borders. This is predominantly prevalent in Asian countries where transnational marriage which occurred among Asians are those foreign women who got married to men of the destination countries. The unbalance female-male ratio and a lack of brides in rural farming regions can be the triggers for hosting countries. In recent years migration of women from developing Asian countries such as

¹ Teh Wei Soon, "The Malaysian Rush For a Foreign Bride", <http://malaysiandigest.com/opinion/525752-the-malaysian-rush-for-a-foreign-bride.html> (accessed Friday 30 October 2014).

China, the Philippines and Vietnam from rich Asian countries like Japan, Korea, Singapore and Taiwan has becoming the most dynamic form of permanent migration in East Asia.²

Malaysia is also experiencing this changing trend in marriage with had progressed rapidly over the years. Datin Paduka Chew Mei Fun, the Deputy Minister in the Women, Family and Community Development Ministry was quoted as saying that the increase in men seeking foreign wives is also partly fueled by agent from overseas playing the role of matchmakers.³ The growth in internet usage and social media access has driven the matchmaking business to be available online. The matchmaking operators have found a novel and effective way to promote their services and started to make full use of the online platform by displaying brief introduction and background of the person, male or female online as well as sending out email alerts and promotional offers message notifications. According to a report by *Kosmo* on October 28 2015, the business skill that many women from Thailand possess are the main reason why Malaysian men find them irresistible and want to marry them despite their marital status.⁴

TRANSNATIONAL MARRIAGE: ISSUES AND CHALLENGERS

Though the idea of getting married of diverse culture, community and country may sound progressive but the reality of life is a bit more typical for such couples. When marriage occurred between two different nations several issues involved ranging from socioeconomic dynamics and cultural diversity. The couples who are engaged in transnational marriage often have a tougher time blending their traditions. These couples are mostly from very different communities and are followers of different religion. Except for couples one of whom were not Muslims before marriage has to convert to Islam as the religion only allows a non Muslim to convert to the religion before the couple got married. Therefore in a transnational marriage both the bride and groom have to work harder to understand each other's cultural expectation. This was affirmed by the MCA Public Service Complaints Department chairman, Datuk Michael Chong that different lifestyles, clash of ideologies, age differences and communication barrier (language problem), among others are the crux of the problem in transnational marriage⁵. It is generally hypothesized that the greater differences in

² <http://asiancenturyinstitute.com/migration/178-marriage-migration-in-east-asia> viewed on 23/6/2015.

³ <http://malaysiandigest.com/opinion/525752-the-malaysian-rush-for-a-foreign-bride.html>

⁴ The Wei Soon, 2.

⁵ <http://malaysiandigest.com/opinion/525752-the-malaysian-rush-for-a-foreign-bride.html> viewed on Friday 31th October 2017.

background between spouses (cultural background, age, religion, education) the higher the risk that the marriage will end divorce.⁶

Another concern in transnational marriage is the issue or visa and matters concerning immigration. For example there are stringent procedures and processes which have to be followed before obtaining a Permanent Residence (PR). In Malaysia without PR they are treated like foreigners and not part of their Malaysian families. They have to carry their passports around, unable to co-own property, difficult to open bank accounts in their own name, pay tourist rates at leisure and entertainment spots and other predicament. Having PR status is so important especially for estranged or divorced foreign spouses. A foreign wife has to leave her husband as the sponsor for her PR application. If she wishes to work, she requires a letter from her Malaysian spouse granting her permission to work. It is for want of this letter that estranged and widowed spouses are unable to get a work endorsement from Immigration. As such foreign wives without PR who suffer domestic violence are stuck with the abuse and are also vulnerable to deportation because they are at their husband's mercy. Though it is noted that PR is a privilege and not a right but it seems that this privilege is fast tracked for foreign professionals as well as top-performing international students compared to foreign spouses. Thus the government's policy on highly-skilled foreigners should also include foreign spouses as they also act as Malaysian ambassadors to their extended families in the tourism industry.

Another problem which could be encountered from this kind of marriage is that the employer's contribution to EPF is optional. In cases where foreign spouses contribute to the EPF, they are not permitted to withdraw from Account 2, for purchase of homes for our Malaysian family nor for the education of our Malaysian children. In fact foreign spouses are asked to produce an air ticket and withdraw the entire amount even after reaching 55 years of age, or until they receive permanence resident.

CITIZENSHIP LAWS IN MALAYSIA

Citizenship is one of the utmost important issues affecting transnational marriage. Under the Malaysian citizenship law it is clear that a person can acquire citizenship by any one of the four ways, i.e. birth; descent; registration and nationalization under Part II of Second

⁶ Gavin W. Jones, *International Marriage in Asia: What Do We Know, and What Do We need to Know?*, Asia Research Institute Working Paper Series No. 174, January 2012, 14.

Schedule of the Federal Constitution. This will be dealt accordingly throughout the discussion as well as highlighting on several issues affecting transnational marriage.

i. Citizenship through Operation of Law

Under this first type of acquisition there are several categories of persons. The first category refers to those born before Malaysian Day (16th September 1963). They include all persons who were citizens of the former Federation of Malaya before 31st August 1957, by virtue of Federation of Malaya Agreement 1948.

As for the second category, the provision refers to those persons born after Malaysia Day.

The third category refers to those who were born outside the Federation whereby the father of such persons must be citizens and must satisfy one of the requirements namely born in the Federation, was in the service of the Federal or State Government, or the birth was registered at the Consulate. The last category refers to those born within the Federation who is not born a citizen of any country.

Referring to all those categories it is submitted that the Malaysian Constitution does not adopt the true concept of *jus soli*.⁷ The principle is only conditional; the Constitution also adopts the *jus sanguinis* principle.⁸ After September 1963 such persons become citizens of the new Federation by operation of law only if one of their parents at the time of their birth is either a citizen or permanent resident of the Federation. However for those born outside the Federation before *Merdeka* Day they are also entitled to citizenship by operation by law if the father of such persons satisfies certain requirements. In such a situation the principle of *jus sanguinis* is also adopted. In this respect it will affect those who contract transnational marriage where under the Federal Constitution only allows a Malaysian woman married to a foreigner to confer her Malaysian citizenship on her child if the child is born in Malaysia. This had caused a lot of problems for Malaysian women married to foreigners and living abroad. In some cases they had to follow their husbands back home since their husbands could not become Malaysian citizens by registration under Article 15(1) of the constitution. Though the Ministry of Home Affairs had taken a pro active action to solve this problem by introducing a new regulation which allows such women to register their children born abroad,

⁷ *Jus soli* means that a person's citizenship is determine by the place where he is born.

⁸ *Jus sanguinis* means that a person's citizenship is determine by the nationality of his parents.

it is still new and yet to be seen effectively solve the crux of the problem on gender discrimination.⁹

ii. Citizenship by Registration

Besides acquiring citizenship through operation of law, acquisition can also be made through registration, naturalisation and incorporation of territory. Only certain categories of people can acquire citizenship by registration. Citizenship by registration is provided under Article 15-18 of the Federal Constitution. Persons who are likely to become citizens through this process are foreign born wives and children of citizens. It is essential to stress here that foreign born husbands do not come under this category. Under this category such persons must fulfill certain conditions and restrictions such as residence, intention to reside in the country permanently, good character and knowledge of the local language. Though the law provides such a privilege to the foreign wives this does not mean it can be easily acquired. Besides construing the law as provided under article 15 of the Federal Constitution the provisions of the constitution relating to citizenship would seem cognizance of the laws or policy relating to immigration.

As mentioned earlier Article 15 only gives the right to be registered as a citizen in favour of wives and not husbands. It is to be emphasized here that she is entitled to be registered as a citizen if the marriage subsisted and the husband was a citizen at the beginning of October 1962. However no similar provision in favour of husbands who are married to a women citizen was enacted to such effect. Such loophole in the law is seen as a form of gender discrimination towards women with foreign spouses. This would mean that foreign husbands had to apply for citizenship through other means which requires a stiffer test and a longer period of residence. Article 15 also states on the registration of children by their parents or guardian upon application made to the Federal Government. With the formation of Malaysia in 1963 it had also affected the citizenship provisions through registration by taking into account the inclusion of the new states.

More often when discussing the acquisition of citizenship through registration, a point that has been overlooked is the existence of an element of gender discrimination. This is clearly indicated by the different requirements with regard to citizenship through registration for

⁹ Nor Hafizah Binti Mohd Badrol Afandi, "The Laws of Citizenship in the Federal Constitution of Malaysia: An Analysis, (PhD thesis, IIUM), 2010, 229.

those under the age of twenty one years under Article 15(2) and 15(3). The former provision requires that at least one of the parents must be a citizen while the latter only mention the word father thus ignoring the mother's citizenship status. Similarly, no corresponding privilege is extended to a man married under 15(1), as it only entitles a woman married to a citizen to become a citizen through registration. This is one of the challenges faced by women citizen who entered into cross boarder marriage. In fact Tan Sri Rais Yatim commented that it is not simple to get Malaysian citizenship and that it is easier if the foreign women married a Malaysian man, rather than the other way round.¹⁰ As such there is a strong demand among educated Malaysian women that the policy be changed in order to reflect women's increasing participation in education, in the economy, and in their contribution to the advancement of the country. This would militate against the country's aspiration for highly skilled and increasingly technocratic labour force.

An issue that needs to be addressed about the above provision is whether the discriminatory treatment given to females in this respect is in line with article 8(2) of the Federal Constitution which includes the word 'gender' in this article. Though the Federal Constitution upholds the concept of equality before the law, there are still some provisions governing citizenship as mentioned above which indirectly discriminate against women in that while a male can transmit citizenship to his spouse a female citizen cannot do so. This is because in the acquisition of citizenship, it depends so much on the male citizenship whether he be parent or spouse. A male is thereby able to confer legal rights on his issue and his spouse whereas for the female it is otherwise. Such discriminatory treatments on citizenship do not reflect Malaysia as a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Despite Malaysia's ratification of CEDAW there still exist gender discriminatory provisions in Article 15, 14, and 26 of the Second Schedule of the Constitution and other related legislations such as the Immigration Act 1969/63 of the Regulations made there under. Similarly, a Malaysian woman married to a foreign man may confer citizenship rights to her child born overseas upon fulfilling administrative measures unlike their male counterparts who marries to a foreign woman is granted citizenship regardless whether the child is born in Malaysia or abroad. As such inequality still exists where transnational marriages are

¹⁰ Sharyn Shafiya, A Rojak kind of love, <http://www.Viewpoints/Rapestry?Profile/> (accessed 8 Jun 2015), 2.

concerned and women with foreign spouses are facing greater challenges in many citizenship related aspects, either regarding their husbands or children. It is apparent that the views that all discriminatory laws particularly in respect of those relating to citizenship should be reviewed must be look into seriously by the government as the trend of marriage today has changed due to globalisation. Ironically this law discriminates women who are citizens but accommodate the rights of foreign women.

It is to be emphasised that a non citizen wife of a citizen has no right to an entry permit to enable her to reside in the Federation for the two years necessary to make application to be registered as citizen.¹¹ Furthermore, such provision has to be read together with Part III of the Second Schedule.

iii. Citizenship through Naturalisation

Besides the two methods of acquiring citizenship, it may also be acquired through naturalisation which is provided under article 19(1) of the Federal Constitution. The only difference between citizenship through registration and citizenship through naturalisation is the period of residence. Citizenship through naturalisation requires an applicant to reside in the country for a period of ten out of twelve years prior to the application¹² while citizenship through registration requires that the applicant resides in the country for an aggregate of at least five out of seven years prior to the application.

A close analysis on the acquisition of citizenship through registration and naturalisation finds that one has to fulfill or possesses the characteristics of 'good chracter'. This is very subjective as the Federal Constitution is silent on the definition of 'good character' for that purpose. Therefore it is at discretion of the Federal Government which has power to lay down the criteria. Besides, the Federal Government may vary from time to time the criteria which it finds acceptable. The meaning of 'good character' was discussed in the case of *PP v. Munusamy*.¹³ In this case it provides a guideline of what constitutes 'good character' as

¹¹ *Ree Meenal w/o Muniandy* [1980] 2 MLJ 299.

¹² Such person must satisfy that he has resided in the Federation not less than ten years in the twelve years immediately preceding the date of the application for the certificate, and which includes the twelve months immediately preceding the date and intends to reside permanently in the federation, is of good character and had adequate knowledge of the Malay language. See Federal Constitution Article 19 (1)(a),(i),(b),(c).

¹³ (1967)1 M.L.J 238.

appeared under the Citizenship Rules 1960 repealed by the Citizenship Rules 1962 and the repealed again by the Citizenship Rules 1964 which did not to have the same effect.

Under the old 1960 Rules an applicant must be of good character before he could apply for citizenship and the yardstick to assess his character is whether he had a previous conviction. However under 1962 and 1964 Rules he had to be of 'good character' and had to declare his previous convictions. But having a previous conviction does not mean he is not of 'good character'.¹⁴ *Chang Min Tat J.* explained that "such rules were designed so as to reveal to the relevant authorities all the facts relating to the applicant in order for the government to exercise its discretion whether to grant or not to the applicant in order for the government.¹⁵ It is observed that reference to Citizenship Rules 1964 only provides a mere guideline of 'good character' and not a concrete definition. Thus at the end of the day the matter will then rest in the hands of the executive to decide what constitutes 'good character'.

TRANSNATIONAL MARRIAGE AND DUAL CITIZENSHIP

One of the obstacles in transnational marriage is the renunciation of one's citizenship of the previous country or become a dual citizen or permanent citizen. Changing one's citizenship can be a long process, and for some it is an ordeal of negotiating the laws and language of a new country. One has to know that changing citizenship can be a long process, and for some it is an ordeal of negotiating the laws social culture of a new country. Besides, learning how to live with a new spouse with different cultural assumptions, norms and language might be a challenge. People are sometimes suspicious of transnational marriages, as they think the non citizen spouse may use their marriage only to obtain legal status in the host country thus benefited from it. In some cases false marriages occur to gain citizenship or conduct human trafficking. There is also a possibility that children or spouses may not be as loyal or patristic to the new country unlike the second and third generation who had gone through assimilation process. Besides, others find their families torn apart if one spouse is detained or deported for legal reasons such as breaching the immigration laws of the hosting country.

Most European countries as well as United States, Australia and many others had permit dual or multiple citizenship Malaysia including other countries such as Singapore, Indonesia, China, India and many more does not allow it. Hence the foreign spouse must change and

¹⁴ Id,239

¹⁵ Id,240

surrender his or her citizenship when a host country does not allow dual citizenship. Though there was a suggestion on dual nationality, the government will have to study the pros and cons of such proposal since the country's law and system do not provide for dual citizenship. Despite the advantages drawn from dual or multiple citizenships such as rights to establish residence, to work, and to acquire property, educational opportunities, eligibility from various government subsidies, including healthcare and retirement, etc. from various sources, one should realise that each citizenship carries also responsibilities and obligations and that being a citizen of another country may be a liability. It is also associated with security concerns be it foreign influence or foreign preference. There may also problems with conscription. Travel restrictions and sets of law issued by multiple governments governing one's behavior domestically and while travelling abroad is something that a person has to be aware of. In worst situations such as the countries are at war with each other, a dual citizen's international status can be very complicated.

TRANSNATIONAL MARRIAGE IN MALAYSIA: WAY FORWARD

The changing trend of marriage across boarder had also influence the legal and socio culture in Malaysia. Recently the government in Malaysia had made a shift in the policy whereby the foreign spouses now are allowed to access government hospitals at local rates when the marriage certificate is presented. The government also had allowed spouses to be employed with the endorsement to work. However, visas of spouses on the long term social visit pass come with the statement that 'any form of employment is strictly prohibited-spouse of a Malaysian citizen'. This had made the situation difficult for spouses to secure employment and is particularly frustrating for young returning graduates with foreign spouses.

Another issue facing transnational marriage is the brain drain where many professionals, doctors, engineers had left the country after being frustrated with the difficulties that their foreign spouses had to face. This is of so much concern especially among the Malaysian women marring foreign citizens. With the women's increasingly participation in education and in the economy, and their contribution to the advancement of the country, review in discriminatory laws should be made to reflect the actual problems faced by the Malaysian women. It is feared that if such review is not made and no changes in the policy done, highly skilled and educated women may leave the country in search if other opportunities in other countries since their husbands cannot stay here due to difficulties in obtaining Malaysian citizenship. This would militate against the country's aspiration for highly skilled and

increasingly technocratic labour force. The government should be aware that every citizen, whether woman and man has equal roles to play in the development of an equal society. Therefore until such laws are reviewed, inequality will still exist where transnational marriages are concerned and women with foreign spouses will be faced with greater challenges in many citizenship related aspects. As such the government should look forward to a review of the laws and policies and to consider excluding spouses of Malaysians from policies covering foreigners. This will better support couple of transnational marriage, in light of the Government's emphasis on a 'Caring and develop society'

CONCLUSION

In conclusion there is a mixed reaction to transnational marriage in some areas especially as it continues to spread with the effect of globalisation. Some viewed it as something positive where it reconnects the extended families or even persons of similar background that are living all over the globe. It also helps relations between countries by strengthening trade and contact as well as becoming as ambassador in tourism industries to their families way back home. On the other hand some are suspicious of transnational marriages as they think the non citizen spouse may use their marriage only to obtain legal status in the host country. Others find their families torn apart if one spouse is detained or deported for legal reasons. As such the policy makers in Malaysia should start to consider whether they should discourage or encourage transnational marriage and provide effective mechanisms to solve the matters arising out of transnational marriage especially its effect of citizenship laws.

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