TANAH TUMPAHNYA DARAHKU: THE 'GENUINE AND EFFECTIVE LINK' IN ESTABLISHING MALAYSIAN CITIZENSHIP

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Article 14(1)(b) of the Federal Constitution of Malaysia, when read together with sch II pt II s 1(e), theoretically acts as a safety net for Malaysian-born persons by conferring citizenship upon those who would otherwise be stateless. In practice, however, these provisions have been interpreted as imposing a dual jus soli/jus sanguinis requirement that must be satisfied before citizenship can be granted. Consequently, many persons prima facie entitled to Malaysian citizenship by operation of law are deprived of their entitlement. This article explores the possibility of adopting the Nottebohm (Liechtenstein v Guatemala) 'genuine and effective link' principle as a supplementary element of the s 1(e) citizenship test. Support for adoption is derived from the Parliament of Malaysia's intent throughout the history of amendments to the citizenship provisions in the Constitution. The article further considers the plausibility of a direct legal transplantation of the principle into Malaysian law, drawing upon various sources including international law and English common law.

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I INTRODUCTION

Article 14(1)(b) of the *Federal Constitution of Malaysia* ('the *Constitution*'), read together with sch II pt II s 1(e), acts as a safety net for Malaysian-born persons by conferring citizenship upon those who would otherwise be stateless. In practice, the courts have interpreted these provisions as imposing a dual *jus soli/jus sanguinis* requirement that must be satisfied before citizenship is granted. I argue that the existing test (i) has been applied inconsistently, resulting in legal uncertainty and (ii) perpetuates substantive unfairness by depriving persons falling

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within the remit of s 1(e) citizenship (and the various rights and privileges attached to that status). Further, the outcomes generated by the test do not give effect to the Parliament of Malaysia's intent that persons with a genuine attachment to Malaysia should be granted citizenship.

This article seeks to address these issues by exploring the possibility of adopting the *Nottebohm (Liechenstein v Guatemala)* ('*Nottebohm*') 'genuine and effective link' principle as a supplementary element of the s 1(e) citizenship test.[1] It is argued that incorporating a factual assessment of whether the applicant has a genuine and effective link with Malaysia both adds certainty to the application of the test and conforms with the Parliament of Malaysia's intent, ensuring that citizenship is conferred upon those caught by s 1(e). However, the contextual difficulty in transplanting the principle from the international law sphere into Malaysian domestic law means that any adoption would have to be done on a policy (and not a purely legal) basis.

This article is divided into four parts. Part II lays out the relevant provisions of the *Constitution* and discusses the relationship between Malaysian domestic law and international law. Part III reviews the application of the existing test by the Court of Appeal of Malaysia in several leading cases. I argue that the case law is contradictory and the evidential burden imposed upon applicants can be practically impossible to satisfy, particularly for persons with no knowledge about their biological parents. Part IV makes the case for the adoption of the 'genuine and effective link' principle and considers how a modified s 1(e) test incorporating it could be applied in practice. Finally, Part V considers how the principle can be transplanted into Malaysian domestic law, and the various hurdles to adoption.

II CITIZENSHIP LEGISLATION IN MALAYSIA AND INTERACTION WITH INTERNATIONAL LAW

A *Citizenship and the Constitution*

Malaysia's citizenship provisions are housed in the *Constitution*, which provides for four different methods of acquiring citizenship: by operation of law (art 14), registration (arts 15–18), naturalisation (art 19) and incorporation of territory (art 22).

There are several pathways for *in situ* stateless persons ('stateless persons [who] are in their "own country"')[2] in Malaysia to acquire citizenship. As explained later in the article, most foundlings (children abandoned at birth) and stateless children will be entitled to citizenship by operation of law via the s 1(e) safety net. However, due to various legal and administrative hurdles, few, if any, acquire citizenship in this way. Alternatively, art 15A empowers the Government to register any person below the age of 21 as a citizen. In practice, this involves making an application to the Home Minister, whose discretion in approving or rejecting the application is absolute and immune from judicial review.[3] Article 15A does not require the Minister to provide reasons for their decision. When an

1 See *Nottebohm (Liechenstein v Guatemala) Second Phase (Judgment)* [1955] ICJ Rep 4 ('*Nottebohm*').

2 Gabor Gyulai, 'Statelessness in the EU Framework for International Protection' (2012) 14(3) *European Journal of Migration Law* 279.

3 *Federal Constitution of Malaysia*, sch II pt III s 2.

application is rejected, subsequent consecutive applications may still be made provided that the applicant has not reached the cut-off age of 21.

This article is primarily concerned with the conferral of citizenship by operation of law upon *in situ* stateless persons born in Malaysia by way of s 1(e). Article 14 of the *Constitution* states:

> 14. Citizenship by Operation of Law
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> 1. Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
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> …
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

The relevant parts of sch II pt II provide:

> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
>
> (a) every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation; and
>
> …
>
> (e) *every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.*
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> 2. (1) A person is not a citizen by virtue of paragraph (a), (d) or (e) of section 1 if, at the time of his birth, his father, not being a citizen, possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy.
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> …
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> (3) For the purposes of paragraph (e) of section 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provision corresponding to paragraph (c) of that section or otherwise.[4]

Section 17 of sch II pt III further provides that where the person in question is born out of wedlock, any references to their (biological) father/parent/one of their parents are to be construed as references to their mother.

The citizenship provisions in the *Constitution* have been subject to several amendments since Malaysia's independence in 1957. Originally, the provisions adopted a strict *jus soli* approach in conferring citizenship upon 'every person born within the Federation [of Malaya] on or after Merdeka Day'.[5] The *jus sanguinis* principle was introduced into art 14(1)(b) by the *Constitution (Amendment) Bill*

4 ibid (emphasis added).

5 *Constitution of the Federation of Malaya* (1957) (no longer in force) sch II pt I s 1(b).

1962 to supplement the existing *jus soli* requirement.[6] During parliamentary debates on the Bill, then-Deputy Prime Minister Tun Haji Abdul Razak justified this addition on the basis that citizenship ought to be granted only to those with 'real genuine ties' and an 'attachment to the country':[7]

> [I]n the interest of our country and in the interests of our people … people who have no right to be citizens and who obviously have no attachment to this country should not be allowed to become citizens. Therefore, in the light of all these occurrences Government [sic] decided to re-examine and review our Citizenship requirements.
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> …
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> Clause 2 of the Bill, subject to an amendment in Committee, seeks to add a third category by providing that a person will not acquire citizenship by operation of law by reason of birth in the Federation, if at the time of birth neither of his parents was a citizen or a permanent resident in this country. … It will not prejudice rights already acquired, nor will it operate so as to render the child stateless. … [C]hildren of persons who have no right to be in this country and who have no attachment to the country should not have the right to become citizens by operation of law.[8]

A second amendment was introduced in the Malaysia Bill when Singapore and the Borneo states were admitted into the Federation of Malaya to form Malaysia, leading to the current provisions.[9] The substantive provisions in art 14 were moved to the sch II of the *Constitution*, and a new ground for citizenship was introduced in sch II pt II s 1(e).[10]

Surprisingly, no explanation was tendered nor did debate occur specifically in relation to this new ground. At the introduction of the Bill, the Government explained that its provisions were a mere structural change that did 'not affect the existing rules as to citizenship in relation to the States at present comprised in the Federation of Malaya'.[11] In the same speech, however, it was also stated that '[i]n general, outside Singapore, *birth or residence anywhere in the Federation … will make a person a federal citizen* or qualify him for registration or naturalisation under the same conditions as at present'.[12]

Therefore, there existed a possibility that s 1(e) reintroduced a strict *jus soli* pathway to citizenship by operation of law, subject to the condition that they (i) were not born a citizen of another country and (ii) had not acquired any citizenship in the year following their birth (sch II pt II s 2(3) above).

This possibility was rejected by the High Court in *Chin Kooi Nah v Pendaftar Besar Kelahiran dan Kematian, Malaysia* ('*Chin Kooi Nah*').[13] The judge heard submissions from both the applicant and the respondent Federal Government on

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6 *Constitution (Amendment) Bill 1962* (Malaysia), discussed in Malaysia, *Parliamentary Debates*, House of Representatives, 31 January 1962, 4485 3(2)(42) ('*DR Hansard 31 January 1962*').

7 ibid.

8 *Constitution (Amendment) Bill 1962* (Federation of Malaya), discussed in Malaysia, *Parliamentary Debates*, House of Representatives, 29 January 1962, 4167 3(40) ('*DR Hansard 29 January 1962*'). See also the *DR Hansard 31 January 1962* (n 6).

9 *Malaysia Bill 1963* (Federation of Malaya).

10 *Malaysia Act 1963* (Malaysia) s 24.

11 Malaysia, *Parliamentary Debates*, House of Representatives, 15 August 1963, 971 5(9).

12 ibid 1019 (emphasis added).

13 *Chin Kooi Nah v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717, 746–47 ('*Chin Kooi Nah*').

whether the basis of citizenship conferral through s 1(e) was either the *jus soli* or *jus sanguinis* principle, or both. Following an analysis of several cases from other jurisdictions and having considered the wording of s 1(a), their Lordship held that conferral of citizenship by operation of law in the *Constitution as a whole* was premised on a combination of both principles. *Chin Kooi Nah* has since been cited with approval by the Court of Appeal of Malaysia.[14]

B *The Relationship between Malaysian Domestic Law and International Law*

Like the United Kingdom, Malaysia has a dualist legal system that distinguishes between domestic and international law. The *Constitution* provides for the Parliament to make laws on the implementation of treaties, agreements and conventions.[15] However, it is silent as to (i) whether such treaties must be incorporated into domestic law by way of an act of parliament to be given effect, and (ii) the primacy of domestic law over international law, or vice versa.

The prevailing view is that incorporation of such instruments through primary legislation is required and mere ratification of a treaty or convention is insufficient.[16] Several recent High Court cases suggest a liberalisation of this position, but they are arguably exceptions to the general rule and/or those decisions can be confined to the specific facts of those cases.[17] It is also settled law that where domestic law and international law conflict, the latter gives way to the former.[18]

Where international treaties are concerned, Malaysia is not a state party to the 1954 United Nations *Convention Relating to the Status of Stateless Persons*[19] or the 1961 *Convention on the Reduction of Statelessness*.[20] In 1995, Malaysia acceded to both the *Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*') and the *Convention on the Rights of the Child* ('*CRC*').[21] However, several reservations were also entered over various provisions in both treaties (including in relation to the issue of citizenship) that remain in place.[22] At the time of writing, these reservations extend to art 9(2) *CEDAW* and art 7 *CRC*.

The nature of these provisions and Malaysia's reasoning in adopting the reservations offers some insight into our discussion *viz* citizenship, the

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14 See, eg, *Than Siew Beng v Ketua Pengarah Jabatan Pendaftaran Negara* [2017] 5 MLJ 662, [24] ('*Than*').

15 *Federal Constitution of Malaysia*, art 74(1).

16 *AirAsia Berhad v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318 ('*Rafizah Shima*').

17 For a detailed discussion of the case law see Jaclyn Neo, 'Incorporating Human Rights: Mitigated Dualism and Interpretation in Malaysian Courts' (2012) 18 *Asian Yearbook of International Law* 1.

18 *Rafizah Shima* (n 16) [53].

19 *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 30 UNTS 117 (entered into force 6 June 1960).

20 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

21 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 11 August 1958); *Convention on the Rights of the Child*, opened for signature 20 November 1990, 1577 UNTS 3 (entered into force 2 September 1990).

22 'Deputy Minister: Malaysia Upholding Reservation on CEDAW Clause That Would Let Malaysian Women Pass on Citizenship', *The Malay Mail Online* (online, 3 December 2020) <https://www.malaymail.com/news/malaysia/2020/12/03/deputy-minister-malaysia-upholding-reservation-on-cedaw-clause-that-would-l/1928455>.

Constitution and general international law treaties. Article 9(2) *CEDAW* provides that states parties shall grant women equal rights with men with respect to the nationality of their children. Similarly, art 7 *CRC* provides for children to have (amongst others) the right to acquire a nationality and imposes an obligation upon states parties to implement these rights in accordance with their domestic laws 'and their other obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless'.

While the reservations entered regarding both provisions are not identical, it is notable that a common reason cited in both concerns their incompatibility with the *Constitution*.[23] It follows, therefore, that the Malaysian constitutional settlement vis-à-vis citizenship remains uninfluenced (insofar as the aforementioned treaties are concerned) by international law, and the courts are unlikely to accept any arguments premised solely upon developments in that jurisdiction. In the context of statelessness cases, some practitioners opine that the courts adopt a dim to negative view of the invocation of human rights arguments in submissions.[24] For the purposes of this article, the adoption of the *Nottebohm* 'genuine and effective link' principle into the s 1(e) test thus necessitates a bridging of this gap between constitutional interpretation and international law.

Malaysia is also a signatory to the *Universal Declaration of Human Rights* ('*UDHR*'),[25] which recognises the right to a nationality in art 15. However, the Federal Court in *Mohd Ezam bin Mohd Noor v Ketua Polis Negara* rejected the argument that the *UDHR* has been effectively incorporated into Malaysian law so as to be relied upon in interpreting the *Constitution*.[26] In doing so, the court distinguished between the declaratory nature of the *UDHR* and binding treaties, leaving open the question of whether the latter could have legal effect domestically. This distinction was relied upon in *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* ('*Noorfadilla*') when interpreting art 8(2) of the *Constitution* in the light of *CEDAW*, but it is argued that *Noorfadilla* is an exceptional case since art 8(2) was explicitly amended to give effect to Malaysia's *CEDAW* obligations (and to that extent can be deemed to have been incorporated into domestic law).[27]

The position is less clear when considering the application of customary international law in Malaysia. In English law, the doctrine of incorporation applies such that customary international law is generally treated as a source of the common law without the need for specific incorporation, save for international crimes (which must be incorporated by statute).[28] It is presumed by the courts that parliament intends to legislate consistently with any applicable international law

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23 See '8. Convention on the Elimination of All Forms of Discrimination against Women: Reservations and Declarations — Malaysia', *United Nations Treaty Collection* (Web Page, 20 October 2021) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en>; '11. Convention on the Rights of the Child: Reservations and Declarations — Malaysia', *United Nations Treaty Collection* (Web Page, 20 October 2021) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en>.

24 Jamie Liew, 'Homegrown Statelessness in Malaysia and the Promise of the Principle of Genuine and Effective Links' (2019) 1(1) *Statelessness and Citizenship Review* 95, 102.

25 *Universal Declaration of Human Rights*, UN Doc A/810 (10 December 1948).

26 [2002] 4 MLJ 449.

27 [2012] 1 MLJ 832.

28 See *R v Jones (Margaret)* [2006] UKHL 16.

unless statute indicates otherwise.[29] There is no similar analogue in Malaysian law.

Section 3 of the *Civil Law Act 1956*,[30] passed before Malaysia achieved independence, obliged the courts to apply the English common law and rules of equity as they stood on 7 April 1956. Thus, customary international law recognised by the English courts up until that date has been incorporated into the Malaysian common law — not by being recognised as customary international law, but rather as *part of* the English common law.

Does post-April 1956 customary international law have any place in Malaysian law? The only Malaysian Supreme Court case that touches upon the matter seemingly accepts that customary international law (more specifically, the doctrine of state immunity) can be incorporated into domestic law.[31] Problematically, this acceptance was made by citing an English Court of Appeal decision, thus offering little clarity beyond the position already defined by the 1956 *Act*.

Some commentators have suggested that the Malaysian courts ought to emulate their English counterparts and develop Malaysian common law to recognise customary international law.[32] Until such a decision is handed down, however, customary international law's position in Malaysian law remains unclear, barring those elements incorporated via English common law.

On the whole, Malaysian law maintains a strict dualist approach to international law. Whilst there are hints that this position is gradually being liberalised, these developments have generally occurred at the High Court level and have yet to be acknowledged by the upper courts. In the context of this article, for the 'genuine and effective link' principle to become a supplementary element of the s 1(e) test to confer citizenship by operation of law, the initial hurdle of incorporation into domestic law must first be surmounted. This issue is discussed in greater detail in Part V.

III THE COURT OF APPEAL ON CITIZENSHIP AND STATELESSNESS

The current approach adopted by the Malaysian courts in statelessness cases is set out in several leading Court of Appeal decisions. Here, I argue that the application of the existing test effectively denies citizenship to stateless persons who would otherwise be eligible according to sch II pt II s 1(e) of the *Constitution*. A particular issue is the courts' repeated failure to engage in a substantive analysis of whether the applicant has, in fact, acquired the citizenship of another state. This problem is compounded by the fact that the test has been applied inconsistently, resulting in the case law becoming contradictory and thus undermining legal certainty.

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29 See *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [45]; *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143.

30 *Civil Law Act 1956* (United Kingdom).

31 *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd* [1990] 1 MLJ 475. The Supreme Court was replaced as the apex court of Malaysia by the Federal Court in 1994.

32 Jaclyn Neo (n 17); Abdul Ghafur Hamid @ Khin Maung Sein, 'Judicial Application of International Law in Malaysia: An Analysis', *Malaysian Bar* (Web Page, 31 March 2006) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/judicial-application-of-international-law-in-malaysia-an-analysis>.

As set out in *Chin Kooi Nah*, art 14(1)(b), read together with s 1(e), imposes a dual *jus soli/jus sanguinis* requirement to be met.[33] Prospective applicants must therefore satisfy the Court that (i) they are born on Malaysian soil (the '*jus soli* limb') and (ii) they are 'not born a citizen of any other country' (the '*jus sanguinis* limb').[34]

The application of this test — and how it can be used to deny citizenship to applicants who, *prima facie*, satisfy the requirements of s 1(e) — can be seen in *Than Siew Beng v Ketua Pengarah Jabatan Pendaftaran Negara* ('*Than*') and *Lim Jen Hsian v Ketua Pengarah Jabatan Pendaftaran Negara* ('*Lim*').[35] In *Than*, the second appellant, T, was born at a local polyclinic and subsequently adopted by the first appellant (a Malaysian citizen) and his wife. At birth, T was issued a birth certificate that listed the particulars of his adoptive parents as his biological parents. When T applied for an identity card, an investigation revealed that he had been taken away from his biological mother shortly after birth and was raised by the first appellant and his wife. The first birth certificate was revoked and a second one was issued to him with no information listed about his biological parents.

In *Lim*, the second appellant, L, was born out of wedlock at a local hospital to a Thai mother, Rai Putta, and his father, the first appellant. L's parents were not legally married, and Rai Putta separated from them when the second appellant turned one, returning to Thailand. L was left in the care of his father and his paternal grandmother.

Both T and L applied separately for citizenship by registration under art 15A but their applications were rejected by the Government. They then applied to the court seeking a declaration that they were citizens by way of art 14(1)(b), read together with sch II pt II s 1(e). The Court of Appeal dismissed both appeals, upholding the decisions of the High Court.

Although both the appellants in *Than* and *Lim* satisfied the *jus soli* limb of the test, it was found that neither satisfied the *jus sanguinis* limb. In *Than*, the Court held that because the identity and citizenship of T's birth parents were unknown and the steps that had been taken to solicit that information were insufficient, he had failed to prove that he was of Malaysian lineage. In *Lim*, because L was born out of wedlock to a Thai mother, it was held that he had acquired Thai citizenship and therefore fell afoul of s 1(e).

Two points are of note here. First, the burden of proof falls upon the applicant to show that they have not acquired the citizenship of any other country. Yet, in both cases what the courts were asking of the appellants was practically impossible to fulfil. In *Than*, T had been separated from his biological mother at birth and had not seen her since. The Court nevertheless took the view that the onus fell upon him to ascertain her nationality, information without which he could not satisfy the second limb of the test.[36]

With enough time and resources, a particularly persistent applicant could perhaps achieve this objective. But that is to ignore the reality of most stateless persons in Malaysia, who are often from less well-off backgrounds and can hardly be expected to fund a potentially fruitless hunt for answers *and* review proceedings against the Government. The issue is compounded when one considers the

33 *Chin Kooi Nah* (n 13).
34 *Federal Constitution of Malaysia*, art 14(1(b), sch II pt II s 1(e).
35 *Than* (n 14); *Lim Jen Hsian v Ketua Pengarah Jabatan Pendaftaran Negara* [2018] 6 MLJ 548 ('*Lim*').
36 *Than* (n 14) [29]–[37].

ramifications for foundlings or persons with no official documentation of their lineage.[37] The strict evidential burden effectively prevents many stateless persons who, *prima facie*, fall within the scope of s 1(e) from being granted citizenship by operation of law.

It is perhaps also worth noting that this position runs contrary to international practice, which, although not directly applicable to Malaysia, is a useful model to draw upon as a comparator. It is generally accepted that in statelessness cases, precisely due to the possibility that applicants may be stateless *because* they do not have the proper documentation, the burden of proof is shared between the applicant and the state. Thus, the *UNHCR Handbook on the Protection of Stateless Persons* provides:

> In the case of statelessness determination, the burden of proof is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts. The procedure is a collaborative one aimed at clarifying whether an individual comes within the scope of the 1954 Convention. Thus, the applicant has a duty to be truthful, provide as full an account of his or her position as possible and to submit all evidence reasonably available. Similarly, the determination authority is required to obtain and present all relevant evidence reasonably available to it, enabling an objective determination of the applicant's status.
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> Given the nature of statelessness, applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.[38]

The second notable issue is that the courts do not engage with a substantive assessment of whether the applicant is, in fact, stateless. Consider *Lim*: having accepted that L was born an illegitimate child to a Thai mother, the Court subsequently ruled — without any further explanation — that they had *acquired* Thai citizenship. It was also held that there was no need for the Government to call an expert witness to testify that the appellant had acquired Thai citizenship, despite the fact that the Court was dealing here with the citizenship laws of another country.[39]

Closer scrutiny of the facts reveals that this superficial analysis is deeply problematic. Crucially, the Court failed to distinguish between the appellant being *entitled to* Thai citizenship versus him actually *acquiring* it. There are strong reasons to engage in deeper analysis here: an entitlement to citizenship may be attached to procedural requirements such as birth registration that, as a practical matter, must be satisfied to transform it into actual acquisition.[40] Whilst registration is not itself synonymous with acquisition, failure to comply may result in a lack of documentation proving the link between the individual and the state,

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37 See for instance *Chin Kooi Nah* (n 13).

38 United Nations High Commissioner for Refugees, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (Report, 2014) 34 [89]–[90].

39 *Lim* (n 35) [41].

40 UN Human Rights Council, *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/27/2 (17 June 2014) [23]–[24] <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A_HRC_27_22_ENG.doc>.

making it more likely that they may be rendered *de facto* stateless.[41] There may thus be an onus upon parents, for instance, to register the birth of their child at a government office/embassy within a specific period from the date of birth before a state will recognise the child as a citizen.

A mere entitlement is therefore nugatory if, having failed to act upon it, a person does not acquire that citizenship (or cannot prove that they have acquired it). The irony here is that the *Constitution* itself contains such provisions and the courts regularly engage with this type of analysis when dealing with other citizenship cases. Consider, for instance, sch II pt II s 1(c), which provides for conferral of citizenship by operation of law upon persons born outside the Federation to a Malaysian father 'and whose birth is, within one year of its occurrence … registered at a consulate of the Federation'.

On the facts of the case, L had been born in and lived in Malaysia all his life under the care of his paternal grandmother.[42] Beyond his maternal link, he had no ties or connections to Thailand or its polity. There was no suggestion that his birth had been registered with the Thai authorities, nor had any evidence been tendered to the effect that he was a recognised Thai citizen. For all intents and purposes, the Thai government did not even know of L's existence. Nor, it bears repeating, was an expert witness on Thai citizenship law called to give evidence at trial. The finding that L was a Thai citizen thus appears to be a wholly unsubstantiated assertion.

Than and *Lim* may be contrasted with the approach in *Madhuvita v Augustin* ('*Madhuvita*').[43] The appellant, M, was born out of wedlock at a local hospital to her Malaysian father and her mother, who held a passport issued by Papua New Guinea. Following her birth, her parents married. Unbeknownst to them, M's birth had not been registered; they subsequently sought and acquired a birth certificate some six years after her birth. The certificate stated that she was not a Malaysian citizen. M applied for citizenship under art 15A and was rejected. She then brought a judicial review claim seeking an order to compel the Government to register her as a citizen, on the basis that citizenship had been conferred upon her by operation of law under art 14(1)(b), read together with either sch II pt II ss 1(a) and/or 1(e), of the *Constitution*. The High Court dismissed her application, but the Court of Appeal overturned this decision and allowed the appeal.

The Court found for M on the s 1(a) grounds, which alone would have sufficed to dispose of the appeal. They nevertheless went on to consider submissions on the s 1(e) grounds. The respondent Government had sought to argue, along the lines adopted in *Lim*, that M was a citizen of Papua New Guinea by reference to the country's citizenship provisions, and therefore could not satisfy the *jus sanguinis* requirement of s 1(e).

In an incisive judgment, the Court flatly noted that these submissions were premised purely upon counsel's own opinion and interpretation of those provisions, and that they were neither supplemented by caselaw or academic opinion from that jurisdiction. Nor had the respondent sought to confirm the status of M as a citizen with the Papua New Guinean authorities.[44] A perusal of the provisions also indicated that registration of M's birth was necessary for her to acquire Papua New Guinean citizenship; it was undisputed that this had never

41 ibid.
42 *Lim* (n 35) [5].
43 [2018] 1 MLJ 307 ('*Madhuvita*').
44 ibid [72].

occurred and there was no evidence to suggest otherwise.[45] Had the order M sought not been granted, she would have been rendered stateless. The appeal therefore succeeded on both the ss 1(a) and 1(e) grounds.

Madhuvita exemplifies the promise of the existing s 1(e) test if applied correctly, just as *Than/Lim* represents how it can be used to deny citizenship to those who would otherwise be eligible under the *Constitution* by imposing an unrealistic burden of proof to discharge upon them. Further, the inconsistent application of the test generates significant legal uncertainty. The challenge, then, is how to amend the test to prevent a *Than/Lim*-type analysis from arising. Part IV of this article considers how the 'genuine and effective link' principle may be adopted into the existing test for this purpose.

A final point bears mention here. The most recent statelessness appeal heard by the Court of Appeal, *Chan Tai Ern Bermillo v Ketua Pengarah Pendaftaran Negara* ('*Bermillo Chan*'), concerned the issue of whether a child could be legitimated after birth such that sch II pt III s 17 did not apply. In *Madhuvita*, the Court had (in the course of dealing with the s 1(a) grounds) held that s 17 was concerned with the present status of the appellant, and so a subsequent legitimation (provided it had occurred before the appeal) would render s 17 inapplicable.[46] In *Bermillo Chan*, however, a different panel of the Court of Appeal held otherwise, agreeing with the High Court judge that s 17 was concerned with the status of the appellant at the time of birth, and so subsequent legitimation had no effect insofar as citizenship by operation of law was concerned.[47]

Madhuvita was never considered by the Court in *Bermillo Chan*, rendering the decision in the latter *per incuriam*; further, *Bermillo Chan* does not touch upon s 1(e) at all. As it stands, however, this leaves *Madhuvita* on precarious ground: it is the only decision to date that adopts a more progressive, applicant-friendly approach in applying the relevant tests, making it an outlier to the general rule. It is altogether too easy to see how subsequent courts may deem it wrongly decided or seek to downplay its importance. Indeed, at the time of writing, the Court of Appeal's decision in *Bermillo Chan* has since been partially upheld by the Federal Court, with Rohana Yusuf PCA (writing for the majority) commenting on the exceptional status of *Madhuvita*. The implicit repudiation by the apex court significantly undermines its authoritativeness, thrusting its precarious position into the spotlight.[48]

The case law at present is thus contradictory, and the inconsistent application of the existing test risks denying citizenship to stateless persons *prima facie* caught by the s 1(e) safety net. A better solution is needed: I suggest the 'genuine and effective link' provides the answer.

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45 ibid [75].

46 ibid [61]–[65].

47 *Chan Tai Ern Bermillo v Ketua Pengarah Pendaftaran Negara* [2020] 3 MLJ 634, 641 ('*Bermillo Chan*').

48 At the time of writing, the grounds of judgment for the Federal Court decision in *Bermillo Chan* (n 47) have yet to be released; however, the press summaries issued by the Registrar make specific note of *Madhuvita* (n 43).

IV THE 'GENUINE AND EFFECTIVE LINK' PRINCIPLE AS A SUPPLEMENTARY ELEMENT OF THE CITIZENSHIP TEST

The case of *Nottebohm* centred on Frederic Nottebohm ('N'), who was born a German citizen but resided in Guatemala where he ran the family business.[49] Shortly after the outbreak of World War II, N applied for and was granted citizenship of Liechtenstein.[50] During the war, the Guatemalan Government, regarding N as a German national, seized his property and handed him over to the United States for internment.[51] Subsequently, Liechtenstein brought a claim on N's behalf against Guatemala at the International Court of Justice ('ICJ'). The issue arose of whether N's naturalisation (entitling Liechtenstein to invoke diplomatic protection over N) could be validly invoked against Guatemala.

The ICJ drew upon international arbitration jurisprudence in diplomatic protection cases concerning dual nationals, which established that protection could only be validly invoked by an applicant state of 'real and effective nationality' against a respondent state.[52] This required a factual assessment of the strength of an individual's ties with the invoking state, involving factors such as their habitual residence and the centre of their interests.[53] The Court concluded:

> [N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.[54]

On the facts, N's links to Liechtenstein were extremely tenuous and they lacked the genuineness required to allow diplomatic protection to be invoked against Guatemala.[55] Liechtenstein's claim was therefore inadmissible.

What does *Nottebohm* suggest in the context of citizenship conferral? If citizenship is based on a social fact of attachment, then the test for conferral should be concerned with identifying whether that attachment exists, ie, whether an individual has a genuine and effective link to the polity (the 'genuine and effective link'/*Nottebohm* principle). Notably, this concept was explored by Ayelet Shachar in advancing her *jus nexi* principle of citizenship, defined as a 'genuine-connection principle of membership acquisition'.[56]

Although Shachar's work primarily develops a theoretical case for her principle, several aspects are relevant to our Malaysia-specific discussion. Should the *Nottebohm* principle displace the existing *jus soli/jus sanguinis* principles to become the sole determinant of citizenship conferral, or should it instead be adopted as a supplementary consideration to them? Shachar, whilst arguing that the existing principles are formalist proxies of whether a genuine link to the polity exists, accepts that her *jus nexi* principle can be adopted in either capacity.[57]

I argue that the *Nottebohm* principle should be adopted as a supplementary element of the s 1(e) citizenship test on the basis that this conforms with

49 *Nottebohm* (n 1) 12.
50 ibid 15.
51 ibid 18.
52 ibid 22.
53 ibid.
54 ibid 23.
55 ibid 25–26.
56 Ayelet Shachar, *The Birthright Lottery* (Harvard University Press 2009) 164.
57 ibid 165–70.

Parliament's intent as discussed in Part II. Here, the Hansard's relevance and its availability as an interpretative aid are crucial, given that the *Constitution* must be interpreted in its historical and philosophical context.[58] On the one hand, the principle conforms with Parliament's view that citizenship should only be conferred upon those who have an 'attachment to the country'.[59] On the other hand, it was explicitly set out that the *jus soli* principle was being supplemented with the *jus sanguinis* principle, the implication being that Parliament's intention was to retain the two.[60] Adopting the *Nottebohm* principle as a supplementary element allows us to reconcile both these premises, and, further, does not upset post-*Chin Kooi Nah* caselaw recognising the *jus soli/jus sanguinis* requirements.

A modified s 1(e) test incorporating the 'genuine and effective link' could thus be:

1. Article 14(1)(b) (*jus soli*): *Was the applicant born in Malaysia?*

   If yes, proceed to 2); if not, the applicant fails to satisfy the test.

2. Section 1(e) (*jus sanguinis*): *Is the applicant entitled to the citizenship of another country through their lineage?*

   If yes, proceed to 3); if not, the applicant is entitled to citizenship by operation of law.

3. Extended s 1(e) (*genuine and effective link*): *Does the applicant have a genuine and effective link with Malaysia?*

   This is a factual determination that considers the *Nottebohm* factors (habitual residence, centre of interests, family ties) but also whether the applicant, being entitled to foreign citizenship, has taken any steps towards acquiring it. Doing so would, I argue, suggest a lack of a genuine attachment to Malaysia, thus meaning the applicant fails to satisfy the test. Citizenship should therefore not be conferred upon them.

Applying this modified test to the facts of *Than* and *Lim* offers insight as to how it would work in practice, and whether the outcomes generated would have been significantly different from under the existing s 1(e) test. To recall, in both cases the appellants were found to have satisfied the *jus soli* requirement but not the *jus sanguinis* one. In T's case, this was because the identity and nationalities of his birth parents were unknown, making it impossible to determine his lineage. The assumption here was that T *could* have been, per s 1(e), 'born a citizen of another country', and that he had not proven otherwise on the balance of probabilities. Similarly, L did not satisfy this requirement because he had purportedly acquired the Thai citizenship of his birth mother.

In both cases, the explicit/implied premise for failing the existing s 1(e) test was that the appellants were (potentially) entitled to the citizenship of another

58 *Maria Chin Abdullah v Ketua Pengarah Imigresen* [2021] 1 MLJ 750, [537].
59 *DR Hansard 29 January 1962* (n 8).
60 *DR Hansard 31 January 1962* (n 6).

country through their lineage. Under the modified s 1(e) test, this would trigger the factual assessment under the 'genuine and effective link' limb.

At the time of the appeals, both T and L had lived their entire lives in Malaysia, T in the care of his adoptive family and L with his father and paternal grandmother. It is a safe assumption that the centre of their interests was also within Malaysia. Given that T had no information about his lineage, it would have been impossible for him to take any steps towards acquiring the citizenship of another country. Likewise, L, although born to a Thai mother and seemingly entitled to Thai citizenship, had not (on the information available) taken any steps towards acquiring it nor manifested any such intent. On the facts, both appellants thus, seemingly, had genuine and effective links with Malaysia, and under the modified test would accordingly acquire citizenship by operation of law.

The adoption of the *Nottebohm* principle in the modified s 1(e) test can therefore produce different, positive outcomes for applicants and remedy the legal uncertainty arising from the application of the existing test. More importantly, *Than* and *Lim* are representative of two of the five larger categories of persons identified as *prima facie* meeting the s 1(e) requirements for Malaysian citizenship in Jamie Liew's work.[61] Whilst each case within those categories (and whether the applicant has a genuine and effective link with Malaysia) will turn on their own facts, the archetypes in *Than* (an abandoned child) and *Lim* (a child born to a foreign mother and a Malaysian father) are not unique to those appeals. Adopting the principle in the modified s 1(e) test, therefore, helps achieve our objective of ensuring that citizenship is conferred upon those falling within the remit of s 1(e).

V HURDLES AGAINST THE ADOPTION OF THE 'GENUINE AND EFFECTIVE LINK' PRINCIPLE

Having considered the application of the 'genuine and effective link' principle in the modified s 1(e) test, we turn now to consider what may be termed the 'how' problem. The 'genuine and effective link' principle has not been explicitly recognised at Malaysian law, although as I seek to show later in the article, its rationale underpins the conferral of citizenship via naturalisation in art 19 of the *Constitution*. The question, therefore, is how it may be recognised and subsequently adopted by the courts to allow for the modification of the existing test.

The problem here is primarily contextual: the effective/dominant nationality principle developed in *Nottebohm* has generally arisen in diplomatic protection cases concerning persons with multiple nationalities. As the ICJ in *Nottebohm* explicitly set out, diplomatic protection issues arise at the international level, but a state's discretion to *confer citizenship* upon individuals is strictly a matter for domestic law. Thus, the Court's ruling that N did not have any genuine and effective links to Liechtenstein and that the state could not invoke diplomatic protection as against Guatemala did not itself affect his status as a citizen of Liechtenstein.[62]

How then can this principle be effectively adopted into Malaysian domestic law? As a matter of law, a direct legal transplantation may be impossible due to the aforementioned contextual differences between international and domestic

61 Liew (n 24) 107–22.
62 *Nottebohm* (n 1) 20–21.

law. Notwithstanding such a bar, adoption of the principle may still be available as a matter of policy. This Part considers whether such a direct transplantation is possible, and if not, whether adoption as a matter of policy is both possible and warranted.

The *Nottebohm* principle is premised upon the understanding that citizenship is construed in light of the strength of a person's links to a polity, those links having met a certain threshold. Having identified this, we can then consider the various sources of this principle, and the problems (if any) of incorporating them into Malaysian domestic law. Here, I identify three sources: (i) international law, (ii) English common law and (iii) citizenship by naturalisation in the Federal Constitution.

A *International Law*

While *Nottebohm* itself was not concerned with dual nationality, it both crystallised and extended the 'real and effective nationality' concept in international arbitration jurisprudence.[63] The position of *Nottebohm* itself in the wider context of international law is considered in the commentaries of the International Law Commission's ('ILC') 'Draft Articles on Diplomatic Protection' ('Draft Articles').[64] The Draft Articles, despite not having been formally adopted as a treaty by the UN General Assembly, are generally regarded as codifying customary international law in that area. They have also been cited with approval by the ICJ in several cases.[65]

Article 7 of the Draft Articles provides that a state of nationality may not exercise diplomatic protection over a dual national against another state of nationality unless 'the nationality of the former State is predominant'. The concept of a 'predominant nationality' first emerged in the *Mergé Claim* ('*Mergé*') decision of the Italian–United States Conciliation Commission, which also marked the starting point of the customary rule.[66] However, its origins are rooted in the 'effective link' principle in *Nottebohm*, which was itself cited with approval in *Mergé*.[67] The ILC also considered that the terms 'effective' and 'dominant' nationality, used interchangeably in the case law, both meant the same thing.[68]

The term 'predominant' stresses the element of relativity and the need for an assessment of the strength of a person's link with a particular state.[69] The application of the principle in this context is evocative of the case where a person is born out of wedlock in Malaysia to a non-national mother, as occurred in *Lim*. Applied in the context of citizenship conferral, therefore, the relevant issue for consideration (as shown in the modified s 1(e) test) should be the strength of their link to the Malaysian polity, relative to the strength of their link with the country of their birth mother.

However, the conceptual difference between international and domestic law remains. While both cases concern issues of (purported) dual/multiple nationality,

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63 ibid 21–24.

64 *Report of the International Law Commission: Fifty-Eighth Session* UN Doc A/61/10 (1 May–9 June and 3 July–11 August 2006) 16 [49]–[50] ('*Draft Articles*').

65 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* [2007] ICJ Rep 582.

66 *Mergé Claim* (1955) 22 ILR 443 ('*Mergé*').

67 ibid 455.

68 *Draft Articles* (n 64) 45–46, citing *Mergé* (n 66).

69 ibid.

the relativity assessment in diplomatic protection caselaw is directly related to issues of state sovereignty and non-intervention in the domestic affairs of other states. In short, there must be a legitimating link for a state to be able to invoke diplomatic protection over an individual. Conversely, there is no corresponding necessitating factor in citizenship conferral; indeed, sovereign states have the authority to determine their own rules on citizenship acquisition.[70]

Some additional support may be derived from art 8 of the Draft Articles, which extends diplomatic protection to stateless persons who are 'lawfully and habitually resident' in a state's domain.[71] This draft article is regarded as a progressive development of the existing rule and it follows that it may not be considered part of customary international law.[72] Nevertheless, our interest here is with the ILC's adoption of the 'lawfully and habitually resident' factor as a precondition for diplomatic protection to apply to a stateless person/refugee.

The commentaries make clear that the term 'lawfully and habitually resident' is derived from art 6 of the *European Convention on Nationality*, which in turn imposes an obligation upon state parties to facilitate the acquisition of nationality of various categories of persons.[73] While art 8 of the Draft Articles is only concerned with the exercise of diplomatic protection over such individuals and does not purport to pronounce on their status,[74] I argue that the origins of the terminology and its usage in the draft article are relevant.

First, the habitual residence of an individual was regarded as an 'important factor' in determining the strength of their ties to a state by the Court in *Nottebohm*.[75] Second, and relatedly, the use of the term in the *European Convention on Nationality* relates to the acquisition of citizenship and is thus directly relevant to our purposes, but also because the implied premise here is that physical presence in a domain is a precondition to the acquisition of citizenship. In other words (and taken together with *Nottebohm*), it is a factor indicative of a link to the polity.

Finally, its inclusion in art 8 of the Draft Articles as a precondition for diplomatic protection to be afforded resonates with the idea that a person's links with a polity can develop/strengthen over time. If citizenship acquisition is regarded as recognition of an individual's links meeting the 'strength' threshold of a polity to qualify as a member, the exercise of diplomatic protection over a stateless/refugee non-national is arguably the state reciprocal of the progressive strengthening of their links. Notably, this accords with Shachar's conception of the 'incremental process' central to the *jus nexi* principle discussed in Part III.[76]

One final contextual point bears mention here. The preconditions discussed above ('predominant nationality' and 'lawfully and habitually resident') are restrictive in nature, in the sense that they prevent a state from exercising diplomatic protection over an individual unless they are satisfied. On the other hand, this article is largely concerned with applying the *Nottebohm* principle in a

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70 *Nottebohm* (n 1). The caveat here is that states may themselves fetter their own authority by acceding to the imposition of such necessitating factors, ie, by ratifying an international treaty.

71 *Draft Articles* (n 64) 18 art 8.

72 *R (on the application of Al Rawi) v Secretary of State for Foreign Affairs* [2009] EWHC 972 (Admin).

73 *Draft Articles* (n 64) 49 n 91, citing *European Convention on Nationality*, opened for signature 11 April 1997, CETS 166 (entered into force 1 February 1999) art 6(4)(g).

74 *Draft Articles* (n 64) 47–48.

75 *Nottebohm* (n 1) 22.

76 Shachar (n 56) 168–69.

positive manner — by providing for the conferral of citizenship if a social fact of attachment to the Malaysian polity is established. As seen in Part III, however, the modified test also allows for the principle to be applied restrictively, as it is used in the diplomatic protection context.

For instance, where a person with nominal links to the country of their non-national mother's origin has an *entitlement* to the citizenship of that country and they have taken active steps towards acquiring it, this should operate against the finding of a social fact of attachment to Malaysia. While merely taking steps is a less compelling factor than holding the passport of another country,[77] it is nevertheless relevant and should be considered when identifying whether an individual has a 'genuine and effective link' with Malaysia.

In advancing this view, I do not purport to comment on the wider issue of whether such a finding would render the individual *de facto* stateless and thus, potentially, breach international law. In any event, as noted in Part II, Malaysia presently has not acceded to any obligation to extend citizenship to stateless persons, and thus the discussion here extends only to domestic law.

B *English Common Law*

English common law offers an example of the principle (or its analogue) being applied. In *Pham v Secretary of State for the Home Department* ('*Pham*'), the appellant ('P') was born in Vietnam but was subsequently granted asylum in the United Kingdom with his family, and they eventually acquired British citizenship.[78] They became radicalised and aged 21, travelled to Yemen to fight with Al-Qaeda. The Home Secretary then revoked his British citizenship under s 40(2) of the *British Nationality Act 1981*, taking the view that P would not be rendered stateless because he had retained his Vietnamese citizenship. P appealed this decision to the Special Immigration Appeals Commission ('SIAC'), who allowed his appeal on the grounds that in practice, the decision would in fact render him stateless. The Home Secretary's appeal of the SIAC decision was allowed by the Court of Appeal, whose decision was upheld by the Supreme Court.[79]

At the Supreme Court, P submitted that depriving him of his British citizenship was also a violation of European Union law. As the issue was not raised at the first instance, the Court did not deal with its merits but took the opportunity to consider the relationship between EU proportionality and common law unreasonableness, from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* as grounds of review.[80] Interestingly, Lord Mance noted that

> Removal of British citizenship under the power provided by section 40(2) of the *British Nationality Act* 1981 is, on any view, a radical step, particularly if *the person*

77 *Bermillo Chan* (n 47).

78 *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [2]; [2013] EWCA Civ 616.

79 ibid [5]–[19].

80 *Wednesbury* unreasonableness, as it is commonly known, is a ground of judicial review at common law upon which the decisions of public authorities may be challenged on the basis that they are 'so unreasonable that no reasonable authority could ever have come to it': *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

> *affected has little real attachment to the country of any other nationality that he possesses* and is unlikely to be able to return there.[81]

His Lordship's implied reasoning in relation to a 'real attachment' is illuminative. P was born in Vietnam and lived there for several years as a child. Despite this, the strength of his Vietnamese link (and thus to Vietnamese citizenship) was deemed impliedly to be weaker than that of his link to the UK and British citizenship. This assessment resonates with the logic of the real and effective/predominant nationality concept from international law. It further accepts that the *locus* of an individual's existence can shift to other polities over time. We see again that, per *Nottebohm*, citizenship is construed in the light of a 'social fact of attachment'.[82]

Pham suggests that the mere fact that a person is born to a non-national mother should not necessarily be equated to the finding that they are a citizen of another country. Echoing Lord Mance's implied reasoning, our modified s 1(e) test thus includes an assessment of the strength of an individual's links to Malaysia coupled with their weak/non-existent links to any other state. It is also worth noting that *Pham* has been cited by the Malaysian Court of Appeal in *Madhuvita*, albeit being distinguished from the facts of the case in that appeal.[83]

The immediate hurdle to transplantation into Malaysian law here is that while it does deal with (purported) dual nationality at domestic law, *Pham* is concerned with citizenship *revocation*. Can it be applied to citizenship *conferral*? On the one hand, the substantive outcome in both cases is similar. Just as revoking P's citizenship could have rendered him effectively stateless, failing to confer citizenship upon a person with a social fact of attachment to Malaysia may also render them effectively (if not formally) stateless. The result is therefore the same.

However, these are also two different matters entirely. With revocation, the court is reviewing a positive act by the government to deprive someone of their citizenship. With conferral, however, there has been no such positive act — instead, the court is being asked to compel the government to recognise someone as a citizen. Directly transplanting *Pham* into the latter context is thus contextually problematic.

C *Citizenship by Naturalisation*

A third source of the principle can be found in art 19(1) of the *Constitution* itself, which provides for the acquisition of Malaysian citizenship by naturalisation for persons aged 21 or above. This requires that applicants apply to the Government for citizenship and satisfy certain criteria, including that they have (i) resided in the country for at least 10 years in the 12 years preceding the date of application, including the 12 months immediately preceding that date;[84] and (ii) have an adequate knowledge of the Malay language.[85]

The very existence of naturalisation as a process for acquiring citizenship is a tacit acknowledgement that a person may develop social links over time to a polity in which they reside. In this context, the strength of these ties is assessed through

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81 *Pham* (n 78) [98] (emphasis added).

82 *Nottebohm* (n 1) 23.

83 *Madhuvita* (n 43). See also *Ngiam Geok Mooi v Pacific World Destination East* [2016] 2 MLJ 741.

84 *Federal Constitution of Malaysia* (n 3), art 19(3).

85 ibid art 19(1)(c).

both the length of time spent residing in Malaysia (evocative of the 'lawfully and habitually resident' precondition discussed earlier in this section), and of Malay fluency.

In recognising the importance of social ties to the practice of naturalisation, we come full circle to *Nottebohm*. There, the Court itself cited the practice of naturalisation, and more specifically its interest with 'the existence of a link [with the polity]' as one of the sources from which the 'genuine and effective link' principle was derived.[86]

If a person born outside the Malaysian polity can acquire these social ties over time, then the logic applies even more forcefully to those who have resided in Malaysia their whole lives, and who have no social ties to any other country or nationality. It follows, therefore, that the same considerations should apply when construing citizenship by operation of law under art 14(1)(b) and s 1(e), particularly since it has been explicitly stated that art 14(1)(b) in its present form is intended to confer citizenship upon those with an attachment to Malaysia.[87]

Article 19 is not a panacea for the problems discussed earlier in this article. Unlike art 14, art 19 imposes a minimum age threshold of 21 or older. Requiring persons technically falling within the remit of s 1(e) to acquire citizenship under art 19 instead would be to subject them to effective statelessness for at least 21 years, with its associated detrimental effects: inability to access government services, denial of secondary education and so on. Further, there is no principled reason why pursuing this alternate route is necessary if they are already entitled to citizenship by operation of law.

D *Direct Legal Transplantation: An Impossibility?*

In the case of international law, there is an additional hurdle to surmount. As set out in Part II, the process of adopting customary international law into Malaysian common law remains an uncertain one that has not been fully developed by the courts. However, a plausible route for adoption may lie in the decision of *Lee Kwan Woh v Public Prosecutor*.[88]

In *Lee Kwan Woh*, the Federal Court developed what may be termed the 'reception thesis' in interpreting the term 'law' in the *Constitution*.[89] The starting point is art 160(2), which provides that '"law" includes written law, [and] the common law in so far as it is in operation in the Federation'. The Court adopted the definition of 'common law' in s 66 of the *Consolidated Interpretation Acts 1948 and 1967* ('*Interpretation Acts*'),[90] which in turn provides that '"common law" means the common law of England'. The justification was that the *Interpretation Act*s applied to 'every written law … made or issued after 31 January 1948',[91] and the *Constitution* was such a law, having come into force in 1957. On the reception thesis, therefore, customary international law that has been adopted into English common law can also be recognised as part of Malaysian domestic law.

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86 *Nottebohm* (n 1) 22.

87 See *DR Hansard 29 January 1962* (n 8) 4166–68.

88 *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301.

89 Shukri Shahizam, 'The Use of English Caselaw in the Malaysian Law of Judicial Review' (LLM Thesis, University of Cambridge, 15 May 2020) 38–40 <https://ssrn.com/abstract=3660398>.

90 *Consolidated Interpretation Act 1948 and 1967* (1 January 2006) (Malaysia).

91 ibid s 66.

This surmounts the problem discussed in Part II with s 3 of the *Civil Law Act 1956*, which seemingly limited the importation of English common law into Malaysian law to the law as it stood on 7 April 1956.[92] On this view, it is thus open to the courts to interpret the words in art 14(1) — 'citizens by operation of law' — as including customary international law through the transformative medium of English common law.

This begs the question: *what* has been incorporated into English common law? *Pham* itself does not explicitly acknowledge *Nottebohm* or its principle, but rather seemingly adopts those factors into the reasonableness standard of judicial review in the context of that case. Further, such adoption can at best only be implied from Lord Mance's judgment. We return to the contextual problem discussed at the beginning of this Part. Issues of diplomatic protection only arise on the international plane, and they have no analogue at the domestic level. To make the leap from diplomatic protection to citizenship acquisition would be to square a circle: as the second paragraph of Part IV explains, there is simply no equivalent domestic ground upon which the *Nottebohm* principle may take root, whether at English or Malaysian common law. A direct legal transplantation into Malaysian domestic law seems doomed to failure.

However, this does not bar the courts from adopting the principle on a policy basis. As our three sources indicate, there is a cogent base to draw upon in recognising the principle. Our discussion in Part II shows that the principle aligns with the legislative intent behind the current citizenship provisions to ensure that only those with genuine ties to Malaysia acquire citizenship. We have also seen how the current test can subvert that intent by excluding some who fall within the remit of s 1(e) from citizenship. Adopting the principle in a modified test would address that issue and conform with Parliament's intent. As such, there is at least an arguable case that a policy-based adoption should be considered by the courts.

The progressive attitude of the Court of Appeal in *Madhuvita* towards the existing s 1(e) test suggests that such an adoption is not an impossibility, in the sense that the Court in that case engaged in a similar factual analysis to that adopted in our modified test.[93] As a matter of explicit adoption, however, the likelihood of this occurring is slim. On the one hand, *Madhuvita* remains the exception to the position adopted in the other leading cases. From a broader perspective, both the courts' general lack of interaction with international law in general and the insulation of the Malaysian constitutional settlement vis-à-vis citizenship makes it unlikely that the *Nottebohm* principle will be called upon anytime soon. Yet there is surely some solace to be found in the fact that the door here is not entirely closed, and — as is the nature of the common law — the door may continue to edge open, each time with the slightest of increments. Recent obiter comments by the Federal Court also indicate that reference to foreign doctrines and jurisprudence in interpreting the *Constitution* is possible.[94] *Nottebohm* may yet find its way to Malaysian shores.

VI CONCLUSION

Article 14(1)(b), when read together with sch II pt II s 1(e) of the *Constitution*, provides a safety net to persons born in Malaysia who would otherwise be

92 *Civil Law Act 1956* (Malaysia) s 3(a).
93 *Madhuvita* (n 43) [75]–[77].
94 *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan* [2021] 3 MLJ 759 [162].

stateless, by conferring Malaysian citizenship upon them. In practice, however, the existing s 1(e) test developed by the courts has been applied inconsistently, resulting in both (i) legal uncertainty, and (ii) persons falling within the remit of s 1(e) being excluded from acquiring citizenship. In turn, this perpetuates substantive unfairness by denying such persons the various rights and privileges attached to citizenship despite seemingly satisfying the prerequisite conditions.

In addressing this issue, this article has argued for the adoption of the 'genuine and effective link' principle developed by the ICJ in *Nottebohm* as a supplementary element of the s 1(e) test. Such an adoption not only conforms with Parliament's intent behind the relevant provisions that Malaysian citizenship should be extended to those with a genuine attachment to the country, but also complements (instead of upsets) the caselaw in relation to the existing *jus soli/jus sanguinis* requirements. Adopting the *Nottebohm* principle will ensure that applicants who satisfy the s 1(e) requirements acquire citizenship and will remedy the legal uncertainty arising from the inconsistent application of the existing s 1(e) test.

A cogent base may be drawn upon by the courts in recognising the principle, of which three sources are identified here: international law, English common law and the domestic practice of acquiring citizenship by naturalisation in the *Constitution*. As a matter of direct legal transplantation, however, adoption of the *Nottebohm* principle into Malaysian domestic law simply may not be possible due to an overarching contextual problem. Given that the principle exists at international law in cases concerning diplomatic protection, there is simply no analogue in domestic law allowing for it to take root. Nevertheless, adoption on a policy basis remains a possibility, albeit a very remote one. Only time will tell whether *Nottebohm* eventually finds its way into Malaysian jurisprudence, but as this article argues, it has much to offer to the wider issue of Malaysia's citizenship conferral practices and statelessness in the polity.