



CHILD PROTECTION THROUGH INTERCOUNTRY
ADOPTION: A STUDY ON ITS APPLICABILITY IN
MALAYSIA

BY

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ABSTRACT

The study deals with the practice of intercountry adoption and its applicability in Malaysia. Adoption is often perceived as a child's placement through family-based care. Nevertheless, it may not always be an available alternative within the child's birth country. In this case, certain countries have resorted to intercountry adoption as an alternative care option for children without families. This study embarks on the premise that there is no statutory provision on intercountry adoption in Malaysia. Unlike other countries, the option for intercountry adoption is still alien in Malaysia. It is not formally practised as an alternative care option for children without families. The research explores the concept of intercountry adoption and other alternative care options such as domestic adoption, foster care, *kafālah* of Islamic law and residential care. It further examines the legal framework for intercountry adoption. The study analyses among others, the main international legal instrument on intercountry adoption namely, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993. It also investigates several legal issues arising from the practice of intercountry adoption such as the loss of cultural identity and the deprivation of the birth family's care due to involvement of illegal acts in the adoption process. The practice of intercountry adoption in other countries such as the Philippines, Australia, Singapore as well as Muslim countries such as Morocco and Jordan are also examined in their capacity either as a sending or receiving state, to serve as a model for Malaysia to further improve its law on adoption and child protection. Apart from that, the study also analyses the applicability of intercountry adoption in Malaysia based on the domestic adoption statutes. The present practices of the Social Welfare Department, OrphanCare and the National Registration Department on intercountry adoption are also included in the discussion. The research reveals that international law recognizes intercountry adoption as an alternative means of child's care that may offer the benefit of permanent family care. The study also shows that intercountry adoption is practised in Malaysia indirectly in the absence of the statutory provisions. The study further proves that the current law lacks the capacity to address intercountry adoption in Malaysia especially as an alternative care option for children without families. Besides, there is no clear policy and procedure regarding intercountry adoption either as a sending or receiving state. There is also no bilateral arrangement between Malaysia and other countries regarding intercountry adoption. As a conclusion, the study suggests that the law in Malaysia needs to be revised by introducing legal provisions on the practice of intercountry adoption and to consider ratifying the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 in the future. It is hoped that this study provides new insights into the practice of intercountry adoption as an alternative means to offer children without families in Malaysia with permanent family care, particularly for those who are not taken into domestic adoption or foster care. This is provided that the necessary legislation, safeguards, and regulations are put in place to govern such practice.

خلاصة البحث

تناولت هذه الدراسة ممارسة التبني بين الدول وإمكانية تطبيقه في ماليزيا. غالبا يُفهم التبني على أنه عملية وضع الطفل في رعاية أسرية، ومع ذلك قد لا يكون هذا الخيار البديل متاحًا دائمًا في بلد ولادة الطفل. في هذه الحالة لجأت بعض البلدان إلى التبني بين الدول كخيار رعاية بديل للأيتام. تم القيام بهذه الدراسة على أساس عدم وجود نص قانوني بشأن التبني بين الدول في ماليزيا. وبخلاف البلدان الأخرى لا يزال خيار التبني بين الدول غير مألوف به في ماليزيا، ولا يمارس رسميا كخيار رعاية بديل للأيتام. استكشفت هذه الدراسة مفهوم التبني بين الدول، وأيضا خيارات الرعاية البديلة الأخرى مثل التبني المحلي، والحضانة، وكفالة القانون الإسلامي، والرعاية السكنية، كما درست أيضا الإطار القانوني للتبني بين الدول. حللت الدراسة، من بين أمور أخرى، الاتفاقية القانونية الدولية الرئيسية بشأن التبني بين الدول وهي اتفاقية لاهاي لحماية الأطفال والتعاون في مجال التبني على الصعيد الدولي لعام 1993. تم التحقيق أيضا في عدة قضايا قانونية نشأت عن ممارسة هذا النوع من التبني، مثل فقدان الهوية الثقافية، والحرمان من رعاية أسرة الولادة نتيجة لوجود أعمال غير قانونية في عملية التبني. تم أيضا دراسة ممارسات التبني بين الدول في بلدان أخرى مثل الفلبين، وأستراليا، وسنغافورة، بالإضافة إلى بلدان إسلامية مثل المغرب، والأردن، وذلك كدول مرسله أو مستقبلة، لتكون بمثابة نموذج لماليزيا لمواصلة تحسين قوانينها المتعلقة بالتبني وحماية الأطفال. بالإضافة إلى ذلك حللت الدراسة أيضا قابلية تطبيق التبني بين الدول في ماليزيا اعتمادا على قوانين التبني المحلية. أدرجت في المناقشة أيضا الممارسات الحالية لإدارة الرعاية الاجتماعية، و منظمة OrphanCare الماليزية، وإدارة التسجيل الوطني المتعلقة بالتبني بين الدول. أثبتت الدراسة أن القانون الدولي يعترف بالتبني بين الدول كوسيلة بديلة لرعاية الأطفال والذي يوفر منفعة الرعاية الأسرية بشكل دائم. أظهرت الدراسة أيضا أن التبني بين الدول يُمارس في ماليزيا بطريقة غير مباشرة في غياب الأحكام القانونية. أثبتت الدراسة كذلك أن القانون الحالي في ماليزيا يفتقر إلى القدرة على التعامل مع التبني بين الدول، لا سيما كخيار بديل لرعاية الأطفال اليتامى، بالإضافة إلى عدم وجود سياسات وإجراءات واضحة متعلقة بالتبني بين الدول سواء كدولة مرسله أو مستقبلة، كما أنه لا يوجد أي ترتيبات ثنائية بين ماليزيا وبلدان أخرى فيما يتعلق بالتبني بين الدول. وفي الختام، اقترحت الدراسة أهمية مراجعة القانون في ماليزيا من خلال إدخال أحكام قانونية تتناول التبني بين الدول، واقترحت أيضا النظر في التصديق

على اتفاقية لاهاي لحماية الأطفال والتعاون في مجال التبني على الصعيد الدولي لعام 1993 لاحقاً. من المأمول أن تقدم هذه الدراسة رؤى جديدة حول ممارسة التبني بين الدول كوسيلة بديلة لدعم الأيتام في ماليزيا برعاية عائلية دائمة، ولا سيما لأولئك الذين لم يؤخّذوا للتبني المحلي أو للحضانة، وذلك بشرط أن يتم وضع التشريعات والضمانات واللوائح اللازمة لتنظيم هذه الممارسة.

APPROVAL PAGE

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DECLARATION

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

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This thesis is dedicated to my late grandparents; I love and miss you both...

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Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

United Nations Convention on the Rights of Child 1989.

United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally 1986.

LIST OF ABBREVIATIONS

A.B.A	American Bar Association
AA	Adoption Act 1952
AC	Appeal Cases
ACA	Australian Citizenship Act 2007
ACOSS	Apkim Centre for Social Service
Advoc.	Advocacy
Aff.	Affairs
AGD	Attorney-General's Department
AIDS	Acquired immunodeficiency syndrome
AIHW	Australian Institute of Health and Welfare
AIR	All India Reporter
AIRR	Amended Implementing Rules and Regulations
Am.	American
Anor	Another
Ariz.	Arizona
art.	Article
arts.	Articles
Aus.	Australia
B.	Boston
Buff.	Buffalo
Cap	Chapter
Cap.	Capital
CBA	Child Benefit Act
CCA	Child-Caring Agency
CCCWA	China Centre for Children's Welfare
Ch.	Chancery
Civ.	Civil
Comp.	Comparative
CPA	Child-Placing Agency
CPR	Cardiopulmonary Resuscitation
Cumb.	Cumberland
CWO	Child Welfare Officer
DHHS	Department of Health and Human Services
DIBP	Department of Immigration and Border Protection
DNA	Deoxyribonucleic acid
DPMC	Department of the Prime Minister and Cabinet
Dr.	Doctor
DSWD	Department of Social Welfare and Development
DVC	Deed of Voluntary Commitment
e.g.	Example
EAPRO	East Asia and Pacific Regional Office
ECHR	European Convention on Human Rights
Ed.	Editor

edn.	Edition
et al.	And others
FAA	Foreign Adoption Agency
Fam.	Family
FAQ	Frequently Asked Questions
FCR	Family Court Report
Ga.	Georgia
GIA	Guardian-In-Adoption
Gonz.	Gonzaga
Hague Convention 1993	Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption 1993
Hague Convention 1996	Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996
HCCH	Hague Conference on Private International Law
Hist.	History
HIV	Human Immunodeficiency Virus
Hum.	Human
IAV	Inter-country Adoption Victoria
Ibid	Ibidem (same as above)
ICAB	Inter-Country Adoption Board
ICDC	International Child Development Centre
ICPC	Inter-Country Adoption Placement Committee
IGOC	Immigration (Guardianship of Children) Act 1964
IIUM	International Islamic University Malaysia
IIUMLJ	International Islamic University Malaysia Law Journal
INA	Immigration and Nationality Act
Ind.	Indiana
Int'l	International
IRC	International Reference Centre
IRR	Implementing Rules and Regulations
ISS	International Social Service
J.	Journal
JILJ	Journal of Islamic Law and Judiciary
JKM	Jabatan Kebajikan Masyarakat
Just.	Justice
L.	Law
Law No.15-01	Law No.15-01 relating to the care (<i>kafālah</i>) of abandoned children
Law.	Lawyer
LJ	Lord Justice
Mich.	Michigan
Min.	Minnesota
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
MoSD	Ministry of Social Welfare Department
MOU	Memorandum of Understanding
MSF	Ministry of Social and Family Department

MUIS	Majlis Ugama Islam Singapura
MYR	Malaysian Ringgit
n.	Note
n.d	No date
n.p	No place
N.Y.	New York
NGO	Non-Governmental Organisation
nn.	Notes
No.	Number
NRD	National Registration Department
OIC	Organization of Islamic Conference
OP CRC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
Ors.	Others
p.	Page
P.B.U.H	Peace Be Upon Him
PAB	Pre-Adoption Briefing
Pac.	Pacific
para.	Paragraph
paras.	Paragraphs
PDRM	Polis Diraja Malaysia
PIDS	The Philippine Institute for Development Studies
pmb.	Preamble
Pol'y	Policy
Polit.	Politics
pp.	Pages
PRC	People's Republic of China
Proc.	Proceeding
Q.	Quarterly
QB	Queen's Bench
RA	Republic Act
RAA	Registration of Adoptions Act 1952
Rev.	Review
RMB	Renminbi, Chinese Yuan
RMP	Royal Malaysia Police
Rts.	Rights
s.	Section (legislation)
S. Afr.	South Africa
S.W.T	Subhanahu Wa Ta'ala (Praise be to Allah and the Most High)
SACA	Singaporean Adoption of Children Act
SC	Supreme Court
Sch.	Schedule (legislation)
Sch.	School
Sec.	Section
SGD	Singapore Dollar
SIB	Social Insurance Bank
Soc.	Social
ss.	Sections (legislation)

St.	State
Stud.	Studies
SWD	Social Welfare Department
Temp.	Temple
Tex.	Texas
Trans.	Translator, translated by
U.	University
U.C	University of California
U.S.	United States of America
UK	United Kingdom
UN	United Nations
UN Declaration 1986	United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally 1986
UNCRC	United Nations Convention on the Rights of the Child 1989
UNICEF	The United Nations Children's Fund
Unif.	Uniform
USCIS	U.S. Citizenship and Immigration Services
USD	United States Dollar
v.	Versus: against
Val.	Valparaiso
Vol.	Volume
Vt.	Vermont
VWO	Voluntary Welfare Organisation
Wash.	Washington
Wis.	Wisconsin

TABLE OF TRANSLITERATION

Table of system of transliteration of Arabic words and name used by the International Islamic University Malaysia

ء	،	خ	Kh	ش	Sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	ه	H
ت	T	ذ	Dh	ض	ḍ	ق	Q	و	W
ث	Th	ر	R	ط	ṭ	ك	K	ي	Y
ج	J	ز	Z	ظ	ẓ	ل	L		
ح	ḥ	س	S	ع	،	م	M		

Short Vowels	
َ	A
ِ	i
ُ	U

Long Vowels	
اَ + َ	ā
يَ + ِ	ī
وُ + ُ	ū

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Children are considered as the most vulnerable human beings that always require utmost care and protection from adults. It is the duty of the parents to look after their children's well-being by providing them with proper care. Parental care is a natural setting for children to grow and live. Instead, there are children without families who require substitute parental care. These children include orphans as well as abandoned, abused and neglected children. In many parts of the world, many children are left orphaned and abandoned due to natural disasters, war and conflict, diseases such as AIDS or HIV and state's policy such as China's one-child policy.¹ Furthermore, reports in a Muslim country, Morocco, have estimated the number of abandoned children is almost 6,000 annually, while 24 children are abandoned from 153 children who are born out of wedlock every day.² Accordingly, the circumstances of these children seem to be the most contributing factors to their vulnerability.

Since the birth parents are absent, disqualified, incapable or unwilling to look after the children, substitute care is necessary in ensuring that their welfare is taken care of and well protected. Substitute care basically refers to a service that is aimed for a replacement of natural parental care either partly or wholly. History showed that it

¹ See Elisabeth M. Ward, "Utilizing Intercountry Adoption to Combat Human Rights Abuses of Children" (2009) vol. 17 Mich. St. J. Int'l L. 729, at 732-733; Margaret Liu, "International Adoptions: An Overview" (1994) vol. 8 Temp. Int'l & Comp. L.J. 187, at 187-189.

² "A Call to Facilitate Adoption of Moroccan Abandoned Children by Muslim Americans," *Morocco World News*, 31 March 2013, <<http://www.morocoworldnews.com/2013/03/84768/a-call-to-facilitate-adoption-of-moroccan-abandoned-children-by-muslim-americans/>> viewed on 23 January 2014; Aida Alami, "Moroccan Adoption Rules Leave Kids in Limbo," *Al-Jazeera*, 27 July 2013, <<http://www.aljazeera.com/indepth/features/2013/07/2013723114342119193.html>> viewed on 23 January 2014.